

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re: :  
: Chapter 11  
ONCO INVESTMENT COMPANY, :  
a Delaware corporation, et al., : Jointly Administered  
: Case No. 04-10558 (JBR)  
Debtors. : Objection Deadline: 5/31/04 @ 4:00 p.m.  
: Hearing Date: 6/15/04 @ 11:00 a.m.

**APPLICATION OF DEBTORS AND DEBTORS  
IN POSSESSION FOR AN ORDER AUTHORIZING THEM  
TO RETAIN AND EMPLOY JOHN T. BOYD COMPANY  
AS APPRAISERS, NUNC PRO TUNC AS OF MAY 3, 2004**

The above-captioned debtors and debtors in possession (collectively, the "Debtors") hereby apply to the Court for the entry of an order authorizing them to retain and employ John T. Boyd Company ("Boyd") as appraisers for the Debtors' mineral reserves, mines, plants and related assets in these chapter 11 cases, pursuant to section 327(a) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"), and Rule 2014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), nunc pro tunc as of May 3, 2004. In support of this Application, the Debtors: (i) submit the Affidavit of Ronald L. Lewis, Managing Director of Boyd (the "Affidavit"), a copy of which is attached hereto as Exhibit A and incorporated herein by reference; and (ii) respectfully represent as follows:

**Background**

1. On February 23, 2004 (the "Petition Date"), the Debtors commenced their respective reorganization cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"). By an order entered on the Petition Date, the Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being administered jointly.

2 The Debtors are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3 The Court has jurisdiction over this matter pursuant to 28 U S C §§ 157 and 1334. This is a core proceeding pursuant to 28 U S C. § 157(b)(2)

4 On March 8, 2004, the Office of the United States Trustee for the District of Delaware appointed a statutory committee of unsecured creditors (the "Creditors' Committee") in these chapter 11 cases, pursuant to section 1102 of the Bankruptcy Code

5 Debtor ONCO Investment Company, a Delaware corporation, is a direct subsidiary of Debtor Oglebay Norton Company ("Oglebay"), an Ohio corporation. Tracing its history to 1854, Oglebay is the direct or indirect parent of each of the other Debtors and maintains its corporate headquarters in Cleveland, Ohio

6 The Debtors mine, process, transport and market industrial minerals and aggregates that are used in building, energy, environmental and industrial applications. In addition, the Debtors own (a) strategically located, proven long-life reserves of high-quality limestone, industrial sand and mica and (b) related mineral extraction equipment, processing plants and transportation equipment, including trucks, railway lines and equipment, marine vessels and docks. The Debtors maintain operations in 13 states and are (a) one of the five largest producers of lime, (b) one of the ten largest producers of limestone, (c) the fourth largest producer of industrial sands and (d) the largest producer of muscovite mica in the United States. The Debtors commenced these chapter 11 cases primarily to restructure a debt level that threatened the continued viability of the Debtors' businesses.

7. For the year ended December 31, 2003, the Debtors generated consolidated sales of approximately \$404 million. As of December 31, 2003, the Debtors had approximately \$649 million in assets and approximately \$561 million in liabilities on a consolidated basis. The Debtors' workforce currently consists of approximately 1,800 full-time and part-time employees in California, Colorado, Georgia, Indiana, Michigan, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas and Virginia.

8. On March 27, 2004, the Debtors filed their joint plan of reorganization (as it may be amended, the "Plan").

**Request for Authority to Retain and Employ Boyd**

9. The Debtors desire to retain and employ Boyd as appraisers for their mineral reserves, mines, plants and related assets in these chapter 11 cases, nunc pro tunc as of May 3, 2004, pursuant to section 327(a) of the Bankruptcy Code and in accordance with the engagement letter between the Debtors and Boyd, dated as of May 3, 2004 (the "Engagement Letter"), a copy of which is attached hereto as Exhibit B and incorporated herein by reference.<sup>1</sup>

---

<sup>1</sup> Nunc pro tunc retention is appropriate because the appraisals to be conducted by Boyd are an integral component of the fresh start accounting that will be used by the Debtors in (a) the financial disclosure section of the disclosure statement to be filed in connection with the Plan and (b) the pro forma financial reports in a draft Form S-1 to be filed in the near future with the United States Securities and Exchange Commission (the "SEC") to permit, among other things, the issuance of preferred stock, the proceeds of which must be received by the Debtors as a condition to the effective date of the Plan. Accordingly, any delay in the provision of services by Boyd would also delay the Debtors' emergence from chapter 11. Given (a) the Debtors' stated goal of emerging from chapter 11 as expeditiously as possible and (b) the amount of time Boyd will need to complete the appraisals, it was necessary for Boyd to begin providing services to the Debtors immediately upon engagement. Thus Boyd has provided, and will continue to provide, services to the Debtors from and after May 3, 2004, and a hearing on this Application, or any order granting the relief requested in this Application, will likely occur or be entered, respectively, after that date.

