



2. The Debtor planned to move the plan process forward as quickly as is feasible following adjudication of the Adversary Proceeding and Trading Motion. On August 28, 2014, this Court held a hearing and determined to grant final judgment in favor of the Defendants on all remaining counts therein. The Debtor is now exploring its options for bringing resolution to this case in light of the Court's ruling in the Adversary Proceeding. Meanwhile, throughout this case, the Debtor has timely met its reporting obligations, and has moved decisively to address the matters of critical importance to it in this case, including by preserving its tax attributes through the protections set forth in the interim orders respecting the Trading Motion, seeking an adjudication of its rights regarding the tax attributes through the Adversary Proceeding, negotiating and seeking court approval of an amicable resolution of the Securities Litigation, and seeking and negotiating exit financing.

3. The Debtor, therefore, is hopeful that the brief extensions requested herein – the final extensions available to the Debtor under Bankruptcy Code section 1121(d)(2) – will afford it an opportunity to develop a plan process following adjudication of the Adversary Proceeding, without the risk of the substantial additional costs and disruption that could follow an expiration of either of the Exclusive Periods at this critical point. Granting the relief requested will advance the estate's interest in working towards a successful resolution of this case.

### **JURISDICTION**

4. This Court has jurisdiction to consider this matter 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.

5. The statutory basis for the relief requested herein is Bankruptcy Code section 1121(d).

## BACKGROUND

### A. The Bankruptcy Case

6. On June 3, 2013 (the "Petition Date"), the Debtor filed a petition with this Court under chapter 11 of the Bankruptcy Code. The Debtor is operating its business as debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No request for the appointment of a trustee or examiner has been made in this chapter 11 case, and no committees have been appointed or designated.

7. A description of the Debtor's business, the reasons for commencing this chapter 11 case and the relief sought from this Court to allow for a smooth transition into chapter 11 are set forth in the Declaration of William T. Ratliff, III in Support of Debtor's Chapter 11 Petition and First Day Motions (the "First Day Declaration") [D.I. 3].

8. The Debtor has worked diligently in all respects to administer this case promptly and efficiently. The Debtor has retained Womble Carlyle Sandridge & Rice, LLP as its general bankruptcy counsel and Morrison & Foerster LLP as special counsel under Bankruptcy Code section 327(e) with respect to, inter alia, tax matters, insurance insolvency and regulatory matters. See Order Granting Debtor's Application for Entry of an Order Authorizing Employment and Retention of Morrison & Foerster LLP as Special Counsel to Debtor [D.I. 55]; Order Authorizing Retention and Employment of Womble Carlyle Sandridge & Rice, LLP as Counsel for the Debtor Nunc Pro Tunc to June 3, 2013 [D.I. 56]. The Debtor also has retained Donlin Recano & Company as the Debtor's claims and noticing agent this case. See Order Authorizing Retention and Appointment of Donlin, Recano & Company, Inc. as Claims and Noticing Agent Nunc Pro Tunc to June 10, 2013 [D.I. 58]. The Debtor also has retained Ernst &

Young, followed by KPMG LLP, as the Debtor's tax services professionals. See Order Authorizing the Retention and Employment of Ernst & Young LLP as Tax Services Provider for the Debtor and Debtor In Possession, Nunc Pro Tunc to July 23, 2013 [D.I. 123]; Order Authorizing the Debtor and Debtor-In-Possession to Retain and Employ KPMG LLP as Tax Compliance and Tax Consulting Services Provider, Nunc Pro Tunc to October 22, 2013 [D.I. 210]. The Debtor has timely complied with its obligations to file monthly operating reports [D.I. 37, 91, 134, 163, 189, 213, 230, 244, 261, 279, 291, 298, 308, 318, 322, and 334].

**B. The Securities Litigation**

9. On January 28, 2009, securities-related litigation (the "Securities Litigation") was commenced by the filing of a complaint against the Debtor and co-defendants Kenneth W. Jones and Mark J. Tonnesen (collectively, the "Non-Debtor Defendants"). See Phillips, Individually and on Behalf of All Others Similarly Situated, v. Triad Guaranty Inc., Case No. 1:09-cv-00071 (M.D.N.C.)

