Hearing Date: March 6, 2018 at 10:00 am (prevailing Eastern Time)
Objection Deadline: February 27, 2018 at 4:00 pm (prevailing Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
CENVEO, INC., *et al*.,	:	Case No. 18-22178 (RDD)
Debtors.[1]	:	(Jointly Administered)

NOTICE OF MOTION OF BRIGADE CAPITAL MANAGEMENT, LP FOR THE APPOINTMENT OF AN EXAMINER PURSUANT TO 11 U.S.C. § 1104(c)

PLEASE TAKE NOTICE that Brigade Capital Management, LP and certain of its affiliates ("Brigade"), by and through its undersigned counsel, filed a motion (the "Motion") for entry of an order, pursuant to section 1104(c) of title 11 of the United States Code (the "Bankruptcy Code"), for the appointment of an examiner.

[1] The last four digits of Cenveo, Inc.'s tax identification number are 0533. Due to the large number of Debtor entities in these chapter 11 cases, a complete list of the Debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at https://cases.primeclerk.com/cenveo. The Debtors' service address for purposes of these chapter 11 cases is: 777 Westchester Avenue, Suite 111, White Plains, New York 10604.

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion will be held before the Honorable Robert D. Drain at the United States Bankruptcy Court for the Southern District of New York, White Plains Division, 300 Quarropas Street White Plains, New York 10601 (the "Bankruptcy Court"), on **March 6, 2018 at 10:00 a.m. (prevailing Eastern Time)** or as soon thereafter as counsel may be heard (the "Hearing").

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Motion must comply with the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York. Objections, if any, to the Motion must be filed with the Court no later than **February 27, 2018 at 4:00 p.m. (prevailing Eastern Time)** (the "Objection Deadline") and served so as to be actually received by such time by (i) counsel to Brigade, Akin Gump Strauss Hauer & Feld LLP, (a) One Bryant Park, New York, NY 10036, Attn: Michael Stamer, David Zensky, and Stephanie Lindemuth and (b) 1333 New Hampshire Avenue NW, Washington, DC 20036, Attn: James Savin and Kevin Eide; and (ii) all parties on the Master Service List, as defined in the Case Management Order (ECF Doc. No. 46), which may be found at https://cases.primeclerk.com/cenveo.

PLEASE TAKE FURTHER NOTICE that that if no objections to the Motion are timely filed, served and received in accordance with this notice and the Case Management Order, the Court may grant the relief requested in the Motion without further notice or hearing.

[*Remainder of page intentionally left blank.*]

Dated: February 12, 2018

AKIN GUMP STRAUSS HAUER & FELD LLP

By: */s/Michael S. Stamer*

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
CENVEO, INC., *et al*.,	:	Case No. 18-22178 (RDD)
Debtors.[1]	:	(Jointly Administered)

MOTION OF BRIGADE CAPITAL MANAGEMENT, LP FOR THE APPOINTMENT OF AN EXAMINER PURSUANT TO 11 U.S.C. § 1104(c)

[1] The last four digits of Cenveo, Inc.'s tax identification number are 0533. Due to the large number of Debtor entities in these chapter 11 cases, a complete list of the Debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at https://cases.primeclerk.com/cenveo. The Debtors' service address for purposes of these chapter 11 cases is: 777 Westchester Avenue, Suite 111, White Plains, New York 10604.

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Brigade Capital Management, LP and certain of its affiliated entities (collectively, "Brigade"), in their capacity as holders of (i) 6.00% Senior Priority Secured Notes due 2019 (the "First Lien Notes") issued pursuant to that certain Indenture, dated as of June 26, 2014, among Cenveo, Inc. ("Cenveo" and, together with the above-captioned debtors and debtors in possession, the "Debtors"), as issuer, the guarantors party thereto, and the Bank of New York Mellon, as trustee and collateral agent, and (ii) the 8.50% Junior Priority Secured Notes due 2022 (the "Second Lien Notes") issued pursuant to that certain Indenture, dated as of June 26, 2014, among Cenveo, as issuer, the guarantors party thereto, and The Bank of New York Mellon, as trustee and collateral agent, hereby moves the Court for entry of an order directing the appointment of an examiner in these chapter 11 cases.[2] In support of this motion (the "Motion"), Brigade, represents as follows:

PRELIMINARY STATEMENT

1. It is apparent—based merely on an initial review of publicly available information—that the Debtors' controlling shareholders, officers and/or directors (i) have been involved in insider/related party transactions, (ii) have received exorbitant, non-market compensation and benefits, and (iii) have engaged in questionable negotiations culminating in the proposed restructuring support agreement (the "RSA") entered into between the Debtors and certain holders of First Lien Notes (the "Ad Hoc Group"). Despite providing holders of Second Lien Notes (and unsecured creditors) with only a *de minimis* recovery, the RSA contemplates a substantial management incentive plan and employment agreements for existing management and is based on a low value of the Debtors' business that is inconsistent with prior public disclosures. The RSA thus essentially guarantees management's receipt of additional significant

[2] Brigade also submits the Declaration of David M. Zensky in support of the Motion of Brigade Capital Management, LP for the Appointment of an Examiner pursuant to 11 U.S.C. § 1104(c) (the "Zensky Decl.").

value and benefits to the detriment of junior creditors. It also includes a release for the Debtors' insiders from estate claims for no discernible consideration and was agreed to without any investigation of such claims.

