

Hearing Date:
Objection Deadline:

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**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

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In re: Chapter 7 Case No.

In re Helios and Mattheson Analytics, Inc. 20-10242-smb

Debtor.

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**MOTION OF KLDISCOVERY, LLC FOR ALLOWANCE OF AN
ADMINISTRATIVE EXPENSE CLAIM**

KLDDiscovery Ontrack, LLC d/b/a KLDDiscovery ("KLDDiscovery"), by and through its undersigned attorneys, files this motion for an order allowing an administrative expenses pursuant to 11 U.S.C. § 503(b) (the "Motion").



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JURISDICTION

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § § 157 and 1334. The matter is a core proceeding pursuant to 28 U.S.C. § 157(b). The statutory predicate for the relief sought is 11 U.S.C. §§ 105(a) and 503(b) and Fed. R. Bankr. P. 3012(a)(2).

BACKGROUND

2. The Debtor filed for relief under chapter 7 of title 11 of the United States Code on January 28, 2020 (the "Petition Date").

3. KLDISCOVERY offers its clients, including the Debtor, data collection and forensic investigation services, early case assessment, electronic discovery and data processing, application software and data hosting for web-based document reviews, and managed document review services.

4. Prior to the Petition Date, the Debtor was involved in criminal and civil investigations by the United States government, including the Security and Exchange Commission and the U.S. Department of Justice. KLDISCOVERY provided services to the Debtor related to its electronic data production in these investigations.

5. Subsequent to the Petition Date, the Trustee and his attorneys continued to utilize KLDISCOVERY's services to collect, produce, and analyze the Debtor's electronic data.

6. Since the Petition Date, KLDISCOVERY provided active services to the Debtor including through multiple correspondence with the attorneys for the Trustee.

7. The Trustee has utilized KLDISCOVERY's services as part of his efforts to analyze, collect, and administer the assets of the Debtor's estate.

8. Specifically, at the start of this case, the Trustee filed an affidavit noting that KLDISCOVERY's services played an important part in his efforts to administer the case:

In addition to the services that Stretto will provide with respect to moving, housing, maintaining, and servicing the Debtors' servers, since the filing the Motion I have

learned more about the volume and location of the Debtors' electronic data, including the approximately 4.7 terabytes ("TBs") of data on the servers, the approximately 1.3 TBs of emails and e-documents housed in the Debtor's G Suite (Google) accounts, the presently unknown volume of electronic data stored in the Debtors' Amazon Web Services accounts, and several subsets of the above-described data housed by Debtors' former counsel. I am continuing my efforts to identify a complete inventory of the amount, location, and nature of the Debtors' electronic data, but it is now apparent that I will need, in addition to Stretto, the services of an electronic discovery vendor to help me manage such data, and assist in collecting, processing, hosting, and/or producing some or all of this data, both for general purposes in the day-to-day **conduct of the Trustee' duties and obligations and to respond to requests for information in the pending regulatory and criminal investigations involving Debtors, including the investigations currently being conducted by the United States Department of Justice (Criminal Division), and the United States Attorney's Office for the Eastern District of New York, the United States Securities and Exchange Commission, and the Federal Trade Commission.** The Trustee also anticipates that he may need to respond to electronic discovery requests and other issues in future adversary proceedings/litigation involving the Debtors.

ECF 25 at para. 7(emphasis added).

9. Between February 19, 2020 and October 12, 2020, KLDISCOVERY has incurred not less than \$251,244.52 in costs and expenses related to the Trustee's use of KLDISCOVERY's services.¹

10. Notably, on February 19, 2020, Karen Cullen from Windel Marx directed Moria Seazy of KLDISCOVERY to "produce these docs directly to the government . . ." ²

11. Later, on June 18, 2020, Ms. Cullen corresponded with Ms. Seazy about producing more than 53,647 documents to the SEC.³

12. On or about October 30, 2020, the Trustee informed KLDISCOVERY that he was retroactively repudiating the services of KLDISCOVERY, noting that the Trustee never formally agreed or retained KLDISCOVERY to continue to provide services to the estate.⁴

¹ Declaration of Gideon Kaplan ("Kaplan Dec.") at Ex. A.

² Kaplan Dec. at Ex. B.

³ Kaplan Dec. at Ex. C.

⁴ Kaplan Dec. at Ex. D.

REQUEST FOR RELIEF

13. KLDISCOVERY requests that the Court enter an order allowing KLDISCOVERY an administrative expense claim pursuant to 11 U.S.C. § 503(b) in the amount of \$251,244.52 for actual and necessary services rendered to the estate from the Petition Date through October 19, 2020.

ARGUMENT

14. KLDISCOVERY seeks an allowed administrative claim in the amount of \$251,244.52 pursuant to 11 U.S.C. § 503(b)(1)(A),(3)(C).

