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

IN RE: ROCKIES REGION 2006 LIMITED PARTNERSHIP and ROCKIES REGION 2007 LIMITED PARTNERSHIP DEBTORS	CASE NO. 18-33513 CHAPTER 11 Jointly Administered

LIMITED PARTNERS' TRIAL BRIEF IN SUPPORT OF OBJECTION TO DEBTORS' 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

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 M. Schulein, as Trustee of the Schulein Family 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 "Limited Partners") are all limited partners in one or both of the Rockies Region 2006 and the Rockies Region 2007 Limited Partnerships (together, the "Debtors" or "Partnerships"). The Limited Partners hereby file this Trial Brief in support of their Objection to Objection to the Debtors' 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 (the "Objection") and respectfully state as follows:

I. PRELIMINARY STATEMENT

1. The Limited Partners incorporate herein the assertions and arguments set forth in their Objection and the evidence that will be adduced at hearing. The issues concerning PDC Energy, Inc.'s ("PDC") authority to delegate its authority as the Debtors' managing general partner and Ms. Nicolaou's authority to file the bankruptcy petitions on behalf of the Debtors are more fully briefed in the Limited Partners' Trial Brief in Support of Amended Motion to Dismiss filed concurrently herewith and incorporated herein.

2. The Debtors are limited partnerships formed under and governed by the laws of the State of West Virginia. Their sole managing general partner, PDC, is a Delaware corporation.

3. Karen Nicolaou ("Nicolaou") was hired to be the Debtors' "Responsible Party" by PDC. In that role Nicolaou was to be an "independent fiduciary," [DR, ¶ 1],[1] and was expected to "control the process and act independently for the benefit of the Debtors and their estates." [PDC, ¶ 21, ¶ 25 (referring to Nicolaou as "an independent third party"), ¶ 27 (referring to Nicolaou as

[1] The abbreviation DR shall refer to Debtors' Response to Objection to Application to Retain Harney filed on April 5, 2019 [Doc. 142].

an "independent, third party fiduciary")].[2] Nicolaou was expected to make all "material decisions" for the Debtors. While PDC purportedly retained its other fiduciary duties and responsibilities it was obligated to update and advise Nicolaou on operational issues and to consult with her before it took actions outside the Debtors' ordinary course of business. [DR, ¶ 8].

II. DISCUSSION

Retention of Harney and Nicolaou Under Sections 105(a) and 363(b) Is Inappropriate Given Nicolaou's Exclusive Decision Making Authority

4. Retention of Harney and Nicolaou under Sections 105(a) and 363(b) is inappropriate since Nicolaou has full and exclusive control over all key and critical decisions in these bankruptcy cases.

5. Debtors contend that Harney' and Nicolaou's retention is appropriate under Sections 105(a) and 363(b) since courts throughout the nation routinely apply these provisions in approving similar retention arrangements. While courts do apply the more liberal standard to some retentions those instances are clearly distinguishable from the cases at bar. In particular, in those instances the advisors retained remained under the oversight of the debtors' management and/or board of directors. Courts are clear that where there is no such oversight and the professional is the ultimate decisionmaker for all critical decisions relating to the disposition of assets or negotiating the terms of the plan of reorganization then the person will constitute a "professional" whose retention must be evaluated under the more stringent requirements of Section 327.

6. For instance, in *In re Heritage Home Group, LLC*, 2018 Bankr. LEXIS 2944 (Bankr. D. Del., Sept. 27, 2018) the court in approving the debtor's retention of a consultant under the Sections 105 and 363, distinguished the characteristics of a consultant's engagement under that

[2] The abbreviation PDC shall refer to PDC's Response to Objection to Application to Retain Harney filed on April 5, 2019 [Doc. 144].

