

Hearing Date and Time: May 2, 2007 at 9:45 a.m.
Objection Deadline: April 25, 2007 at 4:00 p.m.

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*Attorneys for the Official Committee
of Unsecured Creditors of The Consumers Trust*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re: Chapter 11
:
THE CONSUMERS TRUST, Case No. 05 – 60155 (REG)
:
Debtor.
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**NOTICE OF JOINT MOTION OF THE CONSUMERS TRUST AND
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS
PURSUANT TO BANKRUPTCY RULE 9019 FOR APPROVAL
OF THE SETTLEMENT AGREEMENT BY AND AMONG THE CONSUMERS
TRUST, DAVID RUBIN AND HENRY LAN,
SOLELY AS THE RECEIVERS OF THE CONSUMERS TRUST,
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS,
CAPLANS SOLICITORS, RICHARD CAPLAN, AND WESLEY HARRISON**

PLEASE TAKE NOTICE that a hearing will be held on May 2, 2007, at 9:45 a.m. or as soon thereafter as counsel can be heard, before the Honorable Robert E. Gerber, United States Bankruptcy Judge, at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004, Courtroom 621, to consider the attached *Joint Motion of The Consumers Trust and the Official Committee of Unsecured Creditors Pursuant to Bankruptcy Rule 9019 for Approval of the Settlement Agreement By and Among The Consumers Trust, David Rubin and Henry Lan, Solely as the Receivers of The Consumers Trust, the Official Committee of Unsecured Creditors, Caplans Solicitors, Richard Caplan, and Wesley Harrison*, dated March 30, 2007 (the "Motion").

PLEASE TAKE FURTHER NOTICE that objections to the Motion, if any, must be filed with the Court, with a copy to the Chambers of Judge Gerber, and served on (i) Jeff J. Friedman, Esq., Katten Muchin Rosenman LLP, 575 Madison Avenue, New York, New York 10022; (ii) David L. Barrack, Esq., Fulbright & Jaworski L.L.P., 666 Fifth Avenue, New York, New York 10103; (iii) Brian Masumoto, Esq., Office of the United States Trustee, 33 Whitehall Street, New York, New York 10004; and (iv) Ronald R. Sussman, Esq., Cooley Godward Kronish LLP, 1114 Avenue of the Americas, New York, New York 10036, so as to be received no later than April 25, 2007 at 4:00 pm Eastern Daylight Time.

PLEASE TAKE FURTHER NOTICE that the hearing to consider the Motion and any

objections thereto may be adjourned from time to time without notice to any creditor or other party-in-interest, other than the announcement of the adjourned date at such hearing.

Dated: New York, New York
March 30, 2007

KATTEN MUCHIN ROSENMAN LLP

Attorneys for The Consumers Trust, as Debtor and Debtor-in-Possession

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PURSUANT TO BANKRUPTCY RULE 9019 FOR APPROVAL
OF THE SETTLEMENT AGREEMENT BY AND AMONG THE CONSUMERS
TRUST, DAVID RUBIN AND HENRY LAN,
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THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS,
CAPLANS SOLICITORS, RICHARD CAPLAN, AND WESLEY HARRISON**

TO: THE HONORABLE ROBERT E. GERBER,
UNITED STATES BANKRUPTCY JUDGE

The Consumers Trust, as debtor and debtor-in-possession (the “Debtor”), by its counsel Katten Muchin Rosenman LLP, and the Official Committee of Unsecured Creditors of The Consumers Trust (the “Committee”), by its counsel Fulbright & Jaworski L.L.P. (collectively, the “Movants”), hereby move for entry of an order pursuant to section 105(a) of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for approval of the Settlement Agreement by and among the Debtor, the Committee, Caplans Solicitors (“Caplans”), Richard Caplan (“Caplan”), and Wesley Harrison (“Harrison”), dated as of March 12, 2007 and attached hereto as Exhibit “A” (the “Settlement Agreement”). In support of the motion (the “Motion”) the Movants respectfully represent as follows:

Relief Requested

1. By this Motion, the Movants request that the Court authorize and approve the Settlement Agreement for the reasons set forth herein.

Jurisdiction

2. This court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and regulatory predicates for the relief sought herein are section 105(a) of the Bankruptcy Code and Rule 9019 of the Bankruptcy Rules.

Introduction

3. The Movants seek the Court’s approval of the Settlement Agreement among the Movants, Caplan and Harrison (collectively the “Solicitor Trustees”) and Caplans. At all times

relevant to this Motion and the proposed settlement, the Solicitor Trustees were two of the four trustees of The Consumers Trust and Caplans is the law practice in England where Caplan and Harrison are employed.¹ The Settlement Agreement will resolve all claims of Movants against the Solicitor Trustees and Caplans without the necessity of commencing litigation, in consideration of their payment to the estate of \$3,200,000 in cash. The settlement amount represents approximately 82% of the total policy claim limit available to the Solicitor Trustees under their professional liability insurance policy. The Movants' review of sworn financial statements presented by Caplan and Harrison has revealed that the Solicitor Trustees do not possess any other significant assets other than the insurance policy.

