

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

In re:)	Chapter 11
)	
)	Case No. 18-11272 (LSS)
CSH WINDDOWN, INC., et al.,)	
)	(Jointly Administered)
)	
Debtors. ¹)	Hearing Date: September 17, 2021 at 10:00 a.m. (ET)
)	Obj. Deadline: September 10, 2021 at 4:00 p.m. (ET)

**WIND-DOWN ADMINISTRATOR’S MOTION TO ADDRESS UNLIQUIDATED
SECURED CLAIMS OF CERTAIN INSURANCE COMPANIES**

Beane Associates, Inc., as the Wind-Down Administrator (“**Wind-Down Administrator**”), of the debtors (“**Debtors**”), moves this Court (the “**Motion**”) pursuant to sections 105(a) and 501 et seq. of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”) and Rule 3001 et seq. of the Rules of Bankruptcy Procedure, for an order addressing unliquidated secured claims of certain insurance companies (i) to permit such insurers to process and pay third-party claims covered under applicable insurance policies, in the ordinary course of their businesses, and to permit persons or entities asserting such claims to prosecute such claims, in each case without requiring an order for relief from the automatic stay or plan injunction, as applicable, (ii) to provide for the unliquidated secured claims of such insurers to be marked as “satisfied,” “satisfied in accordance with the treatment in the Plan and Confirmation Order” or to be withdrawn, and to permit such insurers to apply the collateral and other security that they hold now or in the future (the “**Collateral**”) by such insurers in satisfaction of their secured claims without first seeking relief from this Court, (iii) to the extent that any of the

¹ The Debtors and the last four digits of their federal taxpayer identification numbers are: CSH Wind-Down, Inc. (f/k/a Color Spot Holdings, Inc.) (7061); CSN Wind-Down, Inc. (f/k/a Color Spot Nurseries, Inc.) (3266); HG Wind-Down, Inc. (f/k/a Hines Growers, Inc.) (5946); and LSG Wind-Down, Inc. (f/k/a Lone Star Growers, Inc.) (4748). The office of the Wind-Down Administrator, which is winding down the debtors’ affairs, is 22 The Commons, 3518 Silverside Road, Wilmington, Delaware 19810-4907.

policies issued by such insurers to the Debtors and/or any related agreements (collectively, “**Insurer Agreements**”) provide for arbitration, all parties’ rights to assert or dispute the enforceability of such arbitration provisions are preserved and (iv) to direct such insurers to pay any excess Collateral that they may hold directly to Wells Fargo Bank, N.A. (“**Wells Fargo**”), as the holder of first priority, unavoidable security interests in substantially all of the Debtors’ assets, as and when may be required under the applicable Insurers Agreements and applicable law. In support of this motion, the Wind-Down Administrator states:

INTRODUCTION

1. By this Motion, the Wind-Down Administrator is asking the Court (i) to permit the Insurance Companies (as hereafter defined) to process and pay third-party claims covered under applicable insurance policies, in the ordinary course of their businesses, and to permit persons or entities asserting such claims to prosecute such claims, in each case without requiring an order for relief from the automatic stay or plan injunction, as applicable; (ii) to provide for the unliquidated secured claims of Arrowood Indemnity Company (f/k/a Royal Insurance Company of America) (Claim No. 10) (“**Arrowood**”); XL Insurance America, Inc. (Claim Nos. 414, 417, 420, 423)(“**XL Insurance**”), XL Specialty Insurance Co. (Claim Nos. 415, 418, 421, 424)(“**XL Specialty**”), Greenwich Insurance Company (Claim Nos. 416, 419, 422, 425)(“**Greenwich**,” and along with XL Insurance and XL Specialty, “**XL Catlin**”); AIG Property Casualty Inc. (Claim Nos. 10102, 10103, 10104, 10105 and 10146) (“**National Union**,”² and along with Arrowood and XL Catlin, the “**Insurance Companies**”), to be marked as “satisfied,” “satisfied in accordance with the treatment in the Plan and Confirmation Order” or to be withdrawn, and to

² Upon information and belief, National Union Fire Insurance Company of Pittsburgh, Pa. is a member company of American International Group, Inc. (AIG).

permit such Insurance Companies to apply the Collateral held by such Insurance Companies in satisfaction of their secured claims without first seeking relief from this Court; (iii) to the extent that any of the Insurer Agreements provide for arbitration, all parties' rights to assert or dispute the enforceability of such arbitration provisions are preserved; and (iv) to direct such Insurance Companies to pay any excess Collateral that they may hold directly to Wells Fargo, as the holder of first priority, unavoidable security interests in substantially all of the Debtors' assets, as and when may be required under the applicable Insurer Agreements and applicable law. The Wind-Down Administrator believes that proceeding in this fashion will hasten the closing of this case, by obviating the need to keep it open pending the conclusion of all lawsuits, proceedings or third-party claims against the Debtors that are being processed by the Insurance Companies.

