

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

VEC Liquidating Corporation, et al.,<sup>1</sup>

Debtors.

Chapter 11

Case No. 09-13294 (MFW)  
(Jointly Administered)

**Objections Due: 10/22/2013 at 4:00 p.m. (EDT)**  
**Hearing Date: 11/12/2013 at 11:30 a.m. (EST)**

**DEBTORS' MOTION TO DISMISS CHAPTER 11 CASES**

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”) hereby move (the “Motion”), pursuant to section 1112(b) the Bankruptcy Code, and Federal Rule of Bankruptcy Procedure 1017(a), to dismiss all of their Chapter 11 Cases. As part of the Motion, the Debtors seek an order relieving Kurtzman Carson Consultants, LLC (“KCC”) of its responsibilities as the Debtors’ claims and noticing agent. In support of this Motion, the Debtors respectfully represent as follows:

**JURISDICTION**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b).<sup>2</sup> Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

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<sup>1</sup> The following subsidiaries and affiliates (including the last four digits of their respective taxpayer identification numbers) have filed petitions for relief under chapter 11 concurrently with VEC Liquidating Corporation (5929) f/k/a Velocity Express Corporation: MCTS2 (f/k/a Velocity Express, Inc.) (4426); MCTS3 (f/k/a Velocity Express Leasing, Inc.) (6733); MCTS4 (f/k/a CD&L, Inc.) (0958); MCTS5 (f/k/a VXP Mid-West, Inc.) (0845); MCTS6 (f/k/a VXP Leasing Mid-West, Inc.) (0846); MCTS7 (f/k/a Clayton/National Courier Systems, Inc.) (6454); MCTS8 (f/k/a Click Messenger Service, Inc.) (6117); MCTS9 (f/k/a Olympic Courier Systems, Inc.) (3847); MCTS10 (f/k/a Securities Courier Corporation) (0185); MCTS11 (f/k/a Silver Star Express, Inc.) (8303); MCTS12 (f/k/a Velocity Systems Franchising Corporation) (9687); and MCTS13 (f/k/a U-Ship International, Ltd.) (3181). The Debtors’ principal address is One Morningside Drive North, Building B, Westport, CT 06880.

<sup>2</sup> Pursuant to Local Rule 9013-1(f), the Debtors hereby confirm their consent to the entry of a final order by this Court in connection with this Motion if it is later determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

2. The statutory predicate for the relief requested herein is set forth in section 1112(b) of the Bankruptcy Code and Bankruptcy Rule 1017(a).

## **BACKGROUND**

### **A. The Chapter 11 Cases**

3. On September 24, 2009 (the "Petition Date"), the Debtors each filed a voluntary petition under chapter 11 of the Bankruptcy Code.

4. On October 6, 2009, the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the "Committee") pursuant to section 1102(a) of the Bankruptcy Code.

### **B. The Sale Process and the Sale Settlement Agreement**

5. Prior to the Petition Date, the Debtors entered into negotiations with Comvest Velocity Acquisition I, LLC ("Comvest") regarding the sale of substantially all of the Debtors' assets (the "Sale") to a newly-formed Comvest subsidiary, Velocity Acquisition I, LLC (the "Purchaser," and together with Comvest, the "Comvest Parties"). Comvest was the holder of approximately 98% of the debtors' approximately \$63.5 million secured notes. On September 25, 2009, the Debtors filed a *Motion for an Order Under 11 U.S.C. §§ 105(a), 363 and 365 (I) Authorizing and Approving the Sale of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (II) Authorizing and Approving the Asset Purchase Agreement With Respect Thereto, (III) Authorizing and Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases as Necessary in Connection With the Sale, and (IV) Granting Related Relief* [Docket No. 17] (the "Sale Motion"), seeking Court approval of the Sale to Comvest.

6. The Committee filed an *Objection of the Official Committee of Unsecured Creditors to Debtors' Motion for Order Under 11 U.S.C. §§ 105(a), 363 and 365 (I) Authorizing*

*and Approving the Sale of the Debtors' Assets Free and Clear of Liens, Claims and Encumbrances, and Interests, (II) Authorizing and Approving the Asset Purchase Agreement With Respect Thereto, (III) Authorizing and Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases as Necessary in Connection With the Sale and (IV) Granting Related Relief* [Docket No. 253] (the "Committee's Sale Objection").

7. On November 2 and 3, 2009 (together, the "Sale Hearing"), the Court conducted an evidentiary hearing on the Debtors' Sale Motion and the objections thereto. Prior to the conclusion of the Sale Hearing, the Committee, the Debtors, the Purchaser, and Burdale Capital Finance, Inc. ("Burdale"), a senior secured lender, reached an agreement resolving the Committee's Sale Objection.

8. Thus, the Court approved the Sale to the Purchaser with certain negotiated terms, including the preservation and retention of certain causes of action for the Debtors' estates and the provision of certain carve-outs for the benefit of the Debtors' unsecured creditors (*i.e.*, the "Beneficiaries") which were set forth on the record at the Sale Hearing.

