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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re

Case No. 06-10064 (SMB)

MUSICLAND HOLDING CORP. *et. al.*,

Chapter 11

Debtors.  
-----X

**OBJECTION OF THE INFORMAL COMMITTEE OF  
SECURED TRADE VENDORS TO APPLICATION FOR ORDER TO  
RETAIN GIULIANI CAPITAL ADVISORS LLC AS FINANCIAL  
ADVISORS TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS**

The Informal Committee of Secured Trade Vendors<sup>1</sup> (the “Informal Committee”), by and through its undersigned counsel, hereby files this objection (the “Objection”) to the *Application for Order Pursuant to, Inter Alia, 11 U.S.C. §§ 328(a) and 1103(a) of the Bankruptcy Code Authorizing the Employment and Retention of Giuliani Capital Advisors LLC Nunc Pro Tunc to January 20, 2006, as Financial Advisor to the Official Committee of Unsecured Creditors* [Docket No. 811] (the “Retention Application”). In support of this Objection, the Informal Committee respectfully represents as follows:

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<sup>1</sup> The Informal Committee of Secured Trade Vendors is composed of Buena Vista Home Entertainment, Inc.; EMI Music, North America; Paramount Pictures, Home Video Division; Sony BMG Music Distribution; Sony Pictures Home Entertainment Inc.; Twentieth Century Fox Home Entertainment LLC; Universal Music and Video Distribution; Hain Capital Group, LLC as assignee of the interests of V.P.D. IV, Inc.; Warner/Elektra/Atlantic Corp.; Warner Home Video Inc.; and Metro-Goldwyn-Mayer Home Entertainment LLC.

## INTRODUCTION

1. General unsecured creditors have no economic stake in these chapter 11 proceedings. Nevertheless, the Official Committee (defined below) now – more than two months after its formation - seeks to retain Giuliani Capital Advisors LLC (“GCA”) *nunc pro tunc* as of its formation to render financial advisory services in these cases. As set forth in more detail below, GCA’s services have not provided any benefit to the Debtors or their estates, nor will they do so on a going forward basis. Accordingly, GCA’s retention and fee requests should be denied in their entirety. At the very least, GCA’s proposed “Monthly Advisory Fee” should be sharply reduced and terminated as of the recent sale of substantially all of the Debtors’ assets.

2. Furthermore, in addition to an unreasonable “Monthly Advisory Fee,” the Official Committee astoundingly seeks to pay GCA two separate success fees (the “Completion Fee” and the “Incentive Fee” and, collectively, the “Success Fees”) for consummated transactions that GCA actually *opposed* during the course of these chapter 11 cases. Clearly GCA did not assist with or add value to these transactions (*i.e.*, the Debtors’ postpetition financing and the sale of the Debtors’ assets to TWEC (defined below)). For this reason, the Informal Committee objects to the proposed Success Fees.

3. Finally, even were GCA’s retention to be approved in some modified form, several provisions of the Retention Application and the Engagement Letter (defined below) require substantial alteration or clarification. For example, any compensation paid to GCA must be subject to review under section 330 of the Bankruptcy Code, rather than pre-approved pursuant to section 328. Moreover, any Success Fees paid to GCA must be paid solely from funds, if any, otherwise distributable on account of general unsecured claims (exclusive of the deficiency claims of the Informal Committee). The Informal Committee objects to the

approval of the Engagement Letter and the Retention Application absent such modifications, which are further detailed below.

## **BACKGROUND**

### **I. General Background**

4. On January 12, 2006, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) commenced voluntary cases under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) in this Court.

5. On January 20, 2006, the Office of the United States Trustee for the Southern District of New York (the “U.S. Trustee”) appointed an Official Committee of Unsecured Creditors (the “Official Committee”) in the Debtors’ chapter 11 cases. On that date, the Committee selected Hahn & Hessen LLP (“H&H”) as its lead counsel, Olshan Grundman Frome Rosenzweig & Wolosky LLP (“Olshan”) as its conflicts and special litigation counsel and GCA as its financial advisors.

