United States Department of Justice
Office of the United States Trustee
1100 Commerce St. Room 976
Dallas, Texas 75242
(214) 767-1075

Erin Marie Schmidt,
for the United States Trustee
Erin.Schmidt2@usdoj.gov

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:		
	§	
	§	
GGI Holdings, LLC,	**§**	**Case No. 20-31318-HDH-11**
***et. al.*,**	**§**	
	§	**Jointly Administered**
	§	**(Chapter 11)**
	§	
Reorganized Debtors.	**§**	

United States Trustee's Objection to Expedited Application of TRT Holdings, Inc. for Allowance of Substantial Contribution Claim Pursuant to Section 503(b)(3)(D) of the Bankruptcy Code
[docket no. 728]

TO THE HONORABLE HARLIN D. HALE,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

William T. Neary, the United States Trustee for Region 6 ("United States Trustee") objects to the *Expedited Application of TRT Holdings, Inc. for Allowance of Substantial Contribution Claim Pursuant to Section 503(b)(3)(D) of the Bankruptcy Code* ("Application"). [docket no. 728]. The United States Trustee would respectfully show:

Overview

TRT Holdings, Inc. ("TRT") seeks approval of a $75,000 substantial contribution claim as part of a larger proposed settlement between the GGI Holdings, Inc. creditors' trustee Mark Shapiro ("Trustee"), GlassRatner Advisory & Capital Group LLC d/b/a B. Riley Advisory Services ("GlassRatner"), and TRT ("Amended 9019 Motion").

The United States Trustee objects to TRT's substantial contribution claim for four reasons. First, the substantial contribution claim should not be allowed because TRT's work did not benefit the estate as a whole; instead, it primarily benefited TRT as a Class 6 equity holder. Second, TRT's work duplicated the efforts of both the Committee and the United States Trustee in reducing GlassRatner's fee enhancement request. Third, TRT fails to meet its burden of reasonableness for its attorneys' fees. Fourth, TRT's substantial contribution claim is a disguised fee sharing arrangement prohibited under section 504 of the Bankruptcy Code.

Background

Bankruptcy filing

1. On May 4, 2020 ("Petition Date"), GGI Holdings, LLC, along with its subsidiaries (collectively, "Debtors"),[1] filed voluntary chapter 11 petitions in the United States Bankruptcy Court for the Northern District of Texas.

2. On May 7, 2020, the Court entered an order granting joint administration of all Debtors' cases under case no. 20- 31318-HDH-11. [docket no. 53].

3. When the cases first filed, TRT, as Debtors' principal equity holder, had provided DIP funding to permit sufficient funds for Debtors to sell its assets back to them through a fast-

[1] The debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: GGI Holdings, LLC (1222); Gold's Gym International, Inc. (3614); Gold's Holding Corp. (3610); Gold's Alabama, LLC (0520); Gold's Gym Franchising, LLC (5009); Gold's Gym Licensing, LLC (5013); Gold's Gym Merchandising, LLC (4892); Gold's Gym Rockies, LLC (7129); Gold's Louisiana, LLC (9825); Gold's North Carolina, LLC (3221); Gold's Ohio, LLC (4396); Gold's Oklahoma, LLC (7577); Gold's St. Louis, LLC (4827); Gold's Southeast, LLC (9382); and Gold's Texas Holdings Group, Inc. (8156).

tracked plan of reorganization.

4. The final DIP financing order required Debtors to pay TRT's law firm Wick Phillips' fees incurred in connection with the DIP financing. [docket no. 214 at p. 26].

5. According to the GGI Holdings, Inc. July 2020 operating report, Debtors had paid Wick Phillips $231,928.43 through July 30, 2020 with another $64,131.06 in fees outstanding as of that date. [docket no. 508 at p. 21].

6. Debtors had not initially planned to test the market by auctioning its assets because TRT had objected to this process.

7. General unsecured creditors would have received nothing under Debtors' initial plan.

8. The parties agreed to an auction process only after the Official Committee of Unsecured Creditors ("Committee") insisted on such.