10. On July 12, 2013, the Debtor commenced an adversary proceeding, seeking, inter alia, to extend the automatic stay of Bankruptcy Code section 362 to the Non-Debtor Defendants in the Securities Litigation. Adv. Pro. No. 13-51224 (MFW) (the "Securities Litigation Adversary Proceeding"). On July 22, 2013, the Debtor served the summons and complaint in the Securities Litigation Adversary Proceeding on the Western Pennsylvania Electrical Employees Pension Fund ("WPEEPF"), as representative of the defendants in the Securities Litigation.

11. The Debtor and WPEEPF thereafter negotiated and agreed upon on a stipulation (the "WPEEPF Stipulation") providing, among other things, for WPEEPF and plaintiff James Phillips to dismiss the Securities Litigation and for the Debtor to dismiss the Securities Litigation Adversary Proceeding. On September 25, 2013, the Debtor filed a motion under Rule 9019 of the Federal Rules of Bankruptcy Procedure to approve the WPEEPF Stipulation [D.I. 168]. On

October 15, 2013, this Court entered the Order Granting Motion Pursuant to Bankruptcy Rule 9019 for an Order Approving Stipulation by and Between Debtor and James L. Phillips and Western Pennsylvania Electrical Employees Pension Fund [D.I. 186].

**C. The Trading Motion and Related Adversary Proceeding**

12. On the Petition Date, the Debtor filed its Motion for Interim and Final Orders Pursuant to Sections 105(a), 362, and 541 of the Bankruptcy Code (i) Establishing Procedures for (a) Certain Transfers of Equity Interests, and (b) Taking or Implementing Certain Other Actions Affecting the Interests of the Debtor, and (ii) Scheduling a Final Hearing (the “Trading Motion”) [D.I. 4].

13. On June 5, 2013, after an initial hearing, the Court entered an order granting the Trading Motion on an interim basis (the “Interim Order”) [D.I. 17] and setting a final hearing on the Trading Motion.

14. On August 2, 2013, Andrew Boron, Director of Insurance of the State of Illinois acting as rehabilitator (the “Rehabilitator”) of Triad Guaranty Insurance Corp. (“TGIC”) and Triad Guaranty Assurance Corp. filed an objection to the Trading Motion (the “Objection”) [D.I. 98].

15. On August 21, 2013, the Court held a hearing on the Trading Motion (the “August 21 Hearing”). At the August 21 Hearing, the Court directed the Debtor to seek a determination respecting certain relief requested in connection with the Trading Motion by an adversary proceeding (the “Adversary Proceeding”). On August 30, 2013, the Debtor commenced the Adversary Proceeding by filing a complaint (the “Complaint”) (Adv. Pro. No. 13-51749 (MFW)). On September 5, 2013, this Court entered a second interim order respecting the Trading Motion [D.I. 147].

16. The Adversary Proceeding has been heavily litigated. On October 3, 2013, the defendants in the Adversary Proceeding filed a Motion to Dismiss Adversary Proceeding (the "Motion to Dismiss") [Adv. Pro. D.I. 20], which the Court denied in part and granted in part. See Order (I) Granting in Part and Denying in Part Motion of Defendant Andrew Boron, Director of Insurance of the State of Illinois, Acting as Rehabilitator for, and on Behalf of, Triad Guaranty Insurance Corporation and Triad Guaranty Assurance Corporation, to Dismiss Adversary Complaint or for Abstention and (II) Referring Matter to Mediation (the "Order Regarding Motion to Dismiss"), entered November 21, 2013 [Adv. Pro. D.I. 70]. The Order Regarding Motion to Dismiss provided, in part, that the Adversary Proceeding was referred to mediation, and that pending the outcome of such mediation, events in the Adversary Proceeding were stayed. Order Regarding Motion to Dismiss, ¶¶ 2 and 6. On December 18, 2013, in accordance with the Order Regarding Motion to Dismiss, the parties engaged in mediation before James Garrity, which mediation concluded without a settlement. Accordingly, the Adversary Proceeding was stayed for almost one (1) month.

