

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:) Chapter 11
)
TWG CAPITAL, INC.,) Case No. 12-11019-BHL-11
)
Debtor.)

**MOTION TO AUTHORIZE THE REJECTION OF CERTAIN
ADMINISTRATIVE SERVICES AGREEMENT**

TWG Capital, Inc. (the "Debtor"), the debtor and debtor in possession in the above-captioned Chapter 11 case (the "Chapter 11 Case"), files this motion (the "Motion") for entry of an order authorizing the rejection by the Debtor of that certain Administrative Services Agreement dated June 30, 2005 (the "Agreement") between the Debtor and Long Term Preferred Care, Inc. ("LTPC"). The proposed form of the order ("Order") is attached hereto as Exhibit A.

In support of this Motion, the Debtor states as follows:

JURISDICTION

1. On September 14, 2012 (the "Petition Date"), the Debtor filed with the United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division (the "Court"), its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. as amended (the "Bankruptcy Code") commencing the Chapter 11 Case.
2. The Debtor continues to operate its business and manage its properties as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.
3. No trustee, examiner, or committee has been appointed in the Chapter 11 Case.

4. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

5. The statutory basis for the relief sought herein is Section 365(a) of the Bankruptcy Code.

RELIEF REQUESTED

6. For the reasons stated below, the Debtor requests that the Court enter an order authorizing the Debtor to reject the Agreement pursuant to Section 365 of the Bankruptcy Code effective as of the Rejection Date (defined below). A copy of the Agreement (final version, but unsigned), together with amendments (signed), is attached as Exhibit B.

BASIS FOR RELIEF

7. The Debtor is a specialty finance company that serves the insurance industry. The Debtor was founded around the realization that insurance agents and agencies own predictable renewal commission rights on certain types of insurance policies ("Insurance Commission Receivables" or "ICRs") that generate significant cash flows over extended periods of time. These ICRs have not been recognized by traditional financing sources yet represent significant financial assets. The Debtor leverages its understanding of the insurance market and needs of market participants to provide a range of products and services based on the value of ICR assets, and is organized around three business segments: Asset Originations, Asset Servicing, and Lending Business.

8. LTPC is a national marketing organization of Long Term Care policies. LION 2004 Receivables Trust, a Delaware statutory trust (the "LION Trust") is a special purpose vehicle created to acquire the ICRs of LTPC (the "LTPC ICRs"), the primary beneficial owner of

which is Imagine Reinsurance Limited, an Irish registered company ("Imagine"). The commissions received from insurance carriers in this purchase were paid by the carriers to LTPC on a "gross basis," meaning that they included the commissions that were owed to LTPC as well as the commissions that were ultimately to be paid to the agent or broker that actually signed up the policyholder.

9. In December 2004, the Debtor executed a three party transaction by and among the Debtor, LTPC, and Imagine (collectively, the "December 2004 LTPC/ LION Trust Transaction"), whereby, among other things, pursuant to that certain Commission Purchase Agreement dated as of December 30, 2004, between LTPC and LION Trust, LION Trust purchased the rights to the majority of the LTPC ICRs from LTPC¹

10. As noted in paragraph 9 above, per the Commission Purchase Agreement between LTPC and the LION Trust, the LION Trust purchased the rights to *the majority* of the commissions from LTPC. LTPC retained ownership of approximately twenty percent (20%) of the LTPC ICRs (the "LTPC Retained ICRs"). The Agreement the Debtor now seeks to reject is that certain agreement pursuant to which LTPC engaged the Debtor to provide servicing with respect to the policy commission stream related to the LTPC Retained ICRs.

11. The Debtor notes that the Agreement by its terms expired September 30, 2006. However, beginning in October 2006 and at all times thereafter, the Debtor and LTPC have continued to perform their obligations under the Agreement. The monthly servicing fee paid to the Debtor for performing the servicing of the LTPC Retained ICRs is approximately \$3,400. Though any obligations of the Debtor to LTPC, if at all, arguably exist no more than on

¹ On October 3, 2012, the Debtor filed that certain Motion To Authorize The Rejection Of Certain Agreements [Docket 73], pursuant to which the Debtor seeks authority to reject the agreements with the LION Trust and Imagine that are part of the December 2004 LTPC/ LION Trust Transaction. The Debtor expects the matter to be heard concurrently with this Motion.

a "month to month" basis, the Debtor files this Motion to assure rejection of the Agreement in accordance with the Bankruptcy Code and fair and proper treatment of all interests of the parties to the Agreement.

