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Hearing Date: As set by Order to Show Cause  
Objection Deadline: As set by Order to Show Cause

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re : Chapter 11  
: :  
Journal Register Company, et al.,<sup>1</sup> : Case No. 09-10769 (ALG)  
: :  
Debtors. : Jointly Administered  
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**DEBTORS' MOTION FOR AN ORDER:  
(A) AUTHORIZING AMENDMENTS TO CERTAIN COLLECTIVE  
BARGAINING AGREEMENTS; (B) APPROVING AGREEMENTS  
CONCERNING PARTICIPATION IN CWA/ITU NEGOTIATED  
PENSION PLAN; AND (C) AUTHORIZING THE REJECTION  
OF CERTAIN PENSION PLAN PARTICIPATION AGREEMENTS**

The debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**”), by their undersigned counsel, hereby submit this motion (the “**Motion**”) for an order, pursuant to sections 363 and 365 of title 11 of the United States Code (the “**Bankruptcy**”

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<sup>1</sup> If applicable, the last four digits of the taxpayer identification numbers of the Debtors follow in parentheses: (i) Journal Register Company (8615); (ii) 21st Century Newspapers, Inc. (6233); (iii) Acme Newspapers, Inc. (6478); (iv) All Home Distribution Inc. (0624); (v) Chanry Communications, Ltd. (3704); (vi) Greater Detroit Newspaper Network, Inc. (4228); (vii) Great Lakes Media, Inc. (5920); (viii) Great Northern Publishing, Inc. (0800); (ix) The Goodson Holding Company (2437); (x) Heritage Network Incorporated (6777); (xi) Hometown Newspapers, Inc. (8550); (xii) Independent Newspapers, Inc. (2264); (xiii) JiUS, Inc. (3535); (xiv) Journal Company, Inc. (8220); (xv) Journal Register East, Inc. (8039); (xvi) Journal Register Supply, Inc. (6546); (xvii) JRC Media, Inc. (4264); (xviii) Middletown Acquisition Corp. (3035); (xix) Morning Star Publishing Company (2543); (xx) Northeast Publishing Company, Inc. (6544); (xxi) Orange Coast Publishing Co. (7866); (xxii) Pennysaver Home Distribution Corp. (9476); (xxiii) Register Company, Inc. (6548); (xxiv) Saginaw Area Newspapers, Inc. (8444); (xxv) St. Louis Sun Publishing Co. (1989); (xxvi); Up North Publications, Inc. (2784); and (xxvii) Voice Communications Corp. (0455). The Debtors’ executive headquarters’ address is 790 Township Line Road, Third Floor, Yardley, PA 19067.

**Code**”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), authorizing the Debtors to (a) enter into a settlement agreement (the “**INI Agreement**”) that amends their collective bargaining agreements with the: (i) Detroit Typographical Union Number 18 (the “**Printers**”); (ii) Detroit Mailers Union No. 40, IBT Local Union No. 2040 and its successor, Local Union No. 372 (the “**Mailers**”); (iii) Graphic Communications Conference, IBT Local 13N; (iv) Newspaper Drivers and Handlers, Local No. 372; and (v) Newspaper Guild of Detroit, Local 34022 (collectively, the “**INI Unions**”); (b) enter into an agreement (the “**INI NPP Agreement**”) with the CWA/ITU Negotiated Pension Plan (the “**NPP**”) and the Printers and the Mailers (collectively, the “**INI NPP Unions**”) concerning the participation of Debtor International Newspapers, Inc. (“**INI**”) in the NPP; (c) enter into an agreement (collectively, the “**Philadelphia NPP Agreement**,” and together with the INI NPP Agreement, the “**NPP Agreements**”) between certain of the Debtors, the NPP and the: (i) Printing, Publishing and Media Workers’ Sector CWA in Delaware County, PA; (ii) Printing, Publishing and Media Workers’ Sector CWA, Local 14830 in Pottstown, PA; (iii) Printing, Publishing and Media Workers’ Sector CWA Local 14199 in Norristown, PA; and (iv) Printing, Publishing and Media Workers’ Sector CWA Local 14199 in Trenton, NJ (the “**Philadelphia NPP Unions**,” and together with the INI Unions, the “**Affected Unions**”) concerning the Debtors’ participation in the NPP; and (d) reject certain multiemployer pension plan participation agreements.