4. The settlement is limited to the Solicitor Trustees and Caplans and does not resolve any claims against Eurofinance S.A. ("Eurofinance"), the Debtor's settlor; Adrian Roman ("Roman"), the owner of Eurofinance and the party Movants believe to have been in *de facto* control of the Debtor prior to the appointment of David Rubin and Henry Lan as the Debtor's receivers (the "Receivers"); or any of the other parties that were responsible for or involved with the business operations of the Debtor. If the Movants are unable to obtain favorable settlements from others involved with the Debtor that the Movants believe to have liability to the Debtor and its estate, the Movants intend to commence lawsuits against these parties.

5. The Movants are cognizant that the circumstances of the Settlement Agreement are somewhat unusual in that the Movants have not commenced an adversary proceeding

¹ Subsequent to the commencement of the chapter 11 case, the Solicitor Trustees submitted a letter to the Receivers purporting to resign their trusteeships. The Receivers believe such resignations were improper and notified the Solicitor Trustees that they refuse to accept them. The parties reserve all of their respective rights, claims and defenses with respect to the issue.

against the Solicitor Trustees and Caplans. The Movants can assure the Court, as more fully set forth below, that the Settlement Agreement is not being entered into in haste and without the Movants having performed sufficient due diligence to assure themselves and the Court that the settlement is reasonable and in the best interests of the estate.

6. Through the production and analysis of thousands of pages of documents produced by the Trustees to the Receivers, and the production of tens of thousands of documents and testimony compelled by Court-approved examinations under Bankruptcy Rule 2004, the Movants have extensively investigated the pre-petition conduct of the Debtor and the entities and individuals that provided services and conducted its operations. The Movants' Rule 2004 examinations included nearly every party involved in the business operations of the Debtor as well as the attorneys in the United States responsible for providing the Debtor with pre-petition representation. The Movants have no reason to believe that they would obtain additional, material information through discovery in connection with an adversary proceeding against the Solicitor Trustees. The Movants' independent analysis of the information has led them to conclude that the Debtor's estate has significant causes of action against the Solicitor Trustees and Caplans and the nature of these causes of action and potential liability were brought to their attention in detail in meetings with their counsel and counsel for their professional liability insurer.

7. For the reasons set forth below, Movants submit that the Settlement Agreement is in the best interest of the estate, allows for a substantial recovery with no litigation cost or risk, and is well within the range reasonableness. Accordingly, the Movants respectfully request that the Court approve the Settlement Agreement.

Background

8. On December 5, 2005 (the “Petition Date”), the Debtor filed with the Court a petition for relief under chapter 11 of the Bankruptcy Code. The Debtor is currently managing its affairs as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

9. No trustee or examiner has been appointed in this chapter 11 case. On December 29, 2005, the United States Trustee for the Southern District of New York appointed the eleven-member Committee pursuant to sections 1102(a) and 1102(b) of the Bankruptcy Code. The Committee engaged Fulbright & Jaworski L.L.P. to act as its counsel.

10. The Debtor is a business trust formed under the laws of the United Kingdom pursuant to a trust deed dated March 25, 2002 among (i) Eurofinance, (ii) the Solicitor Trustees, and (iii) Andrew Davis and Dennis Bonley (collectively, the “Accountant Trustees” and together with the Solicitor Trustees, the “Trustees”). The Debtor was established for the purpose of administering sales promotions. The promotions, marketed to consumers in the United States and Canada (each a “Consumer” and collectively, the “Consumers”), consisted of a series of sales promotions under which documents called “cashable vouchers”, “cashable rebates” and “cashable bonds” (collectively, the “Programs”) were provided to Consumers who bought generally expensive consumer goods and services.

11. In February 2005, in response to complaints from Consumers, the Attorney General of Missouri (the “Missouri AG”) commenced an action against the Debtor, the Trustees, Eurofinance, Roman (Eurofinance’s original shareholder), Consumer Promotions, Inc. (the Debtor’s marketing and sales agent in the United States) (“Consumer Promotions”)

and four U.S. residents associated with the Programs, alleging multiple violations of Missouri's Merchandising Practices Act (the "Missouri Action"). In connection with the commencement of the Missouri Action, the Missouri AG obtained an order of the Circuit Court of Jackson County, Missouri (the "Missouri Court") freezing the Debtor's bank accounts at the Blue Ridge Bank and Trust Company in Missouri (the "Freeze Order"). As a result of the Freeze Order, the Debtor was unable to pay claims or other obligations.