17. On January 27, 2014, the Debtor filed its Motion for Summary Judgment on Counts VI and VIII of its Complaint (the "Partial SJ Motion") [Adv. Pro. D.I. 88]. A hearing on the Partial SJ Motion has held on May 28, 2014. At the conclusion of the May 28 Hearing, the Court made various rulings from the bench and directed the parties to submit a proposed order.

18. On June 13, 2014, the Court entered a written order denying the Partial SJ Motion (the "SJ Order") [D.I. 141].

19. On July 28, 2014, the Debtor filed its Motion for Entry of Judgment in Defendants' Favor on All Remaining Claims or, in the Alternative, Motion for Certification Pursuant to Fed. R. Bankr. P. 7054 and Fed. R. Civ. P. 54(b) (the "Final Judgment Motion").

20. On August 28, 2014, the Court held a hearing on, and granted, the Final Judgment Motion. The parties are discussing a form of order to be submitted to Court.

**D. Proof of Claims Bar Date**

21. The Debtor timely filed its schedules and statement of financial affairs, and moved promptly to set a claims bar date. On August 20, 2013, this Court entered an order [D.I. 124] setting a general proof of claim bar date of October 31, 2013 at 5:00 p.m. ET. The bar date milestone was significant to preparing the Debtor's plan and disclosure statement.

**E. Negotiation of Exit Financing**

22. The Debtor continues to work diligently to seek an outcome of this case that will maximize value to creditors and other stakeholders. Towards that end, the Debtor actively is seeking out and negotiating with parties that might provide exit financing to the Debtor.

**F. First Motion to Extend Plan Exclusivity Deadlines**

23. On September 30, 2013, the Debtor filed its Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Disclosure Statement [D.I. 173]. On November 4, 2013, this Court entered the Order Extending the Exclusive Periods During Which the Debtor May File and Solicit Acceptances of a Plan [D.I. 197], providing that the exclusive period for the Debtor to file a plan was extended through and including March 30, 2014, and extending the exclusive period to solicit a plan through and including May 29, 2014.

**G. Second Motion to Extend Plan Exclusivity Deadlines**

24. On March 28, 2014, the Debtor filed its Second Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Disclosure Statement [D.I. 283]. On April 18, 2014, this Court entered the Second Order Extending the Exclusive Periods During Which the Debtor May File and Solicit Acceptances of a Plan [D.I. 289], providing that the exclusive period for the

Debtor to file a plan was extended through and including September 26, 2014, and extending the exclusive period to solicit a plan through and including November 25, 2014.

### **RELIEF REQUESTED**

25. By the Motion, the Debtor seeks the entry of an order (a) extending the Plan Period (defined below) until December 3, 2014, a date that is eighteen (18) months after the Petition Date, and the Solicitation Period (defined below) until February 3, 2015, a date that is twenty (20) months after the Petition Date; and (b) prohibiting any party, other than the Debtor, from filing a competing plan and/or soliciting acceptances of any such competing plan during the extended Exclusive Periods (defined below). If granted, the extension of the Exclusive Periods will be without prejudice to the right of any party in interest to seek to reduce the Exclusive Periods for cause.

26. Bankruptcy Code section 1121(b) provides for an initial 120-day period after the entry of the order for relief (as may be extended from time to time, the "Plan Period") within which a debtor has the exclusive right to file a plan. Bankruptcy Code section 1121(c) further provides for an initial 180-day period after the entry of the order for relief (as may be extended from time to time, the "Solicitation Period" and, together with the Plan Period, the "Exclusive Periods") within which a debtor has the exclusive right to solicit and obtain acceptances of a plan filed by such debtor during the Plan Period. In this case, the Debtor previously requested and the Court previously granted two (2) 180-day extension of each of the Exclusive Periods. Thus, the Plan Period is currently set to expire on September 26, 2014, and the Solicitation Period is set to expire on November 25, 2014.