## **BACKGROUND**

1. On February 21, 2009 (the “**Petition Date**”), Journal Register Company and each of the other Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors intend to continue in the possession of their respective properties and the management of their respective businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. By order of this Court dated February 25, 2009, these chapter 11 cases were consolidated for procedural purposes only. On March 3, 2009, the United States Trustee for the Southern District of New York (the “**U.S. Trustee**”) appointed an official committee of unsecured creditors (the “**Creditors’ Committee**”). No trustee or examiner has been appointed in these cases.

3. The Debtors are a national media company primarily serving the greater Philadelphia region, Michigan, Connecticut, the greater Cleveland region, and the Capital Saratoga and Mid-Hudson regions of New York State. The Debtors own and operate twenty daily newspapers and 159 non-daily publications, as well as news and employment websites and commercial printing facilities.

4. Immediately after the Petition Date, the Debtors began discussions with certain of their unions, including the Affected Unions, to achieve contract modifications and savings that are an integral component of the Debtors’ efforts to reorganize successfully. Such modifications include the Debtors’ withdrawal from certain multiemployer pension plans (“**MEPs**”) and the permanent cessation of contributions to such MEPs.

5. After multiple unsuccessful rounds of negotiation with the INI Unions, the Debtors filed a motion (the “**1113 Rejection Motion**”) on May 12, 2009, seeking authority to reject, pursuant to section 1113 of the Bankruptcy Code, their collective bargaining agreements with the INI Unions.

6. After the filing of the 1113 Rejection Motion, negotiations with the INI Unions and the other Affected Unions (whose collective bargaining agreements were not addressed in the 1113 Rejection Motion) recommenced, and a consensual agreement was reached with each of the Affected Unions, which amendments were ratified by the membership

of each respective Affected Union on May 30, 2009. Accordingly, the Debtors are now seeking Court approval of the proposed amendments to their collective bargaining agreements with the Affected Unions.

7. In addition, the Debtors successfully negotiated with three other bargaining units, which are not the subject of this Motion (the “**Remaining Units**”).<sup>2</sup> On May 20, 2009, the Debtors filed a motion to approve amendments to their collective bargaining agreements with the Remaining Units, allowing the Debtors to cease contributions to certain MEPs (the “**May 20th Amendments**”). A hearing with respect to the May 20th Amendments is scheduled for June 9, 2009.

#### **JURISDICTION AND VENUE**

8. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 363 and 365 of the Bankruptcy Code and Bankruptcy Rule 9019.

#### **RELIEF REQUESTED**

9. By this Motion, the Debtors seek authorization, pursuant to sections 363 and 365 of the Bankruptcy Code and Bankruptcy Rule 9019, to: (a) enter into the INI Agreement, attached hereto as Exhibit A, which modifies their collective bargaining agreements with the INI Unions; (b) enter into the INI NPP Agreement and the Philadelphia NPP Agreement, attached hereto as Exhibits B and C, respectively, regarding the Debtors’ future

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<sup>2</sup> These bargaining units are: the Albany-Schenectady-Utica-Poughkeepsie Local 259M of the Graphic Communications International Union; the Graphic Communications Conference/IBT Local 16-N; and the Newspaper Guild--CWA, Local 38010.

contributions to the NPP; and (c) reject certain multiemployer pension plan participation agreements.

### **HISTORY OF NEGOTIATIONS**

10. As discussed above, immediately after the Petition Date, the Debtors began discussions with the Affected Unions to achieve necessary contract modifications. After negotiations with the Affected Unions, the Debtors were able to achieve consensual modifications to the relevant collective bargaining agreements.

