IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
TLC VISION (USA) CORPORATION, *et al*.,	:	Case No. 09-14473 (KG)
	:	Jointly Administered
Debtors	:	
	:	**Requested Hearing Date: March 9, 2010 at 2:00 p.m.**
	:	**Requested Objection Deadline: March 5, 2010 at 4:00 p.m.**

MOTION OF STRATEGIC TURNAROUND OPPORTUNITY FUND, L.P., STRATEGIC TURNAROUND EQUITY PARTNERS, L.P. (CAYMAN), TRINAD CAPITAL MASTER FUND LTD., REXON GALLOWAY CAPITAL GROWTH, LLC, RED OAK FUND L.P., PINNACLE FUND LLLP, BRUCE GALLOWAY ROLLOVER IRA, SARA GALLOWAY ROLLOVER IRA, GARY HERMAN IRA, INVENTRON, LTD. (ENERGY), LORRAINE HERMAN AND LARRY HOPFENSINGER FOR AN ORDER APPOINTING AN EQUITY COMMITTEE

TO THE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE:

Strategic Turnaround Opportunity Fund, L.P., Strategic Turnaround Equity Partners, L.P. (Cayman), Rexon Galloway Capital Growth, LLC, Trinad Capital Master Fund Ltd., Red Oak Fund, L.P., Pinnacle Fund, LLLP., Bruce Galloway Rollover IRA, Sara Galloway Rollover IRA, Gary Herman IRA, Inventron, Ltd. (Energy), Lorraine Herman and Larry Hopfensinger (the "Shareholders"), holders of the common stock of TLC Vision Corporation ("TLCV", and together with TLC Vision (USA) Corporation and TLC Management Services, Inc., the "Debtors"), by and through their undersigned counsel, respectfully submit this motion (the "Motion") for an order appointing an official committee of equity security holders in the above-captioned chapter 11 cases. In support of the Motion, the Shareholders respectfully represent as follows:

PRELIMINARY STATEMENT

The Shareholders, who own approximately 6 million shares, or approximately 12%, of the common stock of TLCV, request that an official committee of equity holders be appointed immediately for the purpose of securing independent representation for public shareholders at this crucial stage of this chapter 11 proceeding.

It is clear that the Debtors' 700 equity holders are in the money. Over the last several weeks, the Debtors have entered into a series of plan support agreements that contemplated the restructuring of the Debtors' operations and the issuance of equity in the reorganized debtors to different plan sponsors. Each successive proposal has marked a significant improvement over the prior proposed plans in terms of value to the estates. The latest plan, sponsored by Charlesbank[1] and HIG, an affiliate of the Debtors' majority prepetition lender, provides for a (i) 100% return to unsecured creditors (based on the Debtors' projections of the unsecured claims pool in the Charlesbank/HIG Plan) and (ii) distribution to TLCV's equity holders of their *pro rata* share of $287,500 in the likely event that TLCV's unsecured creditors vote in favor of the Plan. The Charlesbank/HIG Plan provides far more value to the estates than the initial plan filed by the Debtors at the outset of these cases, which capped unsecured creditor recoveries at 10% and provided nothing for equity holders.

These recent developments validate the Shareholders' long-standing position that the Debtors' equity maintains significant value even with the company in bankruptcy, and demonstrate that multiple parties are intent on realizing that value. The issue going forward in these cases is not whether the Debtors are solvent, but how best to utilize the chapter 11 process to maximize and preserve the Debtors' substantial going concern value for the benefit of the

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[1] All capitalized terms hereinafter defined.

Debtors' estates, including existing equity holders. In order to achieve this outcome, the appointment of an equity committee is essential.

While in theory, the Debtors have a fiduciary duty to maximize asset values for the benefit of their shareholders, in practice the chapter 11 process does not ensure that equity interests are fairly represented by a debtor's management. In these cases, the Debtors have indicated that their primary concern is the confirmation of a plan of reorganization, which is heavily dependent upon the support of the Debtors' prepetition lenders and the Committee. These creditors have no incentive to ensure that equity holders receive fair value. In fact, HIG has a vested interest in freezing equity holders out of the process altogether so that it can realize the Debtors' going concern value upon TLCV's emergence from bankruptcy at the expense of the Debtors' equity holders, whose interests are being cancelled under the Charlesbank/HIG plan. As such, the Debtors cannot adequately represent the interests of equity while maintaining the support of their creditor constituents, including HIG, for the existing plan process.