27. Bankruptcy Code section 1121(d)(2) provides, however, that an Exclusive Period may not be extended beyond a date that is eighteen (18) the date of the entry of order for relief. Bankruptcy Code section 1121(d)(2) also provides that a Solicitation Period may not be extended

beyond a date that is twenty (20) the date of the entry of order for relief. By this Motion, the Debtor seeks to extend briefly the Exclusive Periods to the maximum periods allowed under Bankruptcy Code section 1121(d)(2).

28. This Motion is the Debtor's third request for an extension of the Exclusive Periods.

#### **BASIS FOR RELIEF**

29. Under Bankruptcy Code section 1121(d), the Court may extend the Exclusive Periods for cause. Specifically, Bankruptcy Code section 1121(d) provides:

(1) Subject to paragraph (2), on request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

(2) (A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.

(B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter. 11 U.S.C. § 1121(d)(1).

11 U.S.C. § 1121(d).

30. Courts have identified several key factors relevant to a determination of whether cause exists under Bankruptcy Code section 1121(d), including, among others, the following:

- a. The size and complexity of a debtor's case;
- b. The amount of time that has elapsed since the debtor filed its bankruptcy case;
- c. Whether unresolved contingencies exist that affect the debtor's ability to reorganize;
- d. The debtor's progress in resolving issues facing its estate; and
- e. Whether an extension of time will harm the debtor's creditors or other interested parties.

See In re Dow Corning Corp., 208 B.R. 661, 664–65 (Bankr. E.D. Mich. 1997); In re Express One Int'l, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996); In re Gibson & Cushman Dredging Corp., 101 B.R. 405, 409 (E.D.N.Y. 1989); In re McLean Indus., Inc., 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987).

31. In determining whether to grant a requested extension of exclusivity, courts also consider whether a debtor has had a reasonable opportunity to negotiate an acceptable plan with various interested parties and to prepare adequate financial and nonfinancial information concerning the ramifications of any proposed plan for disclosure to creditors. See McLean, 87 B.R. at 833–34; In re Texaco, Inc., 76 B.R. 322, 327 (Bankr. S.D.N.Y. 1987).

32. In evaluating whether an extension under Bankruptcy Code section 1121(d) is warranted, courts are given maximum flexibility to review the particular facts and circumstances of each case. See In re Amko Plastics, Inc., 197 B.R. 74, 77 (Bankr. S.D. Ohio 1996) (“[A]pplying the ‘flexibility’ in dealing with the question of extension of exclusivity which the cases suggest . . . , we hold that debtor has shown cause for the extension.”); In re Pub. Serv. Co., 88 B.R. 521, 534 (Bankr. D.N.H. 1988) (“[T]he legislative intent [is] to promote maximum flexibility.”); H.R. Rep. No. 95-595, at 232 (1978) (“[T]he bill allows the flexibility for individual cases that is unavailable today.”), reprinted in 1978 U.S.C.C.A.N. 5963, 6191.

33. Here, analysis of the Dow Corning factors demonstrates that the relief requested in this Motion is warranted, as set forth below.

**A. The complexity of the Debtor’s case justifies the requested extensions**

34. The first Dow Corning factor is case size and complexity. The Debtor’s case – and ultimately the substantive content of any plan, particularly the manner in which such a plan would address the tax attributes (the magnitude of which demonstrates the importance of such

issue) – are driven by the outcome of the Adversary Proceeding. The Court only recently granted final judgment in the Defendants’ favor in the Adversary Proceeding, and an order memorializing that final judgment has not yet been entered. The Debtor is studying its options in light of this ruling and exploring the possibility of proposing a confirmable plan. If the Debtor is to successfully reorganize in this case it will require additional time to develop a plan.

**B. The amount of time that has elapsed since the Debtor commenced this case**

35. The second Dow Corning factor – time elapsed in chapter 11 – also favors an exclusivity extension. The Debtor’s case is less than sixteen (16) months old, and the Adversary Proceeding was heavily litigated (including one (1) month during which the Adversary Proceeding was stayed), with final judgment not yet entered, preventing the Debtor from formulating and proposing a plan.

