

(“IPofA Shreveport” and, collectively with the 1031 Debtors, the “Debtors”), by his undersigned counsel, hereby makes this motion (the “Motion”) for entry of an order or orders (collectively, the “Order”) pursuant to section 105(a) of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 9019(a) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and, with respect to the E&O Settlement Agreement, Section 363 of the Bankruptcy Code, approving the following settlement agreements by, between, or among, as applicable, the Trustee and/or IPofA Shreveport and:

- (a) certain former owners of qualified intermediaries, including (i) the AEC Parties² dated as of February 17, 2009; (ii) the Bennett Parties³ dated as of February 11, 2009; (iii) David B. and Marga R. Shefman (the “Shefmans”) dated as of March 16, 2009; (iv) Janet Dashiell (“Dashiell”) dated as of February 17, 2009; (v) the McCabe Group Parties⁴ dated as of September 24, 2008; (vi) Steven Allred (“Allred”) dated as of January 21, 2009; and (vii) Todd Pajonas (“Pajonas”) dated as of June 10, 2009 (collectively, the “Former Owner Settlement Agreements”);

Estate Exchange Services, Inc.; Rutherford Investment LLC; Security 1031 Services, LLC; Shamrock Holdings Group, LLC; and AEC Exchange Company LLC.

² “AEC Parties” means Atlantic Exchange Company, LLC, a Massachusetts limited liability company now known as Ocean Holdings, LLC (“AEC”), William A. Hazel (“Hazel”), J. Patrick Dowdall (“Dowdall”), James F. Livesey (“Livesey”), Charles D. Subrt (“Subrt”), and any other officers, employees, attorneys, managers, members, partners and/or owners of AEC that are entitled to the benefit of the release and discharge provided in the settlement with the AEC Parties, and their respective, heirs, successors and assigns.

³ “Bennett Parties” means William D. Bennett (“Bennett”), National Intermediary, Ltd. (“NIL”), a Texas limited partnership, NIL’s general and limited partners, including Exchange Management L.L.C., and its respective officers, employees, managers, members, owners, representatives and attorneys, and heirs, successors and assigns

⁴ “McCabe Group Parties means (i) Daniel E. McCabe, Shirley L. McCabe, Andrew C. McCabe, Chad J. Greenberg and J. Peter McCann (collectively, the “McCabe Group”), and (ii) Reverse Lending Group, LLC, McCabe Family, LLLP and any other entity now or ever owned by the McCabe Group, and their parents, subsidiaries, affiliates, successors and assigns.

(b) certain underwriter's at Lloyd's of London (collectively, "Lloyd's" or "E&O Insurers") dated as of October 22, 2008 (the "E&O Settlement Agreement");

(c) the following insurers who issued crime policies to one or more of the 1031 Debtors:

(i) Continental Casualty Company and Continental Insurance Company (collectively, "CNA") dated as of February 23, 2009; (ii) Federal Insurance Company ("Federal") dated as of February 23, 2009; and (iii) Twin City Fire Insurance Company ("Twin City") dated as of February 23, 2009 (collectively, the "Crime Policy Settlement Agreements");

(d) the following former attorneys of Okun, the 1031 Debtors and/or certain of the Okun Entities, (i) Kluger Peretz Kaplan & Berlin, PL ("KPKB") dated as of February 13, 2009; and (ii) Michael J. Rosen and Michael J. Rosen P.A. (collectively, "Rosen") dated as of March 18, 2009 (collectively, the "Former Attorney Settlement Agreements"); and

(e) Wachovia Bank, N.A., Wachovia Exchange Services, Inc., Wachovia Capital Markets, LLC, Wachovia Financial Services, Inc., and Wachovia Mortgage Corporation (collectively, "Wachovia") dated as of May 28, 2009 (the "Wachovia Settlement Agreement", and collectively with the Former Owner Settlement Agreements, the E&O Settlement Agreement, Crime Policy Settlement Agreements, and Former Attorney Settlement Agreements, each as amended, the "Plan Funding Party Settlement Agreements," and each party to a Plan Funding Party Settlement Agreement, a "Plan Funding Party").

A copy of the each Plan Funding Party Settlement Agreement has been provided as part of the Supplement to the Second Amended Plan of Reorganization of Gerard A. McHale, Jr., as

Chapter 11 Trustee for Each of the 1031 Debtors, and IPofA Shreveport Industrial Park, LLC, which can be obtained (i) from the docket of bankruptcy case 07-14448, Docket # 1686, (ii) from the Trustee's website at <http://trustee1031taxgroup.com/>, or (iii) by written request to Golenbock Eiseman Assor Bell & Peskoe LLP, 437 Madison Avenue, 35th Floor, New York, New York 10022 (Attn.: Michael S. Weinstein, Esq.). Submitted contemporaneously herewith is the Declaration of the Trustee in support of this Motion. In support of the Motion, the Trustee states as follows:

PRELIMINARY STATEMENT

As discussed in the Trustee's Second Amended Disclosure Statement (the "Disclosure Statement"), the Plan Funding Party Settlement Agreements and the Class Action Agreement, as described below, are integral parts of the Trustee's Second Amended Plan (the "Plan") because these agreements facilitate confirmation of the Plan by providing sufficient funds to pay administrative expenses and priority claims, and to provide for an initial distribution to general unsecured creditors as soon as practicable after the effective date of the Plan. The proceeds from the various settlement agreements will also provide initial funding for the Liquidation Trust, which will, among other things, pursue litigation claims which have not been settled, which claims, if favorably resolved, could potentially provide substantial additional consideration to creditors.