12. After an inconclusive, four-day hearing on a preliminary injunction sought by the Missouri AG in the Missouri Action, the parties voluntarily settled by agreeing that the Debtor would pay the Missouri AG for the benefit of the Consumers, the sum of \$1.65 million in consideration of the dismissal of the Missouri Action. In addition, the Debtor agreed to pay \$200,000 to the Missouri AG to defray the Missouri AG's expense in investigating and pursuing the Missouri Action. The settlement was approved by the Missouri Court on August 31, 2005 and \$1.85 million was paid by the Debtor to the Missouri AG two days later.

13. The Freeze Order was lifted as a result of the settlement of the Missouri Action. As a result of the adverse publicity of the Missouri Action, investigations and litigation by attorneys general in other states, and litigation by individual or groups of voucher holders, however, it became clear to the Trustees that the Debtor would be unable to meet its obligations, especially in light of the loss of the \$1.85 million in trust funds to the Missouri AG. Upon the advice of English counsel and with the goal of obtaining judicial sanction for the Debtor to file for chapter 11 protection in the United States and to file an ancillary proceeding in Canada, on November 14, 2005, Eurofinance petitioned the High Court of Justice in London (the "High Court") to appoint the Receivers and authorized the Debtor,

among other things, to seek relief under chapter 11 of the Bankruptcy Code. The petition had the full support of the Trustees, some of whom filed supporting affidavits with the High Court.

The Investigation By the Receivers and the Committee

14. Subsequent to the Petition Date, Movants sought to conduct a joint investigation (the “Investigation”) into the pre-Petition Date activities of the Debtor. In connection with the Investigation, the Debtor and the Committee sought and obtained court orders on February 9, 2006 and August 14, 2006, pursuant to Bankruptcy Rule 2004 compelling production of documents and permitting the examination of the Trustees, Eurofinance, Roman, Consumer Promotions, James Rigsby, Robin Wertheimer, Aaron Racine and his law firm, James Hobbs and his law firm, Jeff Criswell and Graham Jaynes (collectively, the “Rule 2004 Parties”). Additionally, the Committee obtained court orders on March 31, 2006 and October 3, 2006, compelling production of documents and permitting the examination of the Debtor and designating the Trustees, Eurofinance and Roman as control parties and compelling those designated parties to testify on behalf of the Debtor.

15. In response to the Rule 2004 orders, documents were produced by, among others, all of the former attorneys of the Debtor, the Trustees, and Consumer Promotions. Tens of thousands of pages of documents relating to the pre-petition operation of the Debtor and its litigation strategies regarding the various actions brought by numerous attorneys general, as well as civil actions brought by individual voucher holders. The Receivers, intent on assuring themselves that they had full access to all of the information belonging to the Debtor, sought and obtained relief from the High Court compelling the Trustees to direct former attorneys for the Debtor to produce privileged documents and reveal privileged information to counsel for the Debtor and the Committee in connection with the Rule 2004 exams. All of the documents

were reviewed carefully by the Movants and with the aid of the Committee's forensic accountants and the Receivers' forensic expertise. In addition, the Missouri Attorney General provided the Movants with transcripts of and exhibits from the four-day Missouri hearing.

16. The Movants conducted depositions of nearly all of the Rule 2004 Parties after having fully reviewed the documents produced by them. The evidence adduced at those examinations, in conjunction with the documentary evidence, has enabled the Movants to understand the pre-petition business and financial affairs of the Debtor and to establish that Roman, along with Eurofinance, were in *de facto* control of the Trust and its business operations.

17. The Trustees initially did not agree to participate in Rule 2004 examinations.² The Movants participated in extensive negotiations over several months with the Trustees to broker an agreement to allow Rule 2004 examinations to go forward. Eventually, and prompted by the Court's order directing the Trustees to respond, the negotiations were successful and the Trustees all agreed to participate in the Rule 2004 examinations in London. The Trustees also agreed to respond to the document requests sent to them in connection with the Rule 2004 orders. It was agreed that the Bankruptcy Court would determine any and all discovery disputes. On June 28, 2006 and July 13, 2006, the Court entered orders approving stipulations among the Trustees, the Debtor and the Committee that allowed the examinations of the Trustees to go forward.

² The Trustees were originally represented by a single English solicitor. At some point, a conflict of interest developed and the Solicitor Trustees obtained separate counsel. Only then was there progress in obtaining the Trustees' compliance with the Court's Rule 2004 Orders.

