

Marc Abrams  
Rachel C. Strickland  
Shaunna D. Jones  
WILLKIE FARR & GALLAGHER LLP  
787 Seventh Avenue  
New York, New York 10019  
(212) 728-8000

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re : Chapter 11  
:  
Journal Register Company, et al.,<sup>1</sup> : Case No. 09-10769 ( )  
:  
Debtors. : Joint Administration Pending  
-----X

**DEBTORS' MOTION FOR ORDER AUTHORIZING PAYMENT  
OF INCENTIVE PAY TO OFFICERS AND KEY EMPLOYEES PURSUANT TO  
SECTIONS 105(a), 363(b)(1) AND 503(c)(3) OF THE BANKRUPTCY CODE**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

The debtors and debtors in possession in the above-captioned cases (collectively, the “**Debtors**” or the “**Company**”) hereby move for entry of an order, pursuant to sections 105(a), 363(b)(1) and 503(c)(3) of title 11 of the United States Code (the “**Bankruptcy Code**”), authorizing, but not directing, payment of incentive pay to certain of the Debtors’ officers and

---

<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.

key employees (the “**Motion**”). In support of the Motion, the Debtors rely upon and incorporate by reference the Affidavit of James W. Hall, Chairman and Chief Executive Officer of Journal Register Company, In Support of Chapter 11 Petitions and First Day Pleadings (the “**Hall Affidavit**”), which was filed with the Court concurrently herewith. In further support of the Motion, the Debtors, by and through their undersigned proposed counsel, respectfully represent:

### **BACKGROUND**

1. On the date hereof (the “**Petition Date**”), Journal Register Company (“**JRC**”) 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. The Debtors have requested that these chapter 11 cases be consolidated for procedural purposes. As of the date hereof, no official committee of unsecured creditors has been appointed.

2. The events leading up to the Petition Date and the facts and circumstances supporting the relief requested herein are set forth in the Hall Affidavit.

### **JURISDICTION**

3. 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 of these cases and this Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for the relief requested herein are sections 105(a), 363(b)(1) and 503(c)(3) of the Bankruptcy Code.

## **RELIEF REQUESTED**

4. By this Motion, the Debtors seek entry of an order under Bankruptcy Code sections 105(a), 363(b)(1) and 503(c)(3): (a) approving the Management Incentive Plan (the “**MIP**”) as described herein; and (b) authorizing the Debtors to implement the MIP.

### **THE MANAGEMENT INCENTIVE PLAN**<sup>2</sup>

5. The MIP, a copy of which is annexed hereto as Exhibit A, is designed to maximize assets available for distribution to creditors by providing incentives to 31 officers<sup>3</sup> and key employees (the “**Key Employees**”) to: (a) quickly and efficiently complete certain business restructurings and facilitate and administer large-scale reductions in force as contemplated by the Debtors’ business plan dated as of October 15, 2008 (the “**Business Plan**”); (b) achieve a targeted level of EBITDA in the course of these cases; and (c) assist the Debtors in their goal of moving expeditiously towards confirmation and consummation of a plan of reorganization.

6. The MIP is the product of significant negotiations between the Debtors and their secured lenders, and has been discussed between, and developed by, such parties since the early stages of these cases. The board of directors of JRC (the “**Board**”) approved the adoption of the MIP on January 8, 2009.

#### **I. MIP Components**

7. Pursuant to the MIP, the Key Employees will be eligible to receive bonuses, based on a percentage of their base salary, if certain performance objectives (the “**Performance Objectives**”) are met by certain deadlines (the “**Objective Dates**”). The amount of each bonus

---

<sup>2</sup> The descriptions herein are qualified in their entirety by reference to the MIP. To the extent there is a discrepancy between the terms of the MIP and the descriptions contained herein, the terms of the MIP control. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the MIP.

