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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	Case No. 19-34054-sgj
	§	Chapter 11
	§	
Debtor.	§	
	§	

DEBTOR'S MOTION FOR ENTRY OF AN ORDER AUTHORIZING PAYMENT OF A RESTRUCTURING FEE TO JAMES P. SEERY, JR., THE DEBTOR'S CHIEF EXECUTIVE OFFICER AND CHIEF RESTRUCTURING OFFICER

[1] The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

The above-captioned debtor and debtor-in-possession (the "Debtor") hereby moves (the "Motion"), pursuant to sections 105(a) and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"), for the entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), (a) authorizing the Debtor to pay James P. Seery, Jr., the Debtor's chief executive officer and chief restructuring officer, a "Restructuring Fee" (as defined herein) in the aggregate amount of $2,250,000 as set forth herein, and (b) granting related relief. In support of the Motion, the Debtor respectfully represents as follows:

JURISDICTION

1. The United States Bankruptcy Court for the Northern District of Texas (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. The bases for the relief requested herein are sections 105, 363, and 503(c) of the Bankruptcy Code.

BACKGROUND

3. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Bankruptcy Court").

4. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court. On December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor's chapter 11 case to this Court [Docket No. 186].[2]

[2] All docket numbers refer to the docket maintained by this Court.

5. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

6. On January 9, 2020, the Court entered an order approving a settlement between the Debtor and the Committee [Docket No. 339] (the "Settlement Order"). The Settlement Order provided for, among other things, the creation of a new independent board of directors at the Debtor's general partner, Strand Advisors, Inc., consisting of Mr. Seery, John S. Dubel, and Russell Nelms (collectively, the "Independent Directors") and approved a "Term Sheet" [Docket No. 354] which included the terms of the settlement. The Term Sheet provided that "[a]s soon as practicable after their appointments, the Independent Directors shall, in consultation with the Committee, determine whether a CEO should be appointed for the Debtor. If the Independent Directors determine that appointment of a CEO is appropriate, the Independent Directors shall appoint a CEO acceptable to the Committee as soon as possible, which may be one of the Independent Directors." Term Sheet at 3.

7. Following their appointment, the Independent Directors determined that it would be appropriate to retain a fully engaged chief executive officer and ultimately concluded that Mr. Seery should be appointed the Debtor's chief executive officer and chief restructuring officer. To facilitate this process, the Independent Directors appointed a compensation committee consisting of Mr. Dubel and Mr. Nelms (the "Compensation Committee") which was tasked with negotiating the terms and conditions of Mr. Seery's retention. On June 23, 2020, the Compensation Committee approved the appointment of Mr. Seery to serve as the Debtor's chief executive officer and chief restructuring officer, concurrent with his service as an Independent Director, pursuant to the terms of a letter agreement dated June 23, 2020 (the "Agreement").

8. On June 23, 2020, the Debtor filed the *Debtor's Motion under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc to March 15, 2020* [Docket No. 774] (the "Retention Motion"),[3] seeking authority to retain Mr. Seery and to enter into the Agreement. Attached as Exhibit A-1 to the Retention Motion was a fully executed copy of the Agreement. The Retention Motion was unopposed and was approved by the Court on July 16, 2020 [Docket No. 854] (the "Retention Order").

9. The Agreement provided that Mr. Seery would be paid "Base Compensation" of $150,000 per month. The Agreement also provided that a "Restructuring Fee" would be payable upon confirmation of a plan of reorganization, but the amount of the "Restructuring Fee" would depend on whether certain metrics were achieved. Specifically, the Agreement provided for the payment of one of two potential "Restructuring Fees." The first potential "Restructuring Fee" would be payable if Mr. Seery (i) confirmed a plan and (ii) resolved a material amount of the outstanding claims against the estate (the "Case Resolution Fee"). Under the Agreement, the Case Resolution Fee would be paid (a) $1,000,000 on confirmation of a plan; (b) $500,000 on the effective date of a plan; and (c) $750,000 on completion of distributions under a plan. Agreement § 1(b)(ii). The second potential "Restructuring Fee" would be payable if Mr. Seery simply confirmed a plan (the "Confirmation Fee"). Under the Agreement, the Confirmation Fee would be paid (x) $500,000 on confirmation of a plan and (y) $250,000 on the effective date of a plan, with the possibility for a discretionary bonus. Agreement § 1(b)(iii).