18. During the week of July 24, 2006, counsel for the Movants traveled to London to take the Trustees' Rule 2004 examinations. Each Trustee was examined for a day. The Accountant Trustees both answered all of the questions asked of them and did not assert a Fifth Amendment privilege against testifying. At their examinations, the Solicitor Trustees both asserted their Fifth Amendment privilege and did not answer the vast majority of the questions asked. A further dispute arose with the Solicitor Trustee over their refusal to produce documents based upon an alleged Fifth Amendment privilege.

19. Based upon the Solicitor Trustees' assertion that the act of producing documents held in their "individual" capacities, as opposed to their "representative" capacities as trustees, would eviscerate their privileges under the Fifth Amendment to the Constitution, the Movants filed a motion to compel production of documents by the Solicitor Trustees on August 24, 2006. The Movants thereafter initiated negotiations with the Solicitor Trustees and were able to structure a settlement agreement whereby the Solicitor Trustees agreed to comply with the document production and the motion to compel would be voluntarily dismissed. That resolution resulted in the production of a substantial number of additional documents by the Solicitor Trustees. More importantly, it was during the discussions regarding the motion to compel that the parties began negotiations that eventually led to the Settlement Agreement now before the Court for consideration.

20. The Movants concluded that the Solicitor Trustees have committed breaches of trust under English law, including, without limitation, authorizing the Debtor to pay the \$1.85 million in trust funds to settle the Missouri action without the requisite legal authority under the trust deed creating the Trust, and failing to independently determine the adequacy of the trust funds maintained by the Debtor to pay the claims of Consumers. The Committee and the

Debtor have each obtained independent advice from solicitors in England regarding the benefits and liabilities of the proposed Settlement Agreement. Each agrees that the settlement is a favorable one and is in the best interest of the estate. The Solicitor Trustees do not admit to any wrongdoing in connection with the settlement.

21. The proposed settlement and compromise will provide the estate with a recovery of \$3.2 million in cash. Further, it avoids litigation and collection costs that could consume a substantial portion of that amount, as well as the uncertainty associated with any litigation. These facts and the applicable law discussed below compel the conclusion that the settlement and compromise proposed herein as fair and reasonable under the circumstances and meet all legal standards necessary for Court approval.

The Terms of the Settlement

22. After extensive arm's-length negotiations and discussions concerning the merits of their respective positions, the Debtor, the Receivers and the Committee entered into the Settlement Agreement with the Solicitor Trustees and Caplans, subject to approval of this Court, to settle any and all claims each may have against the Solicitor Trustees and Caplans to avoid the costs and time delay of protracted litigation and the inherent uncertainties in any litigation.

23. The Settlement Agreement provides, in salient part, as follows:

- a. Settlement Payment. Within five business days after entry of an order of the Bankruptcy Court approving the Settlement Agreement, and so long as no stay of such order is in effect (the "Approval Order"), the Solicitor Trustees will cause the sum of \$3,200,000 to be paid to the Receivers for the benefit of the Debtor's estate by wire transfer, in immediately available funds (the "Settlement Payment").

- b. Release by the Debtor, the Receivers and the Committee. Except as specifically set forth in the Settlement Agreement, upon the receipt by the Debtor or the Receivers of the Settlement Payment, the Debtor, its estate, the Receivers, and the Committee, (collectively, the “Releasers”) will irrevocably release and discharge: Caplan, Harrison, and Caplans, including each of their officers, directors, employees, agents, shareholders, attorneys, financial advisors, predecessors, successors, parents, subsidiaries, affiliates and assigns (each a “Releasee” and collectively, the “Releasees”) from all claims, liabilities, losses and causes of action of any kind, nature or description, in any and all jurisdictions in the World in which any such claims, liabilities, losses and causes of action may arise, whether asserted or unasserted, known or unknown, derivative or direct, liquidated or unliquidated, fixed or contingent, matured or unmatured, foreseen or unforeseen, then existing or thereafter arising, in law, equity, or otherwise from the beginning of the World through the date of the Settlement Agreement, including, without limitation, any claim for breaches of trust or breaches of contract of any nature or kind relating in any manner to: the Trust, any affiliates of the Trust, the Promotions administered by the Trust and the Trustees, and any obligations that may have been assumed by the Trust in connection with other programs or consumer rebate promotions (the “Released Claims”).
- c. Release by Releasees. Except as specifically set forth in the Settlement Agreement, upon entry of the Approval Order, Caplan, Harrison, and Caplans will be deemed by the Settlement Agreement to release the Debtor, its estate, the Receivers, and the Committee (collectively, the “Estate Releasees”) from all claims, liabilities, causes of action, contribution claims, indemnities, and will not assert or file any proofs of claim or make any motions for payment of an administrative expense in the Debtor’s bankruptcy case and any such proof of claim heretofore filed will be deemed disallowed and expunged.
- d. Filing of Chapter 11 Plan. The Debtor and the Committee agree to use their reasonable best efforts to file a joint chapter 11 plan by June 1, 2007, which, among other things, provides for the proceeds of the Settlement Payment to be distributed to those holders of allowed-claims against the Debtor (or the beneficiaries thereof) that have granted, through a special election on the plan ballot and/or by virtue of having accepted a distribution of proceeds by negotiating a check, being deemed to have granted, a release to the Releasees of similar scope and breadth as the releases provided by the Debtor, the Receivers and the Committee. The joint chapter 11 plan will contain the language in the following three paragraphs (or language in substantially similar form):

