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COUNSEL TO THE DEBTORS

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

In re:	§	Chapter 11
	§	
ROCKIES REGION 2006 LIMITED PARTNERSHIP and ROCKIES REGION 2007 LIMITED PARTNERSHIP,[1]	§	Case No. 18-33513-sgj-11
	§	
	§	(Jointly Administered)
	§	
Debtors.	§	

DEBTORS' RESPONSE TO OBJECTION TO APPLICATION FOR ORDER (I) AUTHORIZING THE RETENTION OF HARNEY MANAGEMENT PARTNERS TO PROVIDE RESPONSIBLE PARTY AND ADDITIONAL PERSONNEL, (II) DESIGNATING KAREN NICOLAOU AS RESPONSIBLE PARTY EFFECTIVE AS OF THE PETITION DATE, AND (III) GRANTING RELATED RELIEF

Rockies Region 2006 Limited Partnership ("RR 2006") and Rockies Region 2007 Limited Partnership ("RR 2007" and together with RR 2006, the "Debtors"), for their Response (the "Response") to the Objection [Docket No. 61] (the "Objection") filed by Robert R. Dufresne, as Trustee of the Dufresne Family Trust; Michael A. Gaffey, as Trustee of the Michael A. Gaffey and JoAnne M. Gaffey Living Trust dated March 2000; Ronald Glickman, as Trustee of the Glickman Family Trust established August 29, 1994; Jeffrey R. Schulein, as Trustee of the Schulein Family

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: Rockies Region 2006 Limited Partnership (9573) and Rockies Region 2007 Limited Partnership (8835).

Trust established March 29, 1989; and William J. McDonald as Trustee of the William J. McDonald and Judith A. McDonald Living Trust dated April 16, 1991 (collectively, the "LP Plaintiffs") to the Debtors' *Application for Order (i) Authorizing the Retention of Harney Management Partners to Provide the Debtors a Responsible Party and Certain Additional Personnel, (ii) Designating Karen Nicolaou as Responsible Party for the Debtors Effective as of the Petition Date, and (iii) Granting Related Relief* [Docket No. 12] (the "Application"),[2] respectfully represent:

PRELIMINARY STATEMENT

1. Ms. Nicolaou is a restructuring professional with more than twenty years of experience advising financially distressed businesses. She is respected throughout this state and within the insolvency community at-large for her professionalism and commitment to her cases. The LP Plaintiffs may have history with PDC, but they have no reason to question Ms. Nicolaou's integrity or her ability or willingness to faithfully perform the role she was hired to play in these cases: an independent fiduciary tasked with analyzing the options for a possible wind-down of the Debtors' operations (including bankruptcy) and maximizing the value of the Debtors' assets for a final distribution to the Investor Partners. Ms. Nicolaou takes all of her professional responsibilities, including her fiduciary obligations to the Debtors, very seriously. Any swipes at her integrity or lack of independence in these cases, veiled or otherwise, are completely unwarranted.

2. To the extent the LP Plaintiffs are using the Objection as another avenue to seek dismissal of these chapter 11 cases so they can proceed with litigating the Colorado Action, the Objection should be overruled for the same reasons as set forth in the Debtors' Objection to

[2] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the Objection to Dismissal (defined below) or Application.

Dismissal. As for the LP Plaintiffs' contentions relating to the scope of Ms. Nicolaou's engagement, the Debtors believe that they have satisfied all applicable retention standards under the Bankruptcy Code and Bankruptcy Rules. Nevertheless, the Debtors are willing to make appropriate clarifications in the order granting the Application to address some of the LP Plaintiffs' concerns.

3. For all the reasons set forth herein, the Objection should be overruled, and the Court should approve the employment of Harney and Ms. Nicolaou as proposed in the Application and as modified herein.

BACKGROUND

4. The background facts of these cases are set forth in the Debtors' *Objection to Motion for Dismissal of Chapter 11 Case* ("Objection to Dismissal"), filed contemporaneously herewith. The Debtors incorporate the facts and arguments set forth in the Objection to Dismissal, as if more fully set forth at length herein.

