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Lisa L. Lambert,  
for the United States Trustee

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

**In re:**

**NATIONAL RIFLE ASSOCIATION OF  
AMERICA and SEA GIRT LLC**

**Debtors.**

**Chapter 11**

**Case No. 21-30085-hdh11**

**Jointly Administered**

**UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' PROPOSED  
RETENTION OF CHIEF RESTRUCTURING OFFICER**

TO THE HONORABLE HARLIN D. HALE,  
UNITED STATES BANKRUPTCY JUDGE:

The United States Trustee for Region 6 files this Objection to the Application of the Debtors for an Order Authorizing the Retention and Employment of Ankura Consulting Group, LLC and Appointment of Louis E. Robichaux IV as the Debtors' Chief Restructuring Officer [dkt.# 519] ("CRO Application"), and respectfully states:

**SUMMARY OF ARGUMENT**

1. Parties before the Court have sought a range of statutory remedies, including dismissal of the case, the appointment of a trustee, and the appointment of an examiner, to address their various complaints. Although the parties' motions seek different remedies, each with its own twist, underlying all of them are allegations that the

NRA's management, specifically a close circle of executives, together with the Brewer firm, acted outside appropriate board supervision to improperly file these cases and abuse the NRA. At the same time, the NRA contends that its corporate governance practices have improved and that the management team and the activities of the Brewer firm are well-established, fully board-supported, and integral to the future of the NRA.

2. The debtors, with the support of the unsecured creditors' committee, now seek to retain a CRO to address these competing concerns and allegations and "to provide assurance to creditors, parties in interest and the Court that there is an independent fiduciary overseeing these proceedings."<sup>1</sup> CRO Application at 3, ¶ 9. The Court should decline, however, to authorize the CRO retention because the CRO as a proposed remedy for these complaints lies outside the Bankruptcy Code's expressly-provided and well-established remedies. Authorizing the retention of the CRO as requested will not resolve these complaints, provide meaningful independent "oversight," or clarify management's authority and structure but, instead, will muddy the waters and confuse the existing management framework.<sup>2</sup>

3. Because the CRO as proposed does not resolve the issues raised by the parties, the debtors cannot show that the expenditure contemplated for the CRO is an appropriate exercise of the debtors' business judgment necessary under section 363(b). Instead, the CRO, who is to be retained essentially as a consultant reporting to the special litigation committee, will just add another layer to the already staggering professional

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<sup>1</sup> On March 28, 2021, after the petition date, the board met and resolved to ratify the chapter 11 filing and continued retention of the Brewer firm. The board did not in its March 28, 2021, meeting fill the critical vacant treasurer position.

<sup>2</sup> The U.S. Trustee by this Response does not take a position regarding the merits of the various parties' allegations but instead reserves any right to assert a position, if any, at the conclusion of the presentation of evidence on these matters and refers the Court to the U.S. Trustee's Comment Regarding Examiner, Trustee, or Dismissal (dkt. #405).

expenses being incurred in these cases. The NRA's request to hire a CRO at this late hour should be viewed as a brazen attempt to short-circuit an on-going trial and to defeat the statutory remedies under consideration by the Court.

## **ARGUMENT**

### **A. CRO Application Does Not Meet Section 363's Business Judgment Standard**

4. The debtors seek to retain the CRO under section 363, which requires court permission before expending estate funds outside of the ordinary course of business. *In re Asarco, L.L.C.*, 650 F.3d 593, 601 (5th Cir. 2011) (providing that section 363 of the Bankruptcy Code authorizes the use, sale, or lease of estate property subject to a business judgment standard). In applying the "business judgment" standard, the Court should not function as a rubber stamp for the debtors. Subsection 363(b) provides that a debtor-in-possession "after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ." In such circumstances, "for the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business." *In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986). "The bankruptcy judge 'should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike.'" *Id.* (quoting *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir.1983)).

5. Requiring court approval of transactions outside the debtor's ordinary course of its business "protects the estate from activities which pose unnecessary risk to its corpus." *Willow Bend Ventures, LLC v. River Parishes Dirt and Gravel, LLC (In re*

*Willow Bend Ventures, LLC*), Adv. No. 18-1133, 2019 WL 2252498, at \*11 (Bankr. E.D. La. May 24, 2019) (footnote omitted).<sup>3</sup>