2. Just one day before the Petition Date (as defined below) and only after the RSA including full releases for all of the Debtors' insiders was in place, Cenveo's board of directors allegedly appointed an individual to oversee an investigation into any potential claims or causes of action against officers, directors, insiders and other parties arising out of prepetition conduct. The Debtors have provided no other details about the scope of the investigation, the financial resources allocated to it, or the identification of those professionals advising such individual. This appointment is a red flag and an express concession that an independent investigation into the Debtors' prepetition business affairs is necessary and warranted in these chapter 11 cases. But such an investigation should not be conducted by an individual that was handpicked by the very individuals whose conduct is in question. Nor should it be controlled by the Debtors who already agreed to provide such individuals a full release.

3. The type of potential misconduct at issue in these chapter 11 cases is precisely the type of subject matter that should be investigated by an independent examiner. Brigade therefore respectfully requests that this Court appoint an examiner to investigate the insider and related party transactions as well as the potential improprieties involved in the RSA negotiations to ensure a neutral, independent, and proper investigation is conducted that all parties can trust.

JURISDICTION AND VENUE

4. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested

herein are sections 1104(c) and 1106 of title 11 of the United States Code (the "Bankruptcy Code"), and rules 2007.1 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

RELIEF REQUESTED

5. Brigade seeks entry of an order, in the form attached hereto as Exhibit A, (i) appointing an examiner in these chapter 11 cases pursuant to Bankruptcy Code section 1104(c) and (ii) granting related relief.

FACTUAL BACKGROUND

A. The Debtors' Prepetition Restructuring Efforts and Liabilities

6. The Debtors are an envelope and paper manufacturing company headquartered in Stamford, Connecticut with facilities located throughout North America, India, and the United Kingdom. Declaration of Ayman Zameli, Chief Restructuring Officer and Executive Vice President at Cenveo, Inc., (I) In Support of Chapter 11 Petitions and First Day Pleadings and (II) Pursuant to Local Bankruptcy Rule 1007-2, ECF Doc. No. 14 ("First Day Decl."), ¶¶ 3, 16. The Debtors have faced falling revenue in recent years as a result of increased use of digital technology and a concomitant decline in demand for paper products. *See id.* ¶ 39. The Debtors allege that their financial performance has been further hampered by "an unsustainable capital structure, vendors' contraction of trade terms causing rapidly deteriorating liquidity, and customer de-risking by reducing exposure with Cenveo." *Id.* ¶ 38. As a result, the Debtors commenced these chapter 11 cases. *See id.*

7. In connection with their restructuring efforts, the Debtors entered into negotiations with Brigade, the Ad Hoc Group and certain of their other stakeholders, including the lenders (the "ABL Lenders") under their prepetition ABL facility (the "ABL Facility"). *See id.* ¶¶ 10, 47; Declaration of Neil A. Augustine In Support of Cenveo., Inc., *et al*.'s Motion for

Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, and 507 (I) Authorizing the Debtors to Obtain Senior Secured Priming Superpriority Postpetition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Authorizing Use of Cash Collateral, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief ("Augustine Decl."), ECF Doc. No. 18, Ex. B ¶ 20. The Debtors reached an agreement with the Ad Hoc Group and the ABL Lenders on the terms of two debtor-in-possession loan facilities, which provided Cenveo with a $190 million senior secured debtor-in possession, asset based loan facility ("ABL DIP Facility") as well as a $100 million senior secured debtor-in-possession, multiple-draw term loan facility ("DIP Term Facility"). *See* First Day Decl. ¶ 48; *see also id.*, Ex. A-A, Restructuring Term Sheet ("RTS"), at 1-2. In addition, on February 1, 2018, the Debtors and the Ad Hoc Group entered into an RSA that sets forth the terms of a proposed restructuring of the Debtors. *See* First Day Decl. ¶ 11; *see generally* First Day Decl. Ex. A, Restructuring Support Agreement ("RSA"); RTS. The Debtors did not reach an agreement with Brigade on the terms of potential debtor-in-possession financing, and Brigade is not party to the DIP Term Facility or the RSA. *See* First Day Decl. ¶ 11.

8. On February 2, 2018 (the "Petition Date"), the Debtors filed voluntary petitions for relief under the Bankruptcy Code. *See id.* ¶ 13. As of the Petition Date, the Debtors had funded debt obligations of approximately $1 billion, including (i) approximately $125.6 million of outstanding commitments under the ABL Facility, (ii) $50 million in outstanding principal amount of the 4% Senior Secured Notes due 2021 issued by the Debtors, (iii) $540 million in outstanding principal amount of the First Lien Notes, (iv) $250 million in outstanding principal amount of the Second Lien Notes and (v) $104 million in outstanding principal amount of the

6% Senior Unsecured Notes issued by the Debtors (the "Unsecured Notes"). *See id.* ¶¶ 25-31; *see also* Augustine Decl. ¶ 6. In addition to the Unsecured Notes, there are a number of other significant unsecured claims against the Debtors' estates (including approximately $45 million in pension obligations and several other sizeable unsecured claims), as reflected in the list of the Debtors' 50 largest unsecured creditors attached as an exhibit to the Debtors' voluntary petitions. *See* First Day Decl., Ex. D. In total, the Debtors estimate that their liabilities are approximately $1.4 billion. *See id.*, Ex. F.

B. The Need for the Appointment of an Examiner

9. Based on publicly available information, there is evidence of (i) exorbitant compensation paid to the Debtors' insiders, including members of the Burton family, (ii) related party transactions, and (iii) a lack of truly independent board members. Moreover, the terms of the RSA create significant questions regarding the negotiation process that led up to the execution of the RSA. Further, despite already negotiating for releases for the Debtors' insiders, the Debtors have acknowledged the necessity of investigating potential claims or causes of action relating to these matters through Cenveo's appointment of a new member of Cenveo's board of directors with apparent responsibility for conducting an investigation, which, as discussed below, is not an adequate alternative to the appointment of an independent examiner.