If an equity committee is appointed, the Shareholders will be able to meaningfully participate in plan negotiations, potentially increasing the existing return to equity holders and ensuring the adequate representation of their interests at a time when others will likely seek to sell them short. Notably, and in contrast to the extreme prejudice that would occur if equity holders are not provided a seat at the table during this critical period, the cost of appointing an equity committee would be minimal. Accordingly, and for the reasons more fully set forth herein, the Shareholders respectfully request that an equity committee be appointed promptly and that shareholders be provided the representation to which they are entitled under section 1102(a)(2) of the Bankruptcy Code.

BACKGROUND

1. On December 21, 2009 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code

2. On December 30, 2009, the Shareholders submitted a letter to the Office of the United States Trustee (the "US Trustee") requesting the appointment of an official committee of equity security holders of the Debtors. The US Trustee did not issue a formal response, but passed the Shareholders' request on the Debtors and the official committee of unsecured creditors (the "Creditors Committee").

3. On January 5, 2010, the US Trustee appointed the Creditors Committee. No trustee or examiner has been appointed in these cases.

A. The Prepetition Lenders Seek to Acquire the Debtors' Equity Pursuant to a Pre-Negotiated Plan of Reorganization

4. The Debtors are parties to that certain Amended and Restated Credit Agreement, dated as of June 21, 2007, by and among certain of the Debtors, the guarantors party thereto, and the lenders party from time to time thereto (the "Prepetition Lenders").

5. One day before the Petition Date, the Debtors and holders of approximately 56% of the claims arising under the prepetition credit agreement executed a plan support agreement ("Lender PSA") that established a fast-track chapter 11 process through which the Prepetition Lenders would seek to acquire substantially all of the equity of the Debtors in exchange for a refinancing of the Debtors' secured obligations. In connection therewith, certain lenders agreed to provide debtor-in-possession financing sufficient to fund a plan process.

6. On January 6, 2010, in accordance with the terms of the postpetition financing facility and the Lender PSA, the Debtors filed a plan of reorganization (the "Lender Plan", D.I. 94) that provided, *inter alia*, that:

> (a) The Prepetition Lenders would refinance their existing debt into $80 million of secured notes payable by the reorganized debtor;
>
> (b) The Prepetition Lenders would receive virtually all of the equity in the reorganized debtors; and
>
> (c) Holders of allowed general unsecured claims would receive the lesser of their *pro rata* share of a cash pool or 10% of the amount of their claim.

See Disclosure Statement filed contemporaneously with the Lender Plan (D.I. 95), pages 4-14.

7. The Lender Plan proposed that existing equity holders of the Debtors would receive nothing and would have their interests in the Debtors extinguished. Id.

B. Charlesbank Proposes An Alternative Transaction That Provides More Value To The Estates Than the Lender Plan

8. All parties were well aware that the going concern value of the Debtors' business far exceeded the value provided by the Lender Plan, and that there might be alternative restructuring opportunities available to the Debtors. Accordingly, the Debtors negotiated a provision of the interim postpetition financing order (the "Interim DIP Order") that permitted them to obtain alternate financing and to pursue an alternative restructuring transaction so long as, *inter alia*:

> (a) The Debtors filed a motion to pay all amounts owing under the Prepetition Lender-funded postpetition financing facility in full in cash; and
>
> (b) The Debtors filed a plan of reorganization that provided for payment in full in cash of the Prepetition Lenders' prepetition claims and (i) would become effective no later than May 20, 2010, and (ii) was not contingent on further due diligence or financing.

See Interim DIP Order, ¶ 39.

9. Utilizing this "fiduciary out", the Debtors and Charlesbank Equity Fund IV, Limited Partnership ("Charlesbank") subsequently entered into a plan sponsor agreement (the "Charlesbank PSA") that proposed an alternative plan (the "Charlesbank Plan") that improved upon the plan contemplated by the Lender PSA. The Charlesbank PSA, dated February 3, 2010, provided for, *inter alia*:

(a) The payment in full in cash of the prepetition claims of the Prepetition Lenders;

(b) A 15% increase in the amount of the cash pool made available to satisfy allowed unsecured claims and removal of the 10% recovery cap;

(c) The receipt by affiliates of Charlesbank of substantially all of the equity of the reorganized debtors; and

(d) The payment of $287,500 to equity holders of TLCV, provided that general unsecured creditors vote in favor of the Charlesbank Plan, and the termination of their interests.

See D.I. 197, Ex. B. In addition, Charlesbank also committed to provide junior postpetition financing in an amount sufficient to (i) pay the balance on the Prepetition Lender postpetition financing facility pay in full in cash and (ii) fund the Debtors' operations and these chapter 11 cases through the confirmation of the Charlesbank Plan. See D.I. 200.

