

Return Date: No hearing set

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	Chapter 11
	:	Case Nos. 95 B 42777
BRADLEES STORES, INC. <u>et al.</u>	:	Through 95 B 42784 (BRL)
	:	(Jointly Administered)
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**AMENDED APPLICATION OF STATE STREET BANK
AND TRUST COMPANY, AS INDENTURE TRUSTEE,
FOR ALLOWANCE OF COMPENSATION FOR SERVICES RENDERED
AND FOR REIMBURSEMENT OF EXPENSES AND DISBURSEMENTS
(INCLUDING PROFESSIONAL COSTS AND EXPENSES OF ITS
COUNSEL, PALMER & DODGE LLP) PURSUANT TO 11 USC § 503(b)**

TO THE HONORABLE BURTON R. LIFLAND,
UNITED STATES BANKRUPTCY JUDGE:

State Street Bank and Trust Company, as indenture trustee (“State Street” or the “Indenture Trustee”), for the holders of the 11% Senior Subordinated Notes due 2002 (the “11% Notes”) and the 9¼% Senior Subordinated Notes due 2003 (the “9¼% Notes”) and, together with the 11% Notes, the “Notes”) of Bradlees, Inc. (“Parent”), in the aggregate outstanding principal amount of \$225,000,000, and its counsel, Palmer & Dodge LLP (“P&D”) hereby submit this amended joint application (the “Application”) seeking allowance of compensation for services rendered and for reimbursement of expenses and disbursements pursuant to sections 503(b)(3)(D) and 503(b)(4) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”), and Rule 2016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In

support of this Application, State Street and P&D (collectively, the “Applicants”), respectfully represent as follows:

I. Introduction

1. On June 23, 1995 (the “Petition Date”), Parent, Bradlees Stores, Inc., New Horizons of Yonkers, Inc., Bradlees Administrative Co., Dostra Realty Co. Inc., Maximedia Services, Inc., New Horizons of Bruckner, Inc. and New Horizons of Westbury, Inc. (collectively, the “Debtors”), each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Pursuant to an Order of this Court dated June 23, 1995, the Debtors’ chapter 11 cases were consolidated for procedural purposes only and are being jointly administered. The Debtors operated their businesses and managed their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner was appointed in these cases.

2. State Street retained P&D as its counsel in this case in June, 1995 immediately upon learning that a bankruptcy petition may be filed by the Debtors which would constitute an event of default on the Notes and under the Indentures pursuant to which the Notes were issued. P&D commenced its representation of State Street Bank on June 23, 1995 and continues to represent State Street with respect to this matter through the date hereof.

3. On July 6, 1995, the United States Trustee appointed an Official Committee of Unsecured Creditors (the “Committee”), pursuant to Bankruptcy Code section 1102(a). The Indenture Trustee was appointed as a member of the Committee on that date and continued to serve on such Committee throughout its existence. The

Committee retained Otterbourg, Steindler, Houston & Rosen, P.C. as its counsel (“OSHR”), and Ernst & Young LLP as its accountants and financial advisors (“E&Y”).

4. On or about February 2, 1999 (the “Effective Date”), the Debtors (other than New Horizons of Yonkers, Inc.) emerged from chapter 11, pursuant to a joint plan of reorganization confirmed by this Court (the “Plan”).

5. This Application is submitted pursuant to the United States Trustee Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Under 11 U.S.C. § 330, made applicable to cases pending in the Southern District of New York by the Amended Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases (the “Guidelines”).

6. On or about March 19, 1999, State Street filed an application with this Court seeking reimbursement of its fees and expenses, and those of P&D (the “Original Application”). At a hearing held on April 22, 1999 (the “Hearing”) the Court denied the Original Application, without prejudice to the rights of State Street to amend its request within 45 days of that date.

7. State Street has attempted, on several occasions, to resolve its request for reimbursement of fees, with the Debtors and their counsel. In fact, State Street offered a reduction of almost \$200,000 off of its Original Application, to \$375,000 (plus retention of its indenture trustee charging lien). Based on this Court’s denial of the Original Application, however, the Debtors rejected State Street’s offer and accordingly, short of almost complete capitulation, State Street is left with no alternative other than the filing of this amended Application.

