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

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<i>In re:</i>	:	
	:	Chapter 11
	:	
JCK LEGACY COMPANY, <i>et al.</i>,	:	Case No. 20-10418 (MEW)
	:	
Debtors.¹	:	(Jointly Administered)
	:	
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**REPLY OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE
OBJECTION OF THE UNITED STATES TRUSTEE TO CONFIRMATION OF THE
JOINT CHAPTER 11 PLAN OF DISTRIBUTION**

The Official Committee of Unsecured Creditors (the “Committee”) appointed in the chapter 11 cases (the “Chapter 11 Cases”) of the above-captioned debtors and debtors-in-possession (the “Debtors”), by and through its undersigned counsel, hereby submits this reply (the “Reply”) with respect to the *Objection of United States Trustee to Confirmation of the Joint Chapter 11 Plan of Distribution of the McClatchy Company and its Affiliated Debtors and*

¹ The last four digits of Debtor JCK Legacy Company’s tax identification number are 0478. Due to the large number of debtor entities in these jointly administered chapter 11 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ claims and noticing agent at <http://www.kcellc.net/McClatchy>. The location of the Debtors’ service address for purposes of these chapter 11 cases is: 2100 Q Street, Sacramento, California 95816.



Debtors in Possession [Docket No. 855] (the “UST Objection”). In support of this Reply, the Committee respectfully states as follows:²

PRELIMINARY STATEMENT

1. The Committee Settlement embodied in the Stipulation Regarding Mediated Sale and Plan Settlement and the Plan resolved, among other things, the Committee’s objections to the Debtors’ proposed sale and the Committee’s proposed litigation against the Chatham Parties that was likely to be costly, complex, and contentious. The Committee Settlement paved the way for a path forward, enabling the Debtors to sell their business as a going concern and to propose a plan of distribution on terms agreed by nearly all parties in interest. The Committee Settlement is fully supported by the Debtors’ key constituencies and is the product of extensive, hard-fought, good faith, arms’ length negotiations. The Committee Settlement falls well above the lowest point in the range of reasonableness, the applicable standard for approval of a settlement under Bankruptcy Rule 9019, and as a result, it was largely approved by this Court as part of the Sale Order.

2. The Committee Settlement includes numerous integrated parts that cannot be pulled apart piecemeal without disturbing the overall settlement. The payment of the Trustee Fees and Expenses are contained in, and a critical component of, the Committee Settlement and should be allowed pursuant to section 363(b) of the Bankruptcy Code and Bankruptcy Rule 9019.

² Capitalized terms used but not defined herein shall have the meanings ascribed to them in the *Joint Chapter 11 Plan of Distribution of the JCK Legacy Company and its Affiliated Debtors and Debtors in Possession* [Docket No. 856] (as may be further amended, the “Plan”).

BACKGROUND

3. On February 13, 2020 (the “Petition Date”), the Debtors commenced the bankruptcy cases by filing voluntary petitions for relief under chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).

4. On February 25, 2020, this Court entered an order establishing terms for plan mediation. [Docket No. 107].

5. On February 26, 2020, the Office of the United States Trustee for the Southern District of New York (the “U.S. Trustee”) appointed the Committee. [Docket No. 168].

6. On March 11, 2020, this Court entered an order approving, in part, the Committee’s application under Bankruptcy Rule 2004 for an examination of the prepetition conduct of the Debtors, Chatham and Leon Cooperman. [Docket No. 180]. In the ensuing months, the Committee conducted an investigation into certain prepetition transactions. Based on the results of that investigation, the Committee determined that there were colorable and valuable causes of action.

7. On May 11, 2020, the Court entered an order approving the Debtors’ proposed bidding procedures. [Docket No. 432].

8. Against the backdrop of the sale process, on June 22, 2020, after months of stalled mediation sessions and investigation, the Committee filed its motion for standing to commence and prosecute certain claims and causes of action on behalf of the Debtors’ estates against, among others, the Chatham Parties (the “Standing Motion”), along with a proposed complaint. [Docket No. 546].

9. On July 6, 2020, the Court issued an oral ruling on the Standing Motion, finding that the Committee had alleged colorable claims in respect of (i) constructive and actual fraudulent transfer with regard to the second and third lien obligations of the Debtors (and a colorable basis for insolvency); (ii) breach of fiduciary duty and aiding and abetting thereof; (iii) equitable subordination; (iv) disallowance of unamortized original issue discount; and (v) lien perfection issues. *See* July 6, 2020 H'rg Tr. at 51:5-52:23, 53:7-57:12.

