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ATTORNEYS FOR DEBTORS

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

In re: § Chapter 11
Tuesday Morning Corporation, *et al.*,¹ § Case No. 20-31476-HDH-11
Debtors. § Jointly Administered

**AGREED EXPEDITED MOTION UNDER 11 U.S.C. § 365
FOR AUTHORITY TO REJECT EXECUTORY CONTRACT
WITH MCGARRAH JESSE**

**AN EXPEDITED HEARING HAS BEEN REQUESTED ON THIS
MATTER ON AUGUST 19, 2020 AT 2:00 P.M. (CT) AT THE EARLE
CABELL FEDERAL BUILDING, 1100 COMMERCE STREET, 14TH
FLOOR, COURTROOM NO. 3, DALLAS, TEXAS 75242.**

Tuesday Morning Corporation and its debtor affiliates, as debtors and debtors-in-
possession in the above-referenced chapter 11 cases (collectively, the “Debtors”) hereby file this
Agreed Expedited Motion Under 11 U.S.C. § 365 for Authority to Reject Executory Contract

¹ The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: Tuesday Morning Corporation (8532) (“TM Corp.”); TMI Holdings, Inc. (6658) (“TMI Holdings”); Tuesday Morning, Inc. (2994) (“TMI”); Friday Morning, LLC (3440) (“FM LLC”); Days of the Week, Inc. (4231) (“DOTW”); Nights of the Week, Inc. (7141) (“NOTW”); and Tuesday Morning Partners, Ltd. (4232) (“TMP”). The location of the Debtors’ service address is 6250 LBJ Freeway, Dallas, TX 75240.

with McGarrah Jesse (the "Motion"). In support of the Motion, the Debtors respectfully state as follows:

Jurisdiction and Venue

1. The United States District Court for the Northern District of Texas (the "District Court") has jurisdiction over the subject matter of this Motion pursuant to 28 U.S.C. § 1334. The District Court's jurisdiction has been referred to this Court pursuant to 28 U.S.C. § 157 and the District Court's Miscellaneous Order No. 33, *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc* dated August 3, 1984. This is a core matter pursuant to 28 U.S.C. § 157(b), which may be heard and finally determined by this Court. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

2. On May 27, 2020 (the "Petition Date"), the Debtors each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") commencing the above captioned jointly administered cases (the "Chapter 11 Cases"). The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

3. An official committee of unsecured creditors (the "Committee") was appointed in these Chapter 11 Cases on June 9, 2020. No trustee or examiner has been requested or appointed in these Chapter 11 Cases.

4. A detailed description of the Debtors and their business is set forth in greater detail in the *Declaration of Barry Folsie in Support of the Debtors' Chapter 11 Petitions and First Day Motions* (the "Folsie Declaration"), which was filed on the Petition Date and is incorporated by reference in this Motion.

5. The Debtors are party to a letter agreement dated as of February 6, 2017 (as amended, the “Advertising Agreement”), pursuant to which the Debtors retained McGarrah Jesse, L.P. (“McGarrah”) to serve as an advertising agency and to provide related services. The TMI schedules of assets and liabilities [TMI Docket No. 15] (the “TMI Schedules”) list McGarrah as having a prepetition claim in the amount of \$1,007,938. The Advertising Agreement was amended on July 1, 2017 and on July 1, 2018.

6. The Debtors have not been using the services under the Advertising Agreement since the Petition Date. McGarrah asserts that monthly fees have continued to accrue under the terms of the Advertising Agreement at the rate of \$258,075 per month. The Debtors contest that assertion. Due, in part, to the likely amount of the cure obligation associated with assuming the Advertising Agreement, the Debtors do not intend to assume the Advertising Agreement. Because the Debtors are no longer using the services under the Advertising Agreement, the Debtors have entered into arrangements with other third parties to provide marketing services. To facilitate the Debtors’ marketing strategy, the Debtors have asked McGarrah to provide certain content and information (the “Marketing Content”) in McGarrah’s possession. McGarrah has prepared a scope of work outlining the steps that it will take to gather the information and content requested by the Debtors (the “Scope of Work”). A true and correct copy of the Scope of Work is attached hereto as **Exhibit B**. As noted in the Scope of Work, McGarrah has requested payment of a fee of \$12,000 (the “Deliverables Fee”) to compensate McGarrah for the time and expense associated with performing the actions described in the Scope of Work. The Debtors believe that the Deliverables Fee reasonably compensates McGarrah for the work to be performed under the Scope of Work.

7. The Debtors and McGarrah also each believe that it is in the best interests of both parties for the Advertising Agreement to be rejected. McGarrah has agreed to waive its post-petition administrative claims, but not its pre-petition unsecured claims, as part of the termination and resolution of the Advertising Agreement and delivery of the Marketing Content in return for the Deliverables Fee.