RESPONSE TO OBJECTION

5. The LP Plaintiffs object to the retention of Harney and Ms. Nicolaou on the basis that: (i) their employment is not in the best interest of the estates; (ii) PDC was not authorized to retain Harney and Ms. Nicolaou to perform the services contemplated by the Engagement Letter; (iii) Ms. Nicolaou is not a "disinterested person" as defined in section 101(14) of the Bankruptcy Code; (iv) the retention should be based on sections 327 and 328 of the Bankruptcy Code, not section 363; (v) the proposed transaction fee is not limited and is unreasonable; and (vi) the indemnity provisions in the Engagement Letter are overbroad. The LP Plaintiffs' objections are unfounded, and the retention of Harney and Ms. Nicolaou should be approved as proposed in the Application. However, as set forth more fully below, Harney and Ms. Nicolaou are willing to

make certain modifications to the terms of their proposed retention in order to address some of the concerns raised by the LP Plaintiffs in the Objection.

A. PDC Was Authorized to Retain Harney and Ms. Nicolaou for the Services Described in the Engagement Letter

6. The LP Plaintiffs challenge Ms. Nicoloau's role as fiduciary for the Debtors' estates, contending, *inter alia*, that PDC did not have the power or authority to appoint a responsible party under the terms of the partnership agreements. The Debtors submit that the Objection is not the proper forum to raise the alleged "lack of authority" issues. Most of these arguments are encompassed by (and indeed, are more relevant to) the LP Plaintiffs' Amended Motion for Dismissal of Chapter 11 Case [Docket No. 140]. In any event, PDC was authorized to appoint Ms. Nicolaou as responsible party pursuant to the terms of the Engagement Letter and the partnership agreements.

7. The Debtors' partnership agreements provide PDC with broad authority to, among other things, "manage the affairs of the Partnership in a prudent and businesslike fashion," Partnership Agreement § 5.01, to "do any act or execute any document or enter into any contract or any agreement of any nature necessary or desirable . . . in pursuance of the purposes of the Partnership," *id.* § 6.02, "employ and retain such personnel as it deems desirable for the conduct of the Partnerships' activities, including employees, consultants and attorneys," *id.* § 6.02(c), and to "enter into agreements to hire services of any kind or nature," *id.* § 6.02(j).

8. To the extent PDC had the authority to file bankruptcy petitions for the Debtors (which it did, as discussed more fully in the Objection to Dismissal at ¶¶ 60-70), the partnership agreements authorized PDC to delegate that authority to Ms. Nicolaou. Contrary to the LP Plaintiffs' contention, PDC did not appoint Ms. Nicolaou and then wipe its hands of its own fiduciary duties and walk away. PDC retained all of its fiduciary duties and responsibilities as the

Debtors' managing general partner as set forth in each Debtor's partnership agreement; nothing in the Engagement Letter eliminates those duties. Indeed, management always retains fiduciary duties when a restructuring professional is retained. *See generally Bridgeport Holdings Inc. v. Boyer (In re Bridgeport Holdings, Inc.)*, 388 B.R. 548 (Bankr. D. Del. 2008). Pursuant to the Engagement Letter, PDC was obligated to keep Ms. Nicolaou updated and advised in real time on operational issues and to consult with Ms. Nicolaou before taking any action that could be deemed outside of the ordinary course of business.

9. The LP Plaintiffs also contend that the appointment of Ms. Nicolaou as Responsible Party runs afoul of the requirements in the partnership agreements for liquidation or winding up of the Debtors. However, as set forth more fully in the Objection to Dismissal at ¶¶ 75-77, the filing of a bankruptcy petition is not equivalent to a state law dissolution and, thus, those provisions do not apply. Further, whether the transactions contemplated by the Plan violate the partnership agreements are not retention issues and should be raised in the context of a confirmation objection.

B. Retention under 11 U.S.C. §§ 105(a) and 363(b) is Appropriate

10. The Debtors seek to employ Ms. Nicolaou and Harney pursuant to sections 105(a) and 363(b) of the Bankruptcy Code. The LP Plaintiffs "object to the employment of professionals in this case without the authority and protections of 11 U.S.C. §§ 327, 328, 330 and 331" and contend that the "Application does not contemplate such protections." Objection at ¶¶ 32 and 33.