JURISDICTION AND VENUE

2. The Court has jurisdiction of this proceeding arising in these cases under the Bankruptcy Code under 28 U.S.C. §§ 157(b)(2)(G) and 1334(b), and this proceeding may be commenced in this Court, which is where these cases are pending, under 28 U.S.C. § 1409(a).

BACKGROUND³

3. On May 29, 2018 (the "**Petition Date**"), the Debtors filed their voluntary Chapter 11 petitions with this Court.

4. On June 22, 2018, the Court entered an order permitting the Debtors to pay prepetition employee obligations in their discretion, including but not limited to payments for workers' compensation claims, deductibles and fees owed for administrative costs, and other

³ The following description of these cases, including the Plan and the Confirmation Order, is a summary only. Reference is made to the docket in these cases and to the documents entered thereon, including the Plan and the Confirmation Order, for the full contents thereof.

amounts required in connection with the Workers' Compensation Program as such amounts become due in the ordinary course of the Debtors' business. ("**Employee Obligations Order**").⁴

5. On July 25, 2018, the Court authorized the Debtors to sell substantially all of their assets free and clear of almost all interests under an asset purchase agreement with Wells Fargo Bank, N.A. ("**Wells Fargo**") by entering the *Order (I) Approving Asset Purchase Agreement and Authorizing Sale of Certain Assets Outside the Ordinary Course of Business; (II) Authorizing the Sale of Assets Free and Clear of all Encumbrances; (III) Authorizing the Assumption, Sale and Assignment of Certain Executory Contracts and Unexpired Leases; and (IV) Granting Related Relief*.⁵

6. On November 29, 2018 (the "**Confirmation Date**"), the Court confirmed the Plan by entering the *Findings of Fact, Conclusions of Law and Order Confirming Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation Proposed by the Debtors*⁶ (the "**Confirmation Order**").

7. On December 31, 2018 (the "**Effective Date**"), the Plan became effective.⁷

8. The Plan provides in pertinent part that as to insurance, "[c]onfirmation of this Plan and the occurrence of the Effective Date shall have no effect on insurance policies of the Debtors in which the Debtors are or were insured parties" and that the Insurance Companies are

⁴ D.I. 111. "Employee Obligations" is defined in the motion seeking such order as "prepetition obligation incurred in relation to Compensation Obligations, Deductions and Payroll Taxes, Supplemental Workforce Obligations, Reimbursable Expenses, Severance Practices, Equity Incentive Program, Employee Benefits, and Workers' Compensation Program (each as herein defined and, together with all fees, costs and expenses, including amounts owed to third-party administrators, the 'Employee Obligations')." D.I. 9.

⁵ D.I. 243.

⁶ D.I. 479.

⁷ See Notice of (I) Entry of Findings of Fact, Conclusions of Law and Order Confirming Second Amended Combined Disclosure Statement and Joint Chapter 11 Plan of Liquidation Proposed by the Debtors; (II) Occurrence of Effective Dates Thereunder; and (III) Related Deadlines at 1, D.I. 503 ("[T]he Effective Date of the Plan under the Confirmation Order was December 31, 2018.").

“prohibited from, and the Confirmation Order shall include an injunction against, denying, refusing, altering or delaying coverage on any basis regarding or related to these Chapter 11 Cases, this Plan or any provision within this Plan, including the treatment or means of liquidation set out within this Plan for insured Claims.”⁸

9. The Plan provides that with respect to workers’ compensation matters, any injunctions or stays are modified to permit the Debtors’ employees to proceed with their claims and to allow XL Catlin and National Union to administer them.⁹ The Plan contains no similar provisions for non-workers’ compensation claims.

10. As to XL Catlin, the Plan provides in pertinent part that “XL Catlin shall pay directly to Wells Fargo any amounts, if any, which XL Catlin may owe to the Debtors under the XL [insurance] Agreements.”¹⁰

11. As to National Union, the Plan provides in pertinent part that “National Union shall pay directly to Wells Fargo any amounts, if any, which National Union may owe to the Debtors pursuant to the National Union Agreements.”¹¹

12. The Plan does not have similar provisions for Arrowood, nor does the Plan state whether the bankruptcy case must remain open until the Insurance Companies have resolved all third-party claims. Such ultimate resolution will enable the Insurance Companies to determine whether they have, or the amount of, any excess collateral for remittance to Wells Fargo.

13. Until the Effective Date, the Debtors managed their affairs as debtors in possession under Sections 1107(a) and 1108 of the Bankruptcy Code. On the Effective Date, the

⁸ D.I. 479-1 at ¶ 16.9.

