

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

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

**Parties receiving this Omnibus Motion should locate their names and their contracts and leases in the attached Exhibit A.**

**EMERGENCY FIRST OMNIBUS MOTION FOR AN ORDER AUTHORIZING THE REJECTION OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

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") seeking entry of an order, substantially in the form attached hereto as Exhibit B, authorizing the rejection by the Debtor of the executory contracts and unexpired leases identified on Exhibit A hereto (collectively, the "Contracts and Leases") effective as of the Rejection Date (as defined herein). 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 bases for the relief sought herein are Section 365(a) of the Bankruptcy Code and Rule 6006 of the Federal Rules of Bankruptcy Procedure.

### **Background**

6. 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]. The Contracts and Leases (as identified on Exhibit A to this Motion) were not assumed and assigned to CF. The sale to CF closed on December 31, 2012 (the "Closing Date").

7. Since the Closing Date, the Debtor's continued existence is for the limited purpose of winding-down its business and liquidating its remaining assets, and the Debtor has retained no employees. The Debtor "leases" certain of its former employees pursuant to an Agreement for Allocation of Costs and Reimbursement of Expenses dated January 1, 2013 (the "Cost Sharing Agreement")<sup>1</sup> to allow the Debtor to conduct its limited operations during the wind-down period in a cost effective manner. As contemplated by the Cost Sharing Agreement,

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<sup>1</sup> The Court entered an order approving the Cost Sharing Agreement on February 4, 2013 [Docket No. 199].

the Debtor pays its pro rata share of the sums due under the Contracts and Leases and compensation for the services provided to the Debtor by its former employees.

8. The Debtor will shortly be filing a Chapter 11 plan of liquidation and, by July 1, 2013, believes it will no longer require the use of the equipment and services provided to the Debtor pursuant to the Contracts and Leases (collectively referred to herein as the "Contract Benefits"). The Debtor anticipates that it will not be required to continue to allocate any overhead expenses to the Debtor's estate pursuant to the Cost Sharing Agreement, except for employee compensation, after the Rejection Date.

9. Continued compliance with the terms of the Contracts and Leases would be burdensome and would provide no corresponding benefit to the Debtor or its estate. Accordingly, it is in the best interests of the Debtor and its estate to reject the Contracts and Leases pursuant to Section 365 of the Bankruptcy Code.

10. Rejection of the Contracts and Leases will maximize the value of the Debtor's estate and eliminate operating losses associated therewith. By rejecting the Contracts and Leases, the Debtor believes it will achieve a meaningful cost savings for the estate. Rejection of the Contracts and Leases as of the Rejection Date will prevent the estate from incurring unnecessary administrative expenses from the Rejection Date through the effective date of the Debtor's plan of liquidation.

#### **Relief Requested**

11. By this Motion, the Debtor seeks entry of an order, pursuant to Section 365 of the Bankruptcy Code and Rule 6006 of the Federal Rules of Bankruptcy Procedure, approving the Debtor's rejection of the Contracts and Leases effective as of the Rejection Date.

12. The Debtor has requested that the Court set this Motion for expedited hearing on shortened notice to allow the rejection of the Contracts and Leases to become effective before the July 1, 2013 and subsequent payments become due and thereby reduce the estate's ongoing administrative expenses. The Debtor does not believe that any of the counterparties to the Contracts and Leases have any objection to the requested relief.

**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 Contracts and Leases. The Contracts and Leases 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. The Contracts and Leases are unnecessary to the Debtor's limited ongoing operations, and the payments under the Contracts and Leases constitute an unnecessary financial drain on the Debtor's estate.

18. Accordingly, the Debtor submits that rejection of the Contracts and Leases, and the attendant reduction in the estate's administrative costs, represents an exercise of the Debtor's sound business judgment and therefore should be approved.

**Effective Date of Rejection**

19. The Debtor requests that the rejection of the Contracts and Leases be effective as of June 30, 2013 (the "Rejection Date").

**Bankruptcy Rule 6006(d) Waiver**

20. The Debtor requests that the order granting this Motion provide that the fourteen day stay provided in Rule 6006(d) of the Federal Rules of Bankruptcy Procedure is waived.

**No Prior Request**

21. No prior motion for the relief requested herein for the Contracts and Leases has been made to this or any other Court.

**Notice**

22. Notice of this Motion will be served on (i) the United States Trustee for the Southern District of Indiana, (ii) the Service List (as defined in Local Rule B-1000-1(b)(4) of the Local Rules of the United States Bankruptcy Court for the Southern District of Indiana), (iii) counterparties to the Contracts and Leases, and (iv) any other parties as the Court may direct.

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit B, authorizing the Debtor to reject the Contracts and Leases effective as of the Rejection Date and granting 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 June 11, 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 June 11, 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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