11. Bankruptcy courts around the country have routinely authorized the retention of management consultancy firms pursuant to section 363(b) of the Bankruptcy Code, including where a firm's personnel were expected to fill fiduciary roles and manage the debtor's business. *See e.g., In re Enron Corp.*, No. 01-16034, 2006 WL 1030421, at *2 (Bankr. S.D.N.Y. Apr. 12, 2006) (noting that court authorized the debtors, under section 363(b), to retain a management consulting firm to provide a chief executive and chief restructuring officer and additional

individuals to serve as additional personnel during the chapter 11 cases); *In re Ajubeo LLC*, No. 17-17924, 2017 WL 5466655, at *4 (Bankr. D. Col. Sept. 27, 2017) (approving retention of management consulting firm to provide a chief restructuring officer under section 363(b)); *In re Copenhaver, Inc.*, 506 B.R. 757, 764-65 (Bankr. C.D. Ill. 2014) (holding that the retention of a current director as consultant and chief restructuring officer under section 363(b) would be appropriate given the "unique and compelling circumstances" of the case, subject to modification of the court's oversight of the officers' fees); *In re Toisa Ltd.*, No. 17-10184 (Bankr. S.D.N.Y. Jan. 22, 2018) [Docket No. 458] (approving employment of a chief restructuring officer pursuant to section 363(b)); *In re ADPT DFW Holdings LLC*, No. 17-31432 (Bankr. N.D. Tex. May 19, 2017) [Docket No. 208] (same); *In re Forest Park Medical Center at Southlake, LLC*, No. 16-40273 (Bankr. N.D. Tex. Feb. 2, 2016) [Docket No. 77] (same); *see also* cases cited in Application at ¶ 30. Indeed, there is a "mountain of precedent" allowing the retention of restructuring professionals under 11 U.S.C. § 363(b). *In re Nine W. Holdings, Inc.*, 588 B.R. 678, 686 (Bankr. S.D.N.Y. 2018). The benefits of retention under section 363(b) are that the applicant does not have to be disinterested, is not required to file fee applications for review under 11 U.S.C. § 330, and can be covered by the existing directors' and officers' liability insurance or otherwise be indemnified. *Ajubeo*, 2017 WL 5466655, at *3.

12. Here, the Debtors have proposed, and Harney and Ms. Nicolaou have agreed, to modify the usual terms of a section 363(b) retention by agreeing to (i) submit, upon request, quarterly fee statements to the U.S. Trustee or any other party in interest summarizing the fees and expenses incurred by Harney on behalf of the Debtors in the prior quarter, and (ii) file a final fee application with the Court, in accordance with all applicable provisions of the Bankruptcy Code, Bankruptcy Rules, Local Rules and Orders of this Court. *See* Application at ¶ 20. Ms. Nicolaou

has not received any requests to submit fee statements, save and except for a request for production of "[a]ll documents evidencing Harney's services rendered to or for the benefit of the Partnership and/or the Debtors" served by the LP Plaintiffs in connection with the litigation surrounding the Motion to Dismiss and this Application. Unlike cases where section 363(b) retention has not been approved, Harney and Ms. Nicolaou have submitted to court oversight of their fees. *See, e.g.*, *Copenhaver*, 506 B.R. at 765 (denying application because CRO would not subject his fees to court oversight); *In re Blue Stone Real Estate, Const. & Dev. Corp.,* 392 B.R. 897, 906-07 (Bankr. M.D. Fla. 2008) (court exercised its discretion to approve retention pursuant to section 327(a) instead).

13. As discussed more fully below, and contrary to the LP Plaintiffs' protestations, the terms of Harney and Ms. Nicolaou's engagement have been tailored to include many, if not all, of the safeguards afforded under sections 327(a) and 330 of the Bankruptcy Code for the review of fees and expenses. As a result, the Court should approve the retention of Harney and Ms. Nicolaou as proposed in the Application.

i. Employment of Ms. Nicolaou and Harney is in the best interest of the estates

14. The LP Plaintiffs contend that the retention of Ms. Nicolaou and Harney is not in the best interest of the estate because (i) these cases are not large or complex enough to require the services of a responsible party and (ii) PDC could perform the administrative tasks that arise in bankruptcy. Objection at ¶¶ 13-18.

