

Hearing Date and Time: June 4, 2020 at 10:00 a.m.
Objection Deadline: May 28, 2020 at 5:00 p.m.

WINDELS MARX LANE & MITTENDORF, LLP
Attorneys for Alan Nisselson, Chapter 7 Trustee
156 West 56th Street
New York, New York 10019
Telephone: (212) 237-1000
Attorney appearing: Alan Nisselson (anisselson@windelsmarx.com)
Brian Kreutter (bkreutter@windelsmarx.com)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re :
: Chapter 7
:
HELIOS AND MATHESON ANALYTICS : Case Nos. 20-10242-smb
INC., *et al.*,¹ :
: (Jointly Administered)
:
Debtors. :
----- X

**NOTICE OF HEARING ON MOTION FOR AN ORDER AUTHORIZING THE
CHAPTER 7 TRUSTEE TO TERMINATE THE HELIOS AND MATHESON
ANALYTICS INC. TAX DEFERRED SAVINGS PLAN AND FOR RELATED RELIEF**

PLEASE TAKE NOTICE that a hearing (the “Hearing”) on the *Motion for an Order Authorizing the Chapter 7 Trustee to Terminate the Helios and Matheson Analytics Inc. Tax Deferred Savings Plan and for Related Relief* (the “Motion”) shall be held on **June 4, 2020 at 10:00 a.m.** (prevailing Eastern Time), or as soon thereafter as counsel may be heard, before the Honorable Stuart M. Bernstein, United States Bankruptcy Judge at the United States Bankruptcy Court, Southern District of New York, Alexander Hamilton Customs House, One Bowling Green, New York, New York 10004-1408.

¹ The Debtors in the jointly administered Chapter 7 cases, together with the last four digits of each Debtor’s federal tax identification number, are as follows: Helios and Matheson Analytics, Inc., a/k/a MovieFone (9913), Zone Technologies, Inc., a/k/a Red Zone, a/k/a Zone Intelligence, (5124), and MoviePass, Inc. (9893).



PLEASE TAKE FURTHER NOTICE that responses or objections to the Motion and the relief requested therein, if any, shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York, shall set forth the basis for the response or objection and the specific grounds therefore, and shall be filed with the Court electronically in accordance with General Order M-399 by registered users of the Court's case filing system (the User's Manual for the Electronic Case Filing System can be found at <http://www.nysb.uscourts.gov>, the official website for the Court), with two (2) hard copies delivered directly to Chambers pursuant to Local Bankruptcy Rule 9028-1 and served so as to be actually received no later than **May 28, 2020 at 5:00 p.m.** (prevailing Eastern Time) (the "Objection Deadline"), by: (a) counsel for Alan Nisselson, chapter 7 trustee of Helios and Matheson Analytics, Inc., Windels Marx Lane & Mittendorf, LLP, 156 West 56th Street, New York, New York 10019, Attn: Brian Kreutter (counsel for the Trustee); and (b) the Office of the United States Trustee for the Southern District of New York, Attn: Greg Zipes, Esq. and Serene K. Nakano, Esq., U.S. Federal Office Building, 201 Varick Street, Suite 1006, New York, New York 10014.

PLEASE TAKE FURTHER NOTICE that a copy of the above-referenced Motion is available on the Court's official website www.nysb.uscourts.gov for registered users of the Court's case filing system.

PLEASE TAKE FURTHER NOTICE that pursuant to General Order M-543 (available on the Court's website at www.nysb.uscourts.gov/news/general-order-m-543-court-operations-under-exigent-circumstances-created-covid-19), the Court is not holding in-person hearings at this time; therefore, the Hearing **will be conducted telephonically** pending further order of the Court. Unless the Court provides otherwise, parties wishing to participate in a hearing

telephonically must register with Court Solutions. Attorneys seeking to participate must be admitted to the Court or admitted pro hac vice. (See Local Rule 2090-1). Information on how to register with Court Solutions can be found in General Order M-543. Parties that wish to “listen in” on a hearing are not required to receive consent from Chambers prior to registering with Court Solutions, nor to be admitted to the court or to be admitted pro hac vice.