⁹ D.I. 479-1 at ¶¶ 16.9(a)(ii) and 16.9(b)(ii).

¹⁰ D.I. 479-1 at ¶ 16.9(a)(iv).

¹¹ D.I. 479-1 at ¶ 16.9(b)(iv).

Debtors ceased to be debtors in possession pursuant to Paragraph 6 of the Confirmation Order and became the Post-Effective Date Debtors under Sections 1.71 and 9.2(a) of the Plan, and further Beane Associates, Inc. became the Wind-Down Administrator under Paragraph 7 of the Confirmation Order and Sections 1.99 and 9.2(b) of the Plan.

14. As of the Petition Date, the Debtors' operations were covered by various insurance policies, including those issued by the Insurance Companies. Those policies covered the Debtors for third-party claims such as workers' compensation, automobile liability, and other claims of a tort nature.

15. As of the Petition Date, each of the Insurance Companies held cash collateral and/or letters of credit issued by Wells Fargo (the Debtors' principal secured creditor). The cash collateral and/or letters of credit were posted in order to secure the Debtors' self-insured and other obligations under the Insurer Agreements issued by the Insurance Companies (the "**Debtors' Obligations**").¹²

16. Each of the Insurance Companies filed one or more secured proofs of claim as follows: Arrowood (Claim No. 10), XL Insurance (Claim Nos. 414, 417, 420, 423), XL Specialty (Claim Nos. 415, 418, 421, 424), Greenwich (Claim Nos. 416, 419, 422, 425) and National Union (Claim Nos. 10102, 10103, 10104, 10105 and 10146) (collectively, the "**Proofs of Claim**"). The Proofs of Claim are unliquidated because the amount of third-party claims the Insurance Companies will ultimately pay will not be known until all the claims of the third-party claimants have been determined. This could take years. And because those claims are still being processed, it is not yet known if any of the Insurance Companies will be found to be over-

¹² Nothing herein shall be construed to waive or modify the parties' rights and obligations under the applicable Insurer Agreements and all parties' rights and remedies shall be preserved.

secured, thus entitling the Debtors' estates to a refund (which refund would then revert to Wells Fargo under the Plan).

17. By contrast, it is possible that the Collateral held by one or more of the Insurance Companies will be insufficient to pay all of the claims being processed, in which case such Insurance Company would be under-secured, and hold a deficiency (general unsecured) claim¹³.

18. The Plan provides, in pertinent part, that "Holders of General Unsecured Claims shall receive no Distribution on account of such General Unsecured Claims."¹⁴ Since Wells Fargo is itself grossly under-secured, no holders of general unsecured claims, including the Insurance Companies (if they are under-secured), will receive any distribution from the Debtors' estates.

19. The Wind-Down Administrator has addressed and resolved almost all of the 602 proofs of claim filed in this case (there has been no need to file objections to claims that only assert a general unsecured claim, since there will be no distribution to the holders of such claims).

20. All secured claims (other than those of Wells Fargo and the Insurance Companies), have been resolved, either consensually or through objection. As to the secured claims of Wells Fargo, the Wind-Down Administrator anticipates executing a stipulation which will acknowledge the approximate amount of the debt owed to Wells Fargo, that Wells Fargo's

¹³ The Wind-Down Administrator does not expect that there will be many newly-asserted third-party claims, and in the past several months, has agreed to a handful of stipulations granting relief from the Plan Injunction (and the automatic stay under § 362 of the Bankruptcy Code). Given the length of time since the Petition Date, and applicable state statutes of limitations, it is unlikely that there will be many more third-party claims asserted. The Wind-Down Administrator is unaware of any additional asserted or potential claims and demands which could be made against the Insurance Companies beyond those which have already been reported to them. The Plan provides at section 14.2 that all stays and/or injunctions remain in force until the closing of this case ("All injunctions or stays provided for in these Chapter 11 Cases under sections 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the confirmation Date, shall remain in full force and effect until the closing of the Chapter 11 Cases.").

¹⁴ D.I. 479-1 at par. 7.4 (Class 4: General Unsecured Claims).

claims are secured, and that any funds (in addition to those already in the possession of the Wind-Down Administrator and/or Wells Fargo), which may later come into the estate, will be subject to Wells Fargo's liens and will be either turned over by the Wind-Down Administrator to Wells Fargo or instructed to be paid directly to Wells Fargo.

21. All or substantially all priority claims have been paid in full or are in the process of being finally determined and paid. Any such priority claims which may hereafter be asserted likely will be objected to, as being time barred or otherwise not allowable.

22. All administrative claims have been paid in full, or, as to any which may later be asserted, will be objected to for, among other reasons, being time-barred or otherwise not entitled to payment.