9. The sales process was successful, leading to a significant return to general unsecured creditors.

GlassRatner Employed as Financial Advisor

10. GlassRatner began working for Debtors on March 29, 2020, which was approximately five weeks before the Petition Date.

11. On May 8, 2020, Debtors filed an application employ GlassRatner as its financial advisor, which the bankruptcy court approved on June 9, 2020. [docket nos. 75 and 266].

12. Mark Shapiro, as a GlassRatner senior managing director, signed the declaration attached to the employment application. [docket no. 75].

Court confirmed plan of reorganization

13. On August 26, 2020, Debtors confirmed the *Second Amended Joint Plan of Liquidation under Chapter 11 of the Bankruptcy Code* that provided for liquidating trust ("Trust") to resolve

claims objections and pay eligible claims. [docket nos. 457 ("Plan") and 531 ("Confirmation Order"].

14. Mark Shapiro was appointed Trustee for the Trust. [docket no. 458].

15. Plan § 5.3 lists general unsecured claims under Class 3. [Plan at § 5.3].

16. Section 5.6 of the Plan provides for the payment of TRT's Class 6 Equity Interests after all other claims have been paid in full. [Plan at § 5.6].

17. The liquidating trustee is still resolving claims. To date, general unsecured creditors have not been paid in full.

18. The Plan went effective on September 10, 2020. [docket no. 555].

GlassRatner seeks upward adjustment of fees

19. On October 16, 2020, GlassRatner filed its application seeking final approval of fees and expenses under § 330(a) ("GlassRatner Application"). [docket no. 612]. The GlassRatner Application originally sought approval of $1,401,998.52 in fees and expenses. This figure is broken down as follows:

(1) $609,179.20 in fees and expenses *before* upward adjustment of lodestar ($381.50 blended rate times 1,596.80 hours).

(2) $443,580.80 in additional fees based on an adjusted lodestar ($658.47 adjusted rate times 1,596.80 hours equals $1,052,760.00; the difference between this and $609,179.20 is $443,580.80).

(3) $347,240.00 upward adjustment.

(4) $1,998.52 in expenses.

20. GlassRatner argued that it is entitled to the upward adjustment in fees because of the extraordinary work it performed in putting together materials, marketing the assets, and

conducting the auction.

21. Both TRT and the United States Trustee objected to GlassRatner's fee enhancement request. [docket nos. 637 and 638].

22. On January 12, 2021, the Committee filed a comment stating that it would not object to GlassRatner being awarded up to $1 million in fees. [docket no. 682].

23. GlassRatner filed a supplement ("Supplement") to its fee application on January 19, 2021 which capped GlassRatner's fee request at $1 million, which reflects a $400,000.00 reduction. [docket no. 696].

TRT moves to compel production of privileged documents

24. TRT moved to compel GlassRatner to produce documents [docket no. 692]. Specifically, TRT sought the production of documents and correspondence related to Aaron Kaufman's discussions with GlassRatner regarding the preparation and filing of its Fee Application.

25. GlassRather opposed the motion to compel based on its assertion that the requested documents were protected by attorney client privilege. [docket no. 700].

The Trust, TRT, and GlassRatner settle

26. GlassRatner and TRT settled the motion to compel by agreeing to split part of the requested fee enhancement.

27. On February 5, 2021, the Trustee filed his original Bankruptcy Rule 9019 motion to approve a settlement between GlassRatner and TRT, which provided that GlassRatner would receive $225,000 before creditors were paid in full. [docket no. 717].

28. In turn, GlassRatner would pay $75,000 to TRT to cover its attorneys' fees and costs to litigate the fee enhancement.

29. The Trustee filed an amended motion seeking relief under Bankruptcy Rule 90919 ("Amended 9019 Motion") on February 11, 2021 to address concerns that the United States Trustee had informally raised regarding fee sharing under section 504. [docket no. 731].