<sup>3</sup> Mr. James Hall, the Debtors’ Chief Executive Officer (“**CEO**”), is not a participant in the MIP.

that may be earned under the MIP varies based on a Key Employee's position with the Debtors. For instance, each bonus for the Debtors' senior management will range from between 10% to 16% of such Key Employees' base salaries for the completion of each Performance Objective; bonuses for certain other Key Employees will range from 4% to 9% depending on such Employee's seniority, position and other factors. The exact bonus payable to each Key Employee for the completion of each applicable Performance Objective will depend on the extent to which the applicable Performance Objective was achieved, as determined by the Debtors' CEO, in consultation with the Debtors' Board and Chief Restructuring Officer. A summary of the Performance Objectives is as follows:

**A. Business Plan Objectives**

8. Prior to the commencement of these cases, the Debtors' management began to implement the Business Plan as quickly as possible to improve liquidity and increase the recovery of the Debtors' creditors. To that end, the MIP includes two Performance Objectives that are tied to significant headcount reductions contemplated by the Business Plan, only one of which remains unperformed. Certain terminations were completed by December 31, 2008, prior to the Petition Date, and, at that time, thirty-one Key Employees were paid their first scheduled bonus in the aggregate amount of approximately \$450,000. Under the MIP, if additional reductions in force are completed on or prior to March 31, 2009, the Key Employees will be entitled to an additional bonus, which may total approximately \$486,000, with an average bonus of \$15,700 per Key Employee.

9. In order to create additional incentives for the Key Employees to continue to expeditiously implement the Business Plan, which includes difficult tasks such as the restructuring of the Debtors' workforce, the elimination of unprofitable publications and the streamlining of the Debtors' operations, the MIP also provides a bonus for Key Employees if

certain publications slated for elimination in the Business Plan are shut down in a timely manner. The Business Plan contemplates the elimination of many non-daily publications and several daily newspapers, with the goal of making the Company a leaner, more profitable enterprise. Such eliminations require the Key Employees to take on substantially increased responsibilities in order to consolidate operations and maintain relationships with advertisers and subscribers. A second bonus in a maximum aggregate amount equal to approximately \$486,000 may be payable to the Key Employees if such Performance Objective is met by February 28, 2009.

**B. EBITDA Objective**

10. In addition, as continued profitable operation is essential to the Debtors' restructuring efforts and post-emergence health, the MIP provides bonuses for Key Employees if a minimum level of EBITDA (as defined in the MIP) is met for the fourth quarter of 2008 and the first quarter of 2009. If this goal is attained, Key Employees could receive a third bonus in to a maximum aggregate amount of approximately \$486,000.

**C. Emergence Objective**

11. In light of the significant efforts that are required to effect the restructuring of the Company, the MIP provides that upon consummation of a plan of reorganization for JRC and/or the other Debtors, ten of the Key Employees shall be eligible for a bonus award. If all Key Employees eligible for this bonus became entitled to the maximum amount, such bonus would equal approximately \$253,000 in the aggregate, with an average bonus of \$25,300 per Key Employee.

**II. Additional MIP Terms**

12. If, prior to an Objective Date, a Key Employee's employment is terminated for good reason or without cause, the Key Employee is eligible to receive a pro rata share of the bonus awards such Key Employee would have received if he or she had remained in the employ

of the Debtors. Funds that are not awarded under the MIP remain property of the Debtors, and are not distributed to other Key Employees.

13. If, on or after an Objective Date, but prior to the payment of an applicable bonus award, a Key Employee's employment is terminated for good reason or without cause, the Key Employee will remain entitled to be paid the applicable bonus award on its regularly scheduled payment date.

#### **BASIS FOR RELIEF REQUESTED**

14. As part of the Debtors' efforts to negotiate, solicit and consummate a plan of reorganization, the Debtors' officers and certain key employees have been called upon to take on significant responsibilities in addition to their normal day-to-day functions. These incremental duties include providing assistance to the Debtors' bankruptcy counsel and advisors with respect to issues arising in these cases, the claims reconciliation process, assisting counsel with pending or threatened adversary proceedings, and the Plan confirmation process. Notably, these tasks are incremental to the extensive work that must be done to implement the Business Plan in accordance with the Bankruptcy Code. The Business Plan contemplates a substantial operational restructuring of the Company, which requires sale and consolidation efforts, re-negotiation of customer relationships, reduction of overhead costs, and the streamlining of operations, among other duties. These endeavors are critical to the achievement of a successful outcome of these cases for the benefit of the Debtors' stakeholders. Furthermore, if additional outside professionals were retained to perform these tasks, the associated costs would be exponentially greater than the bonuses that may be awarded under the MIP.