9. Thereafter, the Debtors, the Committee, the Purchaser and Burdale memorialized in writing the terms of the agreement articulated on the record at the Sale Hearing (the "Sale Settlement Agreement"). On November 25, 2009, the Committee and the Debtors filed the *Joint Motion of the Committee and the Debtors for an Order Pursuant to 11 U.S.C. §§ 105(a) and 363 and Fed. R. Bankr. P. 9019(a) Approving Settlement By and Among the Debtors, the Committee, Velocity Acquisition I, LLC and Burdale Capital Finance, Inc.* [Docket No. 328] (the "Sale Settlement Motion").

10. On December 15, 2009, the Court entered its *Order Pursuant to 11 U.S.C. §§ 105 and 363 and Fed. R. Bankr. P. 9019(a) Approving Settlement By and Among the Debtors,*

*the Committee, Velocity Acquisition I, LLC and Burdale Capital Finance, Inc.* [Docket No. 371] (the “Sale Settlement Order”), approving the Sale Settlement Motion. Pursuant to the Sale Settlement Order, the Debtors’ estates<sup>3</sup> received, among other things, 35% of the Canadian Cash Flow (as defined therein), a share of any proceeds received by the Purchaser from a potential future sale of the Debtors’ Canadian subsidiary, and an additional \$300,000 from Burdale and Comvest, as secured lender, of the carve-out for retained professionals, making the carve-out \$1,000,000. The settlement also provided for the compromise and satisfaction of Burdale’s claims under the Credit Agreement and DIP Facility and Comvest’s claims under the Senior Notes.

**B. The Debtors’ Remaining Assets**

11. When the Sale and the Sale Settlement Agreement were entered into, the Debtors believed they would be able to satisfy, through funds from the Sale and the Sale Settlement Agreement as well as retained causes of action and other assets, the administrative expense claims for the remainder of the Chapter 11 Cases as well as priority unsecured claims in order to allow the Debtors to confirm a plan of liquidation. However, since the closing of the Sale, the actual proceeds received by the Debtors from, for example, the Canadian Cash Flow and retained causes of action, failed to meet the amounts required to satisfy the Debtors’ priority unsecured claims.

12. Indeed, the Debtors have determined that their remaining assets will not be sufficient to pay any distribution at all to priority unsecured claims, so a plan is impossible. However, United States Trustee fees have been paid in full, non-disputed administrative claims

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<sup>3</sup> The Debtors’ general unsecured creditors, as Beneficiaries under the Sale Settlement Agreement, also received \$175,000 cash plus certain proceeds from the Office Depot Litigation (as defined in the Sale Settlement Motion). Such funds were property of the Beneficiaries, not the Debtors’ estates, and consequently the Beneficiaries received these funds directly, not through the Debtors’ possession.

have also been paid in full, and negotiated resolutions have even been reached with substantially all disputed administrative claims. However, the estates do not have sufficient funds to pay retained professionals in full.<sup>4</sup> There is certainly no cash to pay lower priority claims.

### **RELIEF REQUESTED**

13. By this Motion, the Debtors respectfully request that the Court enter an order, pursuant to sections 105(a) and 1112(b) of the Bankruptcy Code and Bankruptcy Rule 1017(a), dismissing the Chapter 11 Cases.<sup>5</sup>

### **BASIS FOR RELIEF REQUESTED**

14. Section 1112(b) of the Bankruptcy Code provides that “on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested . . . dismissal is not in the best interests of creditors and the estate, the court shall . . . dismiss a case under [chapter 11 of the Bankruptcy Code] . . . if the movant establishes cause.” *Id.* at § 1112(b)(1). The determination of cause and the decision to dismiss a chapter 11 bankruptcy case pursuant to section 1112(b) rests within the sound discretion of the court. See In re Nugelt, Inc., 142 B.R. 661, 665 (Bankr. D. Del. 1992)

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<sup>4</sup> Indeed, the retained professionals in these cases understand that they will not be paid for services rendered after the fourteenth interim fee period through the dismissal of the Chapter 11 Cases. Because no meaningful funds remain to satisfy such claims, the professionals have agreed to spare the estates the costs of preparing and reviewing, and the Court the administrative burden of reviewing final fee applications and a final fee order. To the extent that additional funds are received by the former Debtors after the dismissal of the Chapter 11 Cases, such funds will be remitted to the professionals outside of the Chapter 11 process. However, the Debtors do not currently believe it likely that such new funds will become available, at least in any material amounts.