10. Although the Agreement provided for the payment of either the Case Resolution Fee or Confirmation Fee, the Committee did not agree to the payment of a "Restructuring Fee"

[3] Under the Retention Motion, the Debtor also sought authority to replace Bradley Sharp of Development Specialists, Inc. as the Debtor's foreign representative with Mr. Seery.

when the Retention Motion was filed. Retention Motion ¶ 18 n.5. Consequently, the Debtor, Mr. Seery, and the Committee agreed that no Restructuring Fee would be paid unless subsequently approved by this Court. *Id.* ¶ 19 n.7.

11. On November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472], which was modified on January 22, 2021 [Docket No. 1808], and again on February 1, 2021 [Docket No. 1875] (as modified, the "Plan"). After a two-day hearing to consider confirmation of the Plan, the Bankruptcy Court entered the *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Docket No. 1943] on February 22, 2021 (the "Confirmation Date").

12. As this Court knows, confirmation of the Plan required an enormous amount of time, skill, and effort and was the result of settlements with all material creditors in this case. Prior to confirmation of the Plan, the Debtor settled the following claims:

- Redeemer Committee: On September 23, 2020, the Debtor filed *Debtor's Motion for Entry of an Order Approving Settlements with (A) the Redeemer Committee of the Highland Crusader Funds (Claim No. 72), and (B) the Highland Crusader Funds (Claim No. 81), and Authorizing Actions Consistent Therewith* [Docket No. 1089], which was approved by this Court on October 22, 2020 [Docket No. 1272] over objection [Docket No 1190].

- Acis/Terry Settlement. On September 23, 2020, the Debtor filed the *Debtor's Motion for Entry of an Order Approving Settlement with (a) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (b) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (c) Acis Capital Management, L.P.* (Claim No. 159) *and Authorizing Actions Consistent Therewith* [Docket No. 1087], which was approved by this Court on October 28, 2020 [Docket No. 1347] over substantial objections [Docket No. 1121, 1177, 1191, 1195, 1201].

- HarbourVest Settlement. On December 23, 2020, the Debtor filed the *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625], which was approved by this Court on January 21, 2021 [Docket No. 1788] over substantial objections [Docket No. 1697, 1706, 1707].

13. In connection with confirmation of the Plan, the Debtor was also able to reach a settlement with UBS and a settlement in principle with Patrick Hagaman Daugherty.[4] On April 15, 2021, the Debtor filed the *Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities LLC and UBS AG London Branch and Authorizing Actions Consistent Therewith* [Docket No. 2199] (the "UBS Motion"). A hearing on the UBS Motion was held on May 21, 2021, and the UBS Motion was approved by the Court on May 27, 2021 over multiple objections [Docket No. 2389]. The Debtor intends to file a motion seeking approval of the Daugherty settlement as soon as possible.

14. The foregoing represents the settlement of all major, third-party claims against the Debtor's estate.[5] It is understatement to say this is an incredible achievement, and substantial credit goes to Mr. Seery. Mr. Seery was directly involved in the negotiation of each of the foregoing settlements and was instrumental in their implementation. He was required to testify at length in support of each settlement and is expected to testify at the future hearing seeking approval of any settlement with Mr. Daugherty.

15. Mr. Seery routinely worked at least 180 hours per month following his appointment as an Independent Director in January 2020. However, since late fall 2020, Mr. Seery has worked in excess of 200 hours per month trying to resolve the various claims against the estate and confirm the Plan (while also managing the Debtor's assets and overseeing the Debtor's operations in ways that made the structure of the Plan feasible).

