

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

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|---------------------------|---|----------------------|
| IN RE: | : | CASE NUMBER 04-10990 |
| | : | |
| DAN RIVER, INC., et. al., | : | CHAPTER 11 |
| | : | |
| DEBTOR. | : | JUDGE DRAKE |

**UNITED STATES TRUSTEE'S OBJECTIONS TO APPLICATION
BY COMMITTEE OF UNSECURED CREDITORS
TO EMPLOY HOULIHAN LOKEY HOWARD & ZUKIN**

COMES NOW Felicia S. Turner, United States Trustee for Region 21, in furtherance of the administrative responsibilities imposed pursuant to 28 U.S.C. § 586(a), and files her objections to the Application Pursuant to Bankruptcy Rule 2014(a) for an Order under Sections 328(a) and 1103(a) of the Bankruptcy Code Authorizing the Employment and Retention of Houlihan Lokey Howard & Zukin as Financial Advisor for the Official Committee of Unsecured Creditors Nunc Pro Tunc to April 19, 2004.

1.

The official committee of unsecured creditors appointed in this case by the United States Trustee (the "Committee") has filed an application to employ Houlihan Lokey Howard & Zukin ("Houlihan Lokey") to serve as the "financial advisor" to the Committee.

MONTHLY FEE

2.

The application provides that Houlihan Lokey shall receive a monthly fee of \$100,000 payable in cash for each month or any part thereof (the "Monthly Fee").

3.

Neither the application, nor the order approving the application, provides that Houlihan Lokey will keep records of time and prepare and file a standard fee application, following the United States Trustee Fee Guidelines.

4.

The United States Trustee opposes approval and payment of professional fees absent the filing of a standard fee application. See, In re Hillsborough Holdings Corp., 125 B.R. 837,840 (Bankr. M.D. Fla. 1991). (“This Court is not unaware that the work of investment banking is indeed a strange but wonderful place where a large amount of money is spent, generally at the expense of debtors in Chapter 11. Nevertheless, this Court is satisfied that in the absence of a time record it is almost impossible to determine the reasonable value of the services rendered.”) ; In re Gillett Holdings, Inc., 137 B.R. 452,456 (Bankr. D. Colorado 1992) (“(T)he Court is not at all persuaded that investment bankers are entitled to separate, and special treatment.”); In re Drexel Burnham Lambert Group, Inc., 133 BR. 13 (Bankr. S.D.N.Y. 1991) (“Mathematically, a correlation of fees, cases, and clients shows, at worst, incestuous fee-setting practices or, at best, oligopolistic behavior.”).^{1/}

TRANSACTION FEE

5.

In addition to the Monthly Fee, the Engagement Letter contemplates payment of a “Transaction Fee” in an amount to be determined by the Committee in its sole discretion.

^{1/} Houlihan Lokey is not unfamiliar with the necessity of filing detailed fee applications. See, e.g., In re The Circle K Corporation, 191 B.R. 426 (Bankr. D.Arizona 1996) and In the Matter of UDC Homes, Inc., 203 B.R. 218 (Bankr. D.Delaware 1996).

6.

The United States Trustee objects to pre-approval of Houlihan Lokey's compensation under Bankruptcy Code section 328(a). Requests for compensation should be submitted to, considered by, and ruled upon by the Bankruptcy Court, after notice and a hearing.

INDEMNIFICATION AGREEMENT

7.

The Engagement Letter requires the debtors to indemnify and the committee to forgive negligent conduct by Houlihan Lokey.

8.

Many court have held that such provisions are contrary to public policy. See, In re Allegheny Int'l Inc., 100 B.R. 244, 247 (Bankr. W.D.Pa. 1989) (“(H)olding a fiduciary harmless for its own negligence is shockingly inconsistent with the strict standard of conduct for fiduciaries.”); In re Drexel Burnham Lambert Group, Inc., 133 BR. 13, 27 (Bankr. S.D.N.Y. 1991) (“Simply stated, indemnification agreements are inappropriate.”).

9.

Recently, in the *Thermadyne* opinion, the Eighth Circuit BAP upheld the bankruptcy court's denial of indemnification, noting courts have broad discretion to deny such requests. See: Unsecured Creditors Committee v. Pelofsky (In re Thermadyne Holdings Corp), 283 B.R. 749 (8th Cir. BAP Oct. 3, 2002). Indemnification should be granted only when the requesting party proves it is reasonable based upon the facts and circumstances of the case. The applicant bears the burden of establishing that the proposed indemnification provisions are reasonable. See, e.g., In re Geraci, 138 F.3d 314, 318 (7th Cir.), cert. denied, 525 U.S. 821 (1998); Zolfo, Cooper & Co. v.

Sunbeam-Oster Co., 50 F.3d 253, 259 n.5 (3d Cir. 1995); In re Gillett Holdings, Inc., 137 B.R. 452, 455 (Bankr. D. Colo. 1991).

WHEREFORE, the United States Trustee objects to the unsecured creditors' committee's application to employ Houlihan Lokey Howard & Zukin.

FELICIA S. TURNER
United States Trustee, Region 21

s/ Jeneane Treace
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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2004, a true copy of the attached **UNITED STATES TRUSTEE'S OBJECTIONS TO APPLICATION BY COMMITTEE OF UNSECURED CREDITORS TO EMPLOY HOULIHAN LOKEY HOWARD & ZUKIN** was served by U.S.

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