The Class Action Agreement, which has already been approved by this Court and has been preliminarily approved by the Class Action Court, provides the structure for continuing litigation against Boulder, Citibank and other parties in a collaborative manner between the Class Action Representatives and the Trustee, which the Trustee believes will optimize the value of these claims for the benefit of the Exchangers and other creditors of the Estates. Further, the

Class Action Litigation is integral in providing the necessary injunctive relief required to effectuate the Plan Funding Party Settlement Agreements.

Pursuant to this Court's Order dated August 18, 2009, the Court approved the Disclosure Statement and scheduled the Confirmation Hearing on the Plan for October 7, 2009. In accordance with such order, the Trustee is filing this motion and memorandum of law in support of the Plan Funding Party Settlement Agreements by September 14, 2009. The memorandum of law in support of confirmation of the Plan will be filed by October 2, 2009.

JURISDICTION AND VENUE

1. By this Motion, the Trustee seeks entry of an order approving the Plan Funding Party Settlement Agreements pursuant to sections 105(a) and 363 of the Bankruptcy Code and Bankruptcy Rule 9019.

2. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1408.

4. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B) and (O).

5. The statutory predicates for the Motion are sections 105(a) and 363 of the Bankruptcy Code, as supplemented by Bankruptcy Rule 9019(a).

BACKGROUND

A. The Chapter 11 Cases

6. On May 14, 2007 (the "1031 Debtors' Petition Date"), all but one of the 1031 Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On June 11, 2007, AEC Exchange Company, LLC, one of the 1031 Debtors, also filed a voluntary petition for chapter 11 relief. From their respective filing dates until October 24, 2007, the 1031 Debtors continued in possession of their properties and operated their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. By order entered May 22, 2007, the Court authorized the joint administration of the 1031 Debtors' bankruptcy cases.

8. On May 30, 2007, the United States Trustee appointed the Official Committee of Unsecured Creditors.

9. On or about October 15, 2007, the United States Trustee and several other creditors filed motions seeking, inter alia, the appointment of a chapter 11 trustee.

10. After an evidentiary hearing held on October 23, 2007, the Court entered an amended memorandum opinion and order granting the motions for the appointment of a chapter 11 trustee.

11. On October 24, 2007, the United States Trustee filed a motion for approval of the appointment of Gerard A. McHale, Jr., as the chapter 11 trustee. The Court granted the United States Trustee's motion by Order dated October 25, 2007.

12. By agreement dated October 11, 2007 (the "Asset Transfer Agreement"), Edward H. Okun ("Okun") and his wife, Simone Bolani, conveyed to the 1031 Debtors all of their assets except for two residential properties and two vehicles (the "Okun Assets"). The Okun Assets include their interests in numerous entities (collectively, the "Okun Entities")⁵ and in any future assets or entities acquired by Okun or Bolani, all of their rights to and interest in all real and personal property, and all intangible assets, including Okun's ownership interest in any and all entities and all claims arising prior to the termination of the Asset Transfer Agreement.

⁵ The Okun Entities include the following entities: Crossroads Transportation and Logistics, Inc.; Investment Properties of America, LLC; Okun Air, LLC; Okun Air 2, LLC; Okun Air 3, LLC; Okun Air 4, LLC; Okun Holdings, Inc.; FMFG Ownership, Inc.; Columbus Works Virginia Trust; Parkway Virginia Trust; Okun Water, LLC; Simone Bentley, LLC; Simone Salon, LLC; Montauk Financial Corp.; IPofA Shreveport Industrial Park, LLC; 8810 Jewella, LLC; 100 Corporate Drive, LLC; IPofA Salina Central Mall, LLC; IPofA West Oaks Mall, LP; IPofA WOM JCP, LP; IPofA Waterview, LLC; IPofA Columbus Works LeaseCo, LLC; IPofA Fund Manager, Inc.; CW Acquisition, LLC; IPofA Miami Logistics Center, LLC; IPofA Racing, LLC; IPofA W. 86th Street LeaseCo, LLC; IPofA WOM Master LeaseCo, LP; Okun Water Ltd.; and FMFG Acquisition, Inc.

13. By Order dated October 26, 2007, the Court approved the Asset Transfer Agreement. By virtue of the Asset Transfer Agreement and the Court's approval thereof, the Trustee became the indirect owner of IPofA Shreveport.

14. Okun was the owner, in whole or in part, directly or indirectly, of the 1031 Debtors and the Okun Entities. After the petitions of the 1031 Debtors were filed and up until the execution and/or approval of the Asset Transfer Agreement, Okun continued to own and control Okun Entities other than the 1031 Debtors – including Investment Properties of America, LLC (“IPofA”) and its affiliates such as IPofA Shreveport.

15. On November 15, 2007 (the “IPofA Petition Date”), IPofA, IPofA Shreveport and several other Okun Entities (collectively, the “IPofA Debtors”)⁶ filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Contemporaneously therewith a motion was filed for joint administration of the ten initial Okun Entity cases, including IPofA Shreveport's chapter 11 case, which was granted by the Court on November 19, 2007.

