

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MARYLAND  
(Baltimore Division)**

<b>In re</b>  <b>The Boyds Collection, Ltd., et al.<sup>1</sup></b>  <b>Debtors.</b>	* * * * * * *	Case No. 05-____ ( ) through 05-____ ( )  Chapter 11 (Jointly Administered under Case No. 05-____ ( ))
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**APPLICATION FOR AN ORDER AUTHORIZING THE EMPLOYMENT AND  
RETENTION OF SWIDLER BERLIN LLP AS MARYLAND BANKRUPTCY  
CO-COUNSEL TO THE DEBTORS AND DEBTORS IN POSSESSION**

The Boyds Collection, Ltd., et al., the debtors and debtors in possession in the above-captioned cases (collectively, the “Debtors”), by counsel, file this Application for an Order Authorizing the Employment and Retention of Swidler Berlin LLP as Maryland Bankruptcy Co-Counsel to the Debtors and Debtors in Possession (the “Application”), and in support thereof state:<sup>2</sup>

**Jurisdiction**

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

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<sup>1</sup> The Debtors in the proposed jointly administered cases include: The Boyds Collection, Ltd.; The Boyds Collection, Ltd., LP; Boyds Operations Inc.; The Boyds Collection - Pigeon Forge, LLC; The Boyds Collection - Myrtle Beach, LLC; The Boyds Collection - Branson, LLC; J&T Designs and Imaginations, Inc.; HC Accents & Associates, Inc.; and Boyds Bear and Company, LP.

<sup>2</sup> The facts and circumstances supporting this Application are set forth in the Affidavit of Jan L. Murley in Support of First Day Motions (the “First Day Affidavit”), filed contemporaneously herewith, and the Affidavit of Roger Frankel in support of this Application (the “Frankel Application”), attached hereto as Exhibit A.

2. The statutory bases for the relief requested herein are section 327(a) of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

### **Background**

3. On the date hereof (the “Commencement Date”), the Debtors each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code (collectively, the “Reorganization Cases”). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Contemporaneously herewith, the Debtors requested an order for the joint administration of the Reorganization Cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

4. The Boyds Collection, Ltd. (“Boyds”) is a leading designer, marketer and distributor of high-quality, hand-crafted collectibles, gift and other specialty products. Boyds was founded in 1979 and is the parent company, holding direct or indirect ownership interests in eight (8) domestic subsidiaries and four (4) foreign subsidiaries.<sup>3</sup>

5. Boyds operates in two segments: a wholesale gift business and a retail gift/entertainment business. Boyds’ wholesale business designs, imports and distributes plush animals, resin figurines and other specialty giftware via a global network of independent retailers and distributors. Boyds imports substantially all of its products from manufacturers in China through buying agencies. Boyds’ retail business sells plush animals, resin figurines and specialty giftware products and provides a unique interactive entertainment experience at its Gettysburg, Pennsylvania and Pigeon Forge, Tennessee retail stores.

6. As set forth in the Form 10-Q filed by Boyds on August 12, 2005, as of June 30, 2005, the Debtors’ consolidated books and records reflected assets totaling approximately \$66.9

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<sup>3</sup> None of the foreign subsidiaries are Debtors.

million and liabilities totaling approximately \$101.7 million. For the three months ended June 30, 2005, Boyds reported revenues of approximately \$17.1 million and net losses of approximately \$101.3 million.

7. The significant indebtedness of Boyds consists of: (i) approximately \$56.5 million in aggregate principal amount under a senior secured credit agreement, dated as of February 23, 2005 (the “Pre-Petition Credit Agreement”) and (ii) approximately \$34.4 million in aggregate principal amount pursuant to certain 9% senior subordinated notes due in 2008.

8. During 2001, Boyds’ financial results began to deteriorate significantly as a consequence of industry-wide and company-specific factors. Over a period of several years, retail sales of plush toys shifted from small independent retailers, in which Boyds had a leading presence, to large regional and national retailers and mass merchandisers, in which Boyds did not have a meaningful presence. Moreover, the large retailers competed with Boyds’ product line at lower price points. This shift in distribution channels coincided with a general cooling of consumer demand for “collectible” products. As a result, the retail sales of Boyds and its direct industry competitors were negatively affected.

9. In response, during 2004 Boyds began to implement various operational restructuring and cost reduction programs. Such programs focused on (i) redirecting sales efforts towards larger regional and national channels, (ii) developing products specifically targeted to these channels, (iii) selectively expanding distribution to include direct in-home marketing initiatives and (iv) developing co-branding campaigns with well-recognized brands such as NASCAR, Coca-Cola, Crayola and M&Ms. Unfortunately, despite the efforts of Boyds’ management to reposition the business in response to the changing industry sales dynamics, Boyds was not able to increase sales in the new channels quickly enough to offset the decline in sales from the company’s traditional core-market of independent retailers.