standard and a professional whose retention required review under Section 327. The court looked to the standard for professionals set out in *In re First Merchants Acceptance Corp*., 1997 Bankr. LEXIS 2245(D. Del. Dec. 15, 1997), stating "[w]hat is clear in *First Merchants* is that a 'professional' is limited to those occupations which control, purchase or sell assets that are important to reorganization, is negotiating the terms of a plan of reorganization, has discretion to exercise his or her own personal judgment, and whether he or she contributes 'some degree of special knowledge or skill.'" *Id*. at *9. The court was further guided by *In re Nine W. Holdings, Inc*., 588 B.R. 678 (Bankr. S.D.N.Y. 1998) where a "professional" was viewed as one that "is intimately involved in the reorganization process." *Id*. at *10; see, *Nine W. Holdings, Inc*., 588 B.R. at 693-95 (distinguishing restructuring advisors retained to fill management roles involved in the day to day management and subject to oversight by debtor's board of directors from professionals subject to Section 327 standards as one who plays an intimate or central role in the administration of the debtor's bankruptcy proceeding, played a part in negotiating a plan, who is involved with disposing of or acquiring assets, or who interacts with creditors).

7. The *First Merchants*' analysis was similarly applied in *In re Brookstone Holdings Corp*, 592 B.R. 27 (Bankr. D. Del. 2018) where the court concluded that a firm assisting the debtor with the sale of its inventory was not a "professional" for purposes of Section 327. *Id*. at *28-29.[3]

[3] The *Brookstone* court identified six factors developed by *First Merchants*:

> (1) whether the employee controls, manages, administers, invests, purchases or sells assets that are significant to the debtor's reorganization;
> (2) whether the employee is involved in negotiating the terms of a Plan of Reorganization;
> (3) whether the employment is directly related to the type of work carried out by the debtor or to the routine maintenance of the debtor's business operations;
> (4) whether the employee is given discretion or autonomy to exercise his or her own professional judgment in some part of the administration of the debtor's estate, i.e. the qualitative approach;
> (5) the extent of the employee's involvement in the administration of the debtor's estate, i.e. the quantitative approach; and
> (6) whether the employee's services involve some degree of special knowledge or skill, such that the employee can be considered a "professional" within the ordinary.

8. Harney's and Nicolaou's retention is clearly distinguishable from the approval of advisors and consultants in *Brookstone*, *Heritage Home* and *Nine West.* In *Nine West* the court noted that the advisors had been engaged for four years in managing the debtor entities' day to day operation and there was no contemplation of a reorganization at the commencement of their engagement. In contrast, here Nicolaou's engagement expressly contemplated a chapter 11 filing from its inception, and rather than managing the Debtors' daily business operations Nicolaou fills the "central" role in the administration of the Debtors' bankruptcy proceedings and is the person responsible for using her business judgment in making the ultimate decisions on behalf of the Debtors. This is clear in Nicolaou's decision to file these cases, in her negotiation of the Term Sheet and the Debtors' joint plan of reorganization, and the disposition of the Debtors' operating assets. Since her retention PDC has made clear that Nicolaou has authority to make all "material decisions" regarding the Partnerships, including, but not limited to filing bankruptcy, to enter into and execute definitive documents to effect transactions or "direct the Managing General Partner to do the above."[4]

9. While Debtors and PDC have not expressly cited to the "Jay Alix Protocol" (the "Protocol")[5] in support of the Retention Application, the Protocol has been referred to several

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See, 592 B.R. at 34-5.

[4] In the Form 10-Qs filed by PDC on behalf of the Debtors for the 2nd and 3rd quarters of 2018, the periods subsequent to Nicolaou's purported appointment as "Responsible Party," PDC stated:

> In her capacity as the Responsible Party, Ms. Nicolaou will make all material decisions regarding this Partnership and has the authority, among other things, to analyze the books and records of this Partnership, analyze potential restructuring and divestiture options, including but not limited to filing bankruptcy, and enter into and execute definitive documents to effect such transactions, or direct the Managing General Partner to do the above.