16. By order dated August 18, 2009, the Disclosure Statement was approved, and the hearing (the “Confirmation Hearing”) on the Plan is scheduled for October 7, 2009.

B. The Class Action

17. On or about May 30, 2007, Anita Hunter filed a class action lawsuit in the United States District Court for the Northern District of California (the “Class Action Court”) to proceed as a putative class on behalf of herself and “all other similarly situated” individuals (the “Class”) against Okun and others, captioned *Hunter v. Okun, et al.*, Case No 5:07-CV-02795-JW (the “Class Action”). On or about November 19, 2008, an amended complaint (the “First

⁶ “IPofA Debtors” also IPofA 5201 Lender, LLC, IPofA Columbus Works LeaseCo, LLC, IPofA West 86th Street LeaseCo, LLC, 100 Corporate Drive, LLC, Crossroads Miami Logistics Center, LLC, CW Acquisition, LLC, Simone Condo I, LLC, Simone Condo II, LLC, Parkway Virginia Trust, and Columbus Works Virginia Trust.

Amended Complaint”) was filed, adding four additional named plaintiffs (collectively, the “Representatives”).⁷

18. The First Amended Complaint, in summary, adds additional defendants and alleges, on behalf of all Exchangers (as defined below), claims which rely on facts similar to the facts on which the Trustee relies in many of the various claims and actions commenced or asserted against third parties, except that the First Amended Complaint alleges that the defendants owed duties directly to the Exchangers and that the Exchange Deposits (as defined below) were held in trust for the Exchangers. Included as defendants in the Class Action are the Former Owners (as defined below), Okun, Richard Simring, Coleman, David Field, Wachovia, CNA, Federal, Twin City and Lockton, LLC (“Lockton”). Counsel for the Class is Hollister & Brace and Foley, Bezeck, Behle & Curtis, LLP and Zelle McDonough & Cohen, LLP (collectively, “Class Counsel”).

19. The First Amended Complaint also alleges claims relating to the 1031 Debtors’ insurance. This portion of the complaint alleges claims against Lockton, an insurance producer, and the three insurance companies (CNA, Federal and Twin City) that issued crime policies to the 1031 Debtors. The First Amended Complaint alleges that these defendants falsely represented to the public that the 1031 Debtors were “bonded” and that a “fidelity bond” would cover the theft of the Exchanger Deposits. Plaintiffs allege, among other things, that they would

⁷ On or about November 14, 2008, Zelle, McDonough & Cohen, LLP filed an action (the “Quirk Litigation”) on behalf of Quirk Infinity, Inc., as class representative (“Quirk Representative” and together with the Representatives, collectively, the “Class Representatives”) of a putative class (“Quirk Class”), in the United States District Court for the District of Massachusetts. A motion of the Class Representatives to consolidate and transfer venue of this action was filed with the Panel for Multi District Litigation (“MDL”) on January 29, 2009. On February 26, 2009, the Quirk Representative joined the Class-Trustee Agreement. A hearing on the motion before the MDL Panel was held on March 26, 2009, and decision was reserved. On April 15, 2009, the MDL Panel directed that the Class Litigation and the Quirk Litigation proceed in the Class Action Court on a consolidated basis.

not have deposited the Exchange funds but for the certification that the 1031 Debtors were “bonded” by a large per occurrence fidelity bond.

20. On May 12, 2009, the Class Representatives commenced a related action in the Class Action Court, captioned *Hunter v. Citibank, N.A., et al.*, Case No. 5:09-CV-02079-JW (the “Related Action” and together with the Class Action, the “Class Litigation”). The Class Action and the Related Action were both commenced by the Class Representatives based upon similar facts, and the cases are being treated as related actions by the Class Action Court. The first amended complaint filed in the Related Action asserts claims against the following defendants, which include banks, hard money lenders, and professional firms: Citibank, N.A., Countrywide Bank, FSB, Bank of America, N.A., United Western Bank, Boulder Capital LLC and several affiliates (collectively, “Boulder”), Roy S. MacDowell, Jr., Cordell Funding LLLP and its affiliates (“Cordell”), Robin Rodriquez,⁸ Jorden Burt LLP, Kutak Rock, LLP, Joseph O. Kavan, Foley & Lardner, LLP, Stephen I. Burr, and Silicon Valley Law Group.

21. The Trustee, through counsel, engaged in negotiations with the Class Action Representatives, through Class Counsel, regarding the relative benefits of jointly pursuing litigation and settlement negotiations. On January 20, 2009, the Trustee and the Class Representatives entered into an agreement concerning the prosecution of claims by the Trustee and the Class Representatives (as amended, the “Class Action Agreement”), which should be consulted for a full description of all of its terms. The Class Action Agreement was approved by Order of the Bankruptcy Court dated May 18, 2009 and preliminary approved by the Class Action Court on June 22, 2009. In essence, it provides for the Trustee and the Class Representatives, through their respective counsel, to work together with respect to recoveries

⁸ The Estates have already settled their claims against Cordell and Robin Rodriquez; accordingly those parties are not included in the Class Action Agreement.

from the various claims and causes of action asserted by the Estates and by the Class Representatives, to allocate recoveries between the Class Action and the Estates, to set a method of establishing attorneys' fees, and to provide for the approval of the Plan Funding Party Settlement Agreements by both the Class Action Court and the Bankruptcy Court, and the issuance by the Class Action Court of an order barring and releasing all claims of Exchangers against the Plan Funding Parties. Schedule A to the Class Action Agreement lists 15 parties (collectively, the "Schedule A Parties"). With respect to the twelve Plan Funding Parties that are Schedule A Parties, Class Counsel and the Class Representatives have already reviewed and approved as in the best interests of the Class the terms of settlements that the Trustee is considering.