**C. There are unresolved contingencies that affect the Debtor’s ability to reorganize**

36. With respect to the third Dow Corning factor, the central unresolved contingencies in the Debtor’s case were the outcomes of the Adversary Proceeding and the Trading Motion. At the hearing on the Motion to Dismiss, the Court “agree[d that] the debtor has a right to know where it can go from here.” November 13 H’rg Tr. at 86:20-21. Without a resolution of the gating issue involved in the Adversary Proceeding only recently reached, the Debtor is only now ascertaining “where it can go from here,” and therefore cannot yet successfully propose and prosecute a plan. This factor also favors the requested exclusivity extension.

**D. The Debtor is making progress in resolving issues facing its estate**

37. The fourth Dow Corning factor also supports the exclusivity extension, in view of the progress made by the Debtor to date. The Debtor has addressed and obtained dismissal of the

Securities Litigation. Additionally, the Debtor has filed the Trading Motion and obtained approval on an interim basis, and commenced the Adversary Proceeding, which only recently has been finally adjudicated. The Debtor also promptly moved to seek imposition of a proof of claim bar date, which passed on October 31, 2013. For all of these reasons, the Debtor diligently has acted to move this case along.

**E. The requested extension of time will not harm the Debtor's creditors or other interested parties**

38. Finally, the fifth Dow Corning factor supports the requested extension because the extension will not prejudice creditors or other stakeholders of the Debtor's estate. Rather, if the Exclusive Periods were to expire at this point, the risk is that the careful balancing fostered by exclusivity would vanish, potentially undercutting the Debtor's ability to lead an organized and cost-effective plan process. Specifically, such expiration would give rise to the risk of competing chapter 11 plans, which inevitably involves substantially increased administrative expenses and litigation at a time when the Debtor is assessing how to proceed in light of the entry of judgment in the Defendants' favor in the Adversary Proceeding. In this case, such an exercise would almost certainly compromise recoveries to the Debtor's creditors and stakeholders, and may significantly delay (if not altogether frustrate) the Debtor's ability to confirm any plan in this bankruptcy case.

39. Exclusivity serves several important purposes, embodying the policy that in most circumstances, a debtor-in-possession is best suited to lead the plan process, of course with the benefit of fulsome participation by all case stakeholders. As set forth above, the further brief – and last – extension of the Exclusive Periods is warranted here because, among other things, an extension of the Exclusive Periods will give the Debtor its last opportunity to determine whether it can formulate and prosecute a chapter 11 plan following the adjudication of the Adversary

Proceeding, without the distraction of the possibility of a competing plan. Maintaining exclusivity for the extended period will benefit the Debtor, its estate, and creditors and stakeholders as a whole. The Debtor submits that its substantial progress in this case warrants affording the Debtor a reasonable amount of additional time to have exclusive plan filing and solicitation rights – in effect to finish out the administration of this case in the manner in which chapter 11 of the Bankruptcy Code is designed.

40. In sum, the requested extension of the Exclusive Periods will benefit the Debtor and its estate by providing the Debtor with a full and fair opportunity to resolve the Adversary Proceeding and formulate and seek approval of a chapter 11 plan consistent with such resolution. It is in the best interests of the Debtor, its estate, and all creditors and stakeholders to obtain an extension of the Exclusive Periods to ensure that the Debtor is afforded a reasonable and sufficient time to resolve the litigation regarding its rights with respect to the tax attributes and solicit, confirm, and consummate a plan without the costly and counter-productive prospect of a competing plan. Accordingly, the Debtor believes that the requested extension is warranted and, indeed, appropriate under the circumstances.

WHEREFORE, the Debtor requests the Court enter an order substantially in the form attached hereto: (i) extending the Plan Period through and including December 3, 2014 and the Solicitation Period through and including February 3, 2015; and (ii) granting the Debtor such other relief as is just and proper.

Dated: September 26, 2014

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