6. In addition to not rubber stamping a debtor's decisions under the business judgment standard, courts also "should not rely on the business judgment of conflicted insiders and [should] instead make their own determination as to whether the transfer or obligation is 'justified.'" *Id. at 12*. Although the facts in *Willow Bend* are somewhat complicated, the court had to determine whether a counterparty to a purchase agreement for a member interest in the debtor had an administrative expense priority for its damages claim. Applying an after-the-fact analysis, the court evaluated whether the non-ordinary course transaction (that was not approved by the court) *could have been approved* in accordance with the debtor's business judgment. Because the debtor's principal had a personal interest in the matter, the court found it had to make an independent determination of whether the transaction was justified by the facts and circumstances of the case. *See* 11 U.S.C. §503(c)(3). Although the court acknowledged that section 503(c)(3) is commonly cited with respect to employee compensation matters, it found that the section applies to other non-ordinary course transactions, particularly those that may implicate the interests of powerful insiders. 2019 WL 2252498, at \*11. Here, there are multiple allegations of irregularities regarding debtors' management, some of which the debtors have admitted. The Court, therefore, should not defer to the debtors' business

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<sup>3</sup> The terms of engagement seek approval of the CRO's retention under Bankruptcy Code section 363 and pre-approval of compensation under section 328(a), with no review under section 330 of either the proposed CRO's hourly fee of \$1,155, capped monthly at an adjusted 40 hours weekly, or the \$1,000,000 restructuring fee earned and payable with any plan confirmed by the debtors. The U.S. Trustee objects to the restructuring fee as all chapter 11 cases contemplate confirmation of a plan of reorganization.

judgment on whether this proposed engagement is appropriate given the facts and circumstances of this case.

7. In the instant case, the debtors explain that the proposed retention of the CRO is “necessary to the successful administration of these Chapter 11 Cases, and to provide assurance to creditors, parties in interest and the Court that there is an independent fiduciary overseeing these proceedings, the Debtors’ reorganization, and the Debtor’s financial operations.” CRO Application at 3, ¶ 9. The Court should deny the motion because the CRO as requested would not be an independent fiduciary providing oversight of these proceedings, but rather reports to the same allegedly tainted management and its special litigation committee (“SLC”). In fact, a CRO retained under Bankruptcy Code section 363 has fewer oversight and disclosure requirements than the professionals already retained under section 327. The bottom line is that the proposed retention of a CRO is an artifice to evade the Code-based remedies for investigating or replacing management against whom serious allegations have been asserted.

**B. Proposed CRO is an End Run Around Bankruptcy Code’s Protections and Remedies for Stakeholders**

8. The CRO is an extra-statutory remedy, will add unnecessary ambiguity to the prosecution of the cases, and does not resolve the alleged underlying complaints and concerns before the Court.

9. When a debtor’s management is alleged to be compromised, the Bankruptcy Code specifically provides for the appointment of a trustee or an examiner in a chapter 11 case if the allegations are proved. Under section 1104, the Court shall direct the appointment of a trustee based on either (1) cause, including fraud, dishonesty,

incompetence, or gross mismanagement, or (2) the best interest of creditors. If the Court does not order the appointment of a trustee, to the extent a requesting party-in-interest meets the burden of section 1104(c), the Court shall order the appointment of an examiner. There is no Code provision that allows the appointment of a CRO or “quasi-trustee” once the Court determines a trustee or examiner is required. When the language of a statute is plain, a court must enforce that statute according to its terms. *See Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 1030, 157 L.Ed.2d 1024 (2004).

10. In these cases, the proposed CRO’s terms of engagement and the unresolved questions about how the CRO will work within the NRA’s existing management scheme both appear to impair the alleged goal of providing independent oversight.<sup>4</sup>

11. The CRO’s terms of engagement provide, among other things, that the CRO “will report directly to the SLC” and that in the event of a disagreement between the CRO and management, “the CRO may at his discretion bring the matter to the SLC for final determination.” Dkt. # 519-2 at 23 of 24. The CRO engagement further provides that the CRO may “subject to settlement authority thresholds and guidance from the SLC, lead the [NRA]’s efforts to resolve claims and controversies which have material connections to the Chapter 11 restructuring process.” *Id.*

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<sup>4</sup>It is not clear whether the NRA’s bylaws permit the creation of a chief restructuring officer position. The NRA’s most recent Bylaws incorporate input from the NRA’s membership and confer limited authority to officers and committees. The NRA’s Bylaws state that certain “AMENDMENTS IN BOLD FACE ITALICS SHALL NOT BE REPEALED OR AMENDED BY THE BOARD OF DIRECTORS.” Instead, Article XV, Section 4, reserves authority to amend bylaws in bold and italics to the NRA’s membership. Article V, Section 1(b), describes the specific officer positions, and in bold italics, states “*The Board may not abolish said offices nor create any other offices.*” The Bankruptcy Code does not confer authority on a bankruptcy court to fill “positions [that are creatures of state law], or to bypass the procedures that the state statutes mandate.” *In re 1031 Tax Group, Inc.*, No. 07–11448, 2007 WL 2085384, \*3 (Bankr. S.D.N.Y. Jul. 17, 2007) (conditionally approving retention on debtors “taking all required actions under applicable state laws to amend their organizational documents or take such other actions as are required properly to select or elect” the proposed manager or director).