II. The Notes

8. The Notes were issued in accordance with the federal securities laws, with the intention of, and in fact, being sold to the public. The securities laws afford the holders of the Notes certain protections, including the filing of a prospectus, qualification of the indentures pursuant to which the Notes were issued, continuing financial disclosures by the Company and the appointment and continued services of an independent trustee to act on behalf of the holders of the Notes under the respective indentures. *Trust Indenture Act of 1939* (the “TIA”), 15 U.S.C.A §§ 77aaa et seq. In fact, Section 310 of the TIA mandates that there “shall at all times be one or more trustees under every indenture qualified or to be qualified” and, further, the resignation or removal of one trustee does not become effective until a successor is appointed and accepts such appointment.

9. Generally, in the absence of any default or event of default as defined in an indenture, a trustee must perform the duties in accordance with the express provisions of the indenture. Post-default, however, the trustee has heightened fiduciary duties and must serve as trustee using the same degree of care and skill as a prudent man in the conduct of his own affairs. TIA § 315. Consequently, although the trustee is not, in reality, protecting its own economic interests, the TIA requires that it act in such a fashion for the benefit of others.

10. The indentures providing for the issuance of the Notes are qualified under the TIA and incorporate these duties. Further, because State Street must protect the economic interests of its holders as though they were its own, but is not the economic beneficiary of any recovery, the indentures provide State Street two protections. First,

the issuer of the Notes (Parent) must reimburse State Street for all fees and expenses incurred by it (including fees and expenses of its counsel). Each of the indentures providing for the issuance of the Notes provide for such compensation and indemnity and further provide that, when the Indenture Trustee provides services after the filing of a petition under the Bankruptcy Code, the fees and expenses incurred by the Indenture Trustee constitute expenses of administration against the estates.¹

11. Second, State Street is provided an indenture trustee charging lien, to compensate the trustee for its reasonable fees and expenses from the trust estate, should the issuer of the underlying securities fail to make payment. The rights of State Street with respect to its indenture trustee charging lien have been specifically retained as part of the Plan, in the event of non-payment of fees by the Debtors.²

12. State Street submits that all of the fees and expenses incurred by it, including those of its counsel, P&D, are reasonable. Over the nearly 4 years since Bradlees chapter 11 proceeding, State Street incurred fees and expenses in the aggregate amount of \$562,702.25; the average hourly billing rate of its counsel was \$263.31. Further, State Street became successor to Fleet National Bank, as trustee for the holders of the 9 ¼% Notes, thereby eliminating the fees and expenses of a second indenture trustee and its outside counsel. Moreover, the aggregate fees and expenses of State Street over this almost 4 year period, amount to approximately one-quarter of one percent (1/4%) of the total aggregate principal amount outstanding on the Notes as of the

¹ Sections 7.07 and 7.7 of the indentures providing for the issuance of the 11% Notes and the 9 ¼% Notes, respectively, contain such provisions.

² Section 7.27 of the Plan provides that the indentures continue in effect for the purpose of allowing the Indenture Trustee to make distributions under the Plan and permitting the Indenture Trustee to maintain its liens for fees, costs, expenses and indemnification.

Petition Date. State Street's fees and expenses are certainly reasonable, and State Street reserves all of its rights to exercise its indenture trustee charging lien for any and all amounts which are not reimbursed to it by the Company

III. The Amended Fee Application

13. State Street and P&D submit this amended Application seeking (a) allowance of reasonable final compensation for the services rendered by them during the period from the Petition Date through the Effective Date, plus additional amounts of fees and expenses incurred after the Effective Date in connection with formation of procedures for making distributions to the holders of the Notes and in making this Application and (b) reimbursement of actual and necessary out-of-pocket disbursements and expenses incurred by them in the rendition of required professional services on behalf of an indenture trustee.