15. The role of a temporary restructuring officer like the Responsible Party is often critical to the success of a bankruptcy, particularly when previous management has been released or has deserted, or in the case of these Debtors, did not exist outside of the managing general partner. *See Ajubeo*, 2017 WL 5466655, at *3; *Nine West Holdings*, 588 B.R. at 692 (finding that

removing interim management just as debtors are entering bankruptcy could put the success of the entire reorganization at risk). As set forth in the Application, the proposed retention of Ms. Nicolaou and Harney pursuant to section 363(b) is a sound exercise of business judgment. Application at ¶¶ 26-28. A court will not second-guess a debtor's business judgment, provided that the debtor's management acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. *See Nine West Holdings*, 588 B.R at 692; *Reed v. Linehan (In re Soporex, Inc.)*, 463 B.R. 344, 377 (Bankr. N.D. Tex. 2011) (applying Delaware law).

16. Rather than put the Debtors into bankruptcy itself to effect a sale of the Debtors' assets (an act that the managing general partner is authorized to do pursuant to the partnership agreement, *see* Objection to Dismissal at ¶¶ 68-70), PDC engaged Ms. Nicolaou to independently review, analyze, and come to her own conclusions about the best course of action to address the Debtors' financial difficulties. Given the fact that PDC (i) was a likely buyer of the Debtors' assets; (ii) is a defendant in the Colorado Action; (iii) is the operator of the Debtors' wells; and (iv) holds a significant equity interest in the Debtors, it would have been suspicious, at best, and potentially self-dealing, at worst, for PDC to file voluntary petitions on behalf of the Debtors. The retention of Harney and Ms. Nicolaou adds an additional layer of accountability and fiduciary obligation to the Debtors, and in the event that a conflict arises between PDC and the Debtors via an interested-party transaction, allows an independent fiduciary to negotiate and facilitate that transaction.

17. Moreover, as set forth in the Objection to Dismissal, these chapter 11 cases are not just about the Colorado Action. The Debtors' oil and gas assets are coming to the end of their productive lives, and they are faced with looming P&A liabilities. The Debtors have been

consistently losing money for the past two years and have been unable to make distributions to their Investor Partners since at least 2016. Ms. Nicolaou is seeking to stem these financial difficulties, liquidate the Debtors' assets, and provide a final distribution to the Investor Partners. The fact that a chapter 11 trustee allegedly could perform some of the same tasks of the responsible party does not mean the retention is not in the best interest of the estates or the Application should the denied. *See, e.g.*, *Blue Stone Real Estate*, 392 B.R. at 901-02 (overruling objection that independent and disinterested chapter 11 trustee would be better able to perform the functions of CRO where there was no evidence that proposed CRO could not be independent or disinterested); *In re First River Energy, LLC*, No. 18-50085, 2018 WL 4403820, at *6, *8 (Bankr. W.D. Tex. Sept. 13, 2018) (recognizing that there is no prohibition in the Bankruptcy Code or Bankruptcy Rules that precludes a debtor from selecting its own estate professional: "[A] debtor can choose which [professional] it employs").

18. Based on the foregoing, and for the reasons set forth in the Application, the Court should find that the retention of Harney and Ms. Nicolaou is in the best interest of the Debtors' estates and decline the LP Plaintiffs' invitation to second-guess the Debtors' business judgment.

ii. Harney and Ms. Nicolaou nonetheless meet the standards for retention under 11 U.S.C. §§ 327 and 328

19. Retention under section 327 of the Bankruptcy Code requires a professional to be disinterested and not hold an interest adverse to the estate. 11 U.S.C. 327(a). It also requires fee applications to be reviewed and evaluated by the court under the reasonableness standard of section 330. "Thus, the twin goals of 11 U.S.C § 327 are impartiality of the professional and professional fees subject to court review for reasonableness." *Ajubeo*, 2017 WL 5466655, at *3.