1. Insider Compensation, Related Party Transactions and Board Composition

10. The Debtors have long been controlled by the Burton family. As of the Petition Date, at least two members of the Burton family were members of the Debtors' board of directors, and three members of the Burton family served in senior management positions at the Debtors. *See* First Day Decl., Ex. L. According to the Debtors' public filings, the three members of the Burton family that serve as senior management have received approximately $80 million

of disclosed compensation between 2005 and 2016, plus any compensation that has been received since 2016. *See* Zensky Decl. Exs. 1-5, 7-11, 14-15 (summary executive compensation tables disclosed in Cenveo's 2006-2017 proxy statements). This appears to be an extraordinary amount of officer/director compensation for a company of this size and in this industry, suggesting not only waste but an especially cozy relationship between the Burtons and outside, supposedly "independent" directors.

11. Moreover, there are at least some publicly reported related party transactions. For example, in 2013, Cenveo entered into a 10-year lease of a manufacturing facility with a related party wholly-owned and managed by the Burton family. *See id.*, Ex. 16, Cenveo, Inc., Annual Report (Form 10-K) (Feb. 23, 2017) ("Cenveo Form 10-K"), at p. 71. As of 2016, the Debtors reported that future undiscounted lease payments under this lease were approximately $3.8 million. *Id.* In addition, the same Burton-controlled entity purchased land located under an adjacent Cenveo manufacturing facility, and the Debtors are currently sub-leasing this facility under a separate agreement with an unrelated third party, which in turn is leasing the land from the Burton-controlled entity. *Id.* Finally, the Debtors are party to certain supply agreements with related or insider affiliated suppliers. *See id.*; *see also* RSA §§ 4(a)(x), 4(b)(v).

12. Publicly available information has also revealed that two of the purportedly independent directors of Cenveo—Susan Herbst and Mark J. Griffin—have relationships with the Burton family that suggest they may not be truly independent. For example, a review of publicly available information reveals the following:

- Herbst is the President of the University of Connecticut. Zensky Decl., Ex. 13. The Burtons, individually or through their affiliates, have donated millions of dollars to the University of Connecticut, including for the construction of the Burton Family Football Complex, which serves as the on-campus home of the University of Connecticut's football team. *Id.*, Ex. 24. Robert Burton, Sr. is also the recipient of an honorary doctorate degree in business from the university. *Id.*,

Ex. 23; see also First Day Decl. Ex. L at 1.

- Griffin is the founding headmaster of Eagle Hill School, a boarding and day school for children with learning disabilities located in Greenwich, Connecticut. Zensky Decl. Ex. 25. The Burtons, again individually or through their affiliates, have donated money to the school, including by making contributions for housing for the school's teachers and an athletic field. *Id.*, Exs. 6, 12, 19, 21. Robert G. Burton, Sr. has also served as a member of the school's board of directors. *Id.*, Ex. 6.

13. At present, the full extent of the benefits derived by the Burton family or other insiders from these transactions and relationships is unknown. Additionally, although there are several insider and related party transactions identifiable just through publicly available information, *see supra*, a further investigation could identify an array of insider and related party transactions that are currently unknown or were not subject to proper oversight as a result of relationships and conflicts among the directors.

2. The Negotiation and Terms of the RSA

14. The RSA is premised on a business plan that appears to be unreasonably pessimistic at best. Over the past several months, the Debtors have provided a series of increasingly lower business plans to their creditors in connection with restructuring negotiations. *See, e.g.*, Zensky Decl., Ex. 24, Cenveo, Inc., Current Report (Form 8-K) (Feb. 2, 2018) ("Cenveo Form 8-K"), at 106 (December 21, 2017 presentation estimating 2018E EBITDA of $125.7 million); *id.* at 151 (January 2018 presentation estimating 2018E EBITDA of $97.8 million). Earlier in 2017, the Debtors publicly projected $150 million EBITDA for 2017 and a $180 million to $200 million "run rate" EBITDA for 2018. *See, e.g.*, Zensky Decl., Ex. 17, Cenveo, Inc., FQ4 2016 Earnings Call Transcript (Feb. 23, 2017), at 4, 6-7, 11; *id.* Ex. 18, Cenveo, Inc., FQ1 2017 Earnings Call Transcript (May 4, 2017), at 4; *id.* Ex. 20, Cenveo, Inc. FQ2 Earnings Call Transcript (Aug. 3, 2017), at 10. The Debtors have blamed their declining performance on a variety of factors—such as the Debtors' financial condition scaring

customers—that appear to be temporary in nature and should be corrected in any restructuring. *See* First Day Decl. ¶¶ 4-6, 38-39. In other words, any business plan used to plot the course of this bankruptcy must, among other things, take into account the upside associated with the fact that the Debtors will exit bankruptcy substantially delevered. Despite the fact that many of the challenges that the Debtors have been facing do not appear to present long-term or permanent issues, the Debtors' business plan in connection with the RSA reflects a permanent and substantial decline in value. This, along with other subjective assumptions contained in the business plan, unfairly prejudice junior creditors.

