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PROPOSED ATTORNEYS FOR DEBTORS

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE: § **CHAPTER 11**
§
THE LASALLE GROUP, INC., ET AL.,¹ § **CASE No. 19-31484**
§
DEBTORS. § **(JOINTLY ADMINISTERED)**

**DEBTORS' EMERGENCY MOTION FOR AN ORDER AUTHORIZING THE
DEBTORS TO CONTINUE TO HONOR IN THE ORDINARY COURSE OF BUSINESS
CERTAIN NON-INSIDER BONUS OBLIGATIONS**

The above-captioned debtors and debtors-in-possession (the "Debtors"), debtors-in-possession in the above-referenced chapter 11 cases, file this *Debtors' Emergency Motion for an Order Authorizing the Debtors to Continue to Honor in the Ordinary Course of Business Certain Non-Insider Bonus Obligations* (the "Motion") and in support thereof, respectfully represent as follows:

¹ A list of the Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, is attached hereto as Schedule 1. The Debtors' mailing address is 545 E. John Carpenter Freeway, Suite 500, Irving, Texas 75062.

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this 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 pursuant to 28 U.S.C. §§ 1408 and 1409.

II. BACKGROUND

2. On May 2, 2019 (the “Petition Date”), the Debtors filed their voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) commencing the above captioned cases (the “Chapter 11 Cases”). The Debtors continue to manage and operate their business as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

3. An official committee of unsecured creditors has not been appointed in these Chapter 11 Cases. Further, no trustee or examiner has been requested or appointed in these Chapter 11 Cases.

4. A more detailed description of the Debtors and their business and the facts and circumstances leading up to the filing of the Debtors’ Chapter 11 Cases are set forth in greater detail in the *Declaration of Karen Nicolaou in Support of First Day Motions* (the “First Day Declaration”) [Docket No. 13], which is incorporated by reference in this Motion.

III. RELIEF REQUESTED

5. Given the Debtors’ litigation and financial struggles leading up to the filing of the Chapter 11 Cases, and the uncertainty those situations necessarily caused for the Debtor’s employees, the Debtors determined it was critical they retain those employees who are instrumental to the Debtors’ operations, resident care continuity, and current efforts to effect a safe and orderly transition through bankruptcy. To facilitate this, the Debtors’ evaluated their

business needs and the key tasks that would need to be completed during this transition. The business impact and retention risk for each of the Debtors' key employees was then evaluated based upon, among other things: a) each employee's unique or significant knowledge of the Debtors' business and affairs; b) whether the employee's unique skills or experiences would be crucial to the Debtors' smooth and safe transition efforts; c) the anticipated demand for the aforementioned knowledge and skills in the marketplace; and d) the distraction associated with finding an adequate replacement should a particular employee leave the Debtors. Based on this analysis, the Debtors identified those employees—the Key Employees—who are instrumental to the Debtors' business operations and their efforts to preserve and maximize the value of the Debtors' assets, while maintaining the highest quality of care for their residents.

6. The Key Employees are all non-insiders, and generally fall into the level of local management positions. These are the employees that manage operations at the Memory Care Facilities and ensure those continue to run smoothly. Each Key Employee has an important skill set and/or knowledge of the Debtors' business operations that is important for the Debtors to retain. The Debtors have a limited amount of time in bankruptcy to transition the facilities through sale or other methods and in order to do so in a safe and orderly manner, the Debtors will need to rely upon the skills and knowledge of the Key Employees, who will be faced with increased pressure due to the additional demands imposed upon the Debtors as a result of the Chapter 11 Cases. Consequently, the loss of the Key Employees would seriously jeopardize the efforts of the Debtors in these Chapter 11 Cases to have a smooth and short-lived stay in bankruptcy. As a result, the Debtors and their professional advisors have determined that continuing to honor the Bonus Obligations in the ordinary course of business will serve as a necessary and effective means to avoid impairing employee morale and to retain the Key

Employees during the course of these Chapter 11 Cases.

7. The titles of the Key Employees are identified on Exhibit "A" attached hereto. Although certain of the Key Employees have titles such as "Vice President" or "Executive Director," no Key Employee is an officer or director of the Debtors or any of its affiliates, and no Key Employee is appointed by the Debtors' board of directors or exercises sufficient authority to dictate corporate policy. Further, each Key Employee reports to a more senior manager and must obtain approval from an appropriate senior manager before taking any significant action with respect to the Debtors' corporate policies or the disposition of significant assets. The average annual salary of the Key Employees is approximately \$82,000, with a range from \$65,000 to \$140,000 in actual annual salary.