20. Although the Debtors submit that the retention of Harney should be governed by section 363(b) of the Bankruptcy Code, the Application nonetheless addresses, and the retention

nonetheless satisfies, both goals of section 327. As discussed below, Ms. Nicolaou and Harney are disinterested persons under section 101(14) of the Bankruptcy Code and do not hold an interest adverse to the estate. Additionally, as discussed above, Ms. Nicolaou and Harney have agreed to submit a final fee application. The Debtors will clarify in the order granting this Application that fee applications will be subject to review under section 330 of the Bankruptcy Code. This is consistent with Ms. Nicoalou's retention under section 363(b) in the *Colorado 2002B* case. *See* Docket No. 143 in *Colorado 2002B*.

21. Therefore, if the Court is not inclined to approve Ms. Nicolaou's retention pursuant to section 363(b) of the Bankruptcy Code, the Court should employ its power under section 105(a) to grant the Application pursuant to section 327(a). *See Blue Stone Real Estate*, 392 B.R. at 907 n.15.

C. Harney and Ms. Nicolaou are Disinterested Persons

22. As stated in the Application, the Debtors are seeking to employ Harney and Ms. Nicolaou pursuant to section 363 of the Bankruptcy Code, not section 327. Disinterestedness is not required for a section 363 retention. The Debtors nonetheless submit that, even if the disinterested requirement applies, Harney and Ms. Nicolaou are disinterested and do not hold an interest adverse to the estates. The LP Plaintiffs contend that Ms. Nicolaou is not disinterested because she (i) has a close business relationship with PDC, (ii) filed these cases to benefit PDC by obtaining control over the Colorado Action, and (iii) has, in the LP Plaintiffs' opinion, undervalued the claims in the Colorado Action. None of those contentions, even if true and correct, render Ms. Nicolaou not disinterested.

23. The burden of proving the statutory retention requirements of disinterestedness and "no interest adverse to the estate" initially rests with the applicant; however, once the initial burden is met (typically by submitting an application and supporting declaration as required by the

Bankruptcy Rules), the burden shifts to the objecting party to show that the professional's employment violates the Bankruptcy Code. *See, e.g., In re Caesars Entm't Operating Co.*, 561 B.R. 420, 431 (Bankr. N.D. Ill. 2015) (collecting cases). The LP Plaintiffs have failed to meet their burden to prove that the retention of Harney and Ms. Nicolaou violates the applicable provisions of the Bankruptcy Code.

24. Pursuant to section 327(a), a debtor may employ the services of a professional, so long as that professional (1) neither holds nor represents an interest adverse to the bankruptcy estate, and (2) qualifies as a disinterested person. These two criteria significantly overlap because "disinterested person," as defined in 11 U.S.C. § 101(14), includes a person who does not have an interest materially adverse to the estate. *See In re Howell*, 148 B.R. 269, 270 (Bankr. S.D. Tex. 1992).

25. The determination of adverse interest/disinterestedness must be made "with an eye to the specific facts of each case." *Waldron v. Adams & Reese, L.L.P.* (*In re Am. Int'l Refinery, Inc.)*, 676 F.3d 455, 461-62 (5th Cir. 2012) (internal citations omitted) (applying a totality of the circumstances analysis). An instructive example of when a professional is found not to be disinterested is *In re Kendavis Indus. Int'l*, 91 B.R. 742 (Bankr. N.D. Tex. 1988). In *Kendavis,* the law firm representing the debtor had engaged in various activities that benefitted the corporate debtor's stockholders to the detriment of its creditors, caused unnecessary litigation, and failed to add any value to or otherwise assist in settling the bankrupt estate. *Id.* at 748-51. After reviewing all of the evidence, the *Kendavis* court determined that a serious conflict of interest existed in violation of 11 U.S.C. § 327(a). *Id.* at 751. The court found that the law firm was, in effect, representing the shareholders of the debtor corporation; therefore, the court reduced the legal fees by 50% to penalize the lawyers. *Id.* at 762. *See also I.G. Petroleum, LLC v. Fenasci (In re W.*

Delta Oil Co., Inc.), 432 F.3d 347, 358 (5th Cir. 2005) (finding special counsel for the debtor had an adverse interest because they were actively plotting to harm the estate for their own benefit by suppressing other bids to artificially depress the purchase price).