“Releases by the Debtor. As of the effective date of the plan, for good and valuable consideration, the adequacy of which is hereby confirmed, the Debtor will be deemed to release forever, waive, and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action, and liabilities (other than the rights of the Debtor to enforce this plan and other agreements or documents delivered hereunder, and liabilities arising after the effective date in the ordinary course of business) whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, derivative or direct, then existing or thereafter arising, in law, equity, or otherwise that are based in whole or part on any act omission, transaction, event, or other occurrences taking place on or prior to the effective date in any way relating to the Debtor or the post-

confirmation litigation trust, including pursuant to principles of piercing the corporate veil, alter ego, domination, constructive trust and similar principles of state or federal creditors' rights laws, in any such case (collectively, the "Released Claims"), against Caplan, Harrison, and Caplans including each of their officers, directors, employees, agents, shareholders, attorneys, financial advisors, predecessors, successors, parents, subsidiaries, affiliates and assigns (collectively, the "Released Parties"). For the avoidance of doubt, the Released Claims will include, without limitation, any claim for breaches of trust or breaches of contract of any nature or kind relating in any manner to: the Trust, any affiliates of the Trust, the Promotions administered by the Trust and the Trustees, and any obligations that may have been assumed by the Trust in connection with other programs or consumer rebate promotions.

Releases by Holders of Claims and Interests in Respect of Released Parties. On the effective date, each holder of a claim (whether allowed or disallowed) against the Debtor or the beneficiaries thereof, that accepts a distribution from the proceeds of the Settlement Payment in consideration of the obligations of the Debtor under the plan, will be deemed to forever release, waive, and discharge all claims, demands, debts, rights, causes of action, or liabilities (other than the right to enforce Released Parties' obligations under the plan, the confirmation order, and the contracts, instruments, releases, agreements, and documents delivered under the plan), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, derivative or direct, foreseen or unforeseen, then existing or thereafter arising, in law, equity, or otherwise that are based in whole or in part on any act or omission, transaction, event, or other occurrence taking place on or prior to the effective date in any way relating to the Debtor, the Chapter 11 Case, the Released Claims, the plan, or the disclosure statement, in any such case, against the Released Parties including, but not limited to any claim for breaches of trust or breaches of contract of any nature or kind relating in any manner to: the Trust, any affiliates of the Trust, the Promotions administered by the Trust and the Trustees, and any obligations that may have been assumed by the Trust in connection with other programs or consumer rebate promotions.³

Injunction Related to Releases. The confirmation of the plan will permanently enjoin the commencement of prosecution by any entity, whether directly, derivatively or otherwise, of any claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action or liabilities released pursuant to the plan including, but not limited to, the claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action or liabilities released pursuant to Section [] of the plan. For the avoidance of doubt, any litigation trust established by the plan and all holders of claims deemed to have released the Released Parties pursuant to the Section [] of the plan will not bring any action to recover on any Released Claim against any Released Parties. Nothing in the plan or the transactions approved thereby is intended to or will release any non-Debtor of any liabilities or

³ Counsel to the Solicitor Trustees has represented to counsel to the Debtor that the Solicitor Trustees are no longer involved with the Promotions or any other rebate, voucher or similar programs, and that prior to the date by which objections to this Motion are due, the Debtor will file or cause the filing with the Court of sworn statements to that effect from each of the Solicitor Trustees.

obligations to the United States of America or its agencies or subdivisions or against any parties who are not Released Parties.”