15. Additionally, the terms of the RSA give rise to concerns about the nature of the negotiations between the Debtors and the Ad Hoc Group that led up to the execution of the RSA. Namely, the restructuring contemplated by the RSA provides significant benefits to the Debtors' insiders. *See generally* RSA; RTS. Among other things, the RSA contemplates the implementation of a post-emergence management equity plan that will provide the Debtors' management (predominantly the Burtons) with immediate grants of 3% of the equity of the Reorganized Debtors and options for an additional 9% of the equity of the Reorganized Debtors struck at price equal to just 75% of the First Lien Notes. *See* RTS at 8. Thus, the very insiders that brought the Debtors to a chapter 11 filing would own 12% of the equity of a substantially delevered enterprise without any meaningful recovery to the holders of Second Lien Notes or unsecured creditors. These large equity grants are immediate transfers of significant value to the very people that negotiated the RSA on behalf of the Debtors. Especially troubling is that the management equity grants would benefit from the overly pessimistic business plan created by management which was used to justify lower debt capacity and thus increase equity value.

16. Additionally, the RSA contemplates that the Debtors will either assume the

existing employment agreements with the Debtors' management team or enter into new employment agreements with the management team on the effective date of the Debtors' plan, subject to certain modifications to the employment agreement for Robert G. Burton, Sr. *Id.* at 7. As such, the restructuring contemplated by the RSA will result in insiders obtaining significantly more value than they had prior to the restructuring even though all but the most senior secured creditors are receiving only a nominal recovery.

17. Further, the RSA contemplates that the Debtors' plan of reorganization will release any claims or causes of action held by the Debtors' estates against the Debtors' officers, directors and insiders, including the members of the Burton family. *See* RTS, Ex. 4. Significantly, as discussed below, the Debtors did not appoint a new member to Cenveo's board of directors to investigate such potential claims or causes of action until the date of the execution of the RSA. *See* Cenveo Form 8-K at 4; *see also* Omnibus Resolutions, ECF Doc. No. 1, ("OR"), at 7. Thus, apparently, the Debtors agreed to the releases contemplated by the RSA without conducting any investigation of the potential claims or causes of action being released, and it is entirely unclear how the Debtors (and their board of directors) could have justified entering into the RSA.

3. The Appointment of a New Director to Investigate Potential Claims and Causes of Action

18. On February 1, 2018—just one day prior to the commencement of these chapter 11 cases and the same day on which the Debtors executed the RSA—Cenveo's board of directors appointed a new member of the board with responsibility for overseeing an investigation of any potential claims or causes of action against officers, directors, insiders and other parties. *See* Cenveo Form 8-K, at 4; OR at 7. There is no mention of what consideration is being provided to the Debtors in exchange for these releases. The appointment of this new director, in and of itself,

is a concession by the Debtors that an investigation into the Debtors' business affairs is appropriate and warranted. Regrettably, however, the appointment of this new director appears to be an attempt by the Debtors to control the investigation, and the new director was an individual handpicked by Cenveo's board of directors, which is controlled by the Burton family—the very individuals whose prepetition conduct would be at issue in the investigation. Brigade does not believe that an investigation by this new director is appropriate or that any investigation conducted by this new director would be credible.[3] Brigade has requested that the Debtors stand down from such investigation in favor of an examiner and the Debtors have declined.

ARGUMENT

I. The Court Should Appoint an Examiner under Bankruptcy Code Section 1104(c)

19. Bankruptcy Code section 1104(c) governs the appointment of an examiner in chapter 11 proceedings. The statute provides that:

> (c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—
>
> > (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
> >
> > (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

11 U.S.C. § 1104(c).

20. Accordingly, under Bankruptcy Code section 1104(c), the Court is required to

[3] Although a committee has not yet been appointed, it is difficult to imagine that once appointed the committee would be satisfied with the Debtors' unilateral internal investigation.

appoint an examiner if (i) no trustee has been appointed, (ii) no plan has been confirmed, (iii) a party in interest or the United States Trustee has requested an examiner, and (iv) either (a) it is in the interest of creditors, interest holders, or the estate, *or* (b) the debtor's fixed, liquidated, and unsecured debts other than debts for goods, services, taxes, or insider debts exceed $5 million. *See* 11 U.S.C. § 1104(c).

21. Here, there can be no dispute that (i) no trustee has been appointed, (ii) no plan has been confirmed, (iii) Brigade, in its capacity as the largest holder of First Lien Notes and Second Lien Notes, is a party in interest, and (iv) the Debtors' fixed, liquidated, unsecured debts, other than debts for goods services, or taxes, or owing to an insider, exceed $5 million (indeed, the Debtors have asserted that the total outstanding principal amount of the Unsecured Notes alone is approximately $104 million). *See* First Day Decl., ¶¶ 25-31. Moreover, given the Debtors' calculated decision to appoint a director to conduct an investigation one day before the Petition Date and the Debtors' simultaneous agreement to blindly release all potential claims against officers, directors and other insiders, there can also be no dispute that an investigation into the Debtors' business affairs is necessary in these chapter 11 cases and in the interests of the Debtors' estates, creditors and other stakeholders. Therefore, the appointment of an examiner in these chapter 11 cases is both warranted and required.