30. The Amended 9019 Motion provides that the Trust shall pay the following to GlassRatner before general unsecured creditors are paid in full:

> (i) $100,000.00 immediately upon entry of the Proposed Order (the "Initial Fee Enhancement"). Within three (3) business days of B. Riley's receipt of the Initial Fee Enhancement, the Trustee shall remit $25,000 to TRT to partially satisfy the TRT Substantial Contribution Claim.
>
> (ii) $50,000.00 as soon as practicable after the Trustee makes distributions under the Plan in the amount of 85% of the allowed general unsecured claims (the "Second Fee Enhancement"). Within three (3) business days of B. Riley's receipt of the Second Fee Enhancement, the Trustee shall remit $50,000 to TRT in full and final satisfaction of the TRT Substantial Contribution Claim.

Amended Motion at § III(E)(i)-(ii).

31. Once the Trustee has satisfied 100% of allowed general unsecured claims in full with interest, the Trust would distribute the following to GlassRatner as an additional fee enhancement and to TRT as equity:

> a. The first $100,000: 75% to B. Riley and 25% to TRT; then
> b. The next $75,000: 100% to TRT; then
> c. The next $1,000,000: 90% to TRT and 10% to B. Riley, until B. Riley receives $100,000; then
> d. The next $500,000: 85% to TRT and 15% to B. Riley, until B. Riley receives $75,000; then
> e. The next $3,750,000: 98% to TRT and 2% to B. Riley, until B. Riley receives $75,000; then
> f. Any remaining funds: 100% to TRT.

Id. at § III(E)(iii).

TRT files application for allowance of a substantial contribution claim

32. TRT has filed a separate application with the bankruptcy court seeking allowance of its $75,000 substantial contribution claim.

33. TRT claims that through its "strenuous advocacy, it has preserved substantial value for creditors by negotiating a valuable settlement with [GlassRatner] to resolve its $1.4 million Fee Application" by reducing GlassRatner's fees "below $900,000, with portions of its allowed fee enhancement contingent upon the Trustee making distributions to creditors under the plan." Application at ¶ 1.

34. TRT seeks $75,000 for "its efforts in objecting to and negotiating a favorable settlement." *Id.* at ¶ 12.

35. TRT claims its "efforts were not duplicative of any other parties in the proceeding." *Id.* at ¶ 18(e).

36. TRT did not attach any invoices or other documents evidencing the expenses incurred in objecting to GlassRatner's fee enhancement.

37. The United States Trustee incorporates the factual recitations and arguments from his objection to both the GlassRatner Application and Amended 9019 Motion into this objection.

Objection

38. The United States Trustee objects to TRT's substantial contribution claim for four reasons. First, the substantial contribution claim should not be allowed because TRT's work did not benefit the estate as a whole; instead, it primarily benefited TRT as a Class 6 equity holder. Second, TRT's work duplicated the efforts of both the Committee and the United States Trustee in reducing GlassRatner's fee enhancement request. Third, TRT fails to meet its burden of

reasonableness for its attorneys' fees. Fourth, TRT's substantial contribution claim is a disguised fee sharing arrangement prohibited under section 504 of the Bankruptcy Code.

39. GlassRatner reduced its requested fee enhancement by $400,000.00 due to the combined efforts of the Committee, the United States Trustee, and TRT.

40. Parties seeking allowance of a section 503(b)(3)(D)/503(b)(4) substantial contribution claim are subject to the same standards set forth for reasonableness under section 330(a). TRT has not even attached invoices or time sheets for its counsel to its Application.

41. The proposed settlement *harms* creditors in that funds used to pay both GlassRatner and TRT comes from the Trust before Class 3 general unsecured creditors are paid in full.

42. Even though TRT seeks compensation directly from the GGI Liquidating Trust ("Trust"), and not GlassRatner, the settlement hinges on the Court approving this $75,000 payment. The proposed fee enhancement settlement falls apart if TRT does not receive the $75,000.

Substantial contribution, generally

43. As a general rule, creditors and other parties in interest in chapter 11 cases must bear their own professional fees and costs, unless a statute provides otherwise. *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015). Congress created a narrow exception to this general rule in 11 U.S.C. §§ 503(b)(3)(D) and (4), under which statutorily-specified parties in interest that have made a "substantial contribution" in a chapter 11 case may recover their actual, necessary expenses and their attorney's reasonable fees and expenses as an administrative expense payable from estate funds before any payments to creditors. 11 U.S.C. § 507(a).