15. The Key Employees are being asked to take on considerable additional responsibilities, yet as a result of the chapter 11 filing, such employees cannot be awarded bonuses to compensate them for their enhanced responsibilities consistent with past practice.

Additionally, due to the Company's cost-cutting initiatives, certain aspects of the Key Employees' compensation, such as 401(k) matching, have been eliminated. All payments under the MIP have been, and shall continue to be, in lieu of any prior policies, plans and other bonus arrangements for the Key Employees.<sup>4</sup> Quite simply, the Key Employees are working more for less. By this Motion, the Debtors seek the authority to provide incentives to those individuals tasked with navigating the Debtors through this challenging period. The Key Employees continue to work against the backdrop of uncertainty of their continued employment and without assumed employment or severance agreements. To properly and fairly incentivize and reward the performance of the Key Employees for the benefit of these estates, the Board approved the formation of the MIP in its current structure to appropriately reward the substantial contribution and performance of the employees and to motivate them to maximize creditor recoveries. The efforts of the Key Employees have been and will continue to be instrumental in achieving maximum value for the Debtors' stakeholders.

**I.     The MIP Should Be Approved Pursuant to Sections 105(a), 363(b)(1) and 503(c)(3) of the Bankruptcy Code.**

**A.     Section 363(b) of the Bankruptcy Code**

16.     Section 363(b)(1) of the Bankruptcy Code permits a debtor in possession to use property of the estate "other than in the ordinary course of business" after notice and a hearing 11 U.S.C. § 363(b)(1). Uses of estate property outside the ordinary course of business may be authorized if the debtor demonstrates a "sound business purpose" for it. See In re Lionel Corp., 722 F.2d 1063, 1071 (2d Cir. 1983) ("The rule we adopt requires that a judge determining a

---

<sup>4</sup> The MIP does not supersede the change of control agreements to which certain executive Key Employees are a party. However, given the limitations imposed by the Bankruptcy Code on the payment of certain compensation and severance to insiders, the entitlements under such agreements may have limited value (whether as an incentive or otherwise) for such Key Employees.

363(b) application expressly find from the evidence presented before him . . . a good business reason to grant the application.”); In re Delaware Hudson Ry. Co., 124 B.R. 169, 179 (Bankr. Del. 1991).

17. Once the debtor articulates a valid business justification for a particular form of relief, the Court reviews the debtor’s request under the “business judgment rule.” The business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.” In re Integrated Resources, Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)).

18. The business judgment rule has vitality in chapter 11 cases and shields a debtor’s management from judicial second-guessing. See id.; see also Myers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996) (noting that under normal circumstances, courts defer to a trustee’s judgment concerning use of property under Bankruptcy Code section 363(b) when there is a legitimate business justification); In re Montgomery Ward Holding Corp., 242 B.R. 147, 153 (D. Del. 1999) (affirming bankruptcy court approval of key employee retention program, stating that “in determining whether to authorize the use, sale or lease of property of the estate under [section 363(b)], courts require the debtors to show that a sound business purpose justifies such actions.”).

**B. The MIP Also Should Be Evaluated under Section 503(c)(3) of the Bankruptcy Code, Using the Same Standard as Section 363(b).**

19. Section 503(c) of the Bankruptcy Code provides criteria for courts to use in approving certain types of payments to insiders and “other transfers or obligations that are outside the ordinary course of business.” Section 503(c) of the Bankruptcy Code comprises three subsections: (1) a general prohibition against retention plans for insiders; (2) limitations on



severance payments; and (3) standards governing other transfers to certain employees and consultants, among others, that are outside of the ordinary course of business. For the reasons set forth herein, neither section 503(c)(1) nor section 503(c)(2) of the Bankruptcy Code are applicable to evaluating the MIP.

20. By the statute's plain language, section 503(c)(1) of the Bankruptcy Code pertains solely to retention plans of insiders and section 503(c)(2) of the Bankruptcy Code addresses only the requirements for severance plans, and neither provision applies to performance-based incentive plans. See, e.g., In re Nobex Corp., Case No. 05-20050, January 12, 2006, Hearing Tr. at 67 (MFW) (Bankr. D. Del. 2006); In re Calpine Corp., Case No. 05-60200, April 26, 2006 Hearing Tr. at 87 (BRL) (Bankr. S.D.N.Y. 2006). Indeed, one court held that:

If sections 503(c)(1) and (c)(2) are not operative, a court may consider whether the payments are permissible under section 503(c)(3), which limits payments made to management and employees, among others, outside the ordinary course, unless such payments are shown to be justified under the facts and circumstances of chapter 11 case. As one treatise points out, the test appears to be no more stringent a test than the one courts must apply in approving any administrative expense under 503(b)(1)(A).