22. Any recovery obtained from the settlement or litigation of claims against a Schedule A Party (other than Boulder) will be allocated to the Estates, unless Class Counsel and counsel for the Trustee agree that a portion of the proceeds of such recoveries should be allocated to the Class to facilitate approval of the settlement and to payment of Class Counsel's fees and costs in processing the settlement and obtaining approval from the Class Action Court.

23. With respect to Wachovia, 60% of the settlement with Wachovia will be allocated to the Estates, and 40% of the settlement with Wachovia will be allocated to the Class.

24. In summary, the Class Representatives and the Trustee agreed to cooperate, whether in settlement or litigation, for the purpose of achieving the largest overall recovery and reducing duplicative effort and expenses, by conducting joint settlement discussions, coordinating discovery, and conducting joint depositions where authorized.

C. Operation of the 1031 Debtors and Okun Entities

25. Prior to the 1031 Debtors' Petition Date, the 1031 Debtors were in the business of acting as regional "qualified intermediaries" ("QI") for deferred like kind property exchanges consummated by exchangers pursuant to section 1031 of the Internal Revenue Code, 26 U.S.C. § 1031. Section 1031 of the Internal Revenue Code permits owners of investment property to defer the capital gains tax that would otherwise be due and owing upon sale, conditioned upon timely application of the sale proceeds to the purchase of an identified replacement investment property (a "1031 Exchange"). In a typical 1031 Exchange, an exchanger (the "Exchanger") sells a parcel of real estate (the "relinquished property") and has 45 days from the date of the sale to identify a replacement property and 180 days from the date of the sale to close on the purchase of the replacement property.

26. To preserve the tax benefit of avoiding capital gains taxes on the sale of the relinquished property, the Exchangers may not take possession of the sale proceeds. Under the regulations that apply to Section 1031, the use of a QI in connection with a 1031 Exchange is a "safe harbor" that will result in a determination that the taxpayer is not in actual or constructive receipt of money or other property for purposes of Section 1031.

27. The 1031 Debtors' responsibilities and obligations that a QI owes to the Exchanger regarding the use of funds deposited with the QI (the "Exchange Deposit") are typically set forth in a contract between the QI and the Exchanger referred to as an exchange agreement ("Exchange Agreement"). While the 1031 Debtors used different Exchange Agreements, each 1031 Debtor's Exchange Agreement made it clear that Exchange Deposits were to be held and used to effectuate 1031 Exchanges, and made promises regarding the safekeeping of the Exchange Deposits.

28. Beginning in August 2005 and continuing through December 2006, Okun or entities owned in whole or in part by Okun purchased control of the 1031 Debtors, which were QIs. The following acquisitions were made on or about the dates indicated:

Atlantic Exchange Co. LLC (“ <u>AEC</u> ”)	August 25, 2005
Security 1031 Services, Inc. (“ <u>SOS</u> ”)	November 15, 2005
Real Estate Exchange Services, Inc. (“ <u>REES</u> ”)	June 9, 2006
National Exchange Services QI, Ltd. (“ <u>NES</u> ”)	June 22, 2006
Investment Exchange Group, LLC (“ <u>IXG</u> ”)	August 1, 2006
1031 Advance Inc. (“ <u>1031 Advance</u> ”)	December 19, 2006

Eventually, each of these QIs became a wholly-owned or indirect subsidiary of The 1031 Tax Group LLC (the “1031 Tax Group”), another Okun Entity, which was formed on or about December 22, 2005.

29. Beginning in August 2005 and continuing until April 2007, Edward H. Okun (“Okun”), Lara D. Coleman (“Coleman”) and others acting in concert with them engaged in numerous misappropriations (collectively, the “Misappropriation”) of funds belonging to the 1031 Debtors. In general, upon acquiring a QI, Okun, Coleman and others transferred or caused the transfer of some or all of the funds of the QI entity (the “Exchange Deposits”) to personal and business accounts controlled by Okun or certain officials of his companies (including 1031 Debtors), and then misappropriated them. Subsequent Exchange Deposits were misappropriated in the same fashion.

30. Okun, Coleman and others used the Misappropriation, among other things, (i) to fund Okun’s lavish lifestyle, including acquiring residential properties and luxury assets, (ii) to pay monies and bonuses to Coleman and other participants in the wrongdoing, (iii) to invest for Okun or entities related to him (such as Investment Properties of America, LLC and its affiliates) in commercial real estate, (iv) to acquire QIs and other companies, (v) to pay off lenders who provided loans secured by residential and commercial properties owned by Okun or

related entities (such as Investment Properties of America, LLC and its affiliates), (vi) to pay operating expenses for Okun's various companies and (vii) to make "lulling" payments -- *i.e.*, to use subsequently deposited funds to complete earlier exchange transactions -- and otherwise conceal the wrongdoing. (The allegations in this and the preceding paragraph are referred to herein as the "Misconduct.")