PLEASE TAKE FURTHER NOTICE that parties that wish to make a "live" telephonic appearance in order to speak or make argument are required to receive permission from Chambers prior to registering with Court Solutions. Parties seeking permission to participate telephonically must send a written request by email to bernstein.chambers@nysb.uscourts.gov at least two business days prior to the hearing, and should be prepared to provide the following information: Name of party that the attorney is representing, the motion on which the attorney intends to argue, and the reason that a telephonic appearance is necessary. Counsel and pro se parties are not permitted to participate telephonically for any hearings of an evidentiary nature, including the examination of witnesses or the submission of evidence. The Court may make exceptions to this rule during the COVID-19 pandemic during which time all hearings are held telephonically.

Dated: New York, New York
May 6, 2020

WINDELS MARX LANE & MITTENDORF, LLP
Attorneys for the Chapter 7 Trustee

By: /s/ Brian Kreutter
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Hearing Date and Time: June 4, 2020 at 10:00 a.m.
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UNITED STATES BANKRUPTCY COURT
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In re :
 : Chapter 7
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HELIOS AND MATHESON ANALYTICS : Case Nos. 20-10242-smb
INC., *et al.*,¹ :
 : (Jointly Administered)
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Debtors. :
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**MOTION FOR AN ORDER AUTHORIZING THE CHAPTER 7 TRUSTEE TO
TERMINATE THE HELIOS AND MATHESON ANALYTICS INC. TAX DEFERRED
SAVINGS PLAN AND FOR RELATED RELIEF**

Alan Nisselson, trustee (the “Trustee”) for the chapter 7 estate (the “Estate”) of Helios and Matheson Analytics Inc. a/k/a MovieFone (“Helios”), moves for the entry of an order, substantially in the form annexed hereto as **Exhibit A**, pursuant to 11 U.S.C. §§ 105 and 704(a)(11), authorizing the Trustee to (i) terminate the Helios and Matheson Analytics Inc. Tax Deferred Savings Plan (the “Plan”); (ii) pay the Termination Service Fee (defined below); (iii) terminate the advisory services (described below) provided by Sentinel Pension Advisors (“Sentinel Advisors”), and (iv) pay any other costs relating to the termination of the Plan not to

¹ The Debtors in the jointly administered Chapter 7 cases, together with the last four digits of each Debtor’s federal tax identification number, are as follows: Helios and Matheson Analytics, Inc., a/k/a MovieFone (9913), Zone Technologies, Inc., a/k/a Red Zone, a/k/a Zone Intelligence, (5124), and MoviePass, Inc. (9893) (collectively, the “Debtors”).

exceed \$5,000 (the “Motion”). In support of the Motion, the Trustee respectfully submits as follows:

JURISDICTION, VENUE AND STATUTORY PREDICATES

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).
2. Venue is proper before this Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicates for the relief sought herein are sections 105 and 704(a)(11) of title 11 of the United States Code (the “Bankruptcy Code”).

BACKGROUND

A. The Debtors’ Bankruptcy Cases.

4. On January 28, 2020 (the “Petition Date”), each of the Debtors filed with this Court a voluntary petition for relief under chapter 7 of the Bankruptcy Code.
5. The United States Trustee appointed the Trustee as interim trustee of the Debtors’ estates pursuant to Bankruptcy Code § 701(a) and he has subsequently qualified and currently serves as the permanent trustee.
6. By Order dated February 11, 2020, the Court ordered the joint administration of the Debtor’s cases for procedural purposes only. (Doc. No. 16).
7. Prior to the Petition Date, the Debtors provided high quality information technology services and solutions, including a range of technology platforms focusing on big data, business intelligence, and consumer-centric technology, grouped into three business segments: (i) Subscription and Marketing, (ii) Promotional Services and Films, and (iii) Consulting and Technology.