In re Dana Corporation, 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006).

21. The MIP is intended to provide neither bonuses for retention, nor severance pay. In particular, the MIP is comprised of only targeted incentive payments to management employees who play critical roles in the Debtors' operations. The Key Employees are directly involved with either the implementation of the Business Plan or the management of the Debtors' operations so as to ensure that the assets of these estates, as a whole, retain value. These incentive payments are based upon the successful achievement of certain restructuring-related goals, the efficient management of the bankruptcy cases and the expedited completion of these cases. Consequently, the MIP is properly characterized as a performance based management

incentive plan, not a retention plan for insiders subject to the requirements of section 503(c)(1) of the Bankruptcy Code.

22. Although certain of the Key Employees may be deemed “insiders” within the meaning of the Bankruptcy Code, the MIP has been crafted with great care, and in consultation with the Debtors’ secured lenders, to ensure that it directly incentivizes all Key Employees to meet the Performance Objectives. Although the MIP will have the added benefit of curbing potential attrition among Key Employees, that is merely a byproduct of the MIP. This does not make the MIP a “retention” plan, nor does it detract from the primary purpose of the plan, which is to provide incentives to participants to help the Debtors maximize the value of these estates for the benefit of their creditors.

23. The MIP is not in place to retain the Key Employees, but to motivate them. The preparations for these cases have required tremendous effort from the Key Employees yielding actual benefits to these estates. Although, they have already achieved measurable success, the dedication of the Key Employees remains critical if the Plan is to be consummated in a fashion that brings the maximum return to these estates. The Debtors submit that the MIP is a critical motivational tool, which is necessary to compel the Key Employees to continue to put in the many additional hours needed to lead the Debtors through the chapter 11 process. Accordingly, the MIP exists to reward the Key Employees for the extraordinary efforts that will be needed to successfully and timely complete these cases.

24. Finally, the MIP does not constitute severance for insiders subject to the provisions of section 503(c)(2) of the Bankruptcy Code, because it does not provide benefits to

Key Employees upon termination of their employment with the Debtors.<sup>5</sup> See 11 U.S.C. § 503(c)(2). Therefore, the MIP is a management incentive plan, not a severance plan for insiders subject to the requirements of section 503(c)(2) of the Bankruptcy Code.

25. To the extent that distributions under the MIP are payments “outside the ordinary course of business,” they should be evaluated under section 503(c)(3). See, e.g., Nobex Corp., Case No. 05-20050, January 12, 2006, Hearing Tr. at 67; In re Musicland Holding Corp., Case No. 06-10064 (SMB) (Bankr. S.D.N.Y. Feb. 1, 2006) (debtor continuing to provide incentive bonuses under management incentive plan did not violate section 503(c) of the Bankruptcy Code); Dana, 358 B.R. at 581.

26. Section 503(c)(3) of the Bankruptcy Code states, in relevant part, that “there shall be neither allowed nor paid . . . other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case. . . .” Since courts have begun to analyze various payments under section 503(c)(3) of the Bankruptcy Code, they have been unanimous in holding that they must use the “business judgment” standard as the proper standard for determining whether incentive programs and the payments thereunder are justified.

---

<sup>5</sup> The Company has a generally applicable severance plan, which it has sought approval to maintain in Debtors’ Motion for an Order: (I) Authorizing Debtors to Pay (A) Prepetition Employee Wages, Salaries and Other Compensation, (B) Prepetition Employee Business Expenses, and (C) Other Miscellaneous Employee Expenses and Employee Benefits; and (II) Granting Related Relief, filed on the Petition Date.

27. Indeed, in the Nobex case, Judge Walrath stated that:

“[Section 503] (c)(3) was meant to provide a standard, albeit not as clear, for any other transfers or obligations outside the ordinary course of business . . . . I read (c)(3) to be the catch-all and the standard under (c)(3) for any transfers or obligations made outside the ordinary course of business are those that are justified by the facts and circumstances of the case . . . . I find it quite frankly nothing more than a reiteration of the standard under 363 . . . under which courts had previously authorized transfers outside the ordinary course of business and that [are], based on the business judgment of the debtor . . . .”