[4] Although an agreement in principle was reached with Mr. Daugherty, finalizing that agreement is taking considerable time. The Debtor expects to conclude finalization of the agreement or reach a clear impasse requiring Court intervention in the immediate future.

[5] The only claims that have not yet been resolved are certain alleged administrative and other claims filed by James Dondero, his related entities, and former Debtor employees who are now employed by entities owned and/or affiliated with Mr. Dondero. The Debtor has objected or will object to each of these claims and believes they are without merit and, in certain instances, filed in bad faith.

16. Based on the foregoing, the Compensation Committee believes that Mr. Seery is entitled to the Case Resolution Fee. The Case Resolution Fee requires (i) confirmation of a plan and (ii) "resolution of a material amount of the outstanding claims and their respective treatments". Mr. Seery has met (and exceeded) both of those benchmarks. On May 31, 2021, the Compensation Committee met and authorized the payment of the Case Resolution Fee to Mr. Seery and filing of this Motion. The Committee does not oppose the relief requested in this Motion or the payment of the Case Resolution Fee.

17. The Compensation Committee believes that Mr. Seery is entitled to receive the Case Resolution Fee as set forth in the Agreement. However, Mr. Seery has agreed to defer payment of the Case Resolution Fee to fit within the Debtor's liquidity profile. If approved by this Court, the Case Resolution Fee would be deemed earned by Mr. Seery and paid as follows:

- $1,000,000 will be deemed earned on the Confirmation Date (*i.e.*, February 22, 2021) and paid on September 30, 2021;
- $500,000 will be deemed earned on the Effective Date (as such term is defined in the Plan) and paid on the later of the Effective Date or September 30, 2021; and
- $750,000 will be paid on the earlier of (i) the distribution of not less than 75% of the estimated cash available for distribution to Class 8 (General Unsecured Claims) as set forth in the Amended Liquidation Analysis/Financial Projections [Docket No. 1875-1] or (ii) the substantial completion of the monetization of the assets of the Debtor or its successors-in-interest.

BASIS FOR RELIEF

A. The Payment of the Case Resolution Fee Is a Valid Exercise of the Debtor's Business Judgment and Appropriate under the Circumstances

18. The Compensation Committee's decision authorizing the Debtor to pay Mr. Seery the Case Resolution Fee should be approved pursuant to sections 363(b) and 105(a) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part: "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of

business, property of the estate." 11 U.S.C. § 363(b)(1). In addition, section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

19. The proposed use, sale, or lease of property of the estate may be approved under Bankruptcy Code section 363(b) if it is supported by a sound business justification. *See In re Montgomery Ward*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions"). Although established in the context of a proposed sale, the "business judgment" standard has been applied in non-sale situations. *See, e.g.*, *Inst. Creditors of Cont'l Air Lines v. Cont'l Air Lines (In re Cont'l Air Lines)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (applying the "business judgment" standard in context of proposed "use" of estate property). Moreover, pursuant to section 105, this Court has expansive equitable powers to fashion any order or decree which is in the interest of preserving or protecting the value of a debtor's assets. 11 U.S.C. § 105(a).

20. It is well-established that courts are unwilling to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence, and will uphold a board's decisions as long as they are attributable to "any rational business purpose." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). Whether or not there are sufficient business reasons to justify the use of estate assets depends upon the facts and circumstances of each case. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). In this case, the Debtor has ample justification to pay Mr. Seery the Case Resolution Fee.

