

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

CASE NO. 09-02410-HB

ORDER ON DEBTORS' APPLICATION TO RETAIN GORDON BROTHERS ASSET
ADVISORS, LLC AS APPRAISER FOR THE DEBTORS

The relief set forth on the following pages for a total of 12 pages, is hereby ORDERED.

FILED BY THE COURT
06/10/2009



Entered: 06/10/2009

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In Re:) CASE NO. 09—2140-HB
)
BI-LO, LLC¹) CHAPTER 11
)
Debtors.) (Joint Administration)
)

**ORDER ON DEBTORS’ APPLICATION TO EMPLOY AND RETAIN GORDON
BROTHERS ASSET ADVISORS, LLC AS APPRAISER FOR THE DEBTORS
PURSUANT TO 11 U.S.C. §§ 327(a) AND 328(a)**

THIS MATTER came before the Court for hearing upon the application (Docket # 654) of BI-LO, LLC and its affiliates (“Debtors”), the above-captioned debtors in possession, for entry of an order authorizing the Debtors to employ and retain Gordon Brothers Asset Advisors, LLC (“Gordon”) effective *nunc pro tunc* to the date of the application.

An objection to that application was filed by the ad hoc committee of term lenders under that certain \$260,000,000 Credit Agreement, dated as of March 26, 2007, (“Term Lenders”)(Docket # 715). The official unsecured creditors’ committee (“Committee”) also filed an objection (Docket # 711). Debtors included a proposed order with the original application, but after discussions with various parties an amended proposed order was filed (Docket # 723). That document reflected some negotiated or agreed changes to the terms of the employment and compensation. Debtors also filed documents in support (Dockets # 722, 724 and 728) providing additional information about the proposed employment. The resulting terms of employment,

¹ The Debtors and the last four digits of their respective tax identification numbers are: BI-LO, LLC (0130); BI-LO Holding, LLC (5011); BG Cards, LLC (4159); ARP Ballentine LLC (6936); ARP James Island LLC (9163); ARP Moonville LLC (0930); ARP Chickamauga LLC (9515); ARP Morganton LLC (4010); ARP Hartsville LLC (7906); and ARP Winston Salem LLC (2540).

reflected in Dockets # 654, 715, 722, 724, and 728 are collectively referred to herein as the “Application”. The U.S. Trustee did not object to the terms of that final Application.

Findings of Fact²

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of this proceeding is proper pursuant to 28 U.S.C. §§ 1408 and 1409 and notice of the Application was appropriate under the circumstances.

2. The Declaration of Thomas Scotti (Docket # 728) was filed in support of the Application, detailing Gordon’s services, connections to the Debtors and parties in interest and the proposed compensation. Scotti did not attend the hearing to testify.

3. Debtors seek to retain Gordon to appraise store furniture, fixtures and equipment (FF&E) to supplement the services of other professionals that they plan to employ in this case. Debtors seek to employ Gordon not only to appraise the FF&E at market and liquidation value, but that professional would also provide a model reflecting how it would be willing to dispose of the FF&E in the theoretical circumstance that Gordon was asked to make such liquidation as of the date of the appraisal.

4. Brian P. Carney, chief financial officer of the Debtors, testified in support of the Application. Mr. Carney testified about the process of selecting Gordon, negotiation of the contract and the scope of work. He offered testimony regarding the necessity of the work to be done by Gordon and responded to questions from the Term Lenders and Committee. Carney testified that the Gordon appraisals, along with work to be done by other professionals and appraisers, may be helpful to the Debtors in various ways as they proceed with this case.

² A recitation of the basic events of this case and undisputed factual information about the Debtors’ history can be found in the “background” and “procedural history” portions of various documents filed by the parties in support of and in opposition to this Application. These facts were not in dispute and are therefore not restated herein.

Examples given were business planning, exploring possible refinancing, plan formation, preparation of the disclosure statement, and preparation for possible contested hearings, including those involving collateral value. No hearings involving the value of the collateral in question are scheduled at this time.

5. A copy of the Gordon Brothers Group Amended Engagement Letter is attached hereto as **Schedule I**. The Debtors propose to pay Gordon \$35,000 for appraisals initially plus out of pocket expenses and up to \$15,000. The letter also seeks approval to employ Gordon for expert testimony if required, billed at \$400 per hour. The employment and compensation are sought pursuant to 11 U.S.C. § 328(a). That document includes an agreement for the Debtors to indemnify Gordon under certain circumstances.