11. Negotiations between INI and the INI Unions began on February 27, 2009. In the course of the negotiations, the INI Unions requested, and the Debtors provided, a significant amount of detailed financial information regarding the Debtors. After seven bargaining sessions regarding wages, health insurance, overtime and pensions, on May 15, 2009, the parties reached a tentative agreement on amendments to their collective bargaining agreements (the “**Amended INI CBAs**”), which were ratified by the members of the INI Unions on May 30, 2009.

12. The Debtors’ collective bargaining agreements with the INI NPP Unions and the Philadelphia NPP Unions require the Debtors to contribute to the NPP. After discussions with the relevant parties, on May 13, 2009, the Debtors agreed on the terms of the NPP Agreements with representatives of the INI NPP Unions, the Philadelphia NPP Unions and the NPP. The terms of the NPP Agreements will protect the Debtors against future increases in their required contributions to the NPP and cap their contingent withdrawal liability to the NPP under certain circumstances, while allowing the Debtors to continue to participate in the NPP.

## THE INI AGREEMENT

13. The INI Agreement provides reductions in labor costs that are essential to the Debtors' ongoing financial viability. The significant terms of the INI Agreement are summarized below.<sup>3</sup>

- (a) Term. The Amended INI CBAs will be effective through June 30, 2011, an extension of one year.
- (b) Wages.
  - (i) For the first year of the Amended INI CBAs, wages will be reduced by 12.5% from current levels.
  - (ii) The 2% wage increase due on July 1, 2009, under the existing collective bargaining agreements with the INI Unions (the "**Current INI CBAs**") will not be implemented.
  - (iii) Subject to certain conditions described below, on or after July 1, 2010, INI will restore to bargaining unit employees 2.5% of the current wages, which will take them to a level 10% below the wage level in effect under the Current INI CBAs, provided INI's earnings reach certain levels described in Section (d) below.
  - (iv) Except for item (b)(iii) above, wages will be frozen until the expiration of the Amended INI CBAs on June 30, 2011.
- (c) Health and Dental Insurance.
  - (i) Effective July 1, 2009, the current health insurance plan, the Health Alliance Plan HK7, will be replaced with the Blue Care Network Plan 5.
  - (ii) Effective July 1, 2009, employee health and dental insurance contributions will be increased from 13% to 30% of the monthly premiums for such insurance.
  - (iii) Subject to certain conditions described below, effective July 1, 2010, employee health and dental insurance contributions will be reduced from 30% to 20% of the monthly premiums for such

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<sup>3</sup> To the extent the summaries of the INI Agreement and the NPP Agreements in this Motion are inconsistent with the terms of such agreements, the terms of the INI Agreement and the NPP Agreements, respectively, shall control.

insurance if INI's earnings reach the levels described in Section (d) below.

- (d) Partial Restoration of Reduced Wages and Employer Insurance Contributions. The wage increase in Section (b)(ii) above and the reduction in employee insurance contributions in Section (c)(iii) above (together, the "**Snap-Back**") will occur if INI's annual earnings exceed \$350,000 plus the cost of the Snap-Back, in accordance with the calculations outlined in the INI Agreement.
- (e) Overtime.
- (i) Overtime will be paid only after 40 hours worked per week. Daily overtime will not be paid.
  - (ii) Holiday hours paid will count as "hours worked" to meet the 40-hour requirement. The credit for holiday hours paid will be the number of hours paid without any pyramiding of hours due to overtime pay or premium pay.<sup>4</sup> No other paid benefit time will count as "hours worked."
  - (iii) The overtime arrangements for (a) "sixth shifts," as provided for in Article VI, Section 2 of the collective bargaining agreement with the Mailers (the "**Mailers CBA**") (together with the August 27, 2007 letter of understanding on that subject)<sup>5</sup> and (b) the Sunday premium<sup>6</sup> provided for in Article XI, Section 1 of the Mailers CBA will not be affected by the foregoing overtime changes.
- (f) Pensions.
- (i) INI will immediately and permanently cease making contributions to the following MEPs: (a) the Retirement Benefit Plan of GCIU Detroit Newspaper Union 13N with Detroit Area Newspaper Publishers (the "**GCIU Local Plan**"); (b) the GCIU Employer Retirement Fund (the "**GCIU West Coast Plan**"); (c) the Central States Southeast and Southwest Areas Pension Fund (the "**Central**