B. The Plan.

8. Under the Plan, (i) Helios, as the employer of the Plan participants, was the “Plan Administrator” and “Plan Sponsor”, (ii) Sentinel Advisors provided advisory services to assist Helios in selecting investments for the Plan and (iii) Sentinel Benefits Group, LLC (“Sentinel Benefits”) provided administrative services to the Plan.

9. Upon information and belief, as of May 4, 2020, the aggregate market value of the Plan is approximately \$1 million, which is held by a total of 21 participants.

RELIEF REQUESTED AND BASIS THEREFORE

10. Pursuant to section 704(a)(11) of the Bankruptcy Code, a trustee shall “continue to perform the obligations required of the administrator” of an “employee benefit plan.”

11. The Plan constitutes an “employee benefits plan” under section 704(a)(11) of the Bankruptcy Code. Accordingly, the Trustee is required to perform the obligations of Helios under the Plan.

12. Further, pursuant to section 105(a) of the Bankruptcy Code, the “court may issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code].”

13. Helios is not operating and has no employees. Consequently, as part of his duties under section 704(11) of the Bankruptcy Code, the Trustee has determined that it is in the best interests of the Estate to effectuate the termination of the Plan.

14. For the reasons set forth below, the Trustee, on behalf of Helios as “Plan Administrator” and “Plan Sponsor,” seeks authority: (i) to terminate the Plan, (ii) to pay the Termination Service Fee (defined below), (iii) terminate the advisory services provided by Sentinel Advisors, and (iv) pay any other costs relating to the termination of the Plan not to

exceed \$5,000.

15. Sentinel Benefits has provided the Trustee with a Proposal for Plan Termination Services Defined Contribution Plans (the “Termination Services Agreement”), annexed as **Exhibit B**, pursuant to which the fees to terminate the Plan, including the Fulfillment Service described in the Agreement, total \$5,995.16.²

16. Most of termination costs, \$5,245.16 of the \$5,995.16, can be paid out of the Plan’s assets because this amount is for “non-settlor” expenses relating to the administration of the Plan. Under ERISA, and in accordance with Department of Labor Advisory Opinion 2001-01-A³, “non-settlor” expenses may be paid out of the Plan’s assets. According to Sentinel Benefits, there are sufficient assets available under the Plan to fully fund the \$5,245.16 of “non-settlor” expenses.

17. The remaining \$750 (the “Termination Service Fee”) is a “settlor” expense under ERISA because it relates to plan termination such that it must be paid by the Trustee from the Estate’s assets, and not out of the Plan’s assets. Therefore, the Trustee requests authority to pay the Termination Service Fee of \$750 to Sentinel Benefits out of the Estate’s assets.

18. The Trustee also requests the authority to pay any other costs relating to the

² The Trustee has determined that obtaining an IRS Determination Letter, referenced in the Termination Services Agreement, is not necessary.

³ Department of Labor Advisory Opinion 2001-01-A states, in relevant part, that “ERISA provides that, subject to certain exceptions, the assets of an employee benefit plan . . . shall be held for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. . . . [A]s a general rule, reasonable expenses of administering a plan include direct expenses properly and actually incurred in the performance of a fiduciary’s duties to the plan. . . . [T]here is [however] a class of discretionary activities [called] settlor functions [which] include decisions relating to the establishment, design and termination of plans and . . . are not fiduciary activities governed by ERISA. Expenses incurred in connection with the performance of settlor functions would not be reasonable expenses of a plan as they would be incurred for the benefit of the employer and would involve services for which an employer could reasonably be expected to bear the cost in the normal course of its business operations. However, reasonable expenses incurred in connection with the implementation of a settlor decision would generally be payable by the plan.” See also Coulter v. Morgan Stanley & Co. Inc., 753 F.3d 361, 367 (2d Cir. 2014) (“‘Settlor’ functions . . . include conduct such as establishing, funding, amending, or terminating a plan.”).

termination of the Plan not to exceed \$5,000. At this time, the Trustee is unaware of any other termination costs.