In re Nobex Corp., Case No. 05-20050, January 12, 2006, Hearing Tr. at 86-87 (an order approving the management incentive plan at issue was entered January 20, 2006). See also Dana., 358 B.R. at 576 (Judge Lifland agreeing that management incentive programs should be evaluated under the business judgment standard).

**C. The MIP Has a Sound Business Purpose, and Should Be Authorized by this Court Pursuant to Sections 363(b)(1) and 503(c)(3) of the Bankruptcy Code.**

28. The MIP satisfies the business judgment standard of section 363(b)(1) and 503(c)(3) of the Bankruptcy Code, in that it is: (a) precisely calibrated to achieve the desired performance; (b) fair and reasonable in scope; and (c) does not discriminate unfairly.

29. Initially, the MIP will reward participants for their significant efforts since the Petition Date and their increased responsibilities and burdens over the upcoming months as a result of these chapter 11 cases. Moreover, as outlined above, the MIP is structured to maximize value for the Debtors’ estates and creditors. The Performance Objectives set forth in the MIP depend upon the minimization of cash outflow through both the efficient management, and expedited conclusion, of the bankruptcy cases. Thus, the motivations of Key Employees are aligned with the motivations of the Debtors and their creditors.

30. Secondly, the Debtors’ ability to preserve the value of their assets would be substantially hindered if the Debtors are unable to properly incentivize their Key Employees,

many of whom have already had to sacrifice components of their compensation as a result of the Debtors' circumstances. Authorization to implement the MIP will provide the Debtors' employees with a greater sense of financial security thereby minimizing the need to seek other employment which would otherwise distract the employees from the necessary tasks they need to perform for the Debtors. Providing incentives to encourage employees to focus on the Debtors' objectives, and to motivate them to provide optimal levels of performance, is necessary to successfully maintain the Debtors' business.

31. Third, the overall cost of the MIP is reasonable, particularly compared to the size of these estates.

32. Finally, targeted incentive programs have repeatedly been recognized by this and other courts, as having particular value in motivating management teams. See, e.g., In re Dana Corp., Case No. 06-10354 (BRL) (Bankr. S.D.N.Y. Dec. 18, 2006); In re Musicland Holding Corp., Case No. 06-10064 (SMB) (Bankr. S.D.N.Y. Aug. 11, 2006); In re Calpine Corp., Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. May 15, 2006); In re Refco Finance Inc., Case No. 05-60006 (RDD) (Bankr. S.D.N.Y. Jan. 17, 2006).

33. The Debtors strongly and reasonably believe that the MIP is critical to their ability to maximize returns to creditors. The payments are structured to focus the Key Employees on the execution their duties efficiently and expeditiously. Simply stated, the MIP is necessary and appropriate, because it rewards the Key Employees for maximizing and preserving the value of the estates for the benefit of the Debtors' creditors under very difficult circumstances.

34. The Debtors respectfully submit that the implementation of the MIP is an appropriate exercise of the Debtors' business judgment; is necessary and in the best interest of

the Debtors, their creditors, and their estates; and should be approved under sections 105(a), 363(b) and 503(c)(3) of the Bankruptcy Code.

### **NOTICE**

35. Notice of this Application will be given to: (a) the United States Trustee for the Southern District of New York; (b) counsel to the administrative agent under the Debtors' prepetition credit agreement; and (c) the Debtors' fifty (50) largest unsecured creditors on a consolidated basis. The Debtors submit that, under the circumstances, no other or further notice is required.

36. No previous application for the relief sought herein has been made to this or any other Court.

### **CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form annexed hereto as Exhibit B, granting the relief requested in the Application and such other and further relief as may be just and proper.

Dated: New York, New York  
February 21, 2009

WILLKIE FARR & GALLAGHER LLP  
Proposed Attorneys to Debtors and  
Debtors in Possession

By: /s/ Rachel C. Strickland  
Marc Abrams  
Rachel C. Strickland  
Shaunna D. Jones

787 Seventh Avenue  
New York, New York 10019  
(212) 728-8000