### **II. GCA’s Retention Application**

6. On March 29, 2006, the Official Committee filed the Retention Application on behalf of GCA. By the Retention Application, the Official Committee seeks approval of its letter agreement with GCA attached thereto (the “Engagement Letter”), to retain GCA as its financial advisors, *nunc pro tunc* to January 20, 2006 (more than two months before the filing of the Retention Application), pursuant to sections 328 and 1103 of the Bankruptcy Code, and to compensate GCA as follows:

- First, with a “Monthly Advisory Fee” of \$100,000 per month;
- Second, with a “Completion Fee” of \$300,000 upon either (i) consummation of a sale of substantially all of the Debtors’ assets or (ii) confirmation of a chapter 11 plan; provided, however, that Giuliani is not entitled to the Completion Fee unless (y) distributions of at least \$7 million are made to

unsecured creditors from the Debtors' estates and (z) the Official Committee, in its sole discretion determines that such bonus is appropriate; and

- Third, with an "Incentive Fee" equal to (i) 1% of the Transaction Amount<sup>2</sup> if GCA introduces a party that purchases the Debtors' assets or provides financing or equity to the Debtors or (ii) .5% of the Transaction Amount if an entity other than GCA introduces a party that purchases the Debtors' assets or provides financing or equity to the Debtors.

## **OBJECTION**

### **I. THE RETENTION APPLICATION SHOULD BE DENIED IN ITS ENTIRETY**

#### **A. GCA's Request for *Nunc Pro Tunc* Retention is Untimely and Must Be Denied.**

7. Courts universally agree that *nunc pro tunc* retention is an exceptional remedy that should be granted only upon a showing that the delay in seeking court approval resulted from extraordinary circumstances. In re Keren Ltd. P'ship., 225 B.R. 303, 306 (S.D.N.Y. 1998), aff'd, 189 F.3d 86 (2d Cir. 1999). In determining whether "extraordinary circumstances" exist, courts consider factors such as: (i) whether the applicant or some other person bore responsibility for applying for approval; (ii) whether the applicant was under time pressure to begin services without approval, (iii) the amount of delay after the applicant learned that the initial approval had not been granted, (iv) the extent to which compensation to the applicant will prejudice innocent third parties and (v) other relevant factors. Keren, 225 B.R. at 306-7 (citing In re F/S Airlease II, Inc. v. Simon, 844 F.2d 99, 105-6 (3d Cir. 1998)). Mere inadvertence, oversight or neglect of counsel does not constitute excusable neglect sufficient to relieve the parties of their obligations to timely seek approval of their retention. In re Fleming

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<sup>2</sup> As defined in the Engagement Letter, the "Transaction Amount" is equal to (a) the amount of a debtor in possession credit facility or exit or other loan facility or (b) the amount of cash, liquidity, property or liabilities assumed in a proposed acquisition of all or substantially all of the Debtor's assets or plan of reorganization completed by the investor/purchaser.

Cos., Inc., 305 B.R. 389, 394 (Bankr. D. Del. 2004); In re The Music Store, Inc., 241 B.R. 752, 754 (Bankr. N.D. Okla. 1999).

8. GCA, H&H and Olshan were aware of their respective obligations to expeditiously seek Court approval of their retentions and their provision of services to the Official Committee. Indeed, GCA's Engagement Letter expressly obligates the Official Committee to seek approval of GCA's retention on an expedited basis, if possible. Engagement Letter at p. 4. Although H&H and Olshan both filed their retention applications within 15 days of the formation of the Official Committee, neither the Official Committee nor GCA has proffered any explanation for the *68-day delay* in filing GCA's Retention Application. Moreover, although GCA may have been under time pressure to begin providing services to the Official Committee, such time pressure was no greater than that imposed upon H&H or Olshan and does not explain the excessive delay here. Absent a showing that extraordinary circumstances prevented the Official Committee from filing the Retention Application in a timely manner, this Court must deny GCA's request for *nunc pro tunc* retention.

**B. GCA's Go Forward Retention is Unnecessary and Should Not Be Approved.**

9. GCA's retention in these cases no longer is necessary or beneficial to any real party in interest. The Committee seeks to retain GCA to provide advice and assistance in connection with: (i) the Debtors' business plans, financial projections and related matters; (ii) available capital restructuring, sale and financing alternatives; (iii) development of a plan of reorganization; (iv) proposals from third parties for new sources of capital; and/or (v) development, evaluation and documentation of strategic transactions. GCA also is being retained to provide testimony on behalf of the Official Committee as needed in connection with these matters. Engagement Letter at pp. 1-2.