10. By the fall of 2005, it had become apparent that Boyds could not avoid a financial restructuring. From September to the Commencement Date, Boyds engaged in discussions with the lenders (the “Pre-Petition Lenders”) under the Pre-Petition Credit Agreement regarding the

terms of a comprehensive plan to restructure Boyds' operations and existing debt obligations. Though Boyds and the Pre-Petition Lenders made substantial progress in these negotiations, as of the Commencement Date, negotiations were still ongoing. The Pre-Petition Lenders were unwilling to extend the waiver or commit to providing any further liquidity outside of a reorganization. On the Commencement Date, the Debtors, in the exercise of their prudent business judgment, determined that it was in the best interest of all their stakeholders to commence the Reorganization Cases, continue negotiations with the Debtors' creditor constituencies and consummate a restructuring under the auspices of this Court.

### **Relief Requested**

11. By this Application, the Debtors seek to employ and retain the law firm of Swidler Berlin LLP ("Swidler") pursuant to section 327(a) of the Bankruptcy Code and under the terms of the Retention Agreement, as defined below, effective as of the Commencement Date, as their Maryland bankruptcy co-counsel in these Reorganization Cases.

### **Basis for Relief**

12. Contemporaneously herewith, the Debtors are seeking authorization to retain Kirkland & Ellis LLP ("K&E") as their bankruptcy counsel to represent the Debtors in these Reorganization Cases. K&E will require the assistance of Maryland counsel.

13. The Debtors are familiar with the professional standing and reputation of Swidler. Swidler is intimately familiar with the local bankruptcy rules and procedures in this Court. In addition, Swidler has considerable experience in insolvency and bankruptcy matters, including representation of debtors and other significant parties in interest in large chapter 11 cases. The Debtors seek to retain and use Swidler to coordinate with and assist K&E within these Reorganization Cases. Swidler is qualified to act as Maryland counsel in conjunction with K&E.

14. The Debtors submit that the services of Swidler are necessary and that Swidler is well qualified to provide the specialized legal advice sought by the Debtors on a going-forward basis in a cost-effective, efficient and timely manner. Accordingly, the Debtors submit that

Swidler's retention is in the best interest of their estates and wish to retain Swidler as their Maryland bankruptcy co-counsel.

### Scope of Services

15. The Debtors have retained Swidler to assist them with, among other things, the preparation of their bankruptcy petitions and all related documents and pleadings and, subject to approval from this Court, with the prosecution of these Reorganization Cases.

16. The professional services that the Debtors may request Swidler to render include:

- (a) providing the Debtors legal advice with respect to their powers and duties as a debtor in possession and in the operation of their business and management of their property;
- (b) representing the Debtors in defense of any proceedings instituted to reclaim property or to obtain relief from the automatic stay under section 362(a) of the Bankruptcy Code;
- (c) preparing any necessary applications, answers, orders, reports and other legal papers, and appearing on the Debtors' behalf in proceedings instituted by or against the Debtors;
- (d) assisting the Debtors in the preparation of schedules, statements of financial affairs and any amendments thereto which the Debtors may be required to file in these cases;
- (e) assisting the Debtors in the preparation of a plan of reorganization and a disclosure statement;
- (f) assisting the Debtors with all legal matters, including, among others, all securities, corporate, real estate, tax, employee relations, general litigation and bankruptcy legal work; and
- (g) performing all of the legal services for the Debtors which may be necessary or desirable herein.

17. While certain aspects of Swidler's representation may necessarily involve joint efforts with K&E, the Debtors' general bankruptcy counsel, the Debtors believe that the services to be provided by Swidler will be complementary to, rather than duplicative of, the service to be performed by K&E. Further, the Debtors are mindful of the need to avoid duplication of services, and appropriate procedures will be implemented to ensure minimal duplication of

effort, if any, as a result of Swidler's role as Maryland bankruptcy co-counsel. Swidler has limited the scope of its employment in respect of any services that might be directly adverse to a party in interest which Swidler has connections unrelated to the Debtors.

#### **Swidler's Disinterestedness**

18. Swidler has informed the Debtors that, except as may be set forth in the Frankel Affidavit of Roger Frankel in support of the Application, attached hereto as Exhibit A, (i) has no connection with the Debtors, their creditors, or other parties in interest in these Reorganization Cases, (ii) does not hold any interest adverse to the Debtors' estates and (iii) believes it is a "disinterested person" as that term is defined by section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code, and Swidler's employment is necessary and in the best interests of the Debtors and the Debtors' estates.

19. Swidler will conduct an ongoing review of its files to ensure that no conflicts or other disqualifying circumstances exist or arise. If any new material facts or relationships are discovered or arise, Swidler will provide the Court with a supplemental affidavit.