44. Section 503(b)(3)(D) provides, in part, as follows:

> (b) After notice and a hearing, there shall be allowed administrative expenses, . . . including—
>
> * * *

> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
>
> * * *
>
> (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter . . . 11 of this title[.]

U.S.C. § 503(b)(3)(D).

45. Section 503(b)(3) does not authorize payment of attorney's fees of a creditor or equity security holder that has made a substantial contribution in a case. *Id*. (". . . other than compensation and reimbursement specified in paragraph (4) of this subsection . . ."). But, those attorney fees can be paid as an administrative expense under section 503(b)(4), which allows for

> reasonable compensation for professional services rendered by an attorney . . . of an entity whose expense is allowable under subparagraph. . . (D) . . . of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney[.]

11 U.S.C. § 503(b)(4). Applicant may seek approval of fees even though the creditors may not have been personally liable on their payment. *Smith v. Mirant Corp. (In re Mirant)*, 308 F. App'x 824, 827 (5th Cir. 2009).

46. While the Bankruptcy Code does not define the term "substantial contribution," the Fifth Circuit has held that a substantial contribution must have benefited the bankruptcy proceedings. *In re Mirant*, 308 F. App'x 824, 827 (5th Cir. 2009). Thus any substantial contribution must have contributed to the debtor's reorganization. *Speights & Runyan v. Celotex Corp. (In re Celotex Corp.)*, 227 F.3d 1336, 1338 (11th Cir. 2000) (holding that substantial contribution must foster and enhance reorganization). Furthermore, the Fifth Circuit has recognized this Court's

expertise in evaluating fees and the amount of time spent. "Because judges are familiar with the fees charged by the legal profession and experienced at gauging the quality of legal work, no expert opinion evidence is required, though such evidence may be accepted." *American Beneficial. Life Ins. Co. v. Baddock (In re First Colonial Corp.)*, 544 F.2d 1291, 1300 (5th Cir. 1977) (applying hourly rate and time spent under predecessor to current statutory fee standard) (citations omitted).

47. Mere participation in a case alone, no matter how extensive, is not sufficient to support a substantial contribution award. An applicant for a substantial contribution award must prove, by a preponderance of the evidence, a direct causal connection between its activities and a demonstrable benefit to the bankruptcy estate. *In re Asarco*, 2010 WL 3812642, *7 (Bankr. S.D. Tex. 2010). Substantial contribution claims are only granted in rare and unusual circumstances, and such narrow construction is consistent with the general doctrine that priority statutes should be strictly construed in order to preserve the estate for the benefit of creditors. *Id*. at *8. To meet its burden of proof, an applicant must show that its services have a causal relationship to the contribution. *Id*. Therefore, "something more than mere conclusory statements regarding one's involvement in an act's resulting 'substantial contribution' must be tendered in order for such involvement to be deemed compensable." *In re U.S. Lines*, 103 B.R. 427, 430 (Bankr. S.D.N.Y. 1989).

48. The *Mirant* bankruptcy court identified the following factors in weighing whether to award a substantial contribution claim: (1) whether there was a benefit to the estate; (2) whether the services were undertaken just for the applying creditor or for the benefit of all parties in the case; (3) whether the applicant would have done the same thing absent an expectation of compensation from the estate; (4) whether the benefit incurred exceeds the cost the party seeks to

assess against the estate; (5) whether the applicant's efforts were duplicative of those undertaken by statutory fiduciaries; (6) whether the applicant profited from post-petition acquisition of claims; and (7) whether the applicant had a negative effect on the case. *In re Mirant Corp.*, 354 B.R. 113, 132- 135 (Bankr. N.D. Tex. 2006), *aff'd* 308 F.App. 824 (5th Cir. 2009). Any substantial contribution analysis is necessarily fact-intensive. *Pierson & Gaylen v. Creel & Atwood (In re Consolidated Bancshares, Inc.)*, 785 F.2d 1249, 1253 (5th Cir. Tex. 1986).