10. On July 10, 2020, the Debtors held an auction, and ultimately, the Debtors declared Chatham Asset Management, LLC ("Chatham") as the winning bidder (such bid, the "Credit Bid"). [Docket Nos. 674, 694].

11. Through July and early August, the Debtors, the Committee, the Chatham Parties and the Brigade Parties engaged in vigorous, hard-fought negotiations regarding the terms of a potential settlement to resolve the Committee's Standing Motion and objections to the Credit Bid and to allow the Debtors to proceed with an orderly sale and subsequent plan process.

12. Ultimately, these efforts were successful and the parties reached the Committee Settlement on the terms set forth in the Stipulation Regarding Mediated Sale and Plan Settlement. The Court approved the Committee Settlement in large part in connection with the order approving the sale of substantially all of the Debtors' assets to Chatham. [Docket No. 744].

13. On August 21, 2020, the Debtors filed the Plan incorporating the terms of the Global Settlement. [Docket No. 780].

14. On September 9, 2020, the Debtors filed the declaration of their Chief Restructuring Officer in support of the Plan and the Committee Settlement [Docket No. 828]

(“given the value of the assets that the Chatham Parties have agreed to leave to the GUC Recovery Trust, the challenges asserted by the Committee to the full amounts of the Second Lien Term Loan and Third Lien Notes, the significant costs and uncertainty of litigation, the Court’s statements at the preliminary ruling on July 6, 2020, I believe that the settlement is well within the range of reasonableness.”). *See* ¶ 57.

15. On September 18, 2020, the Debtors filed a revised version of the Plan to incorporate additional settlements and to address certain informal and formal objections. [Docket No. 856].

16. The Committee Settlement and the Plan provide for the payment of the fees and expenses of Wilmington Savings Fund Society, FBS in its capacity as indenture trustee under the 2027 Debentures and the 2029 Debentures, including the fees and expenses of its counsel, Seward & Kissel LLP (collectively, the “Trustee Fees and Expenses”).

17. Specifically, the Stipulation Regarding Mediated Sale and Plan Settlement (which was attached to the Sale Order as Annex A) provides: “As provided for in the Admin Liability Schedule, the fees and expenses of WSFS as indenture trustee for the unsecured debentures and Seward & Kissel as counsel to WSFS shall be paid on the Effective Date.” *See* ¶15.

18. In addition, the revised Plan provides: “Subject to and in accordance with the Sale Order, the Committee Settlement described herein and therein, and the Stipulation Regarding Mediated Sale and Plan Settlement, and in consideration of each of the 2027 Debentures Trustee’s and 2029 Debentures Trustee’s continued performance under the applicable indentures during these Chapter 11 Cases and as further required under the Plan, the fees and expenses of the 2027 Debentures Trustee and the 2029 Debentures Trustee, and the fees and expenses of

Seward & Kissel LLP as their counsel, shall be paid in full in Cash on the Effective Date.” *See* Article 2.4.

19. On September 18, 2020, the U.S. Trustee filed the UST Objection, arguing, among other things, that non-estate professionals must establish a statutory entitlement to an administrative claim, such as the filing of a substantial contribution motion pursuant to section 503(b) of the Bankruptcy Code. *See* UST Objection at 11-14. The U.S. Trustee further notes that “[t]o the extent the parties may believe there is an independent basis for this priority treatment – such as in the case of the indenture trustees – that basis needs to be clearly articulated and established.” *Id.* at 14.

REPLY

20. The Committee Settlement was the result of vigorous, hard-fought negotiations among various case constituencies and represents a value-accretive compromise that is fair, equitable, and in the best interests of the Debtors’ estates and their creditors. The payment of the Trustee Fees and Expenses is provided for in, and a critical component of, the Committee Settlement, which is embodied in Stipulation Regarding Mediated Sale and Plan Settlement and the Plan. Accordingly, the Trustee Fees and Expenses should be allowed as a payment by non-Debtors in furtherance of the Committee Settlement, and to the extent it is considered a payment by the Debtors, pursuant section 363(b) of the Bankruptcy Code and Bankruptcy Rule 9019.

21. First, this Court has already approved the payment of the Trustee Fees and Expenses in the Sale Order. *See* Sale Order [Docket No. 744] (the Committee Settlement “is hereby approved and shall be binding and enforceable upon the Settling Parties and all other parties in interest; provided that to the extent any provisions of the Settlement Agreement are to be implemented in the Plan (as defined in Annex A hereto), such provisions shall be incorporated

into the Plan and approval thereof shall be subject to confirmation of such Plan.”). No party, including the U.S. Trustee, objected to the Committee Settlement or the Stipulation Regarding Mediated Sale and Plan Settlement, which included the payment of the Trustee Fees and Expenses, and the Court approved the same.