31. After acquiring properties in whole or in part with misappropriated funds, Okun and the others also leveraged such properties in order to secure additional funds through more loans. The proceeds from these loans were used along with other misappropriated funds in the manner described above.

32. As of the 1031 Debtors' Petition Date, there were more than 300 open exchange contracts with the 1031 Debtors, representing an estimated liability of more than \$140 million. The primary creditors of the Estates are the Exchangers who deposited funds with the 1031 Debtors in connection with 1031 Exchanges.

33. Some of the Misappropriations were reflected in a series of unauthorized and alleged "borrowings" by IPofA or other Okun Entities from the 1031 Debtors in exchange for a series of unsecured promissory notes issued by IPofA or other Okun Entities. As of the 1031 Debtors' Petition Date, the outstanding aggregate principal amount of these notes was at least \$130 million.

34. On March 17, 2008, Okun was indicted by a United States grand jury in the Eastern District of Virginia for this unlawful conduct including, among other charges, mail fraud conducted from August 2005 through April 2007. A Superseding Indictment (the "Indictment") was filed in July, 2008. On March 19, 2009, Okun was convicted of all 23 counts in the Indictment submitted to the jury, and on August 4, 2009, Okun was sentenced to 100 years in

prison. The grand jury also charged Field, Coleman, and Simring with participating in these acts of misconduct, and all of them pled guilty.

D. Former Owners Settlement Agreements and E&O Settlement Agreement

35. As set forth in more detail below, the Trustee has entered into the Former Owner Settlement Agreements with remaining former owners of AEC, NES, REES, SOS, IXG and 1031 Advance (collectively, the “Former Owners”). The Trustee also has entered into the E&O Settlement Agreement, which is a comprehensive settlement agreement with Lloyd’s. The following descriptions are subject in all respects to the specific terms of the respective settlement agreements

1. *The Former Owners*

36. 1031 Advance. On or about December 18, 2006, Allred and Dashiell sold the 1031 Advance business to the 1031 Tax Group in consideration of a payment of \$2,500,000, which amount was paid at closing. Dashiell and Allred each received \$1,250,000 of the purchase price. Dashiell and Allred became employees of the 1031 Tax Group.

37. AEC. On or about August 25, 2005, Atlantic Exchange Company, LLC (“AEC Massachusetts”), a non-debtor, sold substantially all of its assets (including subsidiaries) to AEC, in consideration of a payment of \$4,250,000. Hazel and Dowdall owned 25% and 65% interests in AEC Massachusetts, respectively. The remaining 10% was owned by Subrt and Livesey (5% each). Hazel and Dowdall represent that they are each a Managing Member of AEC Massachusetts. Contemporaneous with the closing, Hazel and Dowdall executed Consulting Agreements with AEC, and Hazel, Dowdall, and Subrt continued to work for AEC, but Livesey did not. Hazel and Dowdall remained employed by AEC through September 28, 2005. Subrt remained employed there through March 2007.

38. IXG. On or about August 4, 2006, the McCabe Group sold the IXG QI business to the 1031 Tax Group, in consideration of a payment of \$9,000,000, of which \$7,000,000 was paid at closing, with an additional \$2,000,000 to be paid thereafter, but which was not paid. Following the closing, the McCabe Group became employees of the 1031 Tax Group.

39. NEC. Prior to June 22, 2006, NIL directly or indirectly owned 100% of certain subsidiaries engaged in the 1031 exchange business, including 1031 Debtors NES and National Exchange Accommodators LLC (collectively, "NEC"). Bennett and Reagan Davis ("Davis") were the managers of these businesses, and were limited partners in NIL. On or about June 22, 2006, NIL sold substantially all of its assets to the 1031 Tax Group in consideration of a payment of \$5,000,000, of which Bennett and Davis each received \$1,471,625. Following the closing, only Bennett and Davis continued to work for the 1031 Debtors; none of the other limited partners in NIL worked for the 1031 Debtors following the closing.

40. REES. Prior to June 9, 2006, the Shefmans owned the REES QI business. On or about June 9, 2006, the Shefmans sold the REES business to the 1031 Tax Group in consideration of \$4,250,000, of which \$3,000,000 was paid at closing, with an additional \$1,250,000 to be paid thereafter, but which was not paid. Following the closing, the Shefmans remained as employees of the 1031 Tax Group.

41. SOS. On or about November 15, 2005, Pajonas and Regal Holdings, LLC ("Regal") sold SOS to the 1031 Tax Group in consideration of a payment of \$3,000,000, which amount was paid at closing. Pajonas received \$2,400,000 and Regal received \$600,000 of the purchase price, and Pajonas became an employee and officer of the 1031 Tax Group.

2. *The E&O Policies*

42. Certain of the 1031 Debtors purchased coverage under five Errors & Omissions policies, which apply to one or both of two policy years: July 15, 2005 to July 15, 2006, and July 15, 2006, to July 15, 2007 (the “E&O Policies”). Set forth below is a general description of the E&O Policies, but the language of the E&O Policies controls and this description is not intended to be a statement of the Trustee’s contentions as to the E&O Policies in the event any issues thereunder are ever litigated.