6. The Term Lenders cross-examined Carney regarding whether the proposed work was necessary at this time and the motive for the request. Many of the questions focused on whether the employment of Gordon was primarily to challenge the Term Lenders in future contested matters rather than for any of the other reasons stated. The Term Lenders also questioned Carney regarding whether this employment constitutes a payment to Gordon to prepare its own bid to serve as the Debtors' disposition agent for the store FF&E, and regarding whether this could chill the bidding as a result of Gordon's "inside track" on any such sale or establish a maximum value for the appraised property. Through cross examination the Term Lenders established that the work may not be necessary at this time and brought into question whether the work could result in harm to the estate.

Discussion and Conclusions of Law

The Debtors seek approval of the agreement with Gordon for services and compensation pursuant to 11 U.S.C. §§ 327(a) and 328(a). The question for the court in determining whether

to approve the employment and its terms is whether it is reasonable under the circumstances. In re Thermadyne Holdings Corp., 283 B.R. 749, 756 (B.A.P. 8th Cir. 2002). Such a finding can only be made on a case by case basis. See In re Mortgage & Realty Trust, 123 B.R. 626, 630-31 (Bankr. C.D. Cal. 1991) (stating that Section 328(a) authorizes a condition of employment only if it is reasonable); In re Allegheny Int'l Inc., 100 B.R. 244, 246 (Bankr. W.D. Pa. 1989). The proponent of the Application, in this case the Debtors, bears the burden of establishing that the terms of employment are reasonable under the circumstances. In re Metricom, Inc., 275 B.R. 364, 371 (Bankr. N.D. Cal. 2002). “The bankruptcy court must be persuaded that the terms and conditions are in the best interest of the estate.” Thermadyne, 283 B.R. at 756 (citing In re Gillett Holdings, Inc., 137 B.R. 452, 455 (Bankr. D. Colo. 1991)).

The Application seeks compensation for Gordon under §328(a), which provides:

The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, **the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.**

11 U.S.C. §328(a) (emphasis added). The Debtors and Gordon have agreed to employment terms that alter this section to allow the U.S. Trustee and the Bankruptcy Court to review fees and costs notwithstanding the language in bold. The objecting parties, however, are bound by the limitations of §328(a) if the Court approves the Application.

The Term Lenders assert that the evidence is insufficient to show that the appraisals in question are necessary at this time and that they are actually requested for use in future contested

matters rather than for any of the other reasons stated. The Term Lenders also argued that approval of the Application would be harmful to the estate and at best, a waste of estate resources.

The Committee objected to the Application, arguing that the appraisals have no value to the estate. The Committee asserts that the Application appears to attempt to improperly qualify Gordon as an expert pursuant to Rule 7026 of the Federal Rules of Bankruptcy Procedure, that the Debtors' motivation for the proposed employment is questionable and that the evidence does not support a finding that the appraisals are necessary at this time.

The evidence presented in support of the Application, at best, leaves the Court with the understanding that the employment *may* be helpful under some set of facts or at some point in time, but may also harm the estate or be unnecessary. The evidence presented, as challenged on cross-examination, does not support a finding that the Debtors have met their burden of proving that the Application includes reasonable terms and conditions of employment, is in the best interest of the estate, and is reasonable under the circumstances of this case. Therefore, the Court cannot approve the Application on this record and on these terms.³ Further, Debtors offered no evidence to support a finding that the Application should be approved *nunc pro tunc* to the Application date. See In re Jarvis, 53 F.3d 416 (1st Cir. 1995); In re Atkins, 69 F.3d 970 (9th Cir. 1995); In re Garden Ridge Corp., 326 B.R. 278 (Bankr. D. Del. 2005); In re Fleming Cos., Inc., 305 B.R. 389 (Bankr. D. Del. 2004); In re Saybrook Mfg. Co., Inc., 108 B.R. 366 (Bankr. M.D. Ga. 1989).

³ The Court notes that employment approved for compensation under § 328(a) does not provide a review of fees after services are rendered under the “reasonable compensation for actual, necessary services” standard found in § 330. Without this subsequent opportunity for objecting parties to review the Debtors' decision to spend estate funds, Debtors must be thorough and meticulous in meeting the burden of proof necessary for employment under § 328(a).

After a thorough review of the pleadings, evidence and arguments, and after consideration of the objections to the Application and applicable law, it is HEREBY ORDERED:

That the Debtors' Application to employ and retain Gordon as appraiser effective *nunc pro tunc* to the date of the Application (as amended) and for compensation pursuant to 11 U.S.C. §328(a) is **DENIED**.

IT IS SO ORDERED.