26. In contrast to the egregious nature of the professionals' behavior in *Kendavis* and *West Delta Oil*, the Fifth Circuit in *American International Refinery* affirmed the bankruptcy court's finding that debtor's counsel was disinterested, despite the fact that (i) counsel's prepetition retainer was paid by the debtor's largest creditor as a prepetition loan, (ii) counsel decided not to litigate issues surrounding that creditor's secured claim, and (iii) counsel submitted a bankruptcy plan that was favorable to that creditor. *Am. Int'l Refinery*, 676 F.3d at 463-64. The court expressed some concern about the relationship between debtor's counsel and the creditor, but ultimately did not find any evidence that counsel took action contrary to the interests of the estate or pursued a legal theory that was colored by loyalty to a third party. *Id.* at 464. "While some of the actions of [counsel] appear suspicious," the Fifth Circuit noted, "this case does not present a totality of circumstances as egregious as *West Delta Oil*." *Id.*

27. Here, the totality of the circumstances does not show any adverse interest or render Ms. Nicolaou or Harney not disinterested as alleged by the LP Plaintiffs. Nor have the LP Plaintiffs presented any evidence that Ms. Nicolaou or Harney are plotting harm to the Debtors for their own benefit. As established by *American International Refinery*, the mere fact that (i) Ms. Nicolaou previously served as responsible party to the debtors in the Prior Bankruptcies and (ii) the Plan contemplates the settlement of the Colorado Action and release of PDC in exchange for additional consideration for the Investor Partners, does not disqualify Ms. Nicolaou from serving as responsible party to the Debtors.

28. Moreover, Ms. Nicolaou disclosed her role in the Prior Bankruptcies, as well as her connections with Hunton Andrews Kurth LLP and Gray Reed & McGraw LLP, in her declaration supporting the Application. *See* Exhibit B to the Application. As the Court knows from its years of experience both in private practice and on the bench, it is commonplace for restructuring professionals to work with, against, and be hired by, each other in multiple cases over the years. There is nothing untoward about Ms. Nicolaou's professional relationship with any of the aforementioned firms, or with PDC, nor do those relationships create an adverse interest or render Ms. Nicolaou not disinterested. When the Court denies an application for lack of disinterestedness or adverse interest, it is often because the party seeking to be employed failed to disclose a potential conflict or adverse interest pursuant to Bankruptcy Rule 2014(a). *See, e.g.*, *W. Delta Oil*, 432 F.3d at 358 (denying fees related to engagement under section 327(e) in part because counsel failed to disclose their involvement with group of investors interested in acquiring debtor's assets in violation of FED. R. BANKR. P. 2014).

29. Based on the foregoing, the Court should find that Ms. Nicolaou and Harney are disinterested persons as defined by 11 U.S.C. § 101(14).

D. <u>The Transaction Fee and Indemnification Provisions are Appropriate and should be Approved</u>

30. In addition to Ms. Nicolaou's hourly rate, the Engagement Letter contemplates payment of a fee to Harney from any transaction that results in cash being distributed to the Investor Partners (the "<u>Transaction Fee</u>"). Application at ¶ 18. The Engagement Letter also contains provisions relating to the indemnification of Ms. Nicolaou and Harney from any and all claims made in connection with their performance in these chapter 11 cases, except for claims or losses arising from willful misconduct or gross negligence. Application at ¶ 24. The LP Plaintiffs contend that both provisions should be denied as being overbroad and unreasonable.

31. The appropriateness of a success fee is left to the business judgment of debtors. *See In re Residential Capital, LLC*, 504 B.R. 358, 362, 365 (Bankr. S.D.N.Y. 2014) (approving a success fee as within the debtors' reasonable business judgment). The LP Plaintiffs conflate fee enhancements with success fees and only cite cases referencing the former. However, while fee enhancements (which are generally not approved at retention) are only awarded in limited circumstances, success fees, like the one requested in the Application, are not held to the same standard. *See ASARCO, L.L.C. v. Barclays Capital, Inc. (In re ASARCO, L.L.C.)*, 702 F.3d 250, 267 (5th Cir. 2012) (distinguishing between fee enhancements and success fees); *In re Mirant Corp*., 354 B.R. 113, 143 (Bankr. N.D. Tex. 2006), *subsequently aff'd*, 308 F. App'x 824 (5th Cir. 2009) (same). So long as the Debtors reasonably conclude that a success fee is appropriate, such fee should be approved. *See Residential Capital*, 504 B.R. at 362.