43. The E&O Policies generally provide insurance coverage for certain entities and persons (the “Insureds”) for professional liability claims arising out of specified types of wrongful acts. The various E&O Policies cover different 1031 Debtors. Each of the E&O Policies defines the Insureds under that particular policy to include at least one Debtor as well as various officers, directors, and employees of that Debtor.

44. Each E&O Policy provides coverage up to stated limits. The total limits for the five policies are \$5.5 million, as follows: (1) aggregate limit of \$1,000,000 for E&O Policy issued to NES; (2) aggregate limit of \$1,000,000 for E&O Policy issued to SOS; (3) aggregate limit of \$500,000 for E&O Policy issued to IXG; (4) aggregate limit of \$1,000,000 for E&O Policy issued to REES; and (5) aggregate limit of \$2,000,000 for E&O Policy issued to AEC.

45. Up to the stated limits, the E&O Policies will pay for all (i) reasonable defense costs incurred by Insureds to defend against potentially covered claims; and (ii) judgments or settlements resulting from covered claims. Payment of defense costs erodes the aggregate limits of the E&O Policies.

3. ***Overview of Potential Disputes Between Trustee and Former Owners***

46. The Trustee's investigation of the affairs of the 1031 Debtors included potential claims against the Former Owners, and the related issue of the 1031 Debtors' claims and rights under the E&O Policies. With respect to the Former Owners, among other things, the Trustee investigated the following potential claims: (1) fraudulent transfers arising from receiving excessive consideration for the sale of the QI business; (2) breach of fiduciary or other duties, owed by the Former Owners to the 1031 Debtors; and (3) misrepresentations concerning policies or practices of the 1031 Debtors or failure to follow those practices (collectively, the "Trustee's Former Owner Claims").

47. The Former Owners have generally asserted that there is no merit to the claims asserted against them and are prepared to defend against such claims against them in the Class Action Litigation, the Trustee's Former Owner Claims, and in other actions filed against the Former Owner. Some of the Former Owners claim that they are owed money with respect to employment agreements between them and the 1031 Debtors, and/or that they are owed substantial portions of the purchase price promised them for the sale of their QI businesses to the 1031 Debtors.

48. Most of the Former Owners have filed claims for payment (the "Former Owner Coverage Claims") under one or more of the E&O Policies on the grounds that the cases against them and/or the Trustee's Former Owner Claims are based at least in part on alleged acts which would be covered under the E&O Policies. The Trustee has objected to the Former Owner Coverage Claims and has asserted that as assets of the Estates, any payments under these Policies are subject to the automatic stay provisions of the Bankruptcy Code.

49. Most of the Former Owner defendants in the Hunter Class Action have made demands to Lloyd's under one or more of the E&O Policies for payment now of their defense costs (charged against the policy limits) and for indemnification on potential judgments. To the extent that one or more of these individuals worked for, or for the benefit of, more than one of the 1031 Debtors, they could make claims against several of the E&O Policies.

50. There is a significant chance that each of the individual Insureds is entitled to separate counsel to defend these suits.

51. In order to preserve the maximum value of these E&O Policies for the Estates and thus for the Exchangers, who are creditors of the 1031 Debtors, the Trustee has advised the E&O Insurers that (i) he objects on several grounds to their making any payments to the individual Insureds, including that the E&O Policies *and* the proceeds are property of the Estates; and (ii) as a result, payments cannot be made absent the Former Owners seeking and obtaining relief from the automatic stay.

52. To date, the E&O Insurers have not paid any of the Former Owner Coverage Claims or any of the 1031 Debtors' coverage claims.

53. Set forth below is a discussion of the conflicting claims being resolved under the Former Owner Settlement Agreements.

54. The Trustee's Position. The Trustee has investigated several potential claims against the Former Owners. Those claims generally fall into the following categories, and would generally be based on the allegations set forth below:

- Aiding and Abetting the Misconduct. The Former Owners aided and abetted the Misconduct, which resulted in the Misappropriation, by, with foreknowledge of the Misconduct, permitting and facilitating the transfer of Exchanger Deposits into a pooled account in the name of The 1031 Tax Group. These acts facilitated the Misappropriation from the pooled account into IPofA and other destinations. In addition, the Former

Owners who remained as employees after their sale knew or turned a blind eye to the Misconduct and in one case had such knowledge of Okun's takings prior to the sale.

- Violation of Fiduciary Duty. By permitting the transfers of Exchanger Deposits into pooled account under the control of Okun and The Tax Group, the Former Owners violated their fiduciary duties to their employer.
- Misrepresentation. The Former Owners made misrepresentations regarding the manner in which QI funds would be maintained and protected.
- Fraudulent Conveyance. In some cases, the purchase price of a 1031 Debtor was in excess of any reasonable actual value of its assets, and, as a result, the Former Owner must return a substantial portion of the purchase price to the extent it exceeded the reasonable value of debtor sold.