8. Upon identifying the Key Employees, the Debtors carefully amended (collectively, the "Amendments") each of the Key Employees' employment agreements and/or terms of employment (collectively, as amended, the "Employment Agreements") in order to afford the Key Employees some certainty in light of the Debtors' ongoing bankruptcy and transition and liquidation process and to induce the Key Employees to remain with the Debtors through the process. The Amendments were carefully constructed with the goal of, among other things, ensuring that the Key Employees, as the Debtors' most critical non-insider personnel, are retained through the necessary bankruptcy process.

9. The Bonus Obligations are set forth on Exhibit B. The Debtors propose to pay each of the Key Employees one (1) month of their annual salary.

IV. BASIS FOR RELIEF REQUESTED

10. By this Motion, the Debtors respectfully request entry of the Proposed Order, authorizing the Debtors to continue to honor, in the ordinary course of business, the Bonus

Obligations. As set forth below, the Bonus Payments qualify as ordinary course transactions. In addition, as discussed more fully below, the Debtors should be authorized to satisfy the Bonus Obligations because they are a reasonable exercise of the Debtors' business judgment and are not precluded by sections 503(c)(1) or 503(c)(2) of the Bankruptcy Code because none of the Key Employees are insiders. Chapter 11 Cases create special challenges for companies regarding morale, retention, and productivity. Oftentimes, they demoralize employees and frequently cause an exodus of the most talented employees as those individuals find new employment. For this reason, bankruptcy courts have regularly found bonus plans to be an appropriate exercise of a debtor's business judgment, so long as they are tailored to improve morale, incentivize continued job performance, and decrease the administrative burdens inherent in finding new employees on an expedited basis.

11. In this case, the Debtors, in an exercise of their sound business judgment, seek to continue to honor the Bonus Obligations so that the Key Employees receive the annual compensation that they have come to rely on to ensure that the Debtors retain those employees who are crucial to the Debtors' orderly and transition and liquidation process. The Key Employees hold critical positions throughout the Debtors' business, and their absence would significantly impair the Debtors' business operations and transition efforts, to the detriment of the Debtors and their creditors, and the residents the Debtors seek to protect.

12. For these reasons and those set forth below, the requested relief should be granted.

A. **The Bonus Obligations are Ordinary Course Transactions that Should be Approved Pursuant to Section 363(c).**

13. This District acknowledged the two-part test adopted in *In re Roth American, Inc.*, 975 F.2d 949, 952 (3d Cir. 1992) for purposes of determining what is the ordinary and normal course of business. *In re Denton County Elec. Co-op, Inc.*, 281 B.R. 876, 882, n.12 (Bankr. N.D.T.X. 2002). In *Roth*, the Court applied a vertical dimension and a horizontal dimension test for purposes of determining whether a transaction was considered “ordinary course. *See Roth*, 975 F.2d at 953. Under the “vertical” test, the Court looks to the reasonable expectations of interested parties as to the types of transactions a debtor is likely to enter into the ordinary course of business. The relevant inquiry under the “vertical” test is whether the proposed plan is consistent with the Debtors’ prepetition business practices and conduct. The relevant inquiry under the “horizontal” test, on the other hand, is whether the proposed transaction “is of the sort commonly undertaken by companies in that industry.” *Id.*

14. The Debtors’ payment of the Bonus Obligations fall within the Section 363(c)(1) “ordinary course of business” standard. These payments simply represent a pre-petition employee compensation obligation that has not yet been satisfied, satisfying the vertical test. Furthermore, the Debtors, specifically the LaSalle Debtor’s Chief Operating Officer who directly supervises the Key Employees, and their professional advisors believe that the Bonus Obligations are also commonplace in the Debtors’ industry. The Debtors submit such bonuses are commensurate with competitive employers and the bonuses reflect the Debtors’ financial and operational goals. Upon information and belief, based upon the Debtors’ knowledge of prevailing compensation terms in their industry, the bonuses are generally in line with industry norms. As a result, the Bonus Obligations satisfy the horizontal test.

15. Finally, numerous courts have concluded that payments such as these are ordinary course transactions. *See, e.g., Nellson Nutraceutical*, 369 B.R. at 797 (holding that a postpetition

modification of a debtor's prepetition bonus plan that paid out bonuses despite missing some target goals was in the ordinary course of business); *see also In re Optim Energy, LLC*, Case No. 14-10262 (BLS), [Docket No. 293] (Bankr. D. Del. May 14, 2015) (authorizing the Debtors to honor ordinary course bonus obligations under certain management agreements with the Debtors' employees); *In re Heartland Publications, LLC*, Case No. 09-14459 (KG) [Docket No. 97] (Bankr. D. Del. January 13, 2010) (authorizing the Debtors to satisfy certain prepetition, ordinary course bonus obligations).