10. At this time, the Debtors have consummated the sale of substantially all of their assets to Trans World Entertainment Corp. (“TWEC”) and are in the process of transitioning and winding down their operations. None of the proposed services identified in the Engagement Letter has any applicability to a liquidation, which is effectively what the Debtors’ cases have become. In short, GCA’s continued engagement will not provide any benefit to the Debtors, the true economic stakeholders in these cases (the members of the Informal Committee) or even to its own constituents (who do not have any economic interest in these cases). To preserve the Debtors’ remaining assets, the Informal Committee requests that the Court deny GCA’s retention or, at the very least, substantially reduce any compensation for services rendered prior to the sale and terminate GCA’s retention as of the date of the hearing approving the sale of the Debtors’ assets to TWEC.

## **II. GCA’S COMPENSATION STRUCTURE IS UNREASONABLE**

11. To the extent the Court is inclined to approve GCA’s engagement at all, the Informal Committee submits that the compensation structure proposed in the Retention Application is unreasonable and must be modified to match the realities of these cases.

### **A. The Monthly Advisory Fee.**

12. It is inconceivable that GCA - the financial advisor to an “out of the money” constituency – was or will be required to perform \$100,000 of work per month at any time, and certainly not subsequent to consummation of the sale to TWEC. To date, GCA has not provided any benefit to the Debtors or their estates. There simply is no justification for granting GCA a monthly fee of \$100,000 from January 20, 2006 through the present when all GCA did during that period was work to oppose two transactions that have resulted in significant value for the Debtors’ estates. GCA’s request for fees incurred from January 20, 2006 through the present

either should be denied in its entirety or reviewed, based on the hours worked, under the reasonableness standard of section 330 of the Bankruptcy Code. See ¶¶ 19-20, *infra*.

13. Moreover, now that the Debtors' cases are in a liquidation mode, the Informal Committee submits that GCA's engagement should be terminated and, accordingly, no future Monthly Advisory Fees should be paid. Alternatively, from the date of the TWEC sale hearing forward GCA's Monthly Advisory Fee should be reduced substantially to no more than \$25,000 per month in order to reflect the economic realities.

14. To the extent that its retention is approved, GCA also must be required to support its fee requests with detailed time statements as required by the local rules and orders of this Court. Administrative Order M-104, which establishes guidelines for compensation of professionals in bankruptcy cases in this district (the "Compensation Guidelines"), applies with equal force to lawyers, financial advisors, investment bankers and other professionals, absent an order of the Court to the contrary. Accordingly, GCA must comply fully with the Compensation Guidelines.<sup>3</sup> Moreover, as with all professionals, GCA's fee statements should be subject to objection by parties in interests and review by this Court pursuant to section 330 of the Bankruptcy Code in order to ensure that GCA's compensation is reasonable in light of the work it is performing. See ¶¶ 19-20, *infra*.

15. Finally, pursuant to the Engagement Letter, GCA's retention and its entitlement to the Monthly Advisory Fee continue *ad infinitum* until its engagement is terminated by the Official Committee. GCA's retention and the associated financial drain upon these estates

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<sup>3</sup> With regard to deviations from the Compensation Guidelines, Administrative Order M-104 provides that "[a]ny application departing from [the requirements of Administrative Order M-104] shall include, in the paragraph proffering the justification for departing from the guidelines, the amount that the applicant would be entitled to under the guidelines."

should be subject to termination by this Court *sua sponte* or upon application of any party in interest and a showing of cause, and not at the sole discretion of the Official Committee.

**B. The Success Fees.**<sup>4</sup>

16. Success fees have been awarded to professionals based on criteria such as exceptional performance, extraordinary or unexpected benefit conferred on creditors of the estate, unusually effective and successful nature of a chapter 11 proceeding and the time frame within which such successful results are accomplished. In re Gillett Holdings, Inc., 137 B.R. 452, 459 (Bankr. D. Colo. 1991). See also In re Pub. Serv. Co. of New Hampshire, 160 B.R. 404, 420 (Bankr. D.N.H. 1993) (stating that award of success fee requires a showing of (i) exceptional activity without which the estate likely would not have achieved the results obtained or (ii) exceptional activity beyond that reasonably contemplated at time of the original retention). Success fees are designed to “reward extraordinary effort, not simply to repay one for the job one was hired to do in the first place.” In re Intellogic Trace, Inc., 188 B.R. 557, 561 (Bankr. W.D. Tex. 1995). Given that GCA has done nothing more than create obstacles to the Debtors’ efforts to maximize value, the Informal Committee objects to GCA’s request for either of the Success Fees.