10 The Engagement Letter describes (a) the various services that Boyd anticipates performing for the Debtors in these chapter 11 cases; and (b) the terms and conditions of Boyd's proposed engagement by the Debtors. Pursuant to the Engagement Letter, the issuance of Boyd's draft Report (as defined below) is contingent upon the Court's approval of this Application. The Debtors now seek authority to employ Boyd in these cases on the terms and subject to the conditions described below and in the Engagement Letter, nunc pro tunc as of May 3, 2004.

**Boyd's Qualifications**

11. Boyd is particularly well suited to serve as the Debtors' appraisers in these chapter 11 cases. Since 1943, Boyd has provided practical, cost-effective mining and geological consulting solutions in over 6,000 mining-related projects; offered premier mining evaluations, expert appraisals, mining analyses, mining plans, forecasts, estimates, mining assessments, investigations, engineering designs; and provided expert witness testimony to worldwide coal and mineral industries. Boyd's mineral reserve reports have received wide acceptance within the mining industry and fully comply with both foreign and SEC filing requirements. Boyd has served as mining and geological consultants in numerous chapter 11 cases, including those of James River Coal Company, North American Refractories Co., and Pen Holdings, Inc. Boyd has also been engaged in connection with a number of pre-chapter 11 workout proceedings, including those of Horizon Natural Resources Co. and Lodestar Holdings, Inc. Prominent clients of Boyd within the mining industry include Arch Coal, Inc., Carmeuse North America, CONSOL Energy, Inc., Fairmount Minerals, Ltd., Freeport-McMoRan Copper & Gold, Inc., Peabody Energy, RAG American Coal Holding, Inc. and US Silica Company. Major financial and government institutions that have retained Boyd in various consulting capacities include

Bank of America, Citibank, N.A., Credit Suisse First Boston, Deutsche Bank, Goldman, Sachs & Co., the Internal Revenue Service, J.P. Morgan Chase, Mellon Bank, N.A., Merrill Lynch, Prudential Financial, Salomon Brothers, Inc., the U.S. Trade & Development Agency, the U.S. Agency for International Development and the World Bank

12 Over the course of the last sixty years, the Debtors have had cause to engage Boyd on several occasions to provide services relating to properties or operations not currently owned by the Debtors. In addition, in 1992, as a representative for another client, Boyd performed an operations review of certain properties that have since become part of the Debtors' operations in Michigan and fall within the scope of the appraisal project for which the Debtors currently seek to retain Boyd.

**Services to Be Provided by Boyd**

13 The Debtors expect that Boyd will conduct appraisals for the Debtors' mineral reserves, mines, plants and related assets as needed throughout these chapter 11 cases. These appraisals are essential to the fresh start accounting to be used in (a) the financial disclosure section of the disclosure statement to be filed in connection with the Plan and (b) the pro forma financial reports contained in a draft Form S-1 to be filed with the SEC to permit, among other things, the issuance of preferred stock, the proceeds of which must be received by the Debtors as a condition to the effective date of the Plan. In particular, the Debtors anticipate that Boyd will prepare a comprehensive report (the "Report") that will include among other things:

- (a) a valuation of the mineral reserves located upon the Debtors' properties identified on pages 1 and 2 of the Engagement Letter (the "Properties");

- (b) an appraisal of the fair market value, on an ongoing operational basis, of the Debtors' mining and processing assets located upon the Properties;
  - (c) an appraisal of the Debtors' reported mineral products inventory;
- and
- (d) such other mining and geological consulting services as may be requested by the Debtors.

14. The Debtors require knowledgeable appraisers to render these essential professional services. As described above, Boyd has substantial expertise in these areas. Accordingly, Boyd is well qualified to perform these services and assist the Debtors in these chapter 11 cases. As indicated in the Engagement Letter, Boyd anticipates that drafting the Report will require the expenditure of approximately 1,800 to 2,000 hours and cost approximately \$270,000 to \$300,000, plus expenses and travel time.

**Payment of Fees and Expenses and Other Terms of Boyd's Retention**

15. Pursuant to the terms and conditions of the Engagement Letter and subject to the Court's approval, Boyd intends to (a) charge for its professional services on an hourly basis in accordance with its ordinary and customary hourly rates in effect on the date services are rendered, and (b) seek reimbursement of actual and necessary out-of-pocket expenses.