B. Honoring the Bonus Obligations is a Reasonable Exercise of the Debtors' Sound Business Judgment.

16. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that a debtor "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under section 363(b), courts require only that a debtor "show that a sound business purpose justifies such actions." *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (internal citations omitted); *see also In re Elpida Memory, Inc.*, No. 12-10947 (CSS), 2012 WL 6090194, at *5 (Bankr. D. Del. Nov. 20, 2012) (noting that it is "well-settled" that a debtor may use its assets outside the ordinary course where such use "represents the sound exercise of business judgment"); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (stating that judicial approval under Bankruptcy Code section 363 requires a showing that the proposed action is fair and equitable, in good faith, and supported by a good business reason).

17. Moreover, "[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." *In re Johns-Manville Corp.*, 60 B.R. 612, 616

(Bankr. S.D.N.Y. 1986) (citation omitted); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (stating that “[o]vercoming the presumptions of the business judgment rule on the merits is a near-Herculean task”).

18. The Bonus Plan Obligations may also be evaluated under section 503(c)(3) of the Bankruptcy Code, which prohibits certain transfers to managers and other parties that are outside the ordinary course of business and not justified by the facts and circumstances of the case.¹⁷ Multiple courts have held that section 503(c)(3)’s requirement that transfers or obligations be “justified by the facts and circumstances of the case” is a reiteration of the business judgment test incorporated into section 363(b) of the Bankruptcy Code—specifically, transfers are approved if such transfers are a sound exercise of a debtor’s business judgment and warranted by the facts and circumstances of the case. *See, e.g., In re Velo Holdings, Inc.*, 472 B.R. 201, 212 (Bankr. S.D.N.Y. 2012) (“Courts have held that the ‘facts and circumstances’ language of section 503(c)(3) creates a standard no different than the business judgment standard under section 363(b).”); *In re Borders Grp., Inc.*, 453 B.R. 459, 473 (Bankr. S.D.N.Y. 2011) (noting that Bankruptcy Code section 503(c)(3)’s “facts and circumstances” test “creates a standard no different than the business judgment standard under section 363(b) of the Bankruptcy Code”); *In re Mesa Air Grp.*, No. 10-10018, 2010 WL 3810899, at *4 (Bankr. S.D.N.Y. Sept. 24, 2010); *In re Nobex Corp.*, No. 05-20050, 2006 WL 4063024, at *2 (Bankr. D. Del. Jan. 19, 2006) (the test for evaluating a compensation proposal under Bankruptcy Code section 503(c)(3) is the “sound business judgment” test); *In re Mervyn’s Holdings, LLC*, Case No. 08-11586 (KG) (Bankr. D. Del. Oct. 30, 2008) (Docket No. 794) (approving the debtors’ retention plan pursuant to Bankruptcy Code sections 363(b) and 503(c)); *In re Werner Holding Co. (DE), Inc.*, Case No. 06-10578 (KJC) (Bankr. D. Del. July 20, 2006, Aug. 22, 2006 and Dec.

20, 2006) (ordering various relief requested in connection with debtors' incentive bonus plans pursuant to Bankruptcy Code sections 363(b) and 503(c)); *In re Refco Inc.*, Case No. 05-60006 (RDD) (Bankr. S.D.N.Y. Jan. 10, 2006) (approving non-insider retention plan pursuant to business judgment test in a liquidating case).

19. Courts have examined six factors in determining whether the "sound business judgment test" has been met: (i) whether a reasonable relationship existed between the proposed plan and desired results; (ii) whether the cost of the plan was reasonable in light of the overall facts of the case; (iii) whether the scope of the plan was fair and reasonable; (iv) whether the plan was consistent with industry standards; whether the debtor put forth sufficient due diligence efforts in formulating the plan; and whether the debtor received sufficient independent counsel in performing any due diligence and formulating the plan. *See In re Dana Corp.*, 358 B.R. 567, 576-77 (Bankr. S.D.N.Y. 2006). Courts balance these factors, which are considered on the totality of the facts and circumstances related to the plan in question. *See In re Global Home Prods.*, 369 B.R. 778, 786 (Bankr. D. Del. 2007); *Dana*, 358 B.R. 567 at 577.

20. The Debtors' decision to honor the Bonus Plan Obligations is supported by sound business reasons and was made in good faith. As set forth above, the bonuses are reasonable because of, among other things, the importance of the Key Employees to the Debtors' business operations and their chapter 11 efforts, as well as the expectations of the Key Employees that, consistent with past practice, the bonus payments that they were earned and awarded in the course of their employment would be satisfied in full.