A. The Appointment of an Examiner is Required under Bankruptcy Code Section 1104(c)(2)

22. "Section 1104(c)(2) mandates the appointment of an examiner where a party in interest moves for an examiner and the debtor has $5,000,000 of qualifying debt." *Loral Stockholders Protective Comm. v. Loral Space & Commc'ns Ltd. (In re Loral Space & Commc'ns, Ltd.)*, No. 04 Civ. 8645(RPP), 2004 WL 2979785, at *4 (S.D.N.Y. Dec. 23, 2004) (recognizing that majority view of Section 1104(c)(2) is that it is mandatory not discretionary);

Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.), 898 F.2d 498, 501 (6th Cir. 1990) (holding section 1104(c)(2) mandates the appointment of an examiner if the debt threshold is met); *see also, e.g.*, *In re Erickson Retirement Cmtys., LLC*, 425 B.R. 309, 312 (Bankr. N.D. Tex. 2010) ("[W]here the $5 million unsecured debt threshold is met, a bankruptcy court ordinarily has no discretion" with respect to the appointment of an examiner); *Walton v. Cornerstone Ministries Invs., Inc.*, 398 B.R. 77, 81-82 (Bankr. N.D. Ga. 2008) (finding appointment of examiner required where debt threshold is met); *In re UAL Corp.*, 307 B.R. 80, 84-86 (N.D. Ill. 2004) (concluding language of 1104(c)(2) requires appointment of an examiner); *In re Enron Corp.*, No. 01-16034 (AJG), 2002 WL 32150478, at *4 (Bankr. S.D.N.Y. Feb. 13, 2002) ("[I]t is generally accepted that, as long as the $5 million debt requirement is met by a debtor, the appointment of an examiner is required."); *In re Rutenberg*, 158 B.R. 230, 232 (Bankr. M.D. Fla. 1993) ("[A]pplying the plain language rule . . . it appears that the appointment of an examiner is mandatory because the Section uses the term 'shall' and not the term 'may.'"); *but see In re Residential Capital, LLC*, 474 B.R. 112, 121 (Bankr. S.D.N.Y. 2012) (discussing split in authority regarding whether section 1104(c)(2) is a mandatory or discretionary provision). It is undisputed that the Debtors' qualifying debt is well in excess of $5 million. *See* First Day Decl., ¶¶ 25-31; *id.*, Ex. F. Thus, the appointment of an examiner is required upon this Motion.

B. The Appointment of an Examiner is Required under Bankruptcy Code Section 1104(c)(1)

23. The appointment of an examiner is also required under section 1104(c)(1) because the appointment is "in the interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. § 1104(c)(1) (stating "the court *shall* order the appointment of an examiner") (emphasis added). The appointment of an examiner is mandated pursuant to this provision "whenever allegations of corporate fraud or misconduct are substantiated by credible

evidence." *Keene Corp. v. Coleman (In re Keene Corp.)*, 164 B.R. 844, 856 (Bankr. S.D.N.Y. 1994).

24. Here, there is evidence of (i) insider or related-party transactions involving the Debtors, the Burton family, affiliates of the Burton family, and Cenveo's purported independent directors, (ii) a substantial benefit conferred upon the members of the Burton family, other board members and senior management in the RSA, which was negotiated by the very same individuals who are receiving benefits in the form of both substantial value and releases from liability on account of any prepetition claims or causes of action, and (iii) sudden and substantial declines in the Debtors' valuation and the financial projections underlying the RSA that differ from earlier prepetition projections and essentially guarantee even greater benefits to the Burton family upon the Debtors' emergence from chapter 11. *See supra* at 6-10. This evidence is credible, based on information contained in the Debtors' public filings or that is otherwise publicly available as well as the proposed RSA itself, and establishes the existence of potential corporate fraud, misconduct and/or mismanagement. Consequently, an investigation by an independent and neutral examiner is warranted, necessary and in the best interests of the Debtors' estates, their creditors and other interest holders whose interests were seemingly ignored by the Burtons and the Debtors' board of directors in connection with their prepetition conduct of the Debtors' business and the negotiation of the RSA.

25. Where, as here, there is evidence of insider or related party transactions, courts routinely appoint examiners pursuant to Bankruptcy Code section 1104(c)(1). For example, in *In re JNL Funding Corporation*, the court found it to be in the best interests of the parties to appoint an examiner to investigate the debtor's prepetition financial activities, including, among other things, alleged transfers to interested or related parties and entities. *See* No. 10-737214, 2010

WL 3448221, at *4 (Bankr. E.D.N.Y. Aug. 26, 2010). Similarly, in *In re Gilman Services, Incorporated*, the court appointed an examiner "where there [were] unanswered questions concerning the transactions and interrelationships of the parties involved" in a related party transaction. 46 B.R. 322, 327 (Bankr. D. Mass. 1985); *see also In re Keene Corp.*, 164 B.R. 844 (S.D.N.Y. 1994) (finding appointment of examiner appropriate in the face of potential related-party transactions); Order Defining Role of Examiner at 1-2, *In re Mirant Corp*., No. 03-46590 (Bankr. N.D. Tex. Apr. 29, 2004), ECF No. 3727 (appointing an examiner to review any transactions or course of dealing between debtor or insider of debtor and to determine whether such transactions are in the best interest of creditors and the estate of each debtor). The Debtors cannot deny that there are "unanswered questions" concerning the "interrelationships" between the Debtors, the Burtons, the Burtons' affiliates, and the purported "independent" directors of Cenveo that warrant an examiner investigation—in fact, the Debtors acknowledged the need for an investigation when their board of directors appointed a new member for the purpose of investigating potential claims or causes of action against officers, directors, insiders and other parties. *See* Cenveo Form 8-K, at 4.