C. HIG and Charlesbank Team Up and Propose a Modified and Superior Plan

10. The Debtors' decision to pursue the Charlesbank Plan scuttled the Prepetition Lenders' efforts to acquire the Debtors' equity at what, based on subsequent proposals, would be a depressed value. Undeterred, on February 10, 2010, HIG Middle Market LLC ("HIG"), an affiliate of the Debtors' majority prepetition lender, made an offer to acquire the Debtors' assets on terms superior to those offered by Charlesbank. In response to this offer, Charlesbank and HIG negotiated an agreement pursuant to which they would co-sponsor a modified plan (the

"Charlesbank/HIG Plan") that was far superior in value provided to the estates than the Lender Plan and the Charlesbank Plan.

11. The Charlesbank/HIG Plan, dated February 12, 2010, provides for, *inter alia*,

(a) The payment in full in cash of the prepetition claims of the Prepetition Lenders;

(b) The (i) payment to general unsecured creditors of cash up to 90% of their allowed claim, with aggregate cash not to exceed $9 million; and (ii) the issuance of a note to general unsecured creditors, due one year from the effective date of the plan, which shall be for 10% of the allowed unsecured claims, not to exceed $3 million;

(c) The receipt by Charlesbank and HIG of substantially all of the equity of the reorganized debtor; and

(d) The payment of $287,500 to equity holders of TLCV, provided that general unsecured creditors vote in favor of the Charlesbank/HIG Plan, and the termination of their equity interests.

See D.I.s 232, 238. The Charlesbank/HIG Plan estimates that general unsecured claims will total approximately $7.4 million.[2] Id. If these estimates are correct, then the Charlesbank/HIG Plan pays unsecured creditors in full.

12. These fast-moving developments and the introduction of plans that provide for significantly increasing recoveries to shareholders have made it abundantly clear that the Debtors' equity possesses significant value, and that multiple parties are intent on realizing that value at the expense of the Debtors' shareholders.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (D). Venue of this proceeding and this Motion is proper in this district

[2] The Debtors' schedules reflect an aggregate unsecured claims pool of approximately $14.4 million.

pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for relief sought herein are section 1102(a) of the Bankruptcy Code.

RELIEF REQUESTED AND THE REASONS THEREFOR

14. As more fully set forth below, the facts of these cases demonstrate that the appointment of an official committee of equity holders is warranted. Section 1102(a)(2) of the Bankruptcy Code provides that "on a request of a party in interest, the court may order the appointment of additional committees…of equity security holders if necessary to assure adequate representation of creditors or of equity security holders." 11 U.S.C. § 1102(a)(2). In providing shareholders with the right to seek the appointment of an official committee, Congress recognized the potential prejudice to equity holders from the chapter 11 process and noted that an equity committee could "counteract the natural tendency of a debtor in distress to pacify large creditors, with whom the debtor would expect to do business, at the expense of small and scattered investors." S. Rep. No. 95-989 at 10 (1978). Congress appropriately viewed reorganization proceedings as "literally the last clear chance to conserve values [for equity holders] that corporate financial stress or insolvency had placed in jeopardy." Id.

15. The Bankruptcy Code does not provide a bright-line standard for the appointment of an equity committee. However, courts have applied the following factors in determining whether to appoint an equity committee under section 1102(a)(2): (i) whether Debtors are likely to prove solvent; (ii) whether equity is adequately represented by stakeholders already at the table; (iii) the complexity of the Debtors' cases; and (iv) the likely cost to Debtors' estates of an equity committee. See, e.g., In re Pilgrim's Pride Corp., 407 B.R. 211 (Bankr. N.D. Tex. 2009); In re Kalvar Microfilm, 195 B.R. 599 (Bankr. D. Del. 1996); In re Wang Lab., Inc., 149 B.R. 1

(Bankr. D. Mass. 1992). Here, each of these factors favors the establishment of an equity committee.

A. The Debtors Are Likely Solvent

16. The return to equity holders proposed by the Charlesbank/HIG Plan is compelling evidence that the Debtors are likely solvent. Indeed, these cases have turned into a *de facto* public auction for control of the Debtors' continued operations that has resulted in a proposed plan that puts equity in the money. The Charlesbank/HIG proposal has placed these estates on the cusp of preserving the Debtors' substantial equity value for the benefit of existing shareholders. The formation of an official equity committee is warranted to facilitate this result. Accordingly, the time has come for equity holders to become official participants in these cases.

