

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 FOR AN ORDER *NUNC PRO TUNC* TO DECEMBER 31, 2012
AUTHORIZING THE REJECTION OF EMPLOYMENT AGREEMENTS**

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 *nunc pro tunc* to December 31, 2012, authorizing the rejection by the Debtor of the following agreements: (i) the Employment Agreement by and between the Debtor and Melanie S. Otto ("Otto") dated August 6, 2007, as amended by the First Amendment of Employment Agreement dated September 13, 2012 (the "Otto Employment Agreement"); and (ii) the Employment Agreement by and between the Debtor and Mark P. Nondorf ("Nondorf") dated August 6, 2007 (the "Nondorf Employment Agreement" and together with the Otto Employment Agreement, the "TWG Employment Agreements"). Otto and Nondorf shall collectively be referred to herein as the "Employees." True and accurate copies of the TWG Employment Agreements (without exhibits or attachments) are attached hereto as Exhibits A and B. The proposed form of the order (the "Order") is attached hereto as Exhibit C. In support of this Motion, the Debtor states as follows:

Jurisdiction and Venue

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 Sections 365(a) of the Bankruptcy Code.

Background

6. As more fully set forth in the Declaration of Mark P. Nondorf In Support Of Chapter 11 Petitions and First Day Motions [Doc. No. 4], 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 ("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. The Debtor's business is organized around three primary segments: Asset Originations, Asset Servicing, and Lending Business.

7. On the Petition Date, the Debtor filed a motion [Doc. No. 14] (the "Sale Motion") seeking entry of an order authorizing the sale of substantially all of the assets of the Debtor's estate to Carmel Funding, LLC ("CF") pursuant to the terms of the Asset Purchase Agreement dated as of September 14, 2012 (as amended, restated, or amended and restated, the "Purchase Agreement") or to the bidder submitting the highest or otherwise best bid. On November 9, 2012, the Court entered its order granting the Sale Motion, approving the Purchase Agreement, and authorizing the sale to CF [Doc. No. 142].

8. Sections 6.1(i) and (j) of the Purchase Agreement provide as a waivable condition to CF's obligation to consummate the transactions contemplated in the Purchase Agreement that (i) CF shall have entered into an employment agreement with Employees and (ii) the Debtor shall have assumed and assigned to CF the TWG Employment Agreements (the "Assumption and Assignment Condition"). Pursuant to Section 6.2(e) of the Purchase Agreement, the Assumption and Assignment Condition is also a waivable condition to the Debtor's obligation to consummate the transactions contemplated thereby. The sale to CF closed on December 31, 2012, prior to which each of CF and the Debtor mutually waived the Assumption and Assignment Condition.

9. Pursuant to Section 6.1(i) of the Purchase Agreement, the Employees respectively executed an Employment Agreement dated as of December 31, 2012 by and between each of the Employees and CF (collectively, the "Carmel Funding Employment Agreements"). The terms of the Carmel Funding Employment Agreements commenced on December 31, 2012 (the "Effective Date").

10. By entry into the Carmel Funding Employment Agreements, the Employees have mitigated their rejection damages claims against the Debtor's estate. As set

forth below, in rejecting the TWG Employment Agreements, the Debtor does not seek to affect or compromise either of Employees' claims against the Debtor's estate.

Relief Requested

11. For the reasons stated below, the Debtor requests that the Court enter an order *nunc pro tunc* to December 31, 2012, authorizing the Debtor to reject the TWG Employment Agreements effective as of the Rejection Date (as defined herein) pursuant to Section 365 of the Bankruptcy Code.

12. By separate motion and consistent with the Court's order [Doc. No. 35] entered on September 20, 2012, the Debtor requests the Court authorize, but not direct, the Debtor to pay to the Employees certain compensation related to accrued, unused vacation time and other sums the Employees are due, which are entitled to priority under 11 U.S.C. § 507(a)(4)

Basis for Relief Requested

13. 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.

14. 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").

15. 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.").

16. 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 TWG Employment Agreements. The TWG Employment Agreements are burdensome to the Debtor and create no net benefit to the Debtor's estate.

17. As set forth above, the sale of the Debtor's assets to CF closed on December 31, 2012, and the Debtor is now winding-down its business. Services to the Debtor

by the Employees are necessary only to complete the wind-down of the Debtor's business during this immediate post-sale period. The Carmel Funding Employment Agreements, however, contemplate that the Employees will provide certain interim services to the Debtor on a consulting basis for a period of up to six months after the Effective Date. To that end, subject to approval by the Court, the Debtor and CF have entered into a Cost Sharing Agreement, to be presented to the Court by separate motion. All in all, the Debtor is relieved of its long-term obligations to continue to pay Employees' salaries and benefits under the TWG Employment Agreements, while obtaining the necessary services of Employees during the Debtor's wind-down period.

18. Accordingly, rejection of the TWG Employment Agreements is in the best interests of the Debtor's estate and creditors and constitutes a proper exercise of the Debtor's sound business judgment.

19. Rejection of the TWG Employment Agreements is not intended as a waiver of any rights of Employees under the TWG Employment Agreements, including without limitation, the right to file a claim in the Chapter 11 Case under 11 U.S.C. § 502(b)(7). Damages under 11 U.S.C. §§ 365(g) and 502(b)(7)(A) arising from the rejection of the TWG Employment Agreements have largely been mitigated by the execution of the Carmel Funding Employment Agreements. However, the TWG Employment Agreements provide that the Employees are entitled to their paid vacation benefits, among other employee benefits and other amounts due to Employees, upon termination by the Debtor without cause. *Exh. A and B*, §§ 7(b), 8(b).

Effective Date of Rejection

20. The Debtor requests that the rejection of the TWG Employment Agreements be effective as of December 31, 2012 (the "Rejection Date") so as to coincide with

the closing of the Purchase Agreement and the Effective Date of the Carmel Funding Employment Agreement.

No Prior Request

21. No prior motion for the relief requested herein for the TWG Employment Agreements 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 C, authorizing the Debtor to reject the TWG Employment Agreements effective as of the Rejection Date and for all other just and proper relief.

Respectfully submitted,

FAEGRE BAKER DANIELS LLP

By: /s/ Kayla D. Britton

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2013, 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 January 15, 2013, 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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