26. Moreover, courts consistently find the appointment of an examiner to be in the interests of creditors and other interest holders when there are allegations of "fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor." *In re JNL Funding Corp.*, 2010 WL 3448221, at *2 (appointing an examiner under Section 1104(c)(1) to investigate allegations of mismanagement). To be sure, the appointment of an examiner to investigate mismanagement necessarily includes an examination of the viability of potential "claims for fraudulent conveyance . . . , breach of fiduciary duty, aiding and abetting the same, and equitable

subordination," s*ee, e.g.*, Order, *In re Tribune Co.*, Case No. 08-13141 (KJC) (Bankr. D. Del. April 20, 2010), ECF Doc. No. 4120 (appointing an examiner pursuant to Section 1104(c)(1) to evaluate whether such claims were viable), claims that may be held by the Debtors, and that, if viable, could result in recoveries that would benefit the Debtors' estates and their creditors. Here, the insider and related party transactions, coupled with the potential mismanagement and/or misconduct involved in prepetition conduct of the Debtors' business and the negotiation of the RSA, constitute the type of "irregularities" that raise questions of mismanagement warranting investigation by a court-appointed examiner.

27. Since an investigation by a court-appointed and independent examiner would be in the best interests of the Debtors' estates, their creditors and other stakeholders, this Court should appoint an examiner as required by Bankruptcy Code section 1104(c)(1).

C. The Appointment of an Examiner is Otherwise Appropriate

28. The facts and circumstances of this Motion and the Debtors' chapter 11 proceedings also demonstrate that the appointment of an examiner is otherwise appropriate. For example, Brigade is seeking the appointment of an examiner at the outset of these chapter 11 cases, and to date, no independent party or creditor representative has begun or conducted a similar investigation. *See, e.g.*, *In re Sletteland,* 260 B.R. 657, 671-72 (Bankr. S.D.N.Y. 2001) (denying a motion to appoint an examiner when the "past act" that supposedly needs investigating has already "been the subject of a full trial and certainly requires no further investigation"). Although the Debtors have cleverly appointed a new director just one day before the Petition Date to oversee an investigation of potential claims or causes of action against officers, directors, insiders or and other parties, the Debtors should not be permitted to handpick a "friendly" investigator to investigate themselves, especially after already agreeing to release all

claims and causes of action.[4] The appointment of an examiner would ensure that the investigation is carried out by a neutral, disinterested, and independent party, which in turn ensures that the investigation is conducted properly and in a manner that is both credible and consistent with the best interests of the Debtors' estates, their creditors and other stakeholders. *See, e.g.*, *United States v. Schilling (In re Big Rivers Elec. Corp.)*, 355 F.3d 415, 422 (6th Cir. 2004) (discussing an examiners duty to be neutral and disinterested with no material adverse interests to any party to the bankruptcy). Indeed, as a director, the Debtors' handpicked individual cannot satisfy the definition of "disinterested" under the Bankruptcy Code. 11 U.S.C. § 101(14) (defining "disinterested person" as not being "within 2 years before the date of the filing of the petition, a director . . . of the debtor").

29. Moreover, while Brigade has served discovery requests on the Debtors relating to the topics that would be investigated by an examiner, the discovery requested by Brigade can easily be coordinated with the examiner's investigation to ensure an efficient process.[5] Additionally, Brigade's fees and expenses are not being paid by the Debtors' estates, and thus, there would be no duplicative fees and expenses.

30. Thus, under the facts and circumstances of these chapter 11 cases, the appointment of an examiner is necessary and appropriate, and the Court should appoint an examiner.

[4] At the first day hearing in these chapter 11 cases, the Court noted that the parties should confer with each other regarding the identity of the party responsible for the investigation and the manner in which the investigation will be conducted before the new director appointed by the Debtors' board of directors assumes responsibility for the investigation. *See In re Cenveo, Inc.*, No. 18-22178 (Feb. 2, 2018), Hr'g Tr. 36:25 – 37:23. While the parties have discussed the matter, no agreement has been reached.

[5] Brigade has requested, but not received, discovery concerning the appointment of the new director and his alleged investigation, along with documents relating to the Burtons' insider transactions.

II. The Court Should Authorize the Examiner to Investigate the Proposed Subjects

31. Under Bankruptcy Code section 1106(b), a court-appointed examiner performs the duties set forth in sections 1106(a)(3) and 1106(a)(4), which provide that an examiner shall:

> (3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operations of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
>
> (4) as soon as practicable—
>
> > (A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and
> >
> > (B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates

11 U.S.C. § 1106(3)-(4).

32. An examiner "generally investigates certain designated aspects of a case or the debtor's business operations." 7 Collier on Bankruptcy ¶ 1104.01 (Alan N. Resnick & Henry J. Sommer, eds., 16th rev. ed. 2012. Indeed, the "main purpose of an examiner . . . is primarily investigative." *In re Bradlees Stores, Inc*., 209 B.R. 36, 39–40 (Bankr. S.D.N.Y. 1997). It is "generally understood that an 'investigation' under section 1104(c) is of conduct—that is, of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management of the affairs of the debtor . . .—or of a particular transaction or series of transactions, in order to reveal ways and means to protect or augment the estate." *In re Loral Space & Commc'ns Ltd.*, 313 B.R. 577, 585 (Bankr. S.D.N.Y. 2004) (Drain, J.), *rev'd and remanded* No. 04 CIV. 8645RPP, 2004 WL 2979785 (S.D.N.Y. Dec. 23, 2004).