- e. No Release of Potential Defendants; Contribution and Reimbursement Claims. In the Settlement Agreement, the Releasees acknowledge that the Debtor, the Receivers, the Committee and/or a litigation trust that may be established under a chapter 11 plan, may pursue actions for damages against others involved with the Trust and the Promotions, including, without limitation, the accounting firm of Davis Bonley, Messrs. Davis and Bonley (individually), Roman, Eurofinance, James Rigsby, Jeff Criswell, Consumer Promotions and CP Promotions, GP Enterprises, Graham Jaynes, the law firm of Alexander & Ash, Aaron Racine, the law firm of Monaco, Sanders, Gotfredson & Racine, L.C. (including each aforementioned entities’ officers, directors, shareholders, members, partners, employees, agents and assigns) (each a “Potential Defendant”). For the avoidance of doubt, no Potential Defendant is being released by the Settlement Agreement and no Potential Defendant will be a Releasee or one of the Released Parties hereunder. The entity(ies) pursuing such actions, however, will require that, as part of any settlement agreement reached with a Potential Defendant, such Potential Defendant will (i) release the Releasees from all claims related to the Trust, any affiliates of the Trust, the promotions administered by the Trust and the Trustees, and any obligations that may have been assumed by the Trust in connection with other programs or consumer rebate promotions and (ii) be precluded from seeking contribution, reimbursement or similar relief against the Releasees; provided, however that any such release and bar to contribution, reimbursement or similar relief by a Potential Defendant with respect to a Releasee may be conditioned on a mutual release and bar with respect to such Potential Defendant by such Releasee; provided further, however, that nothing in the Settlement Agreement will affect the applicability of Section 15-108(b) of the New York General Obligations Law (“NYGOL”). The obligations described in this subparagraph will be included in the provisions of a chapter 11 plan, liquidation trust agreement or any other agreement that governs the post-confirmation operations of the Trust.
- f. Protection from Contribution Claims; Judgment Reduction. The Debtor’s estate and/or the post-confirmation liquidation trust will abide by Section 15-108(a) of the NYGOL by voluntarily reducing any judgment obtained against a Potential Defendant by an amount equal to the amount such Potential Defendant would be entitled to against Caplans and the Solicitor Trustees by virtue of contribution rights of such Potential Defendant against Caplans and the Solicitor Trustees. Accordingly, Caplans and the Solicitor Trustees will be entitled to the protections of Section 15-108(b) of the NYGOL. Caplans and the Solicitor Trustees will not seek contribution, reimbursement, or similar relief against any of the Potential Defendants; provided, however, that subject to the mutual release and bar described in the previous subparagraph above and the applicability of Section 15-108(c) of the NYGOL, nothing in the Settlement Agreement will prevent Caplans or the Solicitor Trustees from bringing a claim for contribution, reimbursement or similar relief against a Potential Defendant in relation to the moneys paid or to be paid to the Receivers under the terms of this Settlement Agreement to the extent that the Debtor’s estate and/or such post-confirmation liquidation trust has not

commenced litigation against such Potential Defendant on or before December 31, 2007.

- g. Confidentiality of Financial Statements. Caplan and Harrison have provided sworn statements to the Receivers and the Committee of their personal assets and liabilities. The Debtor, the Committee, each Committee member (individually), the Receivers and each of their respective professionals (collectively, the “Interested Parties”) agree to treat all of the information found in the financial statements in strictest confidence in accordance with the terms of the Settlement Agreement. The Interested Parties agree not to use any portion of the information found in the financial statements for any purpose other than review or consideration of the Settlement Agreement. Except as required by law or regulation or judicial or administrative order, the Interested Parties will not disclose to any person the financial statements or the information provided therein without the prior written consent of the Solicitor Trustees.
- h. Maintenance of High Court Undertakings. The Receivers acknowledge and confirm that the Solicitor Trustees have observed and complied to the satisfaction of the Receivers with the terms of their undertakings given to the High Court as set forth in Schedule C of the Order of the High Court dated November 14, 2005 appointing the Receivers. Nothing in the Settlement Agreement will discharge the Solicitor Trustees from their undertakings given to the High Court.
- i. No Third Party Beneficiaries. No person or entity, including, without limitation, any Potential Defendant, will be a third party beneficiary of this Settlement Agreement.

The Settlement is Reasonable and in the Best Interest of the Estate and its Creditors

24. Compromises and settlements are a normal part of the bankruptcy process.

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968), *reh’g denied*, 391 U.S. 909 (1968), *citing* Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 130 (1939). The structure and provisions of the Bankruptcy Code promote negotiation and settlement for the benefit of creditors in accordance with “the policy of the law generally [which is] to encourage settlements.” In re Jackson Brewing Co., 624 F.2d 599 (5th Cir. 1980). Resolution of claims through settlement furthers the goal of bankruptcy administration to liquidate estate assets as rapidly as possible

“consistent with obtaining the best possible realization upon the available assets and without undue waste by needless or fruitless litigation.” In re Carla Leather, Inc., 44 B.R. 457, 471 (Bankr. S.D.N.Y. 1984), *aff’d*, 50 B.R. 764 (S.D.N.Y. 1985). While in this case the Movants are free to pursue litigation on behalf of the estate, they must “exercise prudence and at the same time be in a position so as to act on a settlement opportunity when that opportunity arises.” *Id.* at 472.