49. Bankruptcy judges are charged "to scrutinize claimed expenses for waste and duplication to ensure that expenses were indeed actual and necessary" and "to distinguish between expenses incurred in making a substantial contribution to the case and expenses lacking a causal connection, the latter being noncompensable." *Hall Fin. Group, Inc. v. DP Partners Ltd. P'ship (In re DP Partners Ltd. P'ship)*, 106 F.3d 667, 673 (5th Cir. 1997).

TRT's work benefited itself and not the estate

50. One factor courts consider is whether work benefited the estate as a whole or only for "limited classes of creditors." *DP Partners Ltd. P'ship*, 106 F.3d at 673. Here, TRT's work benefited primarily itself, and not the estate as a whole.

51. TRT seek compensation for work objecting to GlassRatner's fee enhancement request. While this work may have provided some benefit to other creditors, including general unsecured creditors, this work mostly benefited its own Class 6 equity interests.

52. In fact, TRT's role in from the beginning of this case harmed the estate by its insistence in the beginning on Debtors selling its assets to equity without conducting a competition sale. And per the terms of the DIP financing order, Debtors paid TRT's legal fees that were incurred in connection with the DIP facility. [docket no. 214 at p. 26].

53. TRT's substantial contribution appears to be a disguised payment to Class 6 equity holders in contravention of the confirmed Plan. While the Amended 9019 Motion describes the $75,000 payment to TRT as a "substantial contribution," this payment appears to be a disguised payment to Class 6 equity interest in violation of the Confirmed Plan, which provides that Class 6 claimants shall not be paid before Class 3 general unsecured creditors.

54. Per the proposed settlement, described in the Amended 9019 Motion, only payments made to TRT *before* Class 3 general unsecured creditors are paid in full are called "substantial contributions" while payments to TRT *after* Class 3 creditors are paid in full are "equity" distributions. Amended Motion at ¶ 9(E)(iii). Paying TRT before Class 3 creditors are paid in full violates the terms of the Confirmed Plan and Trust Agreement.

TRT's work duplicated that of other statutory parties in interest

55. Claimed expenses that are duplicative of other statutory fiduciaries are not entitled to a substantial contribution award. *Mirant,* 354 B.R. at 137 n. 63 (*citing In re Consol. Bancshares, Inc.*, 785 F.2d 1249, (5th Cir. 1986)). This case had an active Committee. *In re Venturelink Holdings, Inc.*, 299 B.R. 420, 423 (Bankr. N.D. Tex. 2003)(committee members owe fiduciary duty to all unsecured creditors). While the Committee supported a fee enhancement for GlassRatner, it also signaled its position that it would not agree to the advisory firm receiving more than a $1 million total for its services, inclusive of its fees at the originally negotiated rates.

56. The United States Trustee, who is a statutory party in interest, also objected to GlassRatner's fees. *See* 11 U.S.C. § 307. TRT should not be reimbursed for duplicating others' efforts.

TRT does not meet the burden of reasonableness for its attorneys' fees

57. TRT did not attach any invoices or other descriptions of work performed or billed by its law firm Wick Phillips.

58. Courts have generally applied § 330(a) reasonableness standards to allowance of professional fees under § 503(b)(4). *See, e.g., In re Gen. Electrondynamics Corp.*, 368 B.R. 543, 554 n. 25 (Bankr. N.D. Tex. 2007); *In re Granite Partners*, 213 B.R. 440, 447 (Bankr. S.D.N.Y. 1997); *In re Living Hope Se., LLC*, 509 B.R. 649, 662 (Bankr. E.D. Ark. 2014).

59. The professional seeking reimbursement of fees under § 330(a) bears the burden of proving the reasonable value of the services. *In re Neville v. Eufaula Bank & Trust Co. (In re U.S. Golf Corp.)*, 639 F.2d 1197, 1207 (5th Cir. 1981); *see also Caplin & Drysdale Charter v. Babcock & Wilcox Co. (In re Babcock & Wilcox Co.)*, 526 F.3d 824, 827 (5th Cir. 2008).