NOTICE

19. The Trustee shall provide notice of this Motion to: (i) the Office of the U.S. Trustee (Attn: Greg Zipes, Esq. and Serene K. Nakano, Esq.); (ii) all current participants of the Plan; (iii) Sentinel Benefits; (iv) Sentinel Advisors; and (v) all parties filing a Notice of Appearance herein. The Trustee submits that in light of the nature of the relief requested herein, no other or further notice need be given.

NO PRIOR REQUEST

20. No previous request for the relief sought herein has been made by the Trustee to this or any other court.

CONCLUSION

WHEREFORE, the Trustee respectfully requests that the Court enter an order substantially in the form attached as **Exhibit A**: authorizing him to (i) terminate the Plan, (ii) pay the Termination Service Fee, (iii) terminate the advisory services provided by Sentinel Advisors and (iv) pay any other costs relating to the termination of the Plan not to exceed \$5,000, and for the Court to grant such other and further relief as is just and proper.

Dated: New York, New York
May 6, 2020

WINDELS MARX LANE & MITTENDORF, LLP
Attorneys for the Chapter 7 Trustee

By: /s/ Brian Kreutter
Alan Nisselson (anisselson@windelsmarx.com)
Brian Kreutter (bkreutter@windelsmarx.com)
156 West 56th Street
New York, New York 10019
Tel. (212) 237-1000 / Fax. (212) 262-1215

determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before this Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. The Trustee is authorized to enter into the Termination Services Agreement and terminate the Plan.
3. The Trustee is authorized to pay the Termination Service Fee as described in the Motion.
4. The Trustee is authorized to terminate the advisory services provided by Sentinel Advisors.
5. The Trustee is authorized to pay any other costs relating to the termination of the Plan not to exceed \$5,000.

Dated: New York, NY
_____, 2020

UNITED STATES BANKRUPTCY JUDGE



**Proposal for Plan Termination Services
Defined Contribution Plans**

Date: 3/17/2020
 Expires: 7/1/2020
 Plan Sponsor: Alan Nisselson
 Plan Name: Helios and Matheson

Required Services:

Participants Entitled to Benefits (from most recent records or Form 5500)	21
1. Participant Benefit Payments (\$100 per participant entitled to benefits):	\$ -
<i>This fee will be paid by the participant prior to distribution</i>	
1. Participant Benefit Payments (\$100 per participant entitled to benefits)	\$ -

The following services are included with the utilization of our paying agent, PenChecks, Inc.: Participant communication, distribution election forms, spousal consent forms (if required), Special Tax Notice, lost participant search. The services will also include disbursement of benefits, IRS Form 1099-R, IRS Form 1096 and IRS Form 945.

2. Plan Administration and Compliance

2020 Plan Year - including final compliance, Form 5500 and custodial fees:	\$ 2,184.26
Other Plan Related Administrative Fees:	\$ -

Custodian and/or Trustee Plan Termination Fee (if applicable):

Custodian Wire Fee(s):	\$ -
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Previously billed & not paid:

776452	\$ 540.00
785736	\$ 540.00
790322	\$ 907.50
795233	\$ 907.50

Subtotal Required Fees	\$ 5,079.26
Less Revenue Recapture	\$ -
*Less Forfeitures	\$ -
Subtotal	\$ 5,079.26

-- Plan Termination Amendment (Settlor expense - not eligible to be paid from the Plan)	\$ 750.00
Services include: Full vesting, required legislative/regulatory updates, adopting resolution, Summary of Material Modifications and ERISA 204(h) Notice (if required)	

Additional Document Changes: (Enter Description)	\$ -
Total Amount Due	\$ 5,829.26

Optional Services:

1. Fulfillment Service (\$3.95 per employee: per mailing)	\$ 165.90
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Services include mailing of Plan Amendment Summary Material Modifications and Summary Annual Report to all applicable plan participants. Cost includes materials and postage.