12. On November 5, 2012, the Debtor filed that certain Motion for Approval of Settlement of Claims Pursuant to Rule 9019 (the "Settlement Motion"), contemplating the settlement of claims existing by and among the Debtor, Imagine and the LION Trust. The Court conducted a hearing on the Settlement Motion on November 16, 2012, and while the order approving the Settlement Motion has not yet been entered, there were no objections and at the hearing, the Court ruled that the Settlement Motion would be approved. A condition of the Settlement Motion concerns the Debtor's agreement to terminate its employment of Jennifer Harden the earlier of the closing of the sale of certain assets to Carmel Funding, LLC as approved by this Court on November 8, 2012 [Order, Docket 142] or December 31, 2012. Once Ms. Harden's employment is terminated, the Debtor will lose the ability to perform the LTPC servicing.

13. The rejection of the Agreement is intended to formally and finally terminate any and all of the Debtor's ongoing responsibilities under the Agreement.

REJECTION OF THE AGREEMENT

14. Section 365(a) of the Bankruptcy Code provides that a debtor "subject to the court's approval, may assume or reject any executory contract or an unexpired lease." 11 U.S.C. § 365(a). The assumption or rejection of an unexpired lease or executory contract by a debtor is subject to review under the business judgment standard. See, e.g., Control Data Corp. v. Zelman (In re Minges), 602 F.2d 38, 43 (2d Cir. 1979); Moran v. City of Central Falls, 475 B.R. 323, 332-33 (D.R.I. 2012); In re MF Global Holdings, Ltd., 466 B.R. 239, 242 (Bankr. S.D.N.Y.

2012); In re Greenwood Point, L.P., 445 B.R. 885, 921 (Bankr. S.D. Ind. 2011); In re Philadelphia Newspapers, LLC, 424 B.R. 178, 182 (E.D. Pa. 2010). This standard is satisfied when a debtor demonstrates that rejection will benefit the estate. In re MF Global Holdings, Ltd., 466 B.R. at 242; In re Philadelphia Newspapers, LLC, 424 B.R. at 182.

15. If the debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. Group of Institutional Investors v. Chicago, M., St. P. & P.R.R. Co., 318 U.S. 523, 550-51 (1943); In re Great Atlantic & Pacific Tea Co., Inc., 472 B.R. 666, 672-73 (Bankr. S.D.N.Y. 2012); In re Delta Airlines, Inc., 359 B.R. 468, 476 (Bankr. S.D.N.Y. 2006); Allied Tech., Inc. v. R.B. Brunemann & Sons, Inc. (In re Allied Tech., Inc.), 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982) ("Court approval of a debtor in possession's decision to assume the lease should only be withheld if the debtor's judgment is clearly erroneous, too speculative or contrary to the provisions of the Bankruptcy Code").

16. The business judgment rule has vitality in chapter 11 cases and shields a debtor's management from judicial second-guessing. In re Pilgrim's Pride Corp., 403 B.R. 413, 423-24 (Bankr. N.D. Tex. 2009); In re Delta Airlines, Inc., 359 B.R. at 476; Official Comm. Of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992); see also Committee of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp (In re Johns-Manville Corp.), 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor's management decisions.").

17. The facts and circumstances of this Chapter 11 Case and the express terms of Section 365(a) of the Bankruptcy Code support the Debtor's requested rejection of the

Agreement. The Agreement is burdensome to the Debtor, creates no net benefit to the Debtor's estate, and is not necessary for an effective reorganization. As noted above, Ms. Harden's employment is essential to continued performance of the Agreement, and at the latest, her employment will cease as of December 31, 2012. Also, the monthly \$3,400 servicing fee paid to the Debtor under the Agreement is insufficient to justify the Debtor undertaking to otherwise hire and train persons to perform the servicing. Finally, consistent with the anticipated closing on sale of assets to Carmel Funding, LLC and the settlement with the LION Trust and Imagine, the Debtor is "winding down" and further performance of the Agreement by the Debtor is not feasible. Therefore, rejection of the Agreement is in the best interests of the Debtor's estate and creditors and constitutes a proper exercise of the Debtor's sound business judgment.

EFFECTIVE DATE OF REJECTION

18. The Debtor request that the rejection of the Agreement be effective as of the date the order authorizing the rejection is entered (the "Rejection Date").

NO PRIOR REQUEST

19. No prior motion for the relief requested herein for the Agreement has been made to this or any other Court.

WHEREFORE, the Debtor requests that the Court enter an order, substantially in the form attached hereto as Exhibit A, authorizing the Debtor to reject the Agreement effective as of the Rejection Date, and for all other and just relief.

Respectfully submitted,

FAEGRE BAKER DANIELS LLP

By: /s/ Wendy W. Ponader

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

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I further certify that on November 16, 2012, a copy of the foregoing pleading will be mailed by first-class U.S. Mail, postage prepaid and properly addressed, to the following:

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