**Fees and Expenses**

16. Pursuant to the terms of the Engagement Letter, and subject to the Court's approval, Boyd intends to charge for its professional services on an hourly basis in accordance with the following schedule:<sup>2</sup>

---

<sup>2</sup> The hourly rates charged by Boyd professionals differ based on, among other things, each professional's level of experience. During the ordinary course of its business, Boyd

<u>Position</u>	<u>Hourly Rate</u>
Principal/Managing Director	\$250
Vice President	\$200
Executive Consultant	\$175
Project Manager	\$165
Senior Engineer	\$150
Senior Transportation Analyst	\$130
Senior Market Analyst	\$130
Senior Geologist	\$130
Engineer/Geologist	\$100
Technical Specialist	\$75
Engineering Assistant/Sr. CAD	\$65
Draftsman/CAD	\$50
Clerical	\$45

17. Boyd will maintain detailed, contemporaneous records of time spent in connection with the rendering of the appraisal services described in paragraph 13 above by person, category and by nature of the services rendered. Boyd will bill all professional service time in six-minute increments, as required by Rule 2016-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States District Court for the District of Delaware (the "Local Rules")

---

(continued. )

revises the hourly rates of its professionals to reflect changes in responsibilities, increased

18. In addition to charging for its professional services, Boyd intends to seek reimbursement of actual and necessary out-of-pocket expenses incurred in rendering the appraisal services described in paragraph 13 above. Boyd will maintain detailed, contemporaneous records of all expenses for which it seeks reimbursement and will not seek reimbursement of any expenses in excess of actual costs.

19. Notwithstanding anything to the contrary in the Engagement Letter, (a) the Debtors will not make any payments to Boyd other than in accordance with the Bankruptcy Rules, the Local Rules, the Administrative Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals (D.I. 225) (the "Interim Compensation Order") and any additional procedures that may be established by the Court in these cases<sup>3</sup> and (b) Boyd will not charge interest on any unpaid amounts owing to Boyd for services provided under this Application

20. The Engagement Letter also provides for:

(a) Limitation of Liability. Boyd's total liability to the Debtors for any and all claims, or claims expenses from any cause, will not exceed the total compensation paid to Boyd for its appraisal services

(b) Indemnification. The Debtors agree to indemnify and hold Boyd harmless from any claim or liability arising from the unauthorized reuse or modification of materials prepared by Boyd at the Debtors' request (including documents, maps,

---

(continued )

experience and the increased cost of doing business

<sup>3</sup> Although the Engagement Letter requests that the Debtors provide Boyd with a \$90,000 advance payment (the "Advance Payment") on account of expenses, the Debtors and Boyd have agreed that the Debtors will not provide the Advance Payment



designs, models and reports), either by the Debtors or by anyone acquiring such materials from the Debtors.

(c) Litigation Costs. The Debtors shall be responsible for costs associated with Boyd's compliance with any subpoena related to the services to be provided to the Debtors by Boyd, which costs may include hourly charges for persons involved in responding to such subpoenas, travel expenses, attorneys' fees in connection with Boyd's response, and other reasonable expenses associated with such litigation

(d) Dispute Resolution Any dispute or action regarding Boyd's appraisal services that is valued at less than \$200,000 (exclusive of interest and costs) will be mediated by a professional mediator. If mediation does not settle the dispute, it will be arbitrated under rules governing commercial arbitration. Mediation and arbitration will take place in Pittsburgh, Pennsylvania. In any action, the prevailing party can recover reasonable attorneys' fees and necessary costs as part of the judgment.

### **Prepetition Payments**

21. The Debtors did not make any payments to Boyd during the year immediately preceding the Petition Date.

### **Disclosure Concerning Conflicts of Interest**

22. To the best of the Debtors' knowledge, information and belief, other than in connection with these cases, Boyd has no connection with the Debtors, their creditors, the United States Trustee (the "U.S. Trustee") or any other party with an actual or potential interest in these chapter 11 cases or their respective attorneys or accountants, except as described below or in paragraph 22:

(a) Boyd is not employed by, and has not been employed by, any entity other than the Debtors in matters related to these chapter 11 cases

(b) From time to time, Boyd has provided services, and likely will continue to provide services, to certain creditors of the Debtors and various other parties adverse to the Debtors in matters unrelated to these chapter 11 cases. As described below, however, Boyd has undertaken a detailed search to determine, and to disclose, whether it is providing or has provided services to any significant creditors, equity security holders, insiders or other parties in interest in such unrelated matters

(c) Boyd has approximately 50 employees. It is possible that certain employees of Boyd hold interests in mutual funds or other investment vehicles that may own the Debtors' debt or equity securities

23. To check and clear potential conflicts of interest in these cases, Boyd researched its client database for the past two years to determine whether it had any relationships with the following entities (collectively, the "Interested Parties"):