20. Swidler has agreed not to share with any person or firm the compensation to be paid for professional services rendered in connection with these Reorganization Cases.

#### **Terms of Retention**

21. The terms and conditions of Swidler's retention and its compensation are set forth in the retention letter, dated October 11, 2005 (the "Retention Agreement"), a copy of which is attached hereto as Exhibit B.

22. Swidler intends to apply for compensation for professional services rendered in connection with the Reorganization Cases, subject to this Court's approval and in compliance with applicable provisions of the Bankruptcy Code, Bankruptcy Rules, the Local Bankruptcy Rules for the District of Maryland, this Court's orders and the guidelines established by the office of the United States trustee, on an hourly basis, plus reimbursement of actual, necessary expenses and other charges that Swidler incurs. Swidler's current hourly rates range from \$400 to \$645 for partners, senior counsel and of counsel, \$205 to \$310 for associates and \$145 to \$195

for legal assistants. The hourly rates set forth herein are Swidler's current, customary hourly rates for work of this nature, and are the same hourly rates these attorneys generally charge all clients of the firm. The hourly rates are subject to periodic increases from time to time in the normal course of Swidler's business.

23. Swidler is not owed any amounts with respect to its pre-petition fees and expenses. Swidler has received from the Debtors the sum of \$50,000 as a retainer toward the services rendered and expenses incurred through the filing of the Reorganization Cases, as set forth more fully in the Disclosure of Compensation filed contemporaneously with this Application. Swidler has drawn down on this retainer prior to the filing of the bankruptcy petition for services associated with preparing these Reorganization Cases.

24. It is Swidler's policy to charge its clients for photocopying charges, travel expenses, expenses for working meals, computerized research, transcription costs and non-ordinary overhead expenses such as secretarial and other overtime. Swidler agrees to follow the guidelines promulgated by the office of the United States trustee and the Local Bankruptcy Rules and Orders of this Court, and any additional administrative procedures that may be established by the Court in this case concerning compensation.

25. Other than as set forth above and in Frankel Affidavit, no arrangement is proposed between the Debtors and Swidler for compensation to be paid in these Reorganization Cases.

#### **Memorandum of Law**

26. This Application includes citations to the applicable authorities and a discussion of their application to this Application. Accordingly, the Debtors respectfully submit that such citations and discussion satisfy the requirement that the Debtors submit a separate memorandum of law in support of this Application pursuant to Rule 9013-2 of the Local Bankruptcy Rules for the District of Maryland.

**Notice**

27. Notice of this Application has been given to (a) the office of the United States trustee; (b) counsel to the Agent to the Debtors' Pre-Petition Lenders; (c) counsel for the indenture trustee for the Debtors' 9% Senior Subordinated Notes due 2008; and (d) each of the Debtors' top twenty (20) unsecured creditors.

**No Prior Request**

28. No prior application for the relief requested herein has been made to this or any other court.

**Conclusion**

WHEREFORE, the Debtors respectfully request the entry of an order, substantially in the form attached hereto as Exhibit C, (i) authorizing the Debtors to employ and retain Swidler as their Maryland bankruptcy co-counsel effective as of the Commencement Date and (ii) granting such further relief as the Court deems appropriate.

Respectfully submitted,

**THE BOYDS COLLECTION, LTD.**

Dated: October 16, 2005

By: /s/ Jan L. Murley  
Jan L. Murley, Chief Executive Officer  
350 South Street  
McSherrystown, PA 17344  
(717) 633-9898

Debtors and Debtors in Possession

**EXHIBIT A**

**Affidavit of Roger Frankel**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MARYLAND  
(Baltimore Division)**

<p><b>In re</b></p> <p><b>The Boyds Collection, Ltd., et al.<sup>1</sup></b></p> <p style="text-align: center;"><b>Debtors.</b></p>	<p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>	<p>Case No. 05-____ (____) through</p> <p>05-____ (____)</p> <p>Chapter 11</p> <p>(Jointly Administered under</p> <p>Case No. 05-____ (____))</p>
<p>*   *   *   *   *   *   *   *   *   *   *   *</p>		

**AFFIDAVIT OF ROGER FRANKEL IN SUPPORT OF THE DEBTORS’  
APPLICATION FOR AN ORDER AUTHORIZING THE EMPLOYMENT AND  
RETENTION OF SWIDLER BERLIN LLP AS MARYLAND BANKRUPTCY CO-  
COUNSEL TO THE DEBTORS AND THE DEBTORS IN POSSESSION**

DISTRICT OF COLUMBIA )            ss.