33. Brigade requests that the examiner be empowered to investigate and report on the following subjects:

a. the propriety of any prepetition negotiations regarding the restructuring of the Debtors, including negotiations regarding the RSA, the DIP Term Facility, the DIP Term Loan Agreement or any other restructuring of the Debtors;

b. the accuracy and reasonableness of any prepetition projections, valuations, financial analyses, statements, business plans, and/or reports upon which the RSA was based as well as any decline in Cenveo's enterprise value and whether corporate acts or omissions contributed to such a decline;

c. the grants of (i) equity and employment agreements contemplated by the RSA to and for those responsible for its negotiation, and the negotiations leading to the grants of equity and new employment agreements and (iii) releases of claims and causes of action agreed to in the RSA, and the negotiations leading to the grants of such releases;

d. any monetary compensation or other form of remuneration received by the Burton family or other insiders from the Debtors;

e. any transactions, including payments, leases, supply or distribution agreements, directly or indirectly between (i) the Debtors, the Burtons, and/or their respective Affiliates, and (ii) the Burtons, insiders, officers, directors, and/or their respective affiliates; and

f. any transfers of value, including any charitable donations, made by the Debtors or members of the Burton family and/or their affiliates to any insiders, directors, officers, and/or their respective affiliates or organizations;

g. any potential causes of action that the Debtors may have arising out of the foregoing or any related transactions, including causes of action for breach of fiduciary duty, actionable negligence, waste, avoidance, and/or fraudulent conveyance.

34. Given the limited and focused nature of these topics, the proposed scope of the investigation should be deemed appropriate under the Bankruptcy Code.

NOTICE

35. Notice of this Motion has been provided in accordance with the Interim Order Establishing Certain Notice, Case Management, and Administrative Procedures (ECF Doc. No. 46) (the "Case Management Order"), and notice has been given to the parties identified on the

Master Service List (as defined in the Case Management Order). Brigade submits that such notice is sufficient and no other or further notice need be provided.

NO PRIOR REQUEST

36. No previous request for the relief sought herein has been made by Brigade to this or any other court.

CONCLUSION

For the foregoing reasons, Brigade respectfully requests that the Court (i) enter an order, in the form attached hereto as Exhibit A, appointing an examiner in these chapter 11 cases pursuant to Bankruptcy Code section 1104(c) and (ii) grant Brigade such other and further relief as the Court deems just, proper, and equitable.

Dated: February 12, 2018

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EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
CENVEO, INC., *et al*.,	:	Case No. 18-22178 (RDD)
Debtors.[1]	:	(Jointly Administered)

ORDER DIRECTING THE APPOINTMENT OF AN EXAMINER PURSUANT TO SECTION U.S.C. § 1104(c)

Upon the motion (the "Examiner Motion,") of Brigade Capital Management, LP and certain of its affiliates (collectively, "Brigade") seeking the appointment of an examiner pursuant to Section 1104(c) of title 11, United States Code (the "Bankruptcy Code"); and the Court having jurisdiction to consider the Examiner Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and due and proper notice of the Examiner Motion having been provided; and it appearing that no other or further notice need be provided; and upon the Declaration of David M. Zensky, the record in these cases, and the Court having heard the arguments of counsel and parties in interest at a hearing before the Court held on March 6, 2018 (the "Hearing"); and the Court having determined that appointment of an examiner in the Debtors chapter 11 cases is mandatory as the statutory predicates of section 1104(c)(2) of the Bankruptcy Code have been satisfied and is also in the best interests of creditors under section 1104(c)(1); and all of the proceedings had before the Court and after due deliberations; it is hereby

[1] The last four digits of Cenveo, Inc.'s tax identification number are 0533. Due to the large number of Debtor entities in these chapter 11 cases, a complete list of the Debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at https://cases.primeclerk.com/cenveo. The Debtors' service address for purposes of these chapter 11 cases is: 777 Westchester Avenue, Suite 111, White Plains, New York 10604.

ORDERED that the Examiner Motion is granted to the extent provided herein; and it is further

ORDERED that pursuant to Section 1104(d) of the Bankruptcy Code, the United States Trustee shall, in consultation with the Debtors, Brigade, and other parties in interest, appoint an examiner ("Examiner") in these jointly administered cases; and it is further

ORDERED that pursuant to section 1106 of the Bankruptcy Code, the examiner shall conduct an unfettered investigation of the Debtors and report to the Court and parties in interest in the Debtors' cases, with respect to:

a. the propriety of any prepetition negotiations regarding the restructuring of the Debtors, including negotiations regarding the RSA, the DIP Term Facility, the DIP Term Loan Agreement or any other restructuring of the Debtors;

b. the accuracy and reasonableness of any prepetition projections, valuations, financial analyses, statements, business plans, and/or reports upon which the RSA was based as well as any decline in Cenveo's enterprise value and whether corporate acts or omissions contributed to such a decline;

c. the grants of (i) equity and employment agreements contemplated by the RSA to and for those responsible for its negotiation, and the negotiations leading to the grants of equity and new employment agreements and (ii) releases of claims and causes of action agreed to in the RSA, and the negotiations leading to the grants of such releases;

d. any monetary compensation or other form of remuneration received by the Burton family or other insiders from the Debtors;

e. any transactions, including payments, leases, supply or distribution agreements, directly or indirectly between (i) the Debtors, the Burtons, and/or their respective Affiliates, and (ii) the Burtons, insiders, officers, directors, and/or their respective affiliates;

f. any transfers of value, including any charitable donations, made by the Debtors or members of the Burton family and/or their affiliates to any insiders, directors, officers, and/or their respective affiliates or organizations;

g. any potential causes of action that the Debtors may have arising out of the foregoing or any related transactions, including causes of action for breach of fiduciary duty, actionable negligence, waste, avoidance, and/or fraudulent conveyance; and

h. any other matters as determined by the examiner and approved by the Court; and it is further