22. Second, the payment of the Trustee Fees and Expenses is essentially funded by Chatham and the Purchaser, not the Debtors. Chatham/Purchaser purchased, among other things, all of the Debtors’ cash, except for a specific sum that was to be used as prescribed in the asset purchase agreement, schedules, and Stipulation Regarding Mediated Sale and Plan Settlement. One of the specified uses of cash was to pay the Trustee Fees and Expenses. *See* Sale Order, Annex A, ¶15. Thus, if the amounts were not going to be used for this purpose, Chatham/Purchaser would have taken the cash out of the Debtors’ estates. This cash was not intended to be available to the Debtors for any other purpose.

23. Third, to the extent it is determined that these payments are being made by the Debtors, there is ample authority in this district and elsewhere providing that indenture trustee fees and expenses are permissible pursuant to Bankruptcy Code section 363(b) and Bankruptcy Rule 9019. *See e.g., In re Windstream Holdings, Inc.*, Case No. 19-22312 (RDD), Docket No. 2279 (ordering stipulation of settlement, which allows for the payment of indenture trustee fees and expenses), Docket No. 2459 (denying motion to reconsider the stipulation of settlement), Hr’g Tr. on August 18, 2020, p. 35 at 23:25, p. 36 at 1:8, p. 35 at 4:11 (treating “the stipulation and order as a proposed settlement that would provide for a payment of funds out of the ordinary course of the Debtors’ estate under Section 363(b) of the Bankruptcy Code and Rule 9019” and noting that “[i]t is recognized, however, in the Southern District, including by the District Court in the Southern District, that a party in interest, such as an Indentured Trustee, may have a

separate right to be paid either under Section 363(b) of the Bankruptcy Code or Bankruptcy Rule 9019, which incorporates or facilitates as a procedural matter use of estate property for purposes of settlement, which Bankruptcy Code provision, again, is Section 363(b).”); *In re Stearns Holdings, LLC*, 607 B.R. 781, 793 (Bankr. S.D.N.Y. Nov. 13, 2019) (approving payment of indenture trustee fees and expenses under Bankruptcy Rule 9019 and declining to evaluate the fees and expenses under section 503 on the basis that “where consideration is paid pursuant to a settlement, the Court need not review such payment under section 503(b) of the Bankruptcy Code.”); *United States Trustee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 2003 WL 21738964 at *11 (S.D.N.Y. July 28, 2003) (holding that “subsections 503(b)(3)(D) and (b)(4) do not bar a bankruptcy court from allowing a debtor in possession to reimburse a creditor for professional fees—provided, of course, that the standard for allowing transactions under § 363(b) has been met. . . . To approve a transaction under § 363(b), the bankruptcy court must find that there is a good business reason to allow the transaction. In this case, the Bankruptcy Court found that the reimbursement arrangement was ‘in the best interests of the Debtors and all parties in interest.’”); *In re: Aegean Marine Petroleum Network, Inc.*, Case No. 18-13374 (MEW), Hr’g Tr. on April 1, 2019, p. 53 at 11:14 (discussing the requested payment of indenture trustee fees and expenses at length and noting that “there are many other ways in which this [payment] can be justified than through – than by saying that they made a substantial contribution. It’s a commercial arrangement”). See also *Official Comm. of Unsecured Creditors of Enron Corp. v. Enron Corp. (In re Enron Corp.)*, 335 B.R. 22, 29 (S.D.N.Y. 2005) (“authorization of certain types of payments under § 363(b) is not prohibited simply because there is another section of the Bankruptcy Code related to the same type of payment.”) (quoting *In re Bethlehem Steel Corp.*, 2003 WL 21738964).

24. Indeed, the U.S. Trustee acknowledges in the UST Objection that Courts in this district have approved payment of non-estate professional fees and expenses pursuant to section 363(b) of the Bankruptcy Code and Bankruptcy Rule 9019. *See* UST Objection at n.4.

25. For the foregoing reasons, the Committee submits that the U.S. Trustee's argument that the fees and expenses of non-estate professionals should be allowed only by application for an administrative expense claim under section 503(b) should be overruled, and the Trustee Fees and Expenses should be allowed and payable under section 363(b) of the Bankruptcy Code and Bankruptcy Rule 9019.

WHEREFORE, the Committee respectfully requests that the Court overrule the UST Objection and to the extent necessary, approve the payment of the Trustee Fees and Expenses as provided in the Committee Settlement and the Plan, and grant such other relief consistent with the foregoing or as the Court may deem proper.

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New York, New York

Respectfully submitted,

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