25. Bankruptcy Rule 9019(a) “empowers the Bankruptcy Court to approve compromises and settlements “if they are in the best interests of the estate.” Vaughn v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991). Rule 9019(a) provides:

(a) Compromise. On motion by the trustee and after notice and a hearing the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtors, and indenture trustees as provided in Rule 1002 and to any other entity as the court may direct.

Neither Rule 9019 nor any section of the Bankruptcy Code explicitly sets forth the standards by which a court is to evaluate a proposed settlement for approval. The standards for approval of settlement in bankruptcy cases are well established in precedent, however, focusing upon whether the proposed settlement is reasonable and in the best interests of creditors. In TMT Trailer Ferry, the Supreme Court concluded that the trial court must make an informed, independent judgment as to whether a settlement is fair and equitable, stating:

There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible

difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

309 U.S. at 424 (citations omitted).

26. Whether to approve a particular compromise or settlement is within the sound discretion of the bankruptcy court. In re Drexel Burnham Lambert, 134 B.R. at 505; see also Nellis v. Shugrue, 165 B.R. 115, 122 (S.D.N.Y. 1994) (courts may consider opinions of the trustee or debtor-in-possession that a settlement is fair and reasonable). The court exercises its discretion “in light of the general public policy favoring settlements.” In re Hibbard Brown & Co., 217 B.R. 41, 46 (Bankr. S.D.N.Y. 1998); see also Nellis, 165 B.R. at 123 (“the general rule [is] that settlements are favored and, in fact, encouraged by the approval process outlined above”). The United States Court of Appeals for the Second Circuit has stated that the responsibility of the judge “is not to decide the numerous questions of law and fact raised by appellants, but rather to canvass the issues and see whether the settlement ‘falls[s] below the lowest point in the range of reasonableness.’” In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied sub nom. Cosoff v. Rodman*, 464 U.S. 822 (1983). See In re Purofied Down Products Corp., 150 B.R. 519, 522-23 (S.D.N.Y. 1993); In re Crowthers McCall Pattern, Inc., 120 B.R. 279, 287 (Bankr. S.D.N.Y. 1990); In re Carla Leather, Inc., 44 B.R. 457, 470 (Bankr. S.D.N.Y. 1984), *aff’d*, 50 B.R. 764 (S.D.N.Y. 1984). The assessment of a settlement only requires identification of the issues in controversy “so that the bounds of reasonableness can be seen with some clarity.” Carla Leather, 44 B.R. at 470.

The very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of power to compromise ... This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty.

Id.; see also Purofied Down Products, 150 B.R. at 522-23.

27. This concept of a “range of reasonableness” recognizes “the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent to taking any litigation to completion.” Newman v. Stein, 464 F.2d 689, 693 (2d. Cir. 1972). Thus, a court need not insist upon the best possible settlement, but may approve a settlement as within the range of reasonableness under the circumstances. In determining whether a proposed settlement falls within the range of “reasonableness” courts have applied the following factors: (i) the probability of success in litigation; (ii) the prospect of a complex and protracted litigation if the settlement is not approved; (iii) the proportion of creditors who do not object to, or who affirmatively support the proposed settlement; (iv) the relative benefits to be received; (v) the nature and the breadth of releases to be issued as a result of the settlement; and (vi) the extent to which the settlement is truly the product of arm’s-length bargaining and not the product of fraud and collusion. In re Best Prods. Co., 168 B.R. 35, 50 (Bankr. S.D.N.Y. 1994) (citing TMT Trailer Ferry, 390 U.S. at 424); In re Mrs. Weinberg’s Kosher Foods, Inc., 278 B.R. 358, 362 (Bankr. S.D.N.Y. 2002).

28. Movants are cognizant of the uncertainties and expense of proceeding to litigation and have agreed, after extensive arm’s-length negotiations and assessment of the benefits and burdens of settlement, to enter into the Settlement Agreement resolving the disputes and obviating the need to deplete further the Debtor’s assets in commencing or defending a dispute with an uncertain outcome and questions regarding the ability to collect any judgment. While the Debtor and the Committee have a high degree of confidence in the breach of trust claim based on the payment made to the Missouri AG, the viability of other claims that might be pursued is not as clear.

29. The Settlement Agreement provides a material monetary benefit to the estate in that it will provide an infusion of \$3.2 million in cash into the Debtor's estate, which is \$1.4 million more than was paid by the Debtor to the Missouri AG. The Settlement Payment is in an amount that enables the estate to recover a substantial portion of what it has spent in professional fees since the Receivers were appointed and to fund additional litigation against third parties should the Debtor, in consultation with the Committee, decide to pursue additional claims.