SCHEDULE 1



June 2, 2009

Mr. Brian Carney
BI-LO, LLC
208 BI-LO Boulevard
Greenville, SC 29607

AMENDED ENGAGEMENT LETTER

Dear Brian,

Gordon Brothers Asset Advisors, LLC ("GBAA") is pleased to submit this amended proposal regarding the furniture, fixtures and equipment ("Assets") appraisal of BI-LO, LLC ("Company"). The appraisal provides the Net Orderly Liquidation Values ("NOLV") and the Fair Market Value ("FMV") to be used by the Company for a variety of purposes, to include, but not limited to: business planning, formulation of a Plan of Reorganization, formulation of a Disclosure Statement, determination of secured claims, allocation of potential sales price, and potential refinancing.

The appraisal will outline gross and net recovery values, including a thorough explanation of how the gross values were derived and a detail of expenses necessary to arrive at the net recovery results.

In completing the analysis of the Assets, we will provide a model reflecting how Gordon Brothers would be willing to dispose of the Assets in the theoretical circumstance that Gordon Brothers was asked to make such a liquidation proposal as of the date of the appraisal. The appraisal will be completed on a "fee-bid" basis.

Gordon Brothers is an approved appraiser for virtually every major asset-based lender worldwide. Gordon Brothers appraises and liquidates billions of dollars of assets annually across virtually all sectors and asset classes. Gordon Brothers conducts specific field due diligence for each appraisal by leveraging selected experts from over hundreds of professionals and consultants worldwide. The appraisal is reviewed for quality by experienced liquidation principals who are in the market regularly buying and selling Assets. Every asset is appraised as if Gordon Brothers is going to bid to dispose of that asset within a bankruptcy court authorized sale process.

In order to complete our analysis, Gordon Brothers will:

- Review select Asset history and financial information to be supplied by the Company
- Conduct selected field and Company visits
- Evaluate third-party research
- Interview management

SCOPE

The following Assets will be appraised:

- Owned furniture, fixtures and equipment at Company's 214 retail locations

¹ Fair Market Value shall refer to a valuation of the fixtures in place.

TIMING AND FEES

The final report will be delivered via email in a PDF format on June 12, 2009. All information is due by May 19, 2009. Our ability to meet this schedule is contingent on timely receipt of the detailed information per provided information request lists. All information requested must be received in an electronic format that can be manipulated and has been approved by Gordon Brothers. The final appraisal report will clearly outline a set of assumptions and limiting conditions upon which the appraisal and this proposal are based. One printed and bound copy of the report will be sent after the delivery of the electronic report.

Our fee for the engagement is **\$35,000** plus out-of-pocket expenses*.

Payment is due upon completion of the appraisal. Out-of-pocket expenses include travel, direct administrative expenses and fees for our industry experts. GBAA will be compensated for providing expert testimony at the Company's request at the rate of \$400 per hour. GBAA will keep time records for such services as may be required by the Court and/or requested by the Company.

* The Company shall reimburse GBAA for its reasonable out-of-pocket expenses incurred in the provision of the services provided for in this agreement, such reimbursement not to exceed \$15,000 in the aggregate, and for its reasonably incurred travel expenses, provided that the Company has pre-approved such travel. The appraisal fee is also subject to the \$245,000 cap specified in the DJM Realty consulting agreement for a desk-top valuation with the Company. The Company's total cost for the desk-top valuation and the appraisal shall not exceed \$245,000. If the limit is exceeded, Consultant's compensation shall be reduced by an amount so that the total compensation for the desk-top valuations and the Assets appraisal is reduced to \$245,000.

Please remit payment by check or wire:

<p>Via Mail Gordon Brothers Asset Advisors, LLC Attn: Amy Gallagher 101 Huntington Avenue, 10th Floor Boston, MA 02199</p> <p>Ref. # 7722 Project # 0000BILM01</p>	<p>Via Wire or ACH GB Asset Advisors, LLC Bank of America, N.A. 100 Federal Street Boston, MA 02110</p> <p>Account # 0000546-09927 ABA# for Wire Transfer 026 009 593 ABA# for ACH Transfer 011 000 138 SWIFT Code: BOFAUS3N</p>
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CONFIDENTIALITY

We have requested or will be requesting the Company provide certain information to Gordon Brothers concerning its financial condition, brand, and other matters. We acknowledge that certain information and documentation ("Confidential Information") received in conjunction with this engagement is proprietary and confidential, including, but without limitation, non-public financial and business information furnished by the Company. We confirm and agree not to disclose, distribute, publish or release any of the Confidential Information, without written consent of the Company, to any third-party except as directed to by law or to our representatives for the purpose of evaluating the possible transaction, in which event such representatives will

agree to be bound by this confidentiality agreement. Notwithstanding the above, Gordon Brothers may reference the existence of this engagement in our regular marketing materials and efforts.