14. At the Hearing on the Original Application, counsel for the Debtors argued that certain fees and expenses, while perhaps reasonable, were incurred solely for the benefit of State Street's constituency and were therefore not compensable pursuant to section 503(b) of the Bankruptcy Code. The Applicants point out that State Street's constituency represents virtually the entire Parent estate's creditor constituency—approximately 90%. In submitting this amended Application, the Applicants acknowledge such comments, and therefore agree to reduce their Application by the amount of \$123,777.50, representing fees and expenses incurred with respect to matters which appear solely to benefit the holders of the Notes, including the filing of proofs of claim, the filing of a verified statement under Bankruptcy Rule 2019, general administration fees and other miscellaneous matters. The fees and expenses incurred for

those tasks, however, were reasonable in nature and in dollar amount, and were of direct benefit to the holders of the Notes. Accordingly, the Applicants specifically reserve their rights to assert the indenture trustee charging lien for reimbursement of all such fees and expenses not reimbursed in cash by the Debtors.

15. P&D has maintained detailed records of the time expended in rendering the professional services performed on behalf of the Indenture Trustee in these cases and State Street has maintained similar records with respect to its general administration and default administration fees and expenses. Such time records were generated contemporaneously with the performance of the services described therein and in the ordinary course of Applicants' business practices. In the case of each of State Street and P&D, the individual time records were recorded by the bank officer, attorney or legal assistant who rendered the particular services described. Attached hereto as Exhibit A is a schedule which shows a summary of the hours worked, the hourly billing rates and the total charges of each professional and paraprofessional performing services in this matter for which the Applicants seek reimbursement herein. Exhibit A-1 sets forth the summary with respect to State Street and Exhibit A-2 sets forth the summary for P&D. In addition, attached hereto as Exhibit B is a copy of the actual time records maintained by P&D during the Debtors' chapter 11 proceedings. *Exhibit B sets forth the total amount of time incurred by P&D in these matters, without taking into consideration the reductions being made herein.*

16. P&D's records reflect that, during the chapter 11 proceedings, attorneys and legal assistants rendered an aggregate of 1,588.9 hours of legal services. These services represent a total charge of \$417,650.50, calculated in accordance with P&D's

normal hourly rates in effect at the time the services were rendered. The blended hourly rate of all professionals rendering services in this case, *excluding the time and billing charges for services rendered by paraprofessionals*, is \$263.31

17. State Streets records reflect that, during the chapter 11 proceedings, bank officers and assistants rendered an aggregate of 385.62 hours of services. These services represent a total charge of \$68,521.25 calculated in accordance with State Street's normal hourly rates in effect for default administration at the time the services were rendered. In the Original Application, , State Street requested reimbursement for its general administration fees incurred during the course of the Debtors' chapter 11 proceedings, in the aggregate amount of \$48,000.00. State Street now agrees to seek such general administration fees only by exercise of the indenture trustee charging lien.

18. The Applicants also maintain records of all expenses and disbursements incurred by Applicants which were necessary in connection with the performance of its services (collectively, the "Expenses"). The amount of Expenses incurred by the Applicants on behalf of the Debtors during the application period aggregates \$28,530.50 consisting of \$236.00 incurred by State Street; \$27,544.50 already incurred by P&D; and an estimate of \$750 for fees expected to be incurred for travel and related expenses in filing this Application and attending any hearing thereon. The Applicants have not attached the detailed backup with respect to such Expenses as to do so would require voluminous copies providing little or no value to the Debtors or other parties in interest. Attached hereto as Exhibit C is a schedule with respect to such Expenses, which sets forth the amounts and types of Expenses incurred during these cases. Further, except

with respect to the \$750 in estimated expenses, such Expenses are described on the copies of invoices provided on Exhibits A and B hereto.

19. As described in more detail below, the fees requested herein by the Applicants are reduced by \$123,777.50, to take into account certain of the objections and issues raised by the Debtors and this Court at the Hearing on the Original Application. Accordingly, by this amended Application, the Applicants seek reimbursement of fees in the amount of \$410,394.25, reflecting a blended hourly rate for P&D professionals of \$261.58, plus expenses in the amount of \$28,530.50.