21. The Debtors' payment of the Bonus Plan Obligations will avoid impairing employee morale at a critical time, and ensure that the Key Employees, who have continued to perform at a high level for the Debtors at a time when their workload has increased significantly,

will remain focused and motivated to assist the Debtors in their efforts to successfully prosecute these Chapter 11 Cases. Satisfying the Bonus Plan Obligations on the timeframe originally contemplated by the Debtors and the Key Employees is a sign of good faith, and that good faith is critical to the ultimate success of the Debtors' Chapter 11 Cases.

22. In addition, as to the factors Courts consider under Section 503(c)(3) of the Bankruptcy Code, many of these factors were described and discussed above and demonstrate that satisfaction of the Bonus Plan Obligations is an ordinary course transaction that is within the purview of the Debtors' senior management and is a sound exercise of the Debtors' business judgment. The Bonus Plan Obligations were designed to properly incentivize these Key Employees, and the scope of the outstanding obligations is reasonable and fair when compared to the performance, decision-making authority, accountability, and overall contribution to the Debtors of the Key Employees.

23. The Bonus Plan Obligations are the result of deliberation by the Debtors' senior management and intended to motivate the Key Employees to dutifully and thoroughly meet their materially increased work load, in stressful times and under difficult conditions. Due to this, the Bonus Plan Obligations are appropriate in light of the facts and circumstances in these Chapter 11 Cases and/or otherwise satisfy the standards set forth under Section 503(c)(3) of the Bankruptcy Code.

24. Given all of these facts, the continuation of the Bonus Plan Obligations by the Debtors is a sound exercise of the Debtors' business judgment, does not violate section 503(c)(3) of the Bankruptcy Code, and should be approved by the Court pursuant to section 363(b) of the Bankruptcy Code.

C. The Bonus Obligations are Not Applicable to Insiders and are Therefore Not Governed by Sections 503(c)(1) or 503(c)(2).

25. The Bonus Obligations are not governed by Sections 503(c)(1) or 503(c)(2) of the Bankruptcy Code. By their plain language, sections 503(c)(1) and 503(c)(2) of the Bankruptcy Code pertain solely to retention and severance plans for *insiders*. The Debtors do not believe that any Key Employee is an “insider” of the Debtors, within the meaning of section 101(31) of the Bankruptcy Code. Section 101(31) of the Bankruptcy Code defines an “insider” as a (i) director of the debtor, (ii) officer of the debtor, or (iii) person in control of the debtor. Courts also have concluded that an employee may be an “insider” if such employee has “at least a controlling interest in the debtor or . . . exercise[s] sufficient authority over the debtor so as to unqualifiably dictate corporate policy and the disposition of corporate assets.” *Velo Holdings*, 472 B.R. at 208 (citation and quotation omitted). An employee’s job title alone does not make such employee an “insider” as defined by the Bankruptcy Code. *See Borders*, 453 B.R. at 469-70 (noting that “[c]ompanies often give employees the title ‘director’ or ‘director-level,’ but do not give them decision-making authority akin to an executive” and concluding that certain “director-level” employees in that case were not insiders).

26. As noted above, although certain Key Employees have titles such as “Vice President,” and “Executive Director,” the Key Employees (i) are not appointed by the board of directors, (ii) do not report to the CEO or to the board of director of the Debtors (rather, they report to a more senior management employee and must obtain approval from that senior manager before taking any significant actions with respect to the Debtors’ corporate policies or the disposition of significant assets), and (iii) do not exercise sufficient authority to dictate corporate policy. *See In re Global Aviation Holdings Inc.*, 478 B.R. 142, 148 (Bankr. E.D.N.Y.

2012) (finding that director-level employees were not “officers” because none were members of board, participated in corporate governance, attended board meetings, or reported to board); *see also In re NMI Sys. Inc.*, 179 B.R. 357, 368 (Bankr. D.D.C. 1995) (concluding that a “vice president” was not an “officer” or a “person in control” within the meaning of insider in the Bankruptcy Code because the employee was not in a position to influence corporate policy).²⁴ Many of the Key Employees duties are restricted to a particular division, and courts have declined to find insider status where the scope of authority is limited as it is here. The Key Employees do not attend senior management meetings, and they generally do not participate in board meetings or corporate governance.

27. For these reasons, no Key Employee is an “insider” of the Debtors (as such term is defined by the Bankruptcy Code) and the restrictions of section 503(c)(1) and (c)(2) of the Bankruptcy Code are inapplicable to the Bonus Obligations.