- (a) the Debtors;
- (b) certain of the Debtors' trade names;
- (c) the Debtors' present officers and directors and certain of their major business affiliations;
- (d) the Debtors' largest unsecured creditors on a consolidated basis as identified in the Debtors' chapter 11 petitions;
- (e) other material trade creditors of the Debtors;
- (f) the attorneys and other professionals that the Debtors have either retained or identified for employment in these chapter 11 cases;

- (g) the Debtors' material senior secured creditors and their professionals;
- (h) the Debtors' material senior secured noteholders and their professionals;
- (i) the Debtors' material known unsecured noteholders and their indenture trustee and professionals;
- (j) the Debtors' postpetition lenders and their professionals;
- (k) parties to significant litigation with the Debtors;
- (l) the Debtors' major customers;
- (m) the Debtors' primary insurers;
- (n) 5% shareholders in Oglebay; and
- (o) other significant parties in interest (including nondebtor parties to certain material leases and contracts).

The identities of the Interested Parties were provided to Boyd by the Debtors and are set forth on Schedule 1 to the Affidavit. To the extent that Boyd's research of its relationships with the Interested Parties indicated that Boyd has been or currently is employed by any of these entities in matters unrelated to these chapter 11 cases, the identities of these entities and a description of the services provided by Boyd to such entities are set forth on Schedule 2 to the Affidavit.

24 Despite the efforts described above to identify and disclose Boyd's connections with parties in interest in these cases, because the Debtors are a large enterprise with thousands of creditors and other relationships, Boyd is unable to state with certainty that every client relationship or other connection has been disclosed. In this regard, if Boyd discovers additional information that requires disclosure regarding its relationships, Boyd promptly shall file and serve a supplemental affidavit setting forth such additional information with the Court, as required by Local Rule 2014-1(a).

25 To the best of the Debtors' knowledge, information and belief, Boyd neither holds nor represents any interest adverse to the Debtors or their respective estates in the matters for which it is proposed to be retained. Accordingly, the Debtors believe that Boyd is a "disinterested person," as defined in section 101(14) of the Bankruptcy Code and as required by section 327(a) of the Bankruptcy Code. The Debtors submit that their employment of Boyd would be in the best interests of the Debtors' respective estates. The Debtors' knowledge, information and belief regarding the matters set forth herein are based, and made in reliance, upon the Affidavit.

### **Fee Applications**

26 As described above and notwithstanding anything to the contrary in the Engagement Letter, Boyd intends to apply to the Court for allowance of compensation and reimbursement of expenses in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and the Interim Compensation Order and pursuant to any additional procedures that may be established by the Court in these cases.

### **Notice**

27 No trustee or examiner has been appointed in these chapter 11 cases. Notice of this Motion has been provided to: (a) the United States trustee; (b) counsel to the Creditors' Committee; (c) counsel to the administrative agent for the Debtors' prepetition secured bank group; (d) counsel to the unofficial committee of holders of Oglebay's senior secured notes; (e) counsel to the administrative agents for the Debtors' postpetition lenders; and (f) parties that have filed requests for notices in these chapter 11 cases. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

**No Prior Request**

28 No prior request for the relief sought in this Application has been made to this or any other court in connection with these chapter 11 cases.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit C: (i) authorizing the Debtors to retain and employ Boyd as appraisers for the Debtors' mineral reserves, mines, plants and related assets in these chapter 11 cases, pursuant to section 327(a) of the Bankruptcy Code, on the terms and conditions described herein and in the Engagement Letter (as such terms may be modified

herein), nunc pro tunc as of May 3, 2004; and (ii) granting such other and further relief as the

Court may deem proper.

Dated: May [ // ], 2004  
Wilmington, Delaware

Respectfully submitted,

ONCO INVESTMENT COMPANY, on behalf  
of itself and each of its affiliated Debtors and  
Debtors in Possession

Daniel J. DeFranceschi (DE 2732)  
Paul N. Heath (DE 3704)  
RICHARDS, LAYTON & FINGER, P.A.  
One Rodney Square  
P.O. Box 551  
Wilmington, Delaware 19899  
(302) 651-7700 (Telephone)  
(302) 658-6548 (Facsimile)

  
\_\_\_\_\_  
By: Rochelle F. Walk  
Vice President and Secretary

-and-

David G. Heiman (OH 0038271)  
Heather Lennox (OH 0059649)  
Carl E. Black (OH 0069479)  
JONES DAY  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114  
(216) 586-3939 (Telephone)  
(216) 579-0212 (Facsimile)

ATTORNEYS FOR DEBTORS AND  
DEBTORS IN POSSESSION