32. Like the other provisions in the Engagement Letter, the Transaction Fee was negotiated at arms'-length and is warranted. In light of the challenges involved in this engagement, the financial status of the Debtors, and the potential outcomes of the bankruptcy case, the Transaction Fee serves as a further incentive to maximize value, and is appropriate under the circumstances.

33. The LP Plaintiffs also object to the proposed amount of the Transaction Fee as being unreasonable. However, when reviewed in context, the proposed Transaction Fee is manifestly reasonable. If one were to assume a success fee calculated on $3 million that would equate to a fee payable to Ms. Nicolaou of $70,000, comprised of 3% of the first $1 million ($30,000) plus 2% of the next $2 million ($40,000). By comparison, the compensation payable to a trustee under section 326 of the Bankruptcy Code, for a $3 million transaction would equate to

$113,250.[3] The proposed Transaction Fee payable to Ms. Nicolaou is thus approximately 60% of what would otherwise be payable to a trustee.

34. However, as mentioned above, Harney has agreed to submit a final fee application and that the amount of any Transaction Fee may be reviewed for reasonableness in conjunction with the hourly fees charges under 11 U.S.C. § 330. Thus, a discussion regarding the reasonableness of the success fee (if one is ultimately earned) is better reserved for after an application seeking payment of such fee is filed with this Court.

35. Additionally, contrary to the LP Plaintiffs' assertions, indemnity provisions covering restructuring firms and additional personnel, in addition to a restructuring consultant or officer, are regularly approved in the Northern District. *See, e.g., 4 West Holdings, Inc*., Case No. 18-30777 (HDH) (Bankr. N.D. Tex. Apr. 18, 2018) [Docket No. 263]; *In re CHC Grp., Ltd.*, Case No. 16-31854 (BJH) (Bankr. N.D. Tex. June 8, 2016) [Docket No. 266]; *In re TPP Acquisition, Inc.*, Case No. 16-33437 (HDH) (Bankr. N.D. Tex. Oct. 3, 2016) [Docket No. 220]; *In re ERG Intermediate Holdings, LLC*, Case No. 15-31858 (HDH) (Bankr. N.D. Tex. June 11, 2015) [Docket No. 266]; *In re Pilgrim's Pride Corp.*, Case No. 08-45664 (DML) (Bankr. N.D. Tex. Feb. 9, 2009) [Docket No. 825]. The LP Plaintiffs' statement that such provisions are not permitted in this district is simply wrong.

36. While the Debtors disagree with the LP Plaintiffs' arguments regarding Harney's proposed success fee and indemnification, they are willing to include language in the order granting this Application addressing the LP Plaintiffs' concerns and clarifying the scope of these provisions.

[3] Pursuant to section 326 of the Bankruptcy Code, the $113,250 is comprised of: (i) 25% on the first $5,000 ($1,250), (ii) 10% on the next $45,000 ($4,500), (iii) 5% on the next $950,000 ($47,500), and (iv) 3% on the next $2 million ($60,000).

CONCLUSION

37. For all the reasons set forth herein, the Court should approve the retention of Ms. Nicolaou as set forth more fully in the Application and Engagement Letter.

WHEREFORE, the Debtors respectfully request that this Court grant the Application, overrule the Objection, and grant such other and further relief as may be just and proper.

Respectfully submitted this 5th day of April, 2019.

GRAY REED & McGRAW LLP

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COUNSEL TO THE DEBTORS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of April, 2019, she caused a true and correct copy of the foregoing document to be served on the parties appearing on the Limited Service List maintained in these cases via first class United States mail, postage prepaid and, where possible, via electronic mail.

/s/ Lydia R. Webb
Lydia R. Webb