15. Relevant here, a creditor is entitled to an allowed administrative claim under 11 U.S.C. § 503(b), (i) "for the actual, necessary costs and expenses of preserving the estate" and (ii) for other compensation and reimbursement related to "prosecution of a criminal offense relating to the case or to the business or property of the debtor."⁵

16. "To establish entitlement to a claim under Section 503(b)(1)(A), the creditor must demonstrate that (1) its claim arose from a transaction with or on account of consideration furnished to the debtor, and (2) the transaction or consideration directly benefitted the debtor." ⁶"A clear relationship between the expenditures made and the benefit conferred on the estate must therefore be shown." ⁷

17. To be entitled to an administrative expense related to a criminal prosecution under Section 503(b)(3)(C), "the moving party has the burden of proving (1) there is a direct relationship

⁵ *Id.* at (b)(3)(C).

⁶ *In re Ideal Mortg. Bankers, Ltd.*, 539 B.R. 409, 430 (Bankr. E.D.N.Y. 2015), *aff'd sub nom. Holzer v. Barnard*, No. 15-CV-6277 (JFB), 2016 WL 4046767 (E.D.N.Y. July 27, 2016).

⁷ *In re Drexel Burnham Lambert Group Inc.*, 134 B.R. 482, 489 (Bankr.S.D.N.Y.1991); *In re Keegan Utility Contractors, Inc.*, 70 B.R. 87, 89 (Bankr.W.D.N.Y.1987).

between the expenses sought and the prosecution of the criminal activity, and (2) the prosecution of the criminal offense relates to the debtor's case, business, or property."⁸

I. THE TRUSTEE HAS ACKNOWLEDGED THAT KLDISCOVERY'S SERVICES DIRECTLY BENEFITED THE ESTATE.

18. The Trustee, in an affidavit filed early in this case in support of his efforts to operate the Debtor's business and preserve assets of the estate, directly acknowledged that the Trustee needed a data base management company to assist in securing, investigating, and preserving the assets of the Debtor's estate.⁹

19. In addition, the Trustee's attorneys directly corresponded with KLDDiscovery and requested not just to preserve the prepetition status quo, whereby KLDDiscovery continued to store massive amounts of the Debtor's data, but also that KLDDiscovery provide additional services aimed at facilitating the Trustee's ongoing cooperation with the U.S. government investigations.

20. The invoices and correspondence contained in the Kaplan Declaration Exs. A & B further evidence that the estate (i) received services from KLDDiscovery, including data hosting, discovery processing and analysis, and document production and management; (ii) utilized these services in connection with the Trustee's operation of the Debtors, compliance with government investigations, and his investigation into the Debtor and its assets, and (iii) these services benefited the trustee in his administration of the Debtor's estate.

21. Based on the record, KLDDiscovery has established entitlement to an administrative expense claim in the amount shown on its invoices, of not less than \$251,244.52.

⁸ *In re Ideal Mortg. Bankers, Ltd.*, 539 B.R. 409, 434 (Bankr. E.D.N.Y. 2015), *aff'd sub nom. Holzer v. Barnard*, No. 15-CV-6277 (JFB), 2016 WL 4046767 (E.D.N.Y. July 27, 2016).

⁹ ECF No. 25.

**II. KLDISCOVERY'S SERVICES ASSISTED THE TRUSTEE IN
COMPLYING WITH REGULATORY AND CRIMINAL
INVESTIGATIONS.**

22. The government investigations related to the Debtor include "pending regulatory and criminal investigations involving Debtors, including the investigations currently being conducted by the United States Department of Justice (Criminal Division), and the United States Attorney's Office for the Eastern District of New York." ¹⁰

23. The Trustee further acknowledges that his efforts to respond to the Department of Justice's criminal investigation was directly related to his responsibilities in administering the estate and that data production was an integral piece of performing that duty. ¹¹

24. KLDDiscovery provided services to the Trustee in furtherance of the government investigations, including a criminal investigation by the Department of Justice criminal division.

25. Based on the record, KLDDiscovery has established entitlement to an administrative expense claim in the amount shown on its invoices, of not less than \$251,244.52.

CONCLUSION

26. KLDDiscovery performed actual and necessary services for the Debtors, Trustee, and the estate by assisting the Trustee with investigations by the Securities and Exchange Commission, Department of Justice criminal division, and the U.S. Attorney for the Eastern District of New York. KLDDiscovery is entitled to reimbursement for the services it provided, at the direction of the Trustee, in furtherance of these efforts. Accordingly, the Court should enter an order allowing KLDDiscovery an administrative expenses claim in the amount of not less than \$251,244.52 for services provided from the Petition Date, through October 19, 2020.

¹⁰ ECF. 25 at para. 7.

¹¹ *Id.*

DATED: May 24, 2021

Respectfully submitted,

/s/ Frank Peretore

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