55. The Former Owners' Position. Throughout the course of the extensive communications and negotiations with the Former Owners, the Trustee has learned that the Former Owners would, in summary, respond to the categories of claims described above as follows:

- Aiding and Abetting the Misconduct. The Former Owners were not aware of the Misconduct or the Misappropriations, or were assured by Okun that he consulted with his competent lawyers who approved what he was doing. For example, when a Former Owner received the wire representing the cash portion of the purchase price, they had no reason to know or suspect that the funds came from The 1031 Tax Group. Some of the Former Owners have also asserted that they were not officers of any of the 1031 Debtors, and that, if they remained as employees, it was only for a short time and they were not privy to information that would have led them to discover the Misconduct. They also assert that some of the Exchange Agreements permit the co-mingling of Exchanger Funds with other Exchanger Funds.
- Violation of Fiduciary Duty. The Former Owners would make essentially the same points regarding this claim as they would make respect to the aiding and abetting claim as discussed above.
- Misrepresentation. The Former Owners deny that they stated to any Exchangers that Exchange Deposits would not be moved into a pooled account, or that they otherwise made any misleading or false statements

to any Exchangers. Moreover, they assert that at least some of the Exchange Agreements permit pooling of Exchanger funds with other Exchanger funds. They further contend that all statements they made were in the scope of their employment.

- Fraudulent Conveyance. The Former Owners allege in some cases that the purchase prices were both reasonable and below the estimated value for particular 1031 Debtors set forth in contemporaneous expressions of interest from other parties.

56. In addition to the circumstances that apply to all Former Owners, the Trustee took into account the following considerations with respect to 1031 Advance. Allred is paying 20% of his purchase price back to the Estates and Dashiell is paying about 1/3 of her purchase price back to the Estates. Both claim that they acted in reliance on the advice of counsel who represented them and 1031 Advance at the time of the sale to Okun, and such counsel did not advise them that Okun's borrowing of Exchange Deposits was improper.

57. In addition, Dashiell was the first person who reported Okun's conduct to the Department of Justice, which led to the eventual termination of the Misconduct and the subsequent successful prosecutions. She also attempted to resist Okun's orders as to the borrowings and arranged to create certain accounts, that were neither known to Okun nor under his control, into which she directed certain Exchange Deposits to protect them from Okun. She also made secret recordings for the U.S. Government, spent significant time in Washington D.C. at her own expense assisting the U.S. Government, and paid significant sums to her own attorneys to advise and assist her in this regard. The time and money expended damaged her current business. Furthermore, the business she purchased after the sale of 1031 Advance and her other assets have declined significantly in value and collecting any significant judgment against her would be difficult.

58. In addition to the circumstances that apply to all Former Owners, the Trustee took into account the following considerations with respect to AEC. These Former Owners of AEC owned AEC Massachusetts, which sold certain assets, but not all assets to Atlantic Exchange Company, LLC, a Delaware limited liability company (“AEC Delaware”) formed by Okun. Dowdall and Hazel contend that AEC Massachusetts was the owner of the \$2 million E&O Policy, and that AEC Massachusetts and its owners/employees have the only rights under that policy, and the Trustee contends that this policy still provides certain coverage to AEC and AEC Delaware for wrongful acts.

59. Further, the Former Owners of AEC are attorneys, and were the first to sell to Okun. They contend that there was no prior pattern of wrongdoing from which a seller, like themselves, could glean Okun’s intent. Dowdall and Hazel remained as employees but were terminated 30 days after the acquisition of AEC and contend they had no indication what Okun did during that short time.

60. AEC’s E&O Policy and the claims thereunder are being sold to the Estates. The E&O Policy covers, *inter alia*, claims for negligently transferring the exchanger funds to Okun and the damage therefrom. The Trustee believes that the settlement is in the best interests, when the value of this policy is weighed against the certainty of very expensive litigation against Dowdall and Hazel for their very short stay with AEC Delaware, the difficulty of proving their negligence, and the dissipation of the policy, which Dowdall and Hazel would use to defend themselves against the claims of the Trustee or the Class.

61. In addition to the circumstances that apply to all Former Owners, the Trustee took into account the following considerations with respect to IXG.⁹ The McCabe Group

⁹ The Trustee previously filed a motion for Rule 9019 approval of the Plan Funding Party Settlement Agreement with the McCabe Group on December 10, 2008 (Docket #1410 in Bankruptcy Case 07-11448) with a hearing to be

vigorously disputes that it had any knowledge of Okun's wrongdoing and argues that it cooperated with the U.S. Government and also refused to follow Okun's instructions in April 2007 to release funds in various bank accounts to him, which protected this money and led to the collapse of 1031 Tax Group and the ensuing Chapter 11 filing.

62. The McCabe Group received \$7,000,000 for the sale of IXG, but \$2 million of the purchase price is still owed to the McCabe Group. The settlement amount for the McCabe Group is about 18% of the amount they actually received from the sale. Furthermore, the McCabe Group has filed claims for \$2 million still owed on the sale, plus \$1,055,158 for unpaid wages and expenses, all of which they are waiving.

63. Subsequent to the sale of IXG, the McCabe Groups' assets have significantly decreased in value. Some of their assets are in retirement accounts and they gave a significant amount to charity. Their assets have deteriorated further since reaching the settlement agreement. Taking all of these financial considerations into account, the Trustee believes the settlement with the McCabe Group is reasonable and in the best interests of the Estates.