<sup>5</sup> Alternatively, the Debtors seek dismissal of these Chapter 11 Cases under section 305(a) of the Bankruptcy Code, which provides, in relevant part, that “[t]he court, after notice and a hearing, may dismiss a case under [chapter 11 of the Bankruptcy Code] ... at any time if — (1) the interests of creditors and the debtor would be better served by such dismissal.” 11 U.S.C. § 305(a)(1). As set forth more fully below, the dismissal of the Debtors’ Chapter 11 Cases is in the best interests of the Debtors, their estates and creditors. Accordingly, the Debtors respectfully submit that the dismissal of these cases is also warranted under section 305(a) of the Bankruptcy Code.

(stating that “[c]ourts have wide latitude in determining whether cause exists to convert or dismiss” a chapter 11 bankruptcy case); In re Young, 76 B.R. 376, 378 (Bankr. D. Del. 1987).

15. Section 1112(b)(4) of the Bankruptcy Code provides a litany of statutory examples of “cause” for dismissal or conversion of a chapter 11 case, including the “absence of a reasonable likelihood of rehabilitation.” 11 U.S.C. § 1112(b)(4). However, a bankruptcy court is not constrained by those enumerated examples and may find “cause” based on the facts and circumstances of the particular chapter 11 case. See In re Nugelt, Inc., 142 B.R. at 665. The legislative history of section 1112(b) of the Bankruptcy Code also indicates that the list provided in sections 1112(b)(4)(A)-(P) of the Bankruptcy Code is nonexclusive, such that a bankruptcy court has the ability to dismiss a chapter 11 case for any reason cognizable to its equity powers. See H.R. Rep. No. 595, 95th Cong., 2d Sess. 405-06 (1978); see also Official Comm. of Unsecured Creditors v. Nucor Corp. (In re SGL Carbon Corp.), 200 F.3d 154, 160 (3d. Cir. 1999); Carolin Corp. v. Miller, 886 F.2d 693, 699 (4th Cir. 1993).

16. Here, it is plain that cause exists for the dismissal of their Chapter 11 Cases. The Debtors have terminated their business operations and liquidated or disposed of all of their assets through these cases. Thus, obviously there is no reasonable likelihood of their rehabilitation. Moreover, the Debtors are unable to effectuate a chapter 11 plan of liquidation, as there are insufficient funds available for distribution to any, let alone all priority unsecured creditors, and no remaining assets to be liquidated or recovered for the benefit of their estates. Indeed, the Debtors lack sufficient funds to cover the total outstanding fees of retained professional, let alone the additional fees and expenses that would be accrued in drafting and soliciting a chapter 11 plan of liquidation.

17. Furthermore, because they have no remaining assets to liquidate, the Debtors submit that converting their Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code would only create unnecessary administrative expenses, with no meaningful prospect of recoveries, and is therefore unwarranted. Dismissing their Chapter 11 Cases, on the other hand, will eliminate the accrual of any administrative expense obligations and bring closure to these cases in a timely and efficient manner. In short, there is no remaining purpose to be served by having the debtors remain in a bankruptcy case under any chapter. Accordingly, the Debtors submit that sufficient cause exists to dismiss their Chapter 11 Cases, and that doing so is in the best interests of their estates and creditors.

**REQUEST TO RELIEVE KCC OF FURTHER DUTIES**

18. As a consequence of the Chapter 11 Cases being dismissed, KCC will have no further obligations under the terms of the retention agreement entered into between KCC and the Debtors (as such agreement was approved and modified by this Court's order approving KCC's retention [Docket No. 121], the "KCC Retention Agreement"), and the Debtors will have no further need of KCC's services under the KCC Retention Agreement. Accordingly, for the purposes of clarity, the Debtors request that the dismissal order provide that KCC be relieved of its responsibilities as the Debtors' claims and noticing agent in the Chapter 11 Cases.

**NOTICE**

19. Notice of this Motion has been provided to: (i) the U.S. Trustee; (ii) the Committee; (iii) Comvest; (iv) the Purchaser; (v) counsel to the Comvest Parties; (vi) counsel to Burdale; and (vii) those parties requesting notice pursuant to Bankruptcy Rule 2002.<sup>6</sup>

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<sup>6</sup> Contemporaneously herewith, the Debtors filed the *Debtors' Motion to Limit Notice of Debtors' Motion for an Order, Pursuant to Sections 105(A) And 1112 (B) of the Bankruptcy Code and Bankruptcy Rule 1017(A), Dismissing Their Chapter 11 Cases* (the "Motion to Limit Notice"), pursuant to which the Debtors are seeking a waiver of the requirement of Bankruptcy Rule 2002(a)(4) that all creditors of the Debtors receive notice of the

**CONCLUSION**

WHEREFORE, the Debtors respectfully request the Court to enter an order, substantially in the form attached hereto as Exhibit A, dismissing the Chapter 11 Cases and granting such other and further relief to the Debtors as this Court deems just and proper.

Dated: October 8, 2013  
Wilmington, Delaware

RICHARDS, LAYTON & FINGER, P.A.

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Motion. In the event that the Motion to Limit Notice is denied, notice of the Motion will also be served upon all creditors of the Debtors.