WHEREFORE the Debtors respectfully request that the Court (i) grant the Motion and (ii) grant such other and further relief as is just and proper.

RESPECTFULLY SUBMITTED this 10th day of June, 2019.

CROWE & DUNLEVY, P.C.

By: /s/ Vickie L. Driver

Vickie L. Driver

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CERTIFICATE OF CONFERENCE

I hereby certify that on June 5, 2019, I conferred with Rhonda Mates, counsel for Veritex regarding the relief requested herein. Ms. Mates indicated Veritex does not object to the Debtor seeking an emergency hearing on the requested relief, and does not anticipate a substantive objection to the relief sought. I further certify that on June 4, 2019, I conferred with Lynda Lankford, counsel for Origin Bank regarding the relief requested herein. Ms. Lankford indicated Origin does not object to the relief requested. I further certify that on June 4, 2019, I conferred with Katie Clark, counsel for TLG Management regarding the relief requested herein. Ms. Clark indicated TLG Management does not object to the relief sought or the request for expedited consideration. On June 10, 2019, Christina Stephenson conferred with Stephen McKitt with the U.S. Trustee's office regarding the relief requested herein and the U.S. Trustee's office is not opposed to an expedited hearing on the foregoing matter. The Debtors will continue to work with the U.S. Trustee to resolve any concerns that may be raised as to the substance of the relief requested.

/s/ Vickie L. Driver

Vickie L. Driver

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading provided by me to Donlin Recano for service upon the parties listed on the Limited Service List via e-mail, facsimile, overnight delivery, and/or courier on this 10th day of June, 2019. I further certify that Donlin Recano will file a certificate of service with the court verifying service upon the following upon completion.

/s/ Vickie L. Driver

Vickie L. Driver

Schedule 1**List of Debtors**

#	Debtor Name	Case No.	EIN
1	The LaSalle Group, Inc.	19-31484	0143
2	West Houston Memory Care, LLC	19-31485	2760
3	Cinco Ranch Memory Care, LLC	19-31486	2716
4	Pearland Memory Care, LLC	19-31488	5311
5	Riverstone Memory Care, LLC	19-31493	5407

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE: § **CHAPTER 11**
§
THE LASALLE GROUP, INC., ET AL.,¹ § **CASE No. 19-31484**
§
DEBTORS. § **(JOINTLY ADMINISTERED)**

**ORDER GRANTING DEBTORS’ EMERGENCY MOTION FOR
AN ORDER AUTHORIZING THE DEBTORS TO CONTINUE TO
HONOR IN THE ORDINARY COURSE OF BUSINESS
CERTAIN NON-INSIDER BONUS OBLIGATIONS**

Upon consideration of the motion (the “Motion”)² of the Debtors for the entry an order, pursuant to Sections 105(a), 363, and 503 of Bankruptcy Code, authorizing the Debtors to continue to honor, in the ordinary course of business, the Bonus Obligations; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and it appearing that the Court has jurisdiction over this matter pursuant to

¹ A list of the Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, is attached hereto as Schedule 1. The Debtors’ mailing address is 545 E. John Carpenter Freeway, Suite 500, Irving, Texas 75062.

² Any capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

28 U.S.C. §§ 157 and 1334; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding and the Application is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested is in the best interests of the Debtors, their estates, and creditors and an appropriate exercise of the Debtors' business judgment; and after due deliberation and sufficient cause appearing therefor, **IT IS HEREBY ORDERED THAT:**

1. The Motion is **GRANTED** as set forth herein.
2. Pursuant to Sections 105(a), 363(b) and 503(c)(3) of the Bankruptcy Code, and subject to complying with the Cash Collateral Budget, the Debtors are authorized to continue, in the ordinary course of their business, to honor the Bonus Obligations and to make payments as proposed thereunder on **Exhibit "A"** to the Motion.
3. The authorization hereunder for the Debtors to continue, in the ordinary course of their business, to honor the Bonus Obligations and to make the payments associated therewith shall not create any obligation on the part of the Debtors or their officers, directors, attorneys, or agents to make such payments unless the Key Employees meet the necessary obligations of their employment.
4. Any payment actually made by the Debtors to or on behalf of any Key Employee on account of the Bonus Obligations in compliance with the terms of this Order shall be final and shall not be subject to disgorgement.
5. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), this Order shall be immediately effective and enforceable upon its entry.

6. This Court shall retain jurisdiction over any and all matters arising from or related to the interpretation or implementation of this Order.

END OF ORDER

PREPARED AND SUBMITTED BY:

BY: /s/ Vickie L. Driver

Vickie L. Driver

State Bar No. 24026886

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