IV. Services Rendered By the Applicants

20. Bankruptcy Code section 503(b) provides that a bankruptcy courts may award, as an administrative expense, legal expenses incurred by an indenture trustee and its professionals for actual and necessary services rendered in making a substantial contribution to the debtor's bankruptcy case. "Compensation based on substantial contribution is designed to promote meaningful participation in the reorganization process ... " *In re Granite Partners*, 213 B.R. 440, 445 (Bankr. S.D.N.Y. 1997). The participation of State Street and P&D in all major and critical issues in the case demonstrates that the Applicants made a substantial contribution to these cases. Moreover, the Applicants were cognizant of the number of professionals acting in these cases, and where possible, avoided duplication of effort and the incurring of unnecessary or wasteful expenses.

21. As described below, the Applicants respectfully submit that the professional services rendered and the Expenses incurred were necessary and have resulted in very substantial benefits to the Debtors' estates. Based on an analysis of each

of the relevant factors, the Applicants respectfully submit that the compensation sought in this application is reasonable.

22. In their Original Application, the Applicants attempted to the extent possible, to categorize the fees and expenses into separate sub-parts. The Applicants have reviewed such categories and believe that the time reflected by the Applicants for Committee Service, fees relating to the Intercompany Claim, and plan negotiations and working group meetings are so intertwined that it is more appropriate to describe those three categories together. Other tasks are more easily categorized, such as the form of the stock warrant and Parent creditor distributions and accordingly, the Applicants describe those tasks separately.

Intercompany Claim/Plan Negotiations/Working Group and Committee Service

23. As previously set forth, State Street was appointed as a member of the Committee at the organizational meeting held in these cases in July, 1995. Almost immediately after the Petition Date and formation of the Committee, issues arose concerning the claims by and between one debtor against the other, as well as the rights of creditors of one estate vis-à-vis creditors of other estates. The Notes were issued by Parent and the recovery afforded to Parent creditors would be based upon maintaining the integrity of the Parent's claim against its subsidiary, Bradlees Stores, Inc. ("Stores")—the so-called "Intercompany Claim".

24. As one of only 2 “pure” Parent creditors on the Committee³ (and at that time the only such creditor with separate counsel), State Street engaged in extensive and continuing discussions with OSHR, E&Y, other members of the Committee, creditors of Stores and members of what ultimately became known as the Unofficial Committee of Trade Claim Holders (the “Unofficial Committee”), with respect to the Intercompany Claim. Over a continued and prolonged period of time, the Applicants argued strenuously to preserve the Intercompany Claim, both within the confines of the Committee and as an active participant in a separate working group, comprised of all creditor constituencies, formed to discuss and resolve major issues in the proceedings.

25. Moreover, during the first six months of the Debtors’ cases, certain of Stores’ creditors (including some members of the Unofficial Committee) argued in favor of the formation of separate creditors’ committees (with the right to engage separate professionals) for each of Parent’s and Stores’ estates. Those parties alleged that, by virtue of the fact that the existing Committee was comprised of creditors of both Stores and Parent, OSHR and E&Y were hopelessly conflicted and unable to advocate positions favorable to one estate to the detriment of another. Those parties made the same arguments with respect to the Debtors’ professionals. By their representation of both Parent and Stores, the Debtors’ professionals were likewise hopelessly conflicted. The Committee, State Street and P&D opposed the creation of separate committees, arguing that Parent creditors on the Committee, including P&D on behalf of State Street, were acting in the best interests of the Parent creditors, were well versed in the issues

³ By August, 1995, Fleet National Bank, who had also been appointed to the Committee, as trustee for the holders of the 9 ¼% Notes, had resigned to participate in

relating to the underlying Intercompany Claim and were participating on the Committee and in the working group to resolve those issues. Ultimately, no separate committees were formed, and no additional professionals were appointed. The Applicants submit that their participation on the Committee benefited the estates by eliminating the formation of separate committees, with separate counsel and other advisors, all of whom would have been compensated at rates substantially in excess of those of the Applicants.