[5] See https://www.justice.gov/sites/default/files/ust/legacy/2014/08/11/J_Alix_Protocol_Engagement.pdf

times during the course of these cases. Given the nature of the Debtors as limited partnerships which are exclusively managed by PDC, its managing general partner, and the broad scope of authority the delegated to Nicolaou, the Protocol is not applicable. Further, given the circumstances of these cases, if applied, the Protocol's guidelines would establish a clear conflict of interest which the Protocol is intended to prevent.

10. The Protocol, and its application of the liberal standard of Section 363(b), is geared towards entities having a governing board or oversight of the while requiring adherence to the conflict of interest rules of Section 327. The key provisions of the Protocol are:

- The protocol incorporates § 327(a)'s and § 101(14)'s prohibition on serving, or having served within two years, on a debtor's board. Directors, not officers, are vested with ultimate management authority and owe a duty of loyalty to the corporation. A board must be independent of the CRO to prevent actual or apparent conflicts of interest, which are key aspects of § 327(a). For example, if the CRO serves on the board while that same board decides to retain the CRO's firm, the insider transaction presents a conflict of interest.

- The protocol incorporates § 327(a)'s conflict of interest rules to bar those with an actual conflict of interest from being retained. The protocol also avoids conflicts of interest by preventing the CRO from managing the engagement to the financial benefit of the CRO's firm. It does so by establishing the so-called "one hat rule"—allowing the professional to serve in only one capacity, such as CRO, crisis manager, financial adviser, claims agent, or investor.

- The protocol incorporates the disclosure requirements governing a § 327(a) application by requiring an affidavit setting forth connections with parties and professionals. These disclosures are analogous to those required under Fed. R. Bankr. P. 2014.

- The protocol requires disclosure of staffing and compensation, as well as court review of compensation under a "reasonableness" standard, which is analogous to the review of compensation of professionals employed under § 327(a).

- The protocol requires success fees or other back end fees to be approved by the Court on a reasonableness standard and not pre-approved under § 328(a). No success fee or back-end fee is to be sought upon conversion or dismissal of the case or upon appointment of a trustee.

11. As the Debtors are not corporations and do not have a governing board, the Protocol simply does not apply in the instant context. If its principles could be applied to limited

partnerships it would reveal a significant conflict of interest on Nicolaou's part. Given her role, as the Debtors' purported Responsible Party, Nicolaou has assumed a position that provides her full and complete authority over the Debtors for purposes of these bankruptcy cases. In that capacity, she makes all "material decisions," based on her business judgment, relating to these cases, including the sale and disposition of assets and the terms of the Debtors' reorganization plans. She further has authority to direct PDC to enter definitive agreements. In short, her role is akin to that of a sole director. This creates a violation of the Protocol and a conflict in three ways. First, the Protocol prohibits a CRO type to serve on a board which is the same board that decides to retain the CRO's firm. Ms. Nicolaou file the petitions on behalf of the Debtors supported by a "resolution" she signed authorizing the filing and also the retention of Harney to provide services to the Debtors. Second, in her capacity as Responsible Party she is seeking through the Retention Application that she presumably authorized to be filed, to engage herself and her firm. Third, the Protocol precludes any firm from providing services to an entity where any principal, employee or independent contractor of the firm had served as a director of the entity or an affiliate within the prior two years. Here, the Debtors, PDC and Ms. Nicolaou openly concede that she served as the Responsible Party for the Colorado Partnerships in their jointly administered cases which were filed in September 2016 and closed in early 2018. Since the partnerships the subject of the Colorado Cases are affiliates of the Debtors, Harney's retention would be prohibited under the Protocol.

12. Based on the foregoing, the Limited Partners submit that Ms. Nicolaou is a "professional" within the meaning of Section 327(a) whose employment may not be considered under Sections 105(a) and 363(b), and, to the extent asserted, the Protocol is not applicable to her retention.

13.

III. CONCLUSION

Based on the foregoing and the evidence to be adduced at hearing the Limited Partners submit that the application to retain Harney and Nicolaou should be denied.

DATED this 13th day of June 2019.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 13, 2019, a true and correct copy of the foregoing paper was served by electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case.

/s/ Mark A. Weisbart
Mark A. Weisbart