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<sup>4</sup> I.e., the employer will not count hours that are already otherwise paid out as overtime or at a premium when calculating the number of holiday hours worked in a week.

<sup>5</sup> Article VI, Section 2 of the Mailers CBA provides that the Mailers receive not less than the overtime rate for a shift if less than nine (9) hours has elapsed since the previous shifted worked, except in the event of a mechanical breakdown in the mailroom, in which case the time between shifts may be reduced to eight (8) hours.

<sup>6</sup> Article XI, Section 1 of the Mailers CBA provides that in most cases the Mailers are paid at one and a half times the usual rate of pay for shifts worked on Sundays.

**States Plan**”); and (d) the Newspaper Guild International Pension Fund (the “**Guild Plan**,” and collectively, the “**Withdrawn MEPs**”).

- (ii) INI will contribute one-half of the amount of INI’s current contributions to the Withdrawn MEPs to certain replacement retirement plans identified in the INI Agreement.
- (iii) INI will reduce the contributions it makes to the NPP under the Current INI CBAs by one-half and enter into the INI NPP Agreement.

### **THE NPP AGREEMENTS**

14. As set forth below, the NPP Agreements are beneficial to the Debtors since they allow the Debtors to reduce the risk of certain potential increases in future contributions to the NPP and cap their contingent withdrawal liability to the NPP under certain circumstances.

15. In addition to the INI Agreement, INI and the INI NPP Unions are parties with the NPP to the INI NPP Agreement with respect to INI’s contributions to the NPP. A summary of the significant terms of the INI NPP Agreement is as follows:

- (a) INI’s collective bargaining agreements with the INI NPP Unions shall be amended to provide that INI shall contribute to the NPP no more than 50% of the contribution currently required to be made to the NPP;
- (b) In the event that the NPP is certified as being in “critical status” at any time from the date of the INI NPP Agreement through December 31, 2014 (the “**Applicable Period**”), there shall be no increase in INI’s contribution obligations with respect to the NPP during or relating to the Applicable Period. Instead, any additional funding of the NPP that would otherwise have been required of INI during the Applicable Period shall be funded by corresponding reductions in the amount of contributions that will generate reduced benefit accruals for the participants in the NPP who are members of the INI NPP Unions; and
- (c) In the event that, during the Applicable Period, INI ceases to print or publish *The Macomb Daily* or *The Daily Tribune*



and undergoes a complete or partial withdrawal from the NPP, the amount of INI's resulting aggregate and corresponding ongoing annual withdrawal liability, if any, associated with such withdrawal, shall be reduced by 50%.

16. A summary of the material terms of the Philadelphia NPP Agreement among certain of the Debtors, the NPP and the Philadelphia NPP Unions is as follows:

- (a) The amount of the Debtors' contributions to the NPP required by its collective bargaining agreements with the Philadelphia NPP Unions shall remain the same;
- (b) In the event that the NPP is certified as being in "critical status" at any time during the Applicable Period, there shall be no increase in the Debtors' contribution obligations with respect to the NPP during or relating to the Applicable Period. Instead, any additional funding of the NPP that would otherwise have been required of the Debtors during the Applicable Period shall be funded by corresponding reductions in the amount of contributions that will generate reduced benefit accruals for the participants in the NPP who are members of the Philadelphia NPP Unions; and
- (c) In the event that, during the Applicable Period, the Debtors cease to print or publish *The Daily Times*, *The Mercury*, *Times Herald* and/or *The Trentonian*, and undergo a complete or partial withdrawal from the NPP, the amount of the Debtors' resulting aggregate and corresponding ongoing annual withdrawal liability, if any, associated with such withdrawal, shall be reduced by 50%.