26. State Street and P&D spent significant time on the Committee and in the working group with respect to the Intercompany Claim. The Intercompany Claim was the lynch-pin of the recovery for Parent creditors. The Applicants did not undertake their own investigation into the creation of those claims, but carefully analyzed all of the documents and reports issued by the Debtors' and the Committee's professionals regarding that claim, including what became known as the "Green Book".

Interestingly, in its objection to the Original Application Debtors' counsel suggested that the Applicants should not have incurred fees and expenses with respect to the Intercompany Claim, as the Debtors were charged with investigating that claim. To suggest, as do the Debtors, that the Applicants should merely have accepted the legal analysis and conclusions of the Debtors' professionals contained in the Green Book without any independent analysis, particularly when the entirety of the Parent estate's recovery may have been wholly dependent upon the successful prosecution of the Intercompany Claim, is nonsense. The Debtors' position is absurd.

27. Further, P&D filed an objection to the motion filed on behalf of the Unofficial Committee seeking the appointment of an examiner in the Stores case, to

the Debtors' debtor-in-possession financing facility. State Street was appointed

investigate and commence litigation to avoid the Intercompany Claim. In addition, P&D participated in the hearing relating to that motion on behalf of the Indenture Trustee, and in the appeal brought by the Unofficial Committee with respect thereto.

28. The Intercompany Claim negotiations, both in the Committee and in the working group with other creditor constituencies, go hand-in-hand with negotiations concerning the overall structure of a plan of reorganization and the distribution recoveries to creditors. Beginning in 1996, the Applicants met almost monthly with members of other creditor constituencies (but *excluding* the Debtors), to discuss the parameters of a plan of reorganization. Numerous meetings addressed the timing, manner and nature of distributions to the various estates. Substantial time was devoted to whether recoveries in either any cash or notes would be appropriate, and whether the reorganized Debtors would have any liquidity upon emergence from Chapter 11, to attract vendor support, if any cash or notes were distributed under a plan.

29. During these negotiations Parent creditors were viewed by other creditor constituencies as the recipients of little or no recovery. The Applicants, believing that any recovery would likely be only a small percentage of equity, stated they would not support any plan which would leave the reorganized debtors in a cash poor position. Instead, if Parent creditors were to receive only a small portion of equity, or even warrants, the Applicants insisted that the reorganized Debtors be in a position to attract trade support to continue operations.

30. In late Spring of 1996, and through the Fall, plan negotiations took a backseat to the Debtors' rapidly deteriorating financial condition. Losses in the

successor trustee to Fleet.

hundreds of millions of dollars were sustained, and expenses were increasing. The Applicants insisted that OSHR and E&Y demand cost reductions from the Debtors. The chief executive officer, Mark Cohen, instituted minor reductions, but insisted further cuts were unnecessary. In late August, 1996, the Applicants began discussions with Committee members and Committee professionals, and later with members of the working group, to seek a management change. Such a change ultimately occurred on December 24, 1996, when Peter Thorner was chosen to replace Cohen.

31. The fees incurred for all of these services are reflected on Exhibits A and B and total \$68,221.25 for 385.62 hours for State Street and \$331,145.00 for 1,271 hours for P&D.

Form of Stock Warrant

32. This category includes time expended by P&D in the review and negotiation of the form of new warrants to be distributed to creditors of Parent, including the holders of the Notes. As part of this task, P&D participated in extensive conference calls with counsel for the Debtors and with counsel for the Unofficial Committee and other parties with respect to the appropriate terms thereof.