Relief Requested

8. The Debtors request the entry of an order, substantially in the form attached to the motion as **Exhibit A** (the “Order”) (i) authorizing the Debtors to enter into the Scope of Work, (ii) to pay the Deliverables Fee, and (iii) to reject the Advertising Agreement effective as of the date the Marketing Content has been delivered to the Debtors (the “Effective Date”).

Basis for Relief Requested

9. Bankruptcy Code § 365(a) provides, in pertinent part, as follows: “the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Rejection under § 365 is generally intended to enable a debtor to relieve itself and the bankruptcy estate from burdensome and unprofitable contracts and leases in order to preserve and maximize the value of the bankruptcy estate. *See Stewart Title Gaur. Co. v. Old Rep. Nat’l Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (noting that Bankruptcy Code § 365 “allows a trustee to relieve the bankruptcy estate of burdensome agreements which have not been completely performed.”) (citation omitted). Bankruptcy courts use the business judgment standard to determine whether to approve a lease or contract rejection. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985) (quoting *Grp. of Inst. Inv. v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 318 U.S. 523, 550 (1943) (“It is well established that ‘the question whether a lease should be rejected . . . is one of business judgment.’”).

10. In addition, “[u]nless a separate provision of the Bankruptcy Code provides a non-debtor party with specific protection, the debtor and its estate's interests are paramount; adverse effects on the non-debtor contract party arising from the decision to assume or reject are irrelevant.” *In re Great Atl. & Pac. Tea Co.*, 544 B.R. 43, 49 (Bankr. S.D.N.Y. 2016); *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 71 (Bankr. S.D.N.Y. 2016); *In re Noranda Aluminum, Inc.*, 549 B.R. 725, 729 (Bankr. E.D. Mo. 2016).

11. The Debtors have determined, in the sound exercise of their business judgment, that entering into the Scope of Work, payment of the Deliverables Fee, and rejecting the Advertising Agreement is in the best interests of the Debtors’ estates and their creditors. The Advertising Agreement is not necessary to the Debtors’ business. The Debtors request that the rejection of the Advertising Agreement be effective as of the Effective Date.

Notice

12. Notice of this Motion will be provided to: (i) the Office of the United States Trustee; (ii) the Debtors’ secured creditors; (iii) any party whose interests are directly affected by this specific pleading, including McGarrah; (iv) those persons who have formally appeared and requested notice and service in these proceedings pursuant to Bankruptcy Rules 2002 and 3017; (v) counsel for the ABL DIP Agent² and DIP Term Agent;³ (vi) counsel for the Committee; (vii) the list of the 20 largest unsecured creditors of each of the Debtors; and (viii) all governmental agencies having a regulatory or statutory interest in these cases (collectively, the “Notice

² “ABL DIP Agent” means JPMorgan Chase Bank, N.A., in its capacity as administrative agent under that certain [Senior Secured Super Priority Debtor-in-Possession Credit Agreement] dated May 27, 2020 between Debtor Tuesday Morning, Inc., as borrower, Guarantors (as defined therein), the DIP Agent, and the lenders party thereto (the “DIP Credit Agreement”).

³ “DIP Term Agent” means Franchise Group, Inc., in its capacities as administrative agent and collateral agent under that certain [DIP Real Estate Facility Credit Agreement], which is the Senior Secured Super Priority Debtor-in-Possession Credit Agreement dated as of July 9, 2020, by and among Tuesday Morning Corporation, as holdings, Tuesday Morning Inc., as borrower, the other Debtors as guarantors, the DIP Term Agent, and the lenders thereto.

Parties”). Based on the urgency of the circumstances surrounding this Motion and the nature of the relief requested herein, the Debtors respectfully submit that no further notice is required.

Conclusion

WHEREFORE, based on the foregoing, 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 7th day of August, 2020.

HAYNES AND BOONE, LLP

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ATTORNEYS FOR DEBTORS

EXHIBIT A

PROPOSED ORDER

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

In re:	§	Chapter 11
	§	
Tuesday Morning Corporation, <i>et al.</i> , ¹	§	Case No. 20-31476
	§	
Debtors.	§	Jointly Administered

**AGREED ORDER GRANTING AGREED EXPEDITED MOTION
UNDER 11 U.S.C. § 365 FOR AUTHORITY TO REJECT
EXECUTORY CONTRACT WITH MCGARRAH JESSE**

Upon the *Agreed Expedited Motion Under 11 U.S.C. § 365 for Authority to Reject Executory Contract with McGarrah Jesse* (the “Motion”)² of Tuesday Morning Corporation, *et al.* (collectively, the “Debtors”); and the Court having jurisdiction to consider the Motion and the