#### **REJECTION OF THE PARTICIPATION AGREEMENTS**

17. In connection with their participation in the MEPs, the Debtors may be party to certain agreements or contracts, written or oral, express or implied, that may affect the Debtors' obligations to participate in and contribute to the MEPs pursuant to their collective bargaining agreements (the "**Participation Agreements**"). Out of an abundance of caution, the Debtors request authority to reject any and all Participation Agreements, if any, which may affect the Debtors' obligations to participate in and contribute to the following MEPs (the "**Rejected**

**Participation Agreements**”), with the rejection being effective as of the date of entry of an order authorizing their rejection:<sup>7</sup>

- (a) the GCIU Local Plan;
- (b) the Central States Plan;
- (c) the GCIU West Coast Plan;
- (d) the Guild Plan;
- (e) the Graphic Communications Conference of the International Brotherhood of Teamsters Supplemental Retirement and Disability Fund (the “**GCC IBT Fund**”);<sup>8</sup> and
- (f) the NPP, provided, however, that the Debtors do not seek to reject that certain Agreement to Participate in the International Typographical Union Negotiated Pension Plan by and between the Tribune Publishing Company and the Detroit Typographical Union, effective as of June 1, 1985.

18. In addition, the Debtors request that proof of any claim (which claim must attach the applicable Participation Agreement) arising from, or related to, the rejection of a Rejected Participation Agreement be filed with the Debtors’ Court-appointed claims agent in accordance with this Court’s Order Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 3003(c)(3) Setting a Final Date to File Proofs of Claim, dated February 25,

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<sup>7</sup> This Motion does not constitute an admission: (i) of any liability or obligation; (ii) that any of the Debtors is party to a Participation Agreement; or (iii) that any such Participation Agreement is an executory contract.

<sup>8</sup> Pursuant to a notice dated June 1, 2009, the Debtors have sought to reject any Participation Agreement with respect to the GCC IBT Fund (the “**IBT Participation Agreement**”). Pursuant to the Order Under Sections 105(a) and 365(a) of the Bankruptcy Code and Bankruptcy Rule 6006: (i) Authorizing Rejection of Certain Executory Contracts and Unexpired Leases; and (ii) Approving Procedure for Future Rejection of Certain Executory Contracts and Unexpired Leases dated March 27, 2009 [Docket No. 137] (the “**Rejection Procedures Order**”), if no objections to such proposed rejection are received by June 17, 2009, then any Participation Agreement with respect to the GCC IBT Fund will be deemed rejected as of such date.

2009 [Docket No. 42] (the “**Bar Date Order**”), by thirty (30) days after service of an order authorizing such rejection.

### **BASIS FOR RELIEF**

A. The Wage and Benefit Reductions Evidenced By the INI Agreement Are Necessary for the Debtors’ Reorganization.

19. Prior to and shortly after the Petition Date, the Debtors identified certain key steps they believed were essential to reducing their operating costs to a level that would give INI its best chance to operate at a profit. After extensive negotiations, a consensual agreement, in the form of the INI Agreement, was reached with the INI Unions and the Debtors’ management regarding the specific steps that should be taken to reach this goal. The INI Agreement was then ratified by the membership of each Affected Union. Implementation of the wage and benefit reductions evidenced by the INI Agreement is in the best interests of the Debtors, their estates, their creditors and other parties in interest because they will provide the Debtors with essential labor cost savings, while at the same time providing what the Debtors consider to be fair and reasonable employment terms for the members of the INI Unions.

20. Accordingly, the INI Agreement should be approved, as entry into the INI Agreement is supported by the Debtors’ business judgment and is not tainted by bad faith, self-interest, or gross negligence.