17. The enterprise value of the Debtors' ongoing operations has never been in question. The company's financial difficulties are the result of temporary liquidity issues resulting from the recent economic downturn. Because the foundation for the Debtors' primary business, laser vision correction, is generally not reimbursed by health insurance companies, it is disproportionately impacted by changes in economic conditions, unemployment rates and discretionary spending patterns. Not surprisingly, the severe recession of 2008-2009 caused the Debtors' revenue and EBITDA to decline considerably, leading the Debtors to fall out of compliance with the financial covenants in their prepetition loan facility and necessitating these chapter 11 cases. See D.I. 238, page 30. However, as demonstrated by the ongoing struggle to acquire control of the equity in the reorganized debtors, these short-term problems have not impaired the Debtors long-term going concern value.

18. In 2007, TLCV's Enterprise Value/ Trailing Twelve Month EBITDA multiple ranged from 5x to 12.5x. See Exhibit A. TLCV's EBITDA for 2009 was approximately $25

million to $26 million. Thus, notwithstanding the Debtors' difficulties, the approximately $116 million of consideration[3] provided by the Charlesbank/HIG proposal indicates that the Debtors' current Enterprise/EBITDA multiple is 4.5x. Comparable companies in the health care services sector trade at a next twelve month EBITDA multiple of 5.8x-7.4x. See Exhibit C. It is reasonable to expect that, upon emergence from bankruptcy, TLCV could return to trading at normalized next twelve month EBITDA multiples for comparable healthcare services companies, resulting in an equity value, net of debt, of up to $1.50 per share.[4] See Exhibit B. TLCV's equity values will likely soar even higher in the event that the pace of recovery of the overall economy continues to quicken and consumer discretionary spending continues to increase. See U.S. Business Economists Boost 2010 Growth Outlook (Feb. 22, 2010), http://www.reuters.com/assets/print?aid=USN2115079020100222 (noting that a "group of U.S. business economists raised their forecast for economic growth over the coming year" from 2010 GDP growth 2.9 percent to 3.1 percent); Personal Income and Outlays: December 2009 (Feb. 1, 2010), http://www.bea.gov/newsreleases/national/pi/2010/pdf/pi1209.pdf (indicating that real disposable income increase 0.3% in December 2009).

19. Recent economic data indicates that in 2010 the healthcare sector will perform better than the economy as a whole. See Addison Franz and Morgan McGowan, U.S. Industry Outlook: Turning Around in 2010 (Jan. 20, 2010), http://www.economy.com/dismal/article_free.asp?cid=120752&src=msnbc (noting that the

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[3] Calculated as follows: payment of (i) $107.7mm (prepetition secured debt); (ii) $7.1mm (prepetition unsecured debt); and (iii) $15mm (fully drawn postpetition junior DIP facility, which is to be utilized to, *inter alia*, pay all of the costs of administration of these cases), minus $14mm (Debtors' estimated cash on hand).

[4] In addition, public documents indicate that TLCV possesses a $178 million tax net operating loss that may be utilized by the company and may be worth $60-$70 million.

second-best performer in 2010 will be the healthcare industry, and that the healthcare industry was "the only U.S. industry to have grown on a yearly basis in 2009 and will see stronger gains this year."). The Debtors have already taken important steps to restructure their operations to take advantage of these improving conditions. Prior to the commencement of these cases, the Debtors implemented a series of initiatives to reduce costs and generate cash, including reductions in head count, freezing or reducing salaries and benefits, reducing discretionary spending and closing underperforming refractive centers. Id. at 30-31. Thus, the Debtors are well-positioned to maximize profits as the economy recovers, and the issue in these cases is not whether the Debtors are solvent, but which entity will reap the sizable benefits conferred upon the holders of the equity in the reorganized debtors.

20. Recognizing this reality, the Prepetition Lenders, Charlesbank and HIG have all sought to outbid one another for the opportunity to own the Debtors going forward, placing shareholders in the money and providing the Court with a glimpse of the true value of the Debtors' equity. The Charlesbank/HIG Plan is convincing evidence of the Debtors' likely solvency, and demonstrates that the conditions are ripe for the Debtors to deliver a meaningful return to the equity holders of TLCV through the plan process. The formation of an official equity committee is the logical next step to effectuate this outcome. See In re Spansion, Inc., 2009 Bankr. LEXIS 3958 at *10 (Bankr. D. Del. 2009) (stating that the formation of an equity committee is appropriate where "there is a substantial likelihood that they will receive a meaningful distribution in the case under a strict application of the absolute priority rule.").