I, Roger Frankel, being duly sworn, hereby deposes and says:

1. I am a partner at the law firm of Swidler Berlin LLP (“Swidler”) which maintains offices at The Washington Harbour, 3000 K Street, N.W., Suite 300, Washington, D.C. 20007 and The Chrysler Building, 405 Lexington Avenue, New York, NY 10174. I am a member in good standing of the Bars of the State of Maryland and the District of Columbia. There are no disciplinary proceedings against me. I am authorized to execute this affidavit (the “Affidavit”) on behalf of Swidler. I submit this Affidavit in support of the application (the “Application”)<sup>2</sup> of the above-captioned debtors and debtors-in-possessions (collectively, the “Debtors”) for an order authorizing the Debtors to employ and retain Swidler as their Maryland bankruptcy co-counsel in the above-referenced chapter 11 cases (the “Reorganization Cases”).

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<sup>1</sup> The Debtors in the proposed jointly administered cases include: The Boyds Collection, Ltd.; The Boyds Collection, Ltd., LP; Boyds Operations Inc.; The Boyds Collection - Pigeon Forge, LLC; The Boyds Collection - Myrtle Beach, LLC; The Boyds Collection - Branson, LLC; J&T Designs and Imaginations, Inc.; HC Accents & Associates, Inc.; and Boyds Bear and Company, LP.

<sup>2</sup> Any capitalized terms used but not defined herein shall have the meanings ascribed to them in the Application.

### **Swidler's Disinterestedness**

2. In connection with the preparation of this Affidavit, I have utilized a set of procedures established by Swidler to insure compliance with the requirements of the Bankruptcy Code and this Court. Swidler has taken various steps to determine whether any conflict of interest exists that would preclude Swidler's service as Maryland bankruptcy co-counsel to the Debtors. In connection with Swidler's proposed representation of the Debtors in this case, I directed that a memorandum be circulated by e-mail to each attorney presently employed at Swidler. This memorandum, like similar memoranda which Swidler circulates throughout the firm before a new representation is undertaken, is intended to elicit, among other things, (i) whether Swidler already represents any other client in connection with the proposed new matter, (ii) whether Swidler already represents any other client in a capacity that may be adverse to the proposed client, or where the proposed representation might be adverse to the interests of such other client and (iii) whether Swidler has any connections with the Debtors, their creditors and other parties identified in the memorandum and Exhibit 1 attached hereto.

3. I also am advised that the employees responsible for maintaining Swidler's computerized database of client matters reviewed such database with a view toward determining whether Swidler has or had any significant connections with the parties listed in Exhibit 1 hereto.

4. Once the database identified a potential connection between Swidler and a listed party, I, or an attorney or legal assistant working under my supervision, contacted the responsible attorney(s) and elicited information to discern the nature and scope of the representation or connection for appropriate disclosure in this Affidavit.

5. Based upon the review of the computerized database described above and the resulting inquiries, and responses from individual attorneys elicited from the conflicts memorandum, I have identified the following matters:

- (a) Swidler currently represents Bank of America (“BOA”) in connection with matters unrelated to this case, and it will not be representing BOA in any matter related to the Debtors’ Reorganization Cases. Moreover, any matters in the Debtors’ cases that are directly adverse to BOA will be handled by other counsel, not Swidler.
- (b) Swidler currently represents D.E. Shaw & Co. on certain merger arbitrage matters including advice regarding antitrust, regulatory and corporate issues related to mergers and acquisitions pertaining to companies in which it may hold securities. These services are unrelated to these Reorganization Cases.
- (c) Swidler currently represents The Bank of New York on sophisticated institutional financial transactions, bank and securities law, regulatory, derivatives and credit facilities matters unrelated to these Reorganization Cases.
- (d) Swidler currently represents Federal Express Corporation and provides legal advice regarding certain insurance recovery matters unrelated to these Reorganization Cases.
- (e) Swidler has represented Kohlberg Kravis Roberts & Co. in the past on certain matters unrelated to these Reorganization Cases.

6. With respect to the matters referred to in paragraph 5 above, none of the services rendered by Swidler have been in connection with these Reorganization Cases. Swidler will not represent any of the parties identified in paragraph 5 above in any way in connection with the Debtors or these Reorganization Cases.

7. The Debtors have or may have other parties in interest in the Reorganization Cases, and Swidler may have rendered or may be rendering services to certain of such parties, or may become involved in matters unrelated to these Reorganization Cases in which such parties, or attorneys or accountants for such parties, were, are or may become, involved. Swidler also may represent interests adverse to such creditors or parties in interest in matters unrelated to these Reorganization Cases. Based on the information currently available, Swidler believes that no such matter involves representation of any interest adverse to the Debtors on matters upon which Swidler is to be engaged.

8. In addition to the foregoing, Swidler’s partners and employees may have business associations with, professional and social relationships with, or interests adverse to, creditors or