ORDERED that pursuant to section 1106(a)(4) of the Bankruptcy Code, the examiner shall file on the docket for the lead case, No. 18-22178, a written report (redacted as necessary to comply with the provisions of this Order) of his or her investigation no later than ninety days after the appointment of the examiner as ordered above, and shall transmit a copy of any such report (redacted as necessary to comply with the provisions of this Order) to the Debtors, the United States Trustee, Brigade and its counsel, and any other entity that the Court may designate. To the extent that the examiner must include confidential or privileged material in any report submitted to the Court the complete report shall be made only to the Court, under seal, with a copy to the party claiming privilege or confidentiality, and such report shall be redacted or otherwise protected prior to the examiner's transmission of it to other parties. The redacted report, if any, shall be filed on the docket of Case No. 18-22178. The Debtors (or any of them) may designate any information as "privileged", "work product", or "confidential", in which case the examiner shall treat such information as so designated, unless otherwise ordered by this Court; provided, that the examiner or any party in interest may challenge such designation and the Court shall have jurisdiction to determine any such challenge; and it is further

ORDERED that in accordance with Rule 502(d) of the Federal Rules of Evidence, all privileges, protections, confidentiality and immunities (including, without limitation, the attorney-client privilege and the work-product doctrine), shall remain in full force and effect as to any information provided to the examiner, and shall not be waived or in any way impaired in connection with these chapter 11 cases (including in connection with any current or subsequent adversary proceeding or contested matter in these chapter 11 cases) or in any other Federal, State or other proceeding outside these chapter 11 cases by disclosure or production to the examiner of

any materials protected by such privileges, protections, confidentiality and immunities, or compliance with any other aspect of this Order; and it is further

ORDERED that the examiner may retain counsel and other professionals if he or she determines that such retention is necessary to discharge his or her duties, with such retention to be subject to Court approval under standards equivalent to those set forth in sections 327 and 330 of the Bankruptcy Code; and it is further

ORDERED that, subject to the provisions below regarding a proposed budget for the examiner's investigation (which proposed budget shall include a good-faith estimate of the fees and expenses of the examiner's proposed retained professionals), the examiner and any professionals retained by the examiner pursuant to any order of this Court shall be compensated and reimbursed for their expenses pursuant to any procedures for interim compensation and reimbursement of professionals that are established in the Debtors' cases, with compensation and reimbursement of the examiner being determined pursuant to section 330 of the Bankruptcy Code, and compensation and reimbursement of the examiner's professionals being determined pursuant to standards equivalent to those set forth in section 330 of the Bankruptcy Code; and it is further

ORDERED that the examiner shall have the standing of a party in interest with respect to matters that are within the scope of his or her investigation; provided, that the examiner may not be called to testify except by this Court; and it is further

ORDERED that the examiner is authorized, upon motion(s) made and order(s) issued pursuant to Bankruptcy Rule 2004, to issue subpoenas as may be necessary to compel the production of documents and the testimony of witnesses in connection with his or her investigation; and it is further

ORDERED that the Debtors are directed to cooperate fully and to (i) cause their respective present directors, officers, employees and professionals, and (ii) utilize reasonable best efforts to cause their respective former directors, officers, employees and professionals, to cooperate fully with the examiner and to provide unfettered access to the examiner in conjunction with the performance of any of the examiner's duties and investigation and to promptly turn over, and otherwise promptly make available to, the examiner all information (including witness interviews) requested by the examiner; and it is further

ORDERED that, if the examiner seeks the disclosure of documents or information (whether written or oral) as to which any of the Debtors asserts a claim of privilege or other protection from disclosure (including, without limitation, the attorney-client privilege and/or the work-product doctrine), or documents or information (whether written or oral) that are confidential (including, without limitation, pursuant to any confidentiality agreement), (i) the Debtors shall not claim or assert, (ii) the Debtors shall cause their respective present directors, officers, employees and professionals not to claim or assert, and (iii) the Debtors shall utilize reasonable best efforts to cause their respective former directors, officers, employees and professionals not to claim or assert, that any privilege, protection, confidentiality or immunity belonging to or assertable by the Debtors precludes the production or disclosure of documents or information (whether written or oral, including witness interviews) requested by the examiner; provided, that pursuant to the above provisions of this Order, no such production or disclosure shall constitute a waiver of any applicable privilege, protection, confidentiality or immunity (including, without limitation, the attorney-client privilege or the work product doctrine) pursuant to Rule 502(d) of the Federal Rules of Evidence; and is further

ORDERED that within ten (10) business days after the appointment of the examiner, the examiner shall file with the Court a proposed work plan that shall include, but not be limited to, (a) an estimated budget of the costs and expenses related to the examiner's investigation, (b) a preliminary list of issues the examiner believes will be the subject of his or her investigation, and (c) a proposed timeline for requesting and obtaining information from the Debtors and other parties and conducting the investigation; and it is further

ORDERED that until the examiner has filed his or her report (and any subsequent report as may be ordered by the Court), neither the examiner nor the examiner's professionals or agents shall make any disclosures other than to the Court (or as ordered by the Court), if requested, concerning the results of the examiner's investigation and any preliminary and final conclusions reached; and it is further

ORDERED that nothing in this Order shall impede the rights of the United States Trustee, Debtors, the Examiner, Brigade or any other party in interest to seek (or oppose) any other relief from this Court; and it is further

ORDERED that the Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: New York, New York
March __, 2018

_____
Hon. Robert D. Drain
United States Bankruptcy Judge