

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

_____)	
In re)	Chapter 11
TELOGY, LLC, <i>et al.</i> , ¹)	Case No. 10-10206 (MFW)
)	(Jointly Administered)
Debtors.)	
_____)	Related Docket No. 77

LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' APPLICATION PURSUANT TO SECTION 327(a) AND 328(a) OF THE BANKRUPTCY CODE AND RULE 2014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, TO EMPLOY AND RETAIN BROADPOINT CAPITAL, INC. AS FINANCIAL ADVISOR TO THE DEBTORS, *NUNC PRO TUNC* TO THE PETITION DATE, AND WAIVING CERTAIN INFORMATIONAL REQUIREMENTS OF LOCAL RULE 2016-2 IN CONNECTION THEREWITH

The Official Committee of Unsecured Creditors (the "Committee") of Telogy, LLC ("Telogy") and e-Cycle, LLC ("e-Cycle" and, together with Telogy, the "Debtors") hereby objects, on a limited basis ("Limited Objection"), to the entry of an order granting the *Debtors' Application Pursuant to Section 327(a) and 328(a) of the Bankruptcy Code and Rule 2014 of the Federal Rules of Bankruptcy Procedure, to Employ and Retain Broadpoint Capital, Inc. as Financial Advisor to the Debtors, Nunc Pro Tunc to the Petition Date, and Waiving Certain Informational Requirements of Local Rule 2016-2 in Connection Therewith* [Docket No. 77] (the "Application").² Although the Application modifies the Indemnification Provisions set forth in Schedule A to the Engagement Letter, out of an abundance of caution, the Committee objects on a limited basis and seeks the entry of an order clarifying the exclusion of certain of the

¹ The Debtors are the following entities (with the last four digits of their federal tax identification numbers in parentheses): (i) e-Cycle, LLC (1582) and (ii) Telogy, LLC (1530). The Debtors' executive headquarters are located at 3200 Whipple Road, Union City, California 94587.

² Capitalized terms used but not specifically defined in this Limited Objection shall have the meanings ascribed to them in the Application.

Indemnification Provisions from the terms of the Debtors' retention of Broadpoint. In support of this Limited Objection, the Committee respectfully states as follows:

BACKGROUND

1. On January 24, 2010 (the "Petition Date"), the Debtors each filed a *Voluntary Petition* for relief under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). Since the Petition Date, the Debtors have continued in the possession of their assets and in the management of their businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

2. Also on the Petition Date, the Debtors filed, as one of their many "first day" motions, the *Motion of Telogy, LLC for Orders: (A)(I) Approving Bid Procedures in Connection with Sale of Substantially All of Its Assets; (II) Scheduling Hearing to Consider Sale of Assets; (III) Approving Form and Manner of Notice Thereof; and (IV) Approving Break-Up Fee and Expense Reimbursement; (B)(I) Authorizing and Approving Sale of Assets Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) Approving Assumption and Assignment of Executory Contracts and Unexpired Leases; and (C) Granting Related Relief* [Docket No. 14] (the "Sale Motion"). Pursuant to the Sale Motion, the Debtors propose to sell substantially all of Telogy's assets (the "Sale") to McGrath Rent Corp. (the "Potential Purchaser") pursuant to section 363 of the Bankruptcy Code.

3. On February 3, 2010, the Office of the United States Trustee for the District of Delaware (the "UST") formed the Committee pursuant to section 1102 of the Bankruptcy Code.

4. On February 8, 2010, the Debtors filed the Application seeking authorization and approval of the Debtors' retention of Broadpoint Capital, Inc. ("Broadpoint") as financial advisor to the Debtors. The Application provides that Broadpoint shall be entitled to a fee upon the

closing of the Sale equal to the greater of \$400,000 and 1.5% of the Aggregate Purchase Price. Broadpoint shall also be entitled to a fee of \$10,000 per day per Broadpoint professional should testimony from Broadpoint become necessary in the Debtors' cases.

LIMITED OBJECTION

5. A bankruptcy court is not compelled to accept a professional's employment under section 328 of the Bankruptcy Code merely because the application states that statutory provision. *In re Circle K Corp.*, 279 F.3d 669, 671 (9th Cir. 2002); *see also Zolfo, Cooper & Co. v. Sunbeam-Oster Co.*, 50 F.3d 253, 261 (3d Cir. 1995) (bankruptcy court need not approve or reject application as presented but may approve application with modified terms that court finds necessary to render proposed employment reasonable). A bankruptcy court is free to make clear that it is only conditionally approving the professional's retention. *Id.* "[A] bankruptcy court has an obligation to determine the reasonableness of the terms and conditions before authorizing the employment of professionals under section 328(a) and may eliminate, modify, or impose additional terms and conditions to satisfy the requirement of reasonableness." *In re High Voltage Eng'g Corp.*, 311 B.R. 320, 333 (Bankr. D. Mass. 2004). The determination of whether the particular proposed terms are reasonable should be made on a case-by-case basis. *In re Metricom, Inc.*, 275 B.R. 364, 371 (Bankr. N.D. Cal. 2002). The proponent of the application bears the burden of establishing that the terms of employment are reasonable under the circumstances. *In re Termadyne Holdings Corp.*, 283 B.R. 749, 756 (B.A.P. 8th Cir. 2002).

6. While the Committee recognizes that the inclusion of indemnification provisions in the engagement of financial advisors and investment bankers are often requested by chapter 11 debtors, certain of the Indemnification Provisions described in the Schedule A to the Engagement Letter are excessive and inconsistent with the relief sought in the Application and

approved in other cases. The Application purports to modify the Indemnification Provisions by, among other things, limiting the Debtors' obligation to indemnify Broadpoint for claims arising out of Broadpoint's own gross negligence or willful misconduct, subject to judicial determination of the same. See Application ¶ 13. Paragraph 7 of Schedule A, however, provides, in relevant part, that:

If any indemnification or reimbursement sought pursuant to this Schedule A were for any reason (by judicial determination or otherwise) not to be available . . . then the Company, in lieu of indemnifying or reimbursing or reimbursing such Indemnified Person, shall contribute to the amount paid or payable by such Indemnified Person with respect to such Losses

See Schedule A ¶ 7.

7. In light of the modification to the Indemnification Provisions described in the Application, paragraph 7 of Schedule A is either is either inappropriate or unnecessary. Moreover, section 328(a) requires that the terms of the retention be reasonable. Absent modification, the terms of the Indemnification Provisions are unreasonable. The Committee respectfully requests that any order approving the Application and the Debtors' retention of Broadpoint clarify that Paragraph 7 of Schedule A shall be deemed deleted in its entirety. Such relief is appropriate and consistent with other orders of this Court approving the retention of Broadpoint. See *In re DeCode*, No. 09-14063 (PJW) (Bankr. D. Del. Jan. 14, 2010) (deleting paragraph 7 of Schedule A of Broadpoint's engagement letter); *In re Intermet*, No. 08-11859 (KG) (Bankr. D. Del. October 1, 2008) (modifying the paragraph 7 of Schedule A of Broadpoint's engagement letter).

RESERVATION OF RIGHTS

8. The Committee reserves its right to assert any other objection to the Application at the hearing thereon.

CONCLUSION

WHEREFORE, the Committee respectfully requests that this Court enter an order: (i) sustaining this Limited Objection; (ii) granting the Application as modified pursuant to this Limited Objection; and (iii) granting to the Committee such other and further relief as the Court deems just and proper.

Dated: Wilmington, Delaware
February 16, 2010

Respectfully submitted,



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