B. The Debtors Must Reduce Their Potential Liabilities to MEPs in Order to Successfully Reorganize.

21. Implementation of the INI Agreement and the NPP Agreements is in the best interests of the Debtors, their estates, their creditors and other parties in interest because it furthers the Debtors’ goal of a successful reorganization by allowing them to withdraw from certain underfunded MEPs, and reduce their potential liability to the NPP, in a cost-effective and consensual manner.

22. Absent the INI Agreement and the NPP Agreements, the Debtors' collective bargaining agreements with the Affected Unions would require the Debtors to contribute to (a) the NPP, (b) the GCIU Local Plan, (c) the Central States Plan, (d) the GCIU West Coast Plan, and (e) the Guild Plan. In addition, the Debtors' contributed to the GCC IBT Fund pursuant to a collective bargaining agreement that is subject to amendment pursuant to the May 20th Amendments.

23. Once the INI Agreement becomes effective, the Debtors will have achieved a complete withdrawal under the Employee Retirement Income Security Act of 1974 ("**ERISA**") from five of the six MEPs to which they contributed to prior to the Petition Date: (a) the GCIU Local Plan; (b) the Central States Plan; (c) the GCIU West Coast Plan; (d) the Guild Plan; and (e) the GCC IBT Fund (the "**Withdrawn MEPs**"), since no other collective bargaining agreements to which the Debtors are a party provides for contributions to or participation in the Withdrawn MEPs. A complete withdrawal from a MEP is effective upon the cessation of an employer's obligation to contribute to such MEP. See 29 U.S.C. § 1383(e). In addition, though the Debtors will not withdraw from the NPP, pursuant to the NPP Agreements, the Debtors will reduce the risk of certain potential increases in future contributions to the NPP and cap their contingent withdrawal liability to the NPP under certain circumstances.

24. The GCIU Local Plan, the Central States Plan, the GCIU West Coast Plan and the GCC IBT Fund have all been certified to be in "critical status" under the Pension Protection Act of 2006 (the "**PPA**"). This generally means that they are less than 65% funded. While the NPP and the Guild Plan have not been officially certified as being in critical status as of January 1, 2009, they have indicated that they would have been in critical status at such time but for their election to carry over their status as non-critical MEPs through the end of the 2009

plan year under the Worker, Retiree and Employer Recovery Act, which was passed in December 2008.

25. The PPA imposes significant additional contribution obligations for MEPs that are facing such funding deficiencies. Beginning with the 2008 plan year, the PPA requires sponsors of MEPs that are in “critical status” to notify plan participants and contributing employers of a MEP’s funding deficiency, and to develop and implement strategies for eliminating such funding deficiency, including, *inter alia*, implementation of higher contribution schedules that address the underfunding on an accelerated basis.

26. Due to the anticipated contribution increases that may be needed to stabilize the funded status of the Withdrawn MEPs, the Debtors believe it is necessary to their reorganization to withdraw from these plans, therefore eliminating their obligations to make further contributions to such MEPs. The partial or complete withdrawal from a MEP may result in withdrawal liability assessed against one or more of the Debtors pursuant to ERISA. Such potential withdrawal liability would constitute unsecured prepetition claims against the Debtors. See e.g., Amalgamated Ins. Fund v. William B. Kessler, Inc., 55 B.R. 735, 740 (S.D.N.Y. 1985).

27. In addition, the Debtors must reject the Rejected Participation Agreements, if any, to ensure that, once reorganized, they have no ongoing contractual liability to the Withdrawn MEPs.

28. Entry into the INI Agreement and the NPP Agreements and rejection of the Rejected Participation Agreements are supported by the Debtors’ business judgment and is not tainted by bad faith, self-interest, or gross negligence. In light of the foregoing, the Debtors respectfully request that the Court authorize: (a) the Debtors’ entry into the INI Agreement and the NPP Agreements pursuant to section 363(b)(1) of the Bankruptcy Code and Bankruptcy Rule

9019; and (b) the rejection of any Rejected Participation Agreements pursuant to section 365 of the Bankruptcy Code, as an exercise of the Debtors' sound business judgment.