12. Even to the extent the CRO reports to the SLC, the CRO is not independent because the SLC is a creature of the board and current management and can be terminated by the board and current management. The SLC itself, as a special committee, possesses only limited powers under the NRA's bylaws.<sup>5</sup> Although it is very hard to trace lines of authority within the NRA given the complex array of authorities emanating from the bylaws to the membership, board, executive committee, standing and special committees, and employees, it is clear from the application that the CRO is not independent and probably cannot be independent absent additional eleventh hour changes to the corporate governance structure of the NRA, if permitted at all under the applicable state corporate law.

13. The NRA has already admitted at trial in this case that serious financial irregularities occurred and continued. On April 7, 2021 – a day when Mr. LaPierre was testifying -- Mr. LaPierre finally signed and submitted the NRA 2021 financial disclosure of interest (NRA Ex. 661), revealing several personal benefits linked to NRA vendors -- including multiple trips on a yacht. These irregularities allegedly were committed by, or occurred under the oversight of, the same NRA management and corporate governance bodies to which the CRO would report. NRA management and board entities allegedly have been tainted, and if an investigation or independent fiduciary is required, then that fiduciary cannot be a creature of the NRA but must be an independent fiduciary provided for by the Bankruptcy Code.

14. Furthermore, the CRO Application and proposed retention leave many essential questions unanswered, such as the following: Does the CRO have authority

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<sup>5</sup> Article XI, Section 5, Limitations on Powers of Committees, states that no special committee can exercise any powers prohibited to the Executive Committee.

over the Brewer firm's ongoing work? Does the NRA's Executive Vice President retain the ability to fire any employee or officer as provided by the bylaws?<sup>6</sup> Does the SLC operate independently from other executive officers on non-litigation matters?<sup>7</sup> Does the CRO have any investigatory authority?

15. The CRO, as proposed, therefore, is not an independent fiduciary separate from management with meaningful "oversight" or investigative authority over "these proceedings" but, instead, will provide the debtor's existing management with services like those currently provided by Debtors' two bankruptcy counsel, proposed special counsel, financial advisors, and other professionals. In fact, the indemnification and fee protections contemplated for the proposed CRO for its representation of the debtors insulates the CRO to a greater degree than the other professionals.<sup>8</sup>

### CONCLUSION

16. The Court should deny the proposed appointment of a CRO as the means to address the conflicts and allegations raised by the parties currently being litigated. A CRO will not solve these conflicts but will instead cloud the existing governance scheme and create numerous additional questions of authority that, in practice, will be resolved in

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<sup>6</sup> Bylaws at 17. The Executive Vice President, in addition, is empowered to suspend officers with pay, including the Secretary or the Treasurer and to "employ, suspend with or without pay, or dismiss any employee."

<sup>7</sup> The Bylaws provide for special committees, like the special litigation committee, and limits the authority of such committees to no greater than the Executive Committee to direct the affairs of the NRA. There is no indication that management or the Board would be divested of any authority, including the authority to oversee and eliminate the CRO.

<sup>8</sup> The U.S. Trustee objects to employment of Ankura Consulting Group, LLC, the entity, pursuant to Bankruptcy Code section 363, as opposed to section 327. The U.S. Trustee would also seek additional disclosure of disinterestedness, including the methodology employed to search for possible conflicts. Importantly, under Bankruptcy Rule 2014, Ankura is required to disclose all connections with the debtors, creditors, and professionals employed in the case, including professionals employed by the Unsecured Creditors Committee, which was integrally involved in selecting the CRO. CRO Application, para.10.

an unorganized and ad-hoc manner behind the scenes. The Bankruptcy Code provides for clear remedies with clear authority and clear precedence, and the Court, for the benefit of all parties-in-interest, should consider only those remedies and deny the proposed CRO appointment.

DATED: April 14, 2021

Respectfully submitted,

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UNITED STATES TRUSTEE

/s/ Lisa L. Lambert

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**Certificate of Service**

I certify that on April 14, 2021, I served a true copy of this document by electronic case filing on those requesting electronic case filing notice.

/s/ Lisa L. Lambert

Lisa L. Lambert