B. Equity Holders Will Not Be Adequately Represented Without the <u>Appointment of an Equity Committee</u>

21. Equity holders will not be adequately represented in these cases without the appointment of an official committee. The Shareholders cannot rely on the Debtors or other parties in interest to protect their economic interests for them. As one court recently noted,

> The dynamics of chapter 11 are such that Debtors-- and their management-- are likely to be constrained to accept and advocate to the court a conservative value for their business in order to obtain creditor assent to a reorganization plan. If [management] is faced with the choice of holding out for the benefit of equity and risking a failure of the reorganization or accepting a restructuring that values Debtors excessively conservatively, despite their interest in maximizing stock value, they may have little choice but to adopt the latter alternative.

<u>In re Pilgrim's Pride Corp.</u>, 407 B.R. 211, 219 (Bankr. N.D. Tex. 2009). Here, the Debtors have indicated that their primary concern is the confirmation of a plan of reorganization, which is heavily dependent upon the support of the Prepetition Lenders and the Committee. Going forward, these parties have no incentive to ensure that equity holders receive fair value. In fact, and as noted above, HIG has a vested interest in freezing equity holders out of the process altogether so that it can realize the Debtors' going concern value upon TLCV's emergence from bankruptcy at the expense of the Debtors' equity holders, whose interests are being terminated under the Charlesbank/HIG plan. As such, the Debtors will be unable to adequately represent the interests of equity while maintaining the support of their creditor constituents, including HIG, for the existing plan process.

22. Moreover, individual equity holders lack the resources that are critical to the fair representation of their interests during this important stage of this proceeding, and that only an equity committee can provide. An official committee enjoys access to documents and information, which can be made available on a confidential basis, that is not afforded to private

parties. Equity holders simply cannot protect their rights as the plan process develops in the coming weeks without the knowledge that comes from being an official participant in these cases. Further, an official committee is far better suited to represent the interests of equity than a scattered and disparate band of a few shareholders, who would each have to bear extensive costs in order to play a meaningful part in the plan process. This is particularly true in light of the fact that all of the professionals of the other major constituents of the Debtors, including the Prepetition Lenders and the Committee, are being paid out of the estates.

23. Without the formation of an equity committee, the Debtors' equity holders are at a material financial and informational disadvantage, and cannot ensure the adequate representation of their meaningful economic interest in these estates. As such, this factor supports granting the Motion.

C. The Appointment of an Equity Committee is Warranted By the Complexity of These Cases

24. There can be no doubt that these cases are exceedingly complex. The Debtors' operations include three debtors, a host of non-debtor affiliates and concurrent insolvency proceedings in Canada. Further, in the first 60 days of the cases alone, (i) three different plans of reorganization were proposed; (ii) the Debtors entered into multiple postpetition financing facilities with different lenders; and (iii) a motion to sell substantially all of the Debtors' Canadian assets was filed, objected to, and subsequently withdrawn. Accordingly, this factor weighs in favor of granting the Motion.

D. The Costs of An Equity Committee Are Greatly Outweighed By the Prejudice to Equity Holders From the Lack of Formal Representation in These Cases

25. The cost of a committee, which is anticipated to be relatively modest in the overall scheme of these proceedings, is greatly outweighed by the prejudice to equity holders from a lack of formal representation at this crucial point in the process. The Shareholders recognize that the cost of an equity committee's professionals is always a factor. However, "costs alone cannot and should not deprive public debt and security holders of representation." In re McLean Indus, Inc., 72 B.R. 852, 860 (Bankr. S.D.N.Y. 1987). Moreover, because the Debtors project that a plan will be confirmed in approximately 90 days, the equity committee will be in existence for only three months and will incur only limited professional fees.

26. In contrast, if an official equity committee is not appointed immediately, the prejudice to equity holders will be significant. The Shareholders and other equity holders plainly have a material economic interest in these estates, and are entitled to a seat at the table as plan negotiations move forward in earnest. Accordingly, this factor weighs in favor of granting the Motion.

NOTICE

27. Notice of this Motion has been provided to (i) the US Trustee; (ii) counsel to the Debtors; (iii) counsel to the Prepetition Lenders; (iv) counsel to the Debtors' post-petition lenders; (v) counsel to the Creditors Committee; and (vi) any party having filed a request for notice in these cases. Based on the nature of the relief requested, the Shareholders respectfully submits that no further notice is necessary or required under the circumstances.

WHEREFORE, the Shareholders respectfully request that this Court enter an order directing the US Trustee to appoint an official committee of equity security holders forthwith, and granting such additional relief as is just.

Dated: March 1, 2010
Wilmington, Delaware

Respectfully submitted,

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