21. As set forth above, the Debtor, under Mr. Seery's leadership, has resolved all material claims in this case and obtained confirmation of the Plan just over a year after the Independent Board was appointed. This is an extraordinary result given the acrimony and culture of litigation that existed at the Debtor before his involvement, and Mr. Seery's achievement cannot be overstated. As this Court is aware, Mr. Dondero, directly and indirectly through his proxies, lodged substantial objections to confirmation of the Plan and the approval of each of the foregoing settlements. Defending against those objections required an enormous amount of Mr. Seery's time and attention, including days of testimony in front of this Court and at deposition. During that time, Mr. Seery received a personal threat from Mr. Dondero and fended off Mr. Dondero's direct and indirect attempts to interfere with the Debtor's management of its estate. Despite these challenges, Mr. Seery led the Debtor through confirmation of the Plan, resolved all material claims, and managed the estate, including taking steps to effectively monetize assets for the benefit of all stakeholders. In light of the litigation brought by Mr. Dondero and his proxies, that is an incredible feat, and the Compensation Committee believes that Mr. Seery should receive the Case Resolution Fee without reservation. Mr. Seery has clearly met the benchmarks set forth in the Agreement, and substantial justification for the payment of the Case Resolution Fee exists.

22. In making this determination, the Compensation Committee also conducted an arm's-length analysis and independent review of Mr. Seery's accomplishments and concluded that payment of the Case Resolution Fee was justified. This determination is entitled to deference from the Court and further supports the relief requested by this Motion. *See, e.g.*, *In re Bridgeport Holdings, Inc.*, 388 B.R. 548, 567 (Bankr. D. Del. 2008) ("[D]irectors enjoy a

presumption of honesty and good faith with respect to negotiating and approving a transaction involving a [use] of assets.")

B. **The Debtor Has Satisfied Bankruptcy Code Section 503(c)(3)**

23. Bankruptcy Code section 503(c)(3) provides that "transfers or obligations that are outside the ordinary course of business . . . including transfers made to . . . consultants hired after the date of the filing of the petition" are not allowed if they are "not justified by the facts and circumstances of the case." 11 U.S.C. § 503(c)(3). Courts generally use a form of the "business judgment" and the "facts and circumstances" standard. *See In re Pilgrim's Pride Corp.*, 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009) (citing *In re Dura Auto Sys., Inc.*, Case No. 06-11202 (Bankr. D. Del. June 29, 2007); *In re Supplements LT, Inc.,* Case No. 08-10446 (KJC) (Bankr. D. Del. Apr. 14, 2008)). Specifically, a court examines first whether the transaction meets the business judgment standard, and second, whether the facts and circumstances justify the transaction. *See In re Pilgrim's Pride Corp.*, 401 B.R. at 237.

24. For the reasons stated above, payment of the Case Resolution Fee is well within the Debtor's business judgment as applied to the facts and circumstances and is warranted. The Debtor submits that the relief requested herein is in the best interests of the Debtor, its estate, creditors, stakeholders, and other parties-in-interest and should be granted.

NOTICE

25. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee; (b) the Office of the United States Attorney for the Northern District of Texas; (c) the Debtor's principal secured parties; (d) counsel to the Committee; and (e) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form annexed hereto as **Exhibit A**, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: June 1, 2021.

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EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj
	§	Chapter 11
	§	
Debtor.	§	Re: Docket No. _____
	§	

ORDER APPROVING DEBTOR'S MOTION FOR ENTRY OF AN ORDER AUTHORIZING PAYMENT OF RESTRUCTURING FEE

Upon the *Debtor's Motion for Entry of an Order Authorizing Payment of Restructuring Fee* (the "Motion"),[1] and the Court finding that: (i) this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Agreement was an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is

[1] All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.

necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that**:**

1. The Motion is **GRANTED**.

2. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Case Resolution Fee will be deemed earned by James P. Seery, Jr., and paid as follows:

a. $1,000,000 will be deemed earned on the Confirmation Date and paid on September 30, 2021;

b. $500,000 will be deemed earned on the Effective Date (as such term is defined in the Plan) and paid on the later of the Effective Date or September 30, 2021; and

c. $750,000 will be paid on the earlier of (i) the distribution of not less than 75% of the estimated cash available for distribution to Class 8 (General Unsecured Claims) as set forth in the Amended Liquidation Analysis/Financial Projections [Docket No. 1875-1] or (ii) the substantial completion of the monetization of the assets of the Debtor or its successors in interest.

3. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

4. This Court shall retain jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of this Order.

 # # # END OF ORDER # # #