30. The Solicitor Trustees and Caplans are beneficiaries under a professional liability insurance policy that provides a maximum coverage of £2 million per claim in addition to amounts for defense costs (subject to certain limitations). While the Debtor and the Committee believe that the policy is applicable to the claims that the estate has against Caplans and the Solicitor Trustees and that the conduct of the Solicitor Trustees may have exposed the insurer to more than one claim under the policy, the insurer has fully reserved its rights with respect to coverage and has taken the position that the conduct of the Solicitor Trustees in connection with the Trust can only constitute one claim under the policy. It is noteworthy that the \$3.2 million Settlement Payment represents approximately 82% of the maximum per claim coverage under the policy based on an exchange rate of about \$1.95/£.⁴ The Receivers and the Committee have weighed the settlement and the risks of litigation against the possibility that they could prevail against Caplans and the Solicitor Trustees on a multiple claim theory that would expose the insurer to coverage in excess of £2 million and concluded that the inherent risks, time and expense in attempting to do so justify entering into the Settlement Agreement.

⁴ The referenced exchange rate was the rate at the time of this Motion was prepared. The Solicitor Trustees have agreed that the payment under the Settlement Agreement is fixed at \$3.2 million, regardless of the exchange rate that will be in effect at the time of the approval of this Motion or the time of payment.

31. Moreover, the Receivers, who are experienced forensic accountants, and their New York and London counsel, together with senior attorneys in Committee counsel's New York and London offices, as well as the Committee's financial advisors, Davis, Graber, Plotzker & Ward LLP, reviewed detailed, sworn personal financial statements of Caplan and Harrison. Based on that review, the Debtor and the Committee do not believe, assuming they could obtain an enforceable judgment against the Solicitor Trustees in excess of the Settlement Payment, that even a small portion of such a judgment could be collected from the Solicitor Trustees' personal assets.

32. The Movants submit that the benefits obtained by the settlement might very well be higher than that which would be obtained if litigation was commenced against the Solicitor Trustees. This is true even if the assumption is made that the Solicitor Trustees would not defend themselves in litigation in order to preserve the invocation of their Fifth Amendment privileges. If litigation were commenced, the Movants would obtain a judgment and would have to enforce it. Given the cost, delay and risks of collection, the risks of litigation with the insurer over coverage, and the lack of material personal assets to satisfy a significant judgment, it is not clear that the estate could actually recover a sum which exceeds the amount to be recovered under the proposed settlement, net of litigation costs. Litigation would surely delay any recovery by the estate and its cost would diminish its value, regardless of the outcome.

33. The Movants also note that the paramount interest of creditors of any bankruptcy estate is to recover the greatest amount upon their allowed proofs of claim. Accordingly, the Movants' primary duties in this case are to marshal, liquidate, preserve and distribute assets of the estate for the benefit of creditors. The Movants must fulfill these responsibilities expeditiously and in a cost effective manner. The Movants submit that the proposed

settlement, which will allow the estate to recover \$3.2 million without the necessity of commencing and prosecuting litigation, provides an excellent recovery under the circumstances with the least cost and delay to the creditors.

34. Further, the settlement reached with the Solicitor Trustees is the product of extensive arm's-length negotiation. Each party was represented in the negotiation by attorneys who specialize in bankruptcy and trial practice. Each party to the settlement is giving up substantial rights in exchange for certainty and finality, all without the necessity of commencing and prosecuting litigation against the Solicitor Trustees and Caplans. To the Movants' knowledge, there has been no fraud or collusion on the part of any party to the settlement.

35. For all of the reasons set forth herein, the Settlement Agreement is fair and equitable and falls well within the range of reasonableness and the Movants respectfully request that the Court approve the Settlement Agreement.

Waiver of Separate Memorandum of Law

36. The legal points and authorities upon which the Motion relies are incorporated herein. Accordingly, Movants respectfully request that the requirement of the service and filing of a separate memorandum of law in support of this Motion under Local Rule 9013-1(b) be deemed to have been satisfied.

Notice

37. Notice of this Motion will be served upon (i) the Receivers, (ii) the Office of the United States Trustee, (iii) counsel for the Solicitor Trustees, and (iv) all other parties who have filed notices of appearance and requests for service of documents in the Debtor's case.

Movants will provide notice of the settlement to all other known creditors and parties in interest of the Debtor in accordance with this Court's order approving the procedures for notifying creditors of the Settlement Agreement and this Motion.

WHEREFORE, Movants respectfully request entry of an order (i) approving the Settlement Agreement; and (ii) granting such other and further relief as is just and proper.

Dated: New York, New York
March 30, 2007

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