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² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334, and the *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc*, Miscellaneous Rule No. 33 (N.D. Tex. Aug. 3, 1984); and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and it appearing that venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided, and it appearing that no other or further notice need be provided; and the Court having reviewed the Motion; and the Court having held a hearing on the Motion; and all objections, if any, to the Motion have been withdrawn, resolved, or overruled; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. The Debtors are authorized to enter into the Statement of Work and to pay the Deliverables Fee. McGarrah is ordered to comply with its obligations under the Statement of Work and to deliver the Marketing Content upon payment of the Deliverables Fee.
3. Pursuant to Bankruptcy Code § 365 and Bankruptcy Rule 6006, the Advertising Agreement shall be deemed rejected effective as of the date that the Marketing Content is provided to the Debtors (the “Effective Date”), without further order of the Court and without the need for further action by the Debtors or any other party.
4. McGarrah shall not hold any claim entitled to administrative expense priority under Bankruptcy Code § 503(b) or otherwise for any post-petition amounts owed under the Advertising Agreement, except with respect to its entitlement to receive the Deliverable Fee

which shall be satisfied in full upon payment of the Deliverables Fee at the time that the Marketing Content is delivered and is a condition to the delivery of the Marketing Content.

5. McGarrah shall be entitled to file a proof of claim to assert any claims arising under or relating to the Advertising Agreement and McGarrah and the Debtors reserve all rights with respect to that proof of claim. The Debtors and McGarrah likewise reserve all rights with respect to the scheduling of the McGarrah claim in the TMI Schedules, including, without limitation, the Debtors' right to amend, modify, or otherwise alter the TMI Schedules with respect to the McGarrah claim.

6. The Debtors are authorized to execute and deliver all instruments and documents and take any additional actions as are necessary or appropriate to implement and effectuate the relief requested in the Motion.

7. The terms and conditions of this Order shall be effective immediately and enforceable upon entry of this Order.

END OF ORDER

CONSENTED AND AGREED TO BY:

HAYNES AND BOONE, LLP

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ATTORNEYS FOR MCGARRAH JESSE

EXHIBIT B

SCOPE OF WORK

Tuesday Morning Video Asset Recovery and Delivery Scope

Per the request of Tuesday Morning (TUM), McGarrah Jessee (McJ) will deliver assets and confirm all usage rights associated with the following McJ-concepted video projects:

Buyer Stories:

- McJ will deliver all versions and formats of the following video assets:
 - Toy Buyer
 - Pet Goods Buyer
 - Towel Buyer
 - Food Buyer
- The following usage rights must be confirmed, including any third party vendor name(s), contact information, and usage terms (i.e., contract length & expiration dates, approved platform(s)) agreed upon at time of acquisition:
 - Music
 - Sound effects
 - Custom illustrations

Ode to Forgotten Spaces:

- McJ will deliver all versions and formats of the following video assets:
 - Living Room
 - Bedroom
 - Patio
- The following usage rights must be confirmed, including any third party vendor name(s), contact information and usage terms (i.e., contract length, expiration date(s), approved platform(s)) agreed upon at time of acquisition:
 - Talent name(s)
 - Talent representative(s) at time of contract
 - Music
 - Sound effects

Norway:

- McJ will deliver all versions and formats of the following video assets:
 - Tree
 - Stocking
- The following usage rights must be confirmed, including any third party vendor name(s), contact information and usage terms (i.e., contract length, expiration date(s), approved platform(s)) agreed upon at time of acquisition:
 - Talent name(s)
 - Talent representative(s) at time of contract
 - Music
 - Sound effects

TUM will be responsible for negotiating and confirming costs for any additional usage needs associated with the assets listed above.

The statement of work below outlines roles and responsibilities for the McGarrah Jessee team based on the deliverables above.

Integration

Serve as the primary client interface, ensuring alignment between McJ and TUM. Responsibilities include:

- Account administration, communication and monitoring, including development and distribution of necessary assignment documentation such as timelines, meeting recaps, next steps, etc.
- Collaborate with integrated teams to develop assignment plans and estimates for all deliverables, ensuring alignment before initiation as needed
- Invoice reviews and approvals
- SOW writing

Project Management

Support integrated teams and ensure timely and successful delivery of all media plans and assets. This includes the following:

- Project planning, scheduling and budgeting
- Monitor and track all scoped hours
- Hours budget reconciliation for internal and client teams
- Quality assurance and/or proofing of all assets
- Identify and secure internal resources (i.e. project manager, post production producer, executive producer)

Video Production

Support integrated teams and ensure timely and successful delivery of all media plans and assets. This includes the following:

- Locate, confirm and gather all file formats and creative versions in preparation for delivery
- Identify the best possible asset delivery method
- Review and document all current usage rights
- Confirm file formats and creative versions

Fees

Listed below are fees associated with the deliverables outlined in this document.

Total fees: \$12,000.00

Any deliverables, roles or responsibilities not listed in this document will be considered out of scope and will incur incremental costs.