17. Furthermore, this Court must determine whether the Success Fees are reasonable prior to approving them. 11 U.S.C. § 330(a)(1)(A) (authorizing the Court to award professionals “*reasonable* compensation” for services rendered) (emphasis added). In the

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<sup>4</sup> The \$300,000 Completion Fee carries all the indicia of a traditional success fee and is nothing more than a disguised request for enhanced compensation. Indeed, GCA admits that the Completion Fee is a “bonus,” as opposed to regular compensation, both in the Engagement Letter (p. 3) and in the Declaration of David S. Miller (p. 4) filed in support of the Retention Application (the “Miller Declaration”). See In re Gillett Holdings, Inc., 137 B.R. 452, 459 n. 19 (Bankr. D. Colo. 1991) (stating that synonyms for a success fee include “premium,” “reward,” “bonus” or “enhancement”).

context of these cases, the Success Fees clearly are not. GCA did not assist with *any* aspect of the sale to TWEC; it did not market the Debtors' assets, bring potential purchasers to the table or play any role in consummating the transaction. Moreover, GCA vigorously opposed the Debtors' postpetition financing proposal and provided testimony seeking to derail or delay such financing. In fact, the only thing GCA has done in these cases is to attempt to disrupt the very transactions for which it now seeks compensation. There is no statutory or case law authority for the payment of a success fee of any sort to GCA under these circumstances. Accordingly, the Official Committee requests that the Success Fees be denied in their entirety.<sup>5</sup>

**C. If Approved, the Success Fees Should be Paid Exclusively from General Unsecured Creditor Distributions.**

18. The members of the Informal Committee do not consent to the use of any funds they may be entitled to receive from the Debtors' estates on account of their deficiency claims for payment of any compensation to GCA. Accordingly, if general unsecured creditors become entitled to any distribution in these cases, the *pro rata* portion of that distribution allocated to members of the Informal Committee must be set aside and GCA's Success Fees, if and to the extent allowed, must be paid exclusively from the remainder before it is distributed to

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<sup>5</sup> GCA's request for the Completion Fee also is premature. See Gillett Holdings, 137 B.R. at 459 (declining to approve a "transaction fee" stating that "[w]hile such an award may indeed become justified based upon the results of this chapter 11 case, it is impossible for this Court to determine whether a success fee is earned until the services are performed and are found to qualify under the Bankruptcy Code . . . [A] determination of a bonus and award of . . . fees, as a bonus, in tandem with a fixed monthly fee, embodied in a Court Order is improper at the onset of a case; it must await a successful conclusion of the services and a proper showing of entitlement."). Accord In re Mortgage & Realty Trust, 123 B.R. 626, 632 (Bankr. C.D. Cal. 1991).

Furthermore, it is unclear whether GCA intends to seek payment for two separate Incentive Fees in these cases. Per the Engagement Letter, GCA earns the "Incentive Fee" if a third party "purchases the Debtors' assets or provides financing or equity to the Debtors." Engagement Letter at p. 3. In these cases, two separate third parties and two separate transactions fit this description (*i.e.*, TWEC purchased the Debtors' assets and Wachovia Bank, N.A., as agent for the Debtors' lenders, provided financing to the Debtors). Quite apart from the patent inappropriateness of any success fee here, no Incentive Fee should be approved unless it is clear that GCA may request only one Incentive Fee.

other general unsecured creditors. See In re Farmland Indus., Inc., 296 B.R. 188, 192-93 (8th Cir. B.A.P. 2003), aff'd, 397 F.3d 647 (8th Cir. 2005) (holding under substantially similar circumstances that where a financial advisor is working for a specific group of creditors, such financial advisor's "transaction fee" should be payable exclusively from the distributions available to the financial advisor's constituents).