60. The United States Bankruptcy Court for the Northern District of Texas has set forth *Guidelines for Compensation and Expense Reimbursement of Professionals* in Standing Order 2000-7 ("Guidelines"). These Guidelines therefore provide a reasonableness standard by which bankruptcy courts in this district evaluate fee applications.

61. TRT' fee statements do not permit parties to evaluate reasonableness because they do not meet the standards promulgated by the Guidelines.

TRT's claim is disguised fee sharing arrangement

62. TRT's substantial contribution claim is a disguised fee sharing arrangement prohibited under section 504 of the Bankruptcy Code. While TRT agreed to file this Application separate from the Amended 9019 Motion, the proposed payment of $75,000 to TRT in conjunction with GlassRatner's fee enhancement constitutes a prohibited fee sharing arrangement.

63. Section 504 of the Bankruptcy Code provides:

(a) Except as provided in subsection (b) of this section, a person receiving compensation or reimbursement under section 503(b)(2) or 503(b)(4) of this title may not share or agree to share--

> (1) any such compensation or reimbursement with another person; or
> (2) any compensation or reimbursement received by another person under such sections.
>
> (b)(1) A member, partner, or regular associate in a professional association, corporation, or partnership may share compensation or reimbursement received under section 503(b)(2) or 503(b)(4) of this title with another member, partner, or regular associate in such association, corporation, or partnership, and may share in any compensation or reimbursement received under such sections by another member, partner, or regular associate in such association, corporation, or partnership.
>
> (2) An attorney for a creditor that files a petition under section 303 of this title may share compensation and reimbursement received under section 503(b)(4) of this title with any other attorney contributing to the services rendered or expenses incurred by such creditor's attorney.
>
> (c) This section shall not apply with respect to sharing, or agreeing to share, compensation with a bona fide public service attorney referral program that operates in accordance with non-Federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals.

11 U.S.C. § 504.

64. Courts have prohibited fee sharing arrangements because they may subject "the professional to outside influences over which the court has no control, which tends to transfer from the court some degree of power over expenditure and allowances." *Futuronics Corp. v. Arutt, Nachamie & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 470 (2d Cir.1981), *cert. denied*, 455 U.S. 941, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982).

65. Courts have strictly interpreted section 504 to prohibit fee sharing with parties not included within the two statutory exceptions. *See, e.g., In re Winstar Communications, Inc.*, 378 B.R. 756, 761 (Bankr. D. Del. 2007)(prohibiting assignment of interest to lender who had agreed to "hedge" special counsel's fees). "Accordingly, three elements must be met for there to be a violation of § 504(a): (1) a person or entity was awarded compensation under § 503(b)(2) or § 503(b)(4), (2) a person or entity shared or agreed to share in the awarded compensation, and (3)

the person or entity that shared or agreed to share in the awarded compensation does not fit within one of the statutory exceptions." *In re Harris-Nutall*, 572 B.R. 184, 190 (Bankr. N.D. Tex. 2017)(citations omitted).

66. The proposed arrangement between GlassRatner and TRT violates section 504(a). It provides payment of the fee enhancement to GlassRatner that is linked to a $75,000 payment to TRT. And TRT does not fit into the statutory exceptions described in section 504(b) and (c). As such, it is prohibited under section 504(a).

Conclusion

The United States Trustee respectfully requests that the Court sustain his objections. The United States Trustee requests any additional relief to which he may be entitled.

DATED: February 24, 2021

Respectfully submitted,

WILLIAM T. NEARY
UNITED STATES TRUSTEE

/s/ Erin Marie Schmidt
Erin Marie Schmidt
Trial Attorney
Texas State Bar No. 24033042
Office of the United States Trustee
1100 Commerce Street, Room 976
Dallas, Texas 75242
(214) 767-1075
Erin.Schmidt2@usdoj.gov

Certificate of Service

I certify that on February 24, 2021, all parties entitled to receive ECF notice received a copy of this document.

/s/ Erin Marie Schmidt
Erin Marie Schmidt