### **APPLICABLE AUTHORITY**

A. The Standard for Entry Into the INI Agreement and the NPP Agreements Pursuant to Section 363 of the Bankruptcy Code is Business Judgment.

29. Courts in this district have approved the amendment of collective bargaining agreements pursuant to section 363 of the Bankruptcy Code. See In re Star Tribune Holdings Corp., et al., 09-10244 (RDD) (April 9, 2009) (approving modifications to a collective bargaining agreement pursuant to section 363 of the Bankruptcy Code); In re Delphi Corporation, et al., 05-44481 (RDD) (August 16, 2009) (approving modifications to a collective bargaining agreement and modifications to retiree benefits pursuant to section 363 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedures); In re Northwest Airlines Corp., et al., 05-17930 (ALG) (November 16, 2005) (approving modifications to a collective bargaining agreement pursuant to section 363 of the Bankruptcy Code).

30. Section 363(b)(1) of the Bankruptcy Code authorizes a debtor, after notice and a hearing, to "use" property other than in the ordinary course of business. As the Court concluded in In re Leslie Fay Co's., Inc., 168 B.R. 294 (Bankr. S.D.N.Y. 1994), "a postpetition modification to a collective bargaining agreement, if out of the ordinary course of business, is not enforceable absent compliance with section 363(b)" of the Bankruptcy Code. Leslie Fay, 168 B.R. at 301.

31. Courts in the Second Circuit and elsewhere have required that decisions to use property outside of the ordinary course of business be based upon the sound business judgment of the debtor. As this Court has counseled, "[w]here the debtor articulates a reasonable

basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986); see also In re Chateaugay Corp., 973 F.2d 141, 143 (2d Cir. 1992); Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983); In re Global Crossing Ltd., 295 B.R. 726, 743 (Bankr. S.D.N.Y. 2003) ("courts are loath to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence" (citing Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992)); Official Comm. of Unsecured Creditors of Enron Corp. v. Enron Corp. (In re Enron Corp.), 335 B.R. 22, 27-28 (S.D.N.Y. 2005) (standard under section 363(b) of the Bankruptcy Code is evidence of a good business reason); Stephens Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) (holding that a bankruptcy court can authorize an action under section 363(b)(1) of the Bankruptcy Code "when a sound business purpose dictates such action"); Official Comm. of Unsecured Creditors v. Raytech Corp. (In re Raytech Corp.), 190 B.R. 149, 151 (Bankr. D. Conn. 1995); In re Ionosphere Clubs, Inc., 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989) (noting that standard for determining a motion under section 363(b) of the Bankruptcy Code is "good business judgment"); In re Phoenix Steel Corp., 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (stating that judicial approval of a motion under section 363 of the Bankruptcy Code requires that a good business reason exist for the requested relief). In light of the foregoing, the Debtors respectfully request that the Court authorize their entry into the INI Agreement and the NPP Agreements under section 363(b)(1) of the Bankruptcy Code.

B. Entry Into the INI Agreement is in the “Best Interests” of the Estates and Should be Approved Pursuant to Bankruptcy Rule 9019.

32. Though the Debtors believe that the appropriate standard to determine whether they may enter into the INI Agreement is the business judgment standard under section 363 of the Bankruptcy Code, the Debtors also meet the standard for entry into a settlement pursuant to Bankruptcy Rule 9019 with respect to the matters addressed in the 1113 Rejection Motion. Bankruptcy Rule 9019(a) provides: “[A]fter notice and hearing, the court may approve a compromise or settlement.” The legal standard for determining the propriety of a bankruptcy settlement is whether the settlement is in the “best interests of the estate.” In re Purofied Down Prods. Corp., 150 B.R. 519, 523 (S.D.N.Y. 1993) (citation omitted).