23. Given that substantially all of the proofs of claim have been addressed or are in the process of being resolved, the Wind-Down Administrator wishes to file a motion closing these cases. This will serve to reduce the ongoing professional fees of the Wind-Down Administrator, as well as eliminate post-confirmation UST quarterly fees. To this end, the Wind-Down Administrator and its counsel are in the process of evaluating all other matters which they believe must be attended to in order to close these cases.

24. The Wind-Down Administrator believes that the only significant obstacle to closing these cases is the inability to timely liquidate the secured claims of the Insurance Companies. The Wind-Down Administrator's representatives have been in ongoing communications with representatives of Wells Fargo and the Insurance Companies, and believe that Wells Fargo and each of the Insurance Companies agree (subject to entry of an order hereon in form and substance satisfactory to each of them in their sole and absolute discretion) that it makes sense to permit the Insurance Companies to continue to process claims (which are their

responsibility under the applicable policies of insurance), to apply the Collateral to the Debtors' Obligations and to pay any excess Collateral that they may hold directly to Wells Fargo, as the holder of first priority, unavoidable security interests in substantially all of the Debtors' assets, as and when such payment of any excess Collateral may be required under the applicable Insurer Agreements and applicable law, without the need for intervention by this Court. Similar to the provisions in the Plan which modify the Plan injunction and automatic stay to permit workers' compensation claims to proceed, such modifications to the Plan injunction and automatic stay should be extended to all insurance claims to permit the orderly administration of such claims. Further, by permitting any person who has not yet asserted an insured claim against the estates to do so without first obtaining an order for relief from this Court (whether before or after the cases are closed), needless administrative expenses can be avoided. All defenses, including those based on timeliness, will, of course, be preserved such that no prejudice to the Insurance Companies will be created by permitting such claimants to proceed.

25. The Wind-Down Administrator believes that the most efficient way to accomplish the mutual goals of reducing administrative expenses and preserving all parties' rights and remedies¹⁵ is through this motion and the proposed form of order granting it.

CONSENT AND/OR NON-OBJECTION OF AFFECTED PARTIES

26. The Wind-Down Administrator represents that counsel for Wells Fargo and each of the Insurance Companies, respectively, have reviewed this Motion and the proposed Order hereon, and have indicated that they consent to and/or do not oppose the relief requested herein, provided, however, that in making this representation, the Wind-Down Administrator does not

¹⁵ Some or all of the Insurer Agreements contain arbitration provisions. The proposed form of order makes clear that all parties' rights to assert or dispute the enforceability of such provisions are preserved.

intend to limit any party's right to respond to any pleading which may be filed in response to this Motion.

RELIEF REQUESTED

27. By this motion, the Wind-Down Administrator asks the Court to enter an order (“**Proposed Order**”):

- (i) to permit the Insurance Companies to process and pay third-party claims covered under applicable insurance policies, in the ordinary course of their businesses, and to permit persons or entities asserting such claims to prosecute such claims, in each case without requiring an order for relief from the automatic stay or plan injunction, as applicable;
- (ii) to provide for the unliquidated secured claims of the Insurance Companies to be marked as “satisfied,” “satisfied in accordance with the treatment in the Plan and Confirmation Order” or to be withdrawn, and to permit such Insurance Companies to apply the Collateral in satisfaction of their secured claims in connection with the Debtors’ Obligations without first seeking relief from this Court;
- (iii) to the extent that any of the Insurer Agreements provide for arbitration, all parties’ rights to assert or dispute the enforceability of such arbitration provisions are preserved; and
- (iv) to direct such Insurance Companies to pay any excess Collateral that they may hold, if any, directly to Wells Fargo, as the holder of first priority, unavoidable security interests in substantially all of the Debtors’ assets, as and when such payment of any excess Collateral may be required under the applicable Insurer Agreements and applicable law.

NOTICE

28. Notice of this motion will be given to: the U.S. Trustee, Wells Fargo, counsel for the Insurance Companies, and all creditors who requested noticed in accordance with Bankruptcy Rule 2002.

29. No other notice is needed under Bankruptcy Rule 9006(b)(1), which requires no notice of this motion, and Section 11.1 of the Plan, which requires the Wind-Down Administrator to give notice of this motion to “those Creditors who requested notice in accordance with Bankruptcy Rule 2002.”¹⁶

CONCLUSION

WHEREFORE, the Wind-Down Administrator asks the Court to enter an order, substantially in the form of the Proposed Order in substantially the form provided with this Motion.

Respectfully submitted,

MCELROY, DEUTSCH, MULVANEY
& CARPENTER, LLP

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¹⁶ Plan at § 11.1, at 51, D.I. 479-1.

-and-

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*Counsel to Beane Associates, Inc., as the Wind-Down
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Dated: August 30, 2021