**D. GCA's Compensation Must Be Subject To Review Under Section 330.**

19. "Generally, a court may not revisit the reasonableness of a fee arrangement that has been approved pursuant to section 328 . . . unless it determines that the terms and conditions proved to be improvident at the time they were approved in light of then-unforeseen circumstances." In re XO Communications, Inc., 323 B.R. 330, 339 (Bankr. S.D.N.Y. 2005). "A finding of improvidence pursuant to section 328 is a difficult determination to make . . ." Id. In short, approval of fees under section 328 eviscerates a Court's ability to review those fees for reasonableness at the end of a case.

20. "Whenever special terms and conditions are requested [in employment agreements], it is important for the court to focus upon them because, once approved, they are difficult to unravel." Gillett, 137 B.R. at 460. In this case, GCA has provided no justification for its request to have its fees approved under section 328 of the Bankruptcy Code. Indeed, given the delay in the filing of the Retention Application and the posture of these cases, it is particularly inappropriate for this Court to pre-approve GCA's fees incurred to date. Instead, this Court may and should review such fees for reasonableness in light of the benefit GCA alleges to have provided to the Debtors' estates. Given that GCA's client has no economic stake in these proceedings, it is unreasonable to authorize payment of any Monthly Advisory Fee on a going forward basis without also providing an opportunity for the Court and the true economic parties in interest to consider whether the services provided by GCA justify such a fee. Because pre-

approval of GCA's fees under section 328 effectively would prohibit this Court from assessing their reasonableness, GCA's fees should be subject to review under the standards imposed by section 330 of the Bankruptcy Code.

### **III. MISCELLANEOUS OBJECTIONS**

21. Certain provisions in the Engagement Letter require modification, as follows:

- In the event the indemnification provisions contained in the Engagement Letter are found to be unenforceable, the Engagement Letter apportions an unreasonable percentage of contribution costs to the Debtors. Engagement Letter at Exhibit A. The Informal Committee submits that in such instances, the costs attributable to each party should be based upon the relative fault of the parties, as determined by a court of competent jurisdiction.
- The Engagement Letter provides that GCA's obligation to maintain the confidentiality of information provided to it by the Debtors expires on the first anniversary of GCA's completion of work under the Engagement Letter. Engagement Letter at p. 5. The Informal Committee submits that no justification has been proffered for this unilateral termination of confidentiality. GCA must remain obligated to maintain the confidentiality of such information for so long as the information remains in its possession. GCA may satisfy this provision by certifying to the Court that it has returned and/or destroyed any confidential information obtained during the course of its representation of the Official Committee.
- The Engagement Letter references surviving provisions of "prior letter agreements" that are sought to be approved sight unseen. Engagement Letter at p. 6. This Court should not approve any provision of any "prior letter agreement" that has not been submitted to and reviewed by the Court, the U.S. Trustee and other parties in interest.
- Paragraph 18 of the Miller Declaration states that "GCA has not shared or agreed to share any of its compensation in connection with this matter with any other person," as required by section 329 of the Bankruptcy Code and Bankruptcy Rule 2016(b). In contrast, the Engagement Letter states that GCA may pay referral fees to "another NASD member firm in connection with [the Engagement Letter]." The Informal Committee submits that no such "referral fee" should be approved and that the provision should be stricken from the Engagement Letter.

**CONCLUSION**

WHEREFORE, the Informal Committee respectfully requests that this Court deny the Official Committee's request to retain GCA in its entirety. Should the Court determine that GCA's retention is appropriate, however, the Informal Committee respectfully requests that the terms of GCA's retention be modified and limited as set forth in this Objection and for such other and further relief as the Court deems just and proper under the circumstances.

Dated: New York, New York  
April 5, 2006

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MUSICLAND HOLDING CORP. *et. al.*,

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Debtors.

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**CERTIFICATE OF SERVICE**

I, James Baribeau, hereby certify that on the 5th day of April, 2006, a copy of the Objection of the Informal Committee of Secured Trade Vendors to Application for Order to Retain Giuliani Capital Advisors LLC as Financial Advisors to the Official Committee of Unsecured Creditors was served upon counsel of record for each of the parties and Giuliani Capital Advisors LLC as set forth on the annexed service list.

\_\_\_\_\_  
/s/ James Baribeau  
James Baribeau

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