

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 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 authorizing the rejection by the Debtor of the following agreements: (i) that certain Assignment and Assumption Agreement dated as of December 30, 2004 (the "Assignment and Assumption Agreement"), between the Debtor and Long Term Preferred Care, Inc. ("LTPC"); (ii) that certain Distribution Agreement dated as of December 30, 2004 (the "Distribution Agreement"), between the Debtor and Imagine Reinsurance Limited, an Irish registered company ("Imagine"); and (iii) that certain Monitoring Agreement dated as of December 30, 2004 (the "Monitoring Agreement," sometimes collectively hereafter with the Assignment and Assumption Agreement and Distribution Agreement, the "LION Trust Agreements"), between the Debtor, Imagine and the LION 2004 Receivables Trust, a Delaware statutory trust (the "LION Trust"). 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 LION Trust Agreements pursuant to Section 365 of the Bankruptcy Code effective as of the Rejection Date (defined below). Copies of the Assignment and Assumption Agreement, Distribution Agreement and Monitoring Agreement (without exhibits) are attached as Exhibits B, C and D, respectively.

#### **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 Trust is a special purpose vehicle created to acquire the ICRs of LTPC (the "LTPC ICRs"), the primary beneficial owner of which is 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 (collectively, the "Downlines").

9. Collectively, the LION Trust Agreements reflect a December 2004, three party transaction by and among the Debtor, LTPC, and Imagine. The transaction was constructed as follows: (i) under that certain Commission Purchase Agreement dated as of December 30, 2004, between LTPC and LION Trust, LION Trust purchased the rights to the commissions from LTPC (as referenced in paragraph 8 above), (ii) per the Assumption and Assignment Agreement, among other things, the Debtor assumed the obligation of LTPC to pay the Downlines arising under the Commission Purchase Agreement; (iii) per the Distribution Agreement, among other things, the Debtor was to receive monthly a "Senior Payment" (as defined in the Distribution Agreement) from the LION Trust monthly waterfall to pay the commissions due to the Downlines as contemplated under the Assumption and Assignment Agreement; and (iv) per the Monitoring Agreement, among other things, the Debtor was to perform servicing related to the LTPC ICRs and receive a monthly servicing fee.

10. In 2008, the Senior Payment to the Debtor became insufficient to pay the Downlines, as the Senior Payment is a fixed percentage of commissions received and the payments owed to the Downlines were variable, dependent on the policyholder mix in the portfolio.

11. From 2008 to October 2011, the Debtor covered the shortfall in the Senior Payment by supplementing the Senior Payment with sums of the Debtor's operating cash, and paid the Downlines full amounts owed. By November 2011, however, the Debtor had paid to the Downlines in excess of approximately \$400,000 more than the sum of the Senior Payments received by the Debtor. The Debtor could not continue to fund the funding shortfall and began a process to remit to Downlines only the amounts of the Senior Payments received from LION Trust. In the months preceding the Petition Date, the Senior Payment covered approximately 70% of the amounts owed to the Downlines.

12. In January 2012, two Downline agents filed suit as a putative class action against the Debtor to recover the unpaid commissions. The costs associated with the litigation, among other things, was a precipitating event to the Debtor's bankruptcy filing as the Debtor had limited operating funds to defend the litigation or pursue recourse or contribution from the other parties to the original LION Trust transaction.

13. On July 2, 2012, Imagine delivered to the Debtor a Notice of Termination of the Monitoring Agreement, citing certain breaches under the Monitoring Agreement that constitute "Early Termination Events" (the "Termination Notice"). The Termination Notice purports to establish July 2, 2012 as the "Early Termination Date." The Debtor does not dispute the termination of the Monitoring Agreement, however, includes the Monitoring Agreement as part of this Motion to assure rejection and termination of any and all of the Debtor's ongoing

responsibilities under the Monitoring Agreement, except such discrete, independent services the Debtor may agree to provide for a fee, on a month- to- month basis.

14. Though no party to the Distribution Agreement and the Assumption and Assignment Agreement has acted formally to terminate either agreement, for most intents and purposes, compliance with respective obligations under these agreements effectively ceased concurrent with the Early Termination Date of the Monitoring Agreement. The last Senior Payment received by the Debtor was in June 2012, for the payment of commissions to the Downlines earned in May 2012. The LION Trust cessation of the remission of the Senior Payment under the Distribution Agreement necessarily renders the Debtor unable in all events to perform its obligations under the Assumption and Assignment Agreement. The Debtor understands that in the interim since June 2012, LION Trust and/or Imagine has paid the commissions due to the Downlines directly.

15. The rejection of the Distribution Agreement and the Assumption and Assignment Agreement is intended to formally and finally terminate any and all of the Debtor's ongoing responsibilities under these agreements. As in the case of the Monitoring Agreement, since July 2012, LION Trust and/or Imagine periodically has requested the Debtor's assistance in connection with the performance various obligations or responsibilities covered by the Distribution Agreement and the Assumption and Assignment Agreement. The Debtor remains amenable to performing or providing discrete, independent assistance or services for a fee as the Debtor, LION Trust and/or Imagine may agree.

16. The Debtor notes that under the LION Trust Agreements, the Debtor and others have indemnification rights against various parties. Rejection of the LION Trust Agreements is not intended to compromise or otherwise effect such indemnification rights that

by their terms or otherwise will survive the Debtor's rejection of the LION Trust Agreements or any one of them.

### **REJECTION OF THE LION TRUST AGREEMENTS**

17. 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.

18. 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").

19. 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.").

20. 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 LION Trust Agreements. Each of the LION Trust Agreements is burdensome to the Debtor, creates no net benefit to the Debtor's estate, and is not necessary for an effective reorganization. Per Imagine's act to terminate the Monitoring Agreement pre-petition on the Early Termination Date, and the interrelationship of the LION Trust Agreements, further monitoring and continued investment of time and expenditures on account of anticipated performance, if any, of the LION Trust Agreements is an unnecessary drain on the resources of the Debtor's estate. Therefore, rejection of the LION Trust 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.

#### **EFFECTIVE DATE OF REJECTION**

21. The Debtor request that the rejection of the LION Trust Agreements be effective as of the date the order authorizing the rejection is entered (the "Rejection Date").

#### **NO PRIOR REQUEST**

22. No prior motion for the relief requested herein for the LION Trust 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 A, authorizing the Debtor to reject the LION Trust Agreements effective as of the Rejection Date, and for all other and just relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 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 October 4, 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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