USE OF THIRD PARTIES

The Company agrees that GBAA may use other related and/or unrelated entities (individually and collectively, the "GBAA Agents") to provide some of the services described herein provided, however, that GBAA agrees that GBAA will be liable to the Company for any and all actions or inactions of the GBAA Agents as if such actions were GBAA's own. Provided, however, that the Company does not agree to waive in advance any potential conflicts of the GBAA Agents and the Company and its estate.

INDEMNIFICATION

Each party (and in the case of the Company, its estate) shall indemnify and hold the other and its affiliates and their respective officers, directors, employees, agents, and independent contractors, harmless from and against all claims, demands, penalties, losses, liabilities, or damages including, without limitation, reasonable attorneys' fees and expenses, directly or indirectly asserted against, resulting from, or related to this agreement except to the extent such claims arise as a result of the indemnified party's action or inaction.

INSURANCE

During the term of this agreement, GBAA will maintain (from a company or companies with a Best rating of A XV or higher) general liability (including property damage and bodily injury), auto liability, workers' compensation and employers' liability insurance. The limits of coverage for general liability and automobile shall equal or exceed \$3,000,000 per occurrence (which may be satisfied by a combination or primary and umbrella policies) and cover claims including, but not limited to, those resulting from bodily injury, death and/or property damage caused by GBAA, its employees, contractors, agents, or representatives. GBAA will add "LSF5 BI-LO Holdings, LLC and all affiliated companies" as additional insureds (on a primary and non-contributing basis) and waive GBAA's right to subrogation as respects general liability and workers' compensation claims.

GBAA shall provide the Company with a certificate of insurance evidencing the same and above-referenced coverages and provide that no reduction, lapse, cancellation, or material modification of the policy shall be effective without 30 days' prior written notice to the Company. GBAA shall send the certificate of insurance, referencing this agreement, to BI-LO Risk Management, PO Box 99, Mauldin, SC 29662. Notwithstanding anything to the contrary herein, GBAA will ensure that its contractors and subcontractors performing work on its behalf hereunder comply with the requirements of this section.

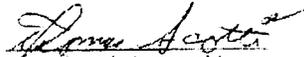
DISCLOSURES

We disclose that other divisions of Gordon Brothers are currently in discussions with the Company regarding additional services. The Company hereby waives any conflict or objection that the Company or their affiliates now have, or might in the future have, as a consequence of our performing this appraisal and other divisions of Gordon Brothers conducting requested transactions and/or performing requested services. Gordon Brothers acknowledges that its employment by the Company shall be pursuant to the requirements of 11 U.S.C. § 327(a) and that, notwithstanding the Company's waiver of any conflict, Gordon Brothers shall be subject to all of the requirements of § 327(a), including the "disinterested" standard, throughout its engagement with the Company.

The Company acknowledges that the Assets appraisal of the Company is for the use by the Company and its estate in the liquidation analysis of the disclosure statement and in determining the Company's five year plan, as well as in possible litigation with the Term Lenders over the value of their secured claim. The Company acknowledges that no other third party may rely upon the Asset appraisal. The Company understands that we are part of a large organization with affiliates that, in the ordinary course of their businesses, engage in purchases, sales and other transactions of securities, loans and other financial instruments of public and private companies. While certain of our affiliates and their directors, officers and employees may have financial and other interests in the securities, loans and other financial instruments of companies to which we and our affiliates provide services, Gordon Brothers has implemented appropriate internal restrictions on the sharing of confidential information to comply with federal securities laws.

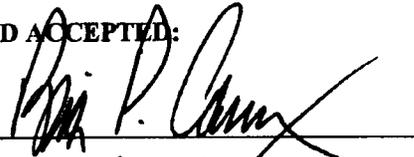
If the terms and conditions of this letter are acceptable, kindly indicate your acceptance at the bottom of this page and return this letter to my office by fax at (617) 210-7143 or via email to tscoffi@gordonbrothers.com and copy gbaa@gordonbrothers.com. Any signed document received by fax or email shall have the binding and legal effect of an original document. If you have any questions, please feel free to call me at (617) 210-7138. I look forward to hearing from you soon.

Sincerely,
GORDON BROTHERS ASSET ADVISORS, LLC


(electronic signature only)

President & Principal

AGREED AND ACCEPTED:
BI-LO, LLC

By: 
Title: RVP - CFO
Dated: June 2, 2009

Ref. # 7722
Project # 0000BILM01