33. The United States Supreme Court established the measure for determining whether a settlement is in the best interests of the estate in Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414 (1968). The Supreme Court held that approval of a settlement requires a finding that the settlement is “fair and equitable.” Id. See also Purofied Down Prods., 150 B.R. at 523. Furthermore, such settlement need not be the best that the debtor could have obtained. See In re Penn Central Transp. Co., 596 F.2d 1102, 1114 (3d Cir. 1979); accord Int’l Distrib. Ctrs., 103 B.R. at 423 (“Indeed, a court may approve a settlement even if it believes that the Trustee ultimately would be successful.”) (citation omitted). Rather, the settlement must fall “within the reasonable range of litigation possibilities.” Penn Central, 596 F.2d at 1114 (citation omitted).

34. The INI Agreement provides a fair and reasonable manner for the reduction of the Debtors’ labor costs and protection against the possibility of exponential increases in future MEP contributions. The benefits to the Debtors of the compromises set forth in the INI Agreement far outweigh the costs of such compromises to the estates. Rather than



incurring the costs of seeking a determination by this Court that the collective bargaining agreements with the INI Unions may be rejected pursuant to section 1113 of the Bankruptcy Code, as well as the risks and uncertainties associated with such litigation, consensually settling any disputes with the INI Unions will permit the Debtors to avoid all such litigation expenses and will result in a cost-effective resolution of the 1113 Rejection Motions. Because of the inherent uncertainty surrounding the outcome and expense of the litigation involved in the 1113 Rejection Motions, the INI Agreement is well within the range of acceptable outcomes the Debtors anticipated if they were to seek nonconsensual rejection or amendment of the Current INI CBAs. Accordingly, the Debtors believe their decision to enter into the INI Agreement is in the best interests of the Debtors, these estates, and all parties in interest.

C. The Standard for the Rejection of the Rejected Participation Agreements is Business Judgment.

35. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that a debtor in possession “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). The standard applied to determine whether the rejection of an executory contract or unexpired lease should be authorized is the “business judgment” standard. See Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36, 39-40 (3d Cir. 1989); In re Stable Mews Assoc., Inc., 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984); see also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984). The rejection of a contract is appropriate where “rejection of a contract would benefit the estate.” L.J. Hooker Int’l Fla. Inc. v. Gelina (In re Hooker Inv. Inc.), 131 B.R. 922, 927 (Bankr. S.D.N.Y. 1991).

36. The Debtors, in the sound exercise of their business judgment, believe that rejection of any Rejected Participation Agreements will benefit the Debtors’ estates due to the

avoidance of potential postpetition contractual liability, if any, with respect to the Withdrawn MEPs. Accordingly, the Debtors submit that the rejection of the Rejected Participation Agreements is in the best interest of their estates and creditors and respectfully request that this Court authorize rejection of the Rejected Participation Agreements as a reasonable exercise of the Debtors' business judgment.

### **NOTICE**

37. Notice of this Motion will be provided by first class mail to: (a) the U.S. Trustee; (b) counsel to the Creditors' Committee; (c) counsel to the administrative agent under the Debtors' prepetition credit agreement; (d) the Affected Unions and their counsel, if known to the Debtors; (e) the trustees for the MEPs, or their counsel, if known to the Debtors; and (f) all parties who have requested notice pursuant to Bankruptcy Rule 2002 as of the date hereof. In light of the nature of the relief requested, the Debtors submit that no other or further notice is necessary.

38. Because the legal points and authorities upon which this Motion relies are incorporated herein, the Debtors respectfully request that the requirement of the service and filing of a separate memorandum of law under Rule 9013-1(b) of the Local Rules for the United States Bankruptcy Court for the Southern District of New York be deemed satisfied.

**CONCLUSION**

WHEREFORE the Debtors respectfully request the Court grant the Debtors the relief requested herein and such other and further relief as is just and proper.

New York, New York  
Dated: June 22, 2009

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