33. P&D also reviewed a series of “no action” letters issued by the Securities and Exchange Commission in response to the Debtors’ desire not to file a registration statement for the new warrants with the SEC. The Plan originally provided that the Debtors would register the new Warrants. P&D reviewed the applicability of Bankruptcy Code section 1145 to subsequent transfers of the warrants and transfers of the stock of the Debtors purchased in exchange for the new warrants to assure the recipients of the new warrants that future sales would be exempt under the securities

laws. Further, on behalf of the Parent creditors, P&D drafted for inclusion into the new warrants a “net exercise” provision. Having such a mechanism would enable recipients of the new warrants to exchange their warrants for stock in a cashless manner, in the event the stock price exceeds the warrant exercise price. On June 3, 1999, the stock price closed at \$10 pre share. If the price of stock remains in excess of the exercise price of the new warrants, the cashless exercise will be available to all of the holders of the new warrants when those warrants are distributed. State Street submits that the inclusion of such a provision was, and will continue to be, of clear benefit to all of the Parent creditors who are to receive new warrants under the Plan.

34. The fees incurred for the tasks included in this category are reflected on Exhibit B and total \$8,448.00 for 28.6 hours in time expended by P&D.

Letters of Transmittal

35. At the time of the Debtors' confirmation hearing, P&D worked with Donlin Recano, the Debtors' distribution agent for the purpose of preparing letters of transmittal to enable parties to participate in the new warrants being distributed under the Plan. P&D reviewed forms of transmittal letters used by Donlin Recano in prior chapter 11 cases and prepared new forms of transmittal letters for use in this proceeding.

36. The fees incurred for the tasks included in this category are reflected on Exhibit B and total \$2,280.00 for 7.6 hours in time expended by P&D.

V. Summary of Request for Compensation and Expenses

37. The services described in this Application reflect the ordinary billing rates of the Applicants and their customary billing practices with respect to expenses. Exhibit A sets forth the billing rates of those attorneys and legal assistants at P&D and at

State Street who worked on these cases. Exhibit C sets forth the Expenses the Applicants incurred and paid in connection with the services rendered. The Applicants submit that all fees and expenses were necessarily incurred and are reasonable in amount.

38. The Applicants are requesting reimbursement only for expenses which are reimbursable under the Guidelines. No charges for secretarial time during the regular workday or proofreading by non-lawyers have been included. The reproduction of documents and pleadings by P&D's in-house copying service, Pitney-Bowes, was at a cost of \$0.20 per page. The bulk of the expenses constitute out of pocket disbursements for travel to and from Boston and New York and lodging, primarily incurred in connection with attendance at Committee and working group meetings and intermittently at hearings and status conferences at the Bankruptcy Court.

39. State Street has reviewed this Application and approves of this Application.

VI. Conclusion

40. All services for which compensation is sought were performed on behalf of State Street, as Indenture Trustee and as a member of the Committee and not on behalf of any other creditor or party in interest. The Applicants have not entered into any agreement, express or implied, with any other party in interest for the purpose of fixing or sharing fees or other compensation to be paid for professional services rendered in these cases.

41. During these cases, the Applicants devoted an aggregate of 1,974.52 hours, representing aggregate time charges of \$534,171.75. Of that amount, the

Applicants seek reimbursement of fees in the amount of \$410,394.25. State Street submits that all of its fees are reasonable and should be reimbursed by the reorganized Debtors in accordance with Section 503(b) of the Bankruptcy Code.

42. The Applicants also seek approval for the reimbursement of actual and necessary expenses incurred in the sum of \$28,530.50. The Applicants submit that the amount of expenses and disbursements it incurred in connection with the effective and efficient performance of services was necessary and are entirely reasonable. Attached hereto as Exhibit D are certifications required by the Guidelines.

LBR 9013-1(b) Waiver

43. The Applicants respectfully requests that the Court waive the requirement under LBR 9013-1(b) that a separate memorandum of law be filed in support of this Application. The Applicants reserve the right to submit a reply memorandum of law in the event objections to the Application are filed.

Notice

44. Copies of this Application have been served on the United States Trustee, counsel for the Debtors, the Debtors and counsel for the Committee. The Applicants respectfully submit, and request that this Court so find, that no other or further notice is necessary or required.

WHEREFORE, the Applicants respectfully request the entry of an Order (a) allowing the Applicants compensation for services rendered in the amount of \$410,394.25 and reimbursement for the Applicants' actual and necessary expenses of \$28,530.50 in connection with such services and (b) granting such other and further relief as may be just and proper.

Dated: June 3, 1999

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