2. Application for IRS Determination Letter (\$25 per participant subject to \$2,500 minimum)	\$ 2,500.00
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** Services include: Review of plan document and operational compliance, three hours consultation with Plan Sponsor, its advisors and/or IRS, Notice to Interested Parties, IRS Form 5310 - Application for Determination for Plan Termination, IRS Form 2848 - Power of Attorney and Declaration of Representative, IRS Form 8717 - User Fee for Employer Plan Determination Request

Total Fee for Plan Termination Service (including determination)	\$ 8,495.16
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* Value of Forfeiture offset may vary due to the underlying investment(s) in which the forfeiture account(s) is invested. Please contact your Plan Consultant regarding how any additions/losses will be applied.

Does not include \$2,300 IRS filing user fee. \$150 per hour charge will apply to collect data for years for which Sentinel did not provide services. Additional time required to address discrepancies or consult with the parties will be billed at normal consulting rates of \$250 to \$350 per hour.

Fulfillment Service (Choose one)

_____ **We Elect to use Sentinel's Fulfillment Services.** Sentinel will mail out the plan termination Summary Material Modification notice to all applicable plan participants. If applicable, an address request file will be created and sent to the plan sponsor for completion.

_____ **We Do Not Elect to use Sentinel's Fulfillment Services.** As plan sponsor, we will be responsible for proving the plan termination Summary Material Modification notice to all applicable plan participants.

IRS Determination Application (Choose one)

_____ **We Are Applying for Determination.** We understand that this process requires a minimum of 14 to 18 months to complete, if all information and the plan are in good order, and if all participants respond timely.

_____ **We Are Not Applying for Determination,** and hereby acknowledge that Sentinel Benefits & Financial Group has suggested applying for an IRS Determination Letter and advised us of the risk of an audit associated with foregoing such an application. We understand the audit risk and have elected NOT to apply for an IRS Determination Letter. We understand that this process requires a minimum of 3 to 6 months to complete, if all participants respond timely.

Payment of Plan Termination Fees (Choose One)

Amendment to terminate the plan is known as a "settlor" expense and must be paid by the Plan Sponsor

_____ **We elect to pay all above listed termination related fees (less the Plan Termination Amendment fee) using Plan Assets.** Assets will be deducted from participant's accounts on a pro-rata basis.

_____ **The Plan Sponsor will pay all termination related fees.** The Plan Sponsor will issue a check payment to Sentinel Benefits & Financial Group.

By signing below,

1. I authorize and engage Sentinel Benefits & Financial Group to terminate the above stated plan and service agreement, and I understand that full payment is required to initiate the plan termination process.
2. I understand that if elected, fees will be paid from Plan Assets. First from Revenue Recapture and Forfeitures, then Plan Participant Accounts
3. I acknowledge that any additional time required to address discrepancies, provide custom requests or complete an additional Form 5500 filing will be billed separately at an hourly rate.
4. I understand that the DOL considers terminating a retirement plan a settlor or business function, however activities taken to terminate are fiduciary in nature. Accordingly, reasonable expenses incurred in terminating a plan may generally be payable by the plan. This would include expenses incurred in auditing the plan, preparing and filing annual reports, preparing benefit statements and calculating accrued benefits, notifying participants and beneficiaries of their benefits under the plan, and, in certain circumstances, amending the plan to effectuate an orderly termination that benefits the participants and beneficiaries. As a fiduciary, I have reviewed the fees and determined that any fees being paid from plan assets are reasonable.
5. I understand that Sentinel Benefits & Financial Group will be utilizing the services of Penchecks, Inc. to process all plan termination distributions. After an agreed upon period following provision of distribution notices to participants (standard 15 days), plan assets will be transferred to Penchecks for payment to participants who have responded to notices.

Signature: _____

Print Name: _____ Date: _____

01/2018

Please return signed proposal to your Plan Consultant

Checks may be made payable to:
Sentinel Benefits & Financial Group
100 Quannapowitt Parkway, Suite 300
Wakefield, MA 01880