64. In addition to the circumstances that apply to all Former Owners, the Trustee took into account the following considerations with respect to NES. Bennett owned a 30.75% interest in NIL, which sold some but not all of its assets to 1031 Tax Group, including NEC. Of the owners of NIL, only Bennett was active in the management of NEC before or after the sale. Bennett contends he had no indication of any wrongdoing by Okun. Bennett's payment of \$400,000 is approximately 27% of the money he received for his personal interest.

65. On June 22, 2006, NIL sold NES to 1031 Tax Group, and NIL did not continue in the 1031 Exchange QI business in any way that was affiliated with the 1031 Debtors. Bennett

held on February 4, 2009. Such motion has been adjourned multiple times, and the Trustee requests such motion to be deemed subsumed into this Motion.

contends that NIL is the owner of the \$1 million E&O Policy, and that NIL and its owners/employees have the only rights under that policy, and the Trustee contends that this policy still provides coverage to NEC for wrongful acts.

66. NEC's E&O Policy and the claims thereunder are being sold to the Estates. The E&O Policy covers, *inter alia*, claims for negligently transferring the exchanger funds to Okun and the damage therefrom. The Trustee believes that the settlement is in the best interests, when the value of this policy is weighed against the certainty of very expensive litigation against Bennett, the difficulty of proving his negligence, and the dissipation of the policy, which Bennett would use to defend himself against the claims of the Trustee or the Class. Furthermore, the Trustee believes it would be difficult to collect any significant judgment against him.

67. In addition to the circumstances that apply to all Former Owners, the Trustee took into account the following considerations with respect to REES. Marga and David Shefman contend that they had no knowledge as to Okun's wrongdoing. They received a total of \$3,000,000 for the sale of REES, but have filed proofs of claim for a total of \$1,250,000 still owed on the purchase price and \$67,451 owed under their consulting agreements. As part of their settlement, the Shefmans are waiving all of these claims. Marga Shefman is retired and has various physical ailments which make it unlikely she will ever work again. The Trustee does not believe it is likely that either of the Shefmans have sufficient liquid assets from which the Trustee could collect any significant judgment.

68. In addition to the circumstances that apply to all Former Owners, the Trustee took into account the following considerations with respect to SOS. The Trustee agreed on \$200,000 and a payment schedule, largely over time, after consideration of the costs of pursuing

Pajonas alone (since all of the Former Owners had already settled) and his claims against the E&O Policies, and in particular, his current state of assets and liabilities, and the substantial likelihood that it would be difficult to collect any significant judgment against him.

Furthermore, Pajonas continues to cooperate with the Trustee and assist the Trustee in pursuing additional claims.

4. *The Former Owner Settlement Agreements*

69. The Trustee has engaged in extensive negotiations with the Former Owners resulting in the Former Owner Settlement Agreements (each of which is a Plan Funding Party Settlement Agreement), as described below. The financial terms of the payments by the Former Owners, pursuant to the Former Owner Settlement Agreements are as follows:

- (i) Hazel, Dowdall, Subrt and Livesey (AEC): \$107,500;
- (ii) Bennett (NES): \$400,000;
- (iii) McCabe Group (IXG): \$1.2 million
- (iv) Pajonas¹⁰ (SOS): \$200,000; \$20,000 paid immediately and the balance payable over three years, without interest;
- (v) The Shefmans (REES): \$10,000; and
- (vi) Allred and Dashiell (1031 Advance): Allred: \$250,000; Dashiell: \$75,000.

70. In addition to these financial terms, the Former Owner Settlement Agreements provide as follows:

¹⁰ The settlement with Pajonas was signed too late to be approved by the Class Action Court as part of the “Wave I” settlements, approval of which will be sought at the final approval hearing in the Class Action Litigation on October 7, 2009. The Class Representatives will seek approval and injunctive relief for the settlement with Pajonas in the second wave of settlements as part of the Related Action. The Trustee, therefore, is seeking approval from the Court that the settlement with Pajonas is reasonable under Rule 9019, but the settlement will not become effective until approval and injunctive relief from the Class Action Court is obtained.

- (i) The assignment to the Trustee of all rights and claims to and under the relevant E&O Policy, as well as all claims under all E&O Policies (the “Coverage Claims”);
- (ii) Exchange of releases;
- (iii) Each settling Former Owner is barred from asserting any contribution or indemnity claims against third parties for amounts paid to the Trustee, and non-settling third parties are barred from any contribution or indemnity claims against any settling Former Owner, but these third parties obtain pro rata reduction of the Trustee’s claims against them, if any;
- (iv) The Trustee must obtain an order from the Class Action Court or the Bankruptcy Court barring all Exchanger claims against the settling Former Owner; and
- (v) Settling Former Owners waive all claims against the Estates, which are believed to aggregate approximately \$4.5 million.

71. Thus, the Former Owner Settlement Agreements (i) bring \$4.4 million into the Estates (ii) reduce the liabilities of the Estates by more than \$4.5 million, which is the total face amount of the Former Owners’ proofs of claim; (iii) assigns to the Estates the former owners’ ownership claims to the E&O Policies; and (iv) enhances the Trustee’s ability to obtain approval of the Trustee’s E&O Agreement by eliminating the potential objections of the Former Owners.

72. It is possible that payment of defense costs to attorneys for the individual Insureds, including the Former Owners, could *consume most if not all* of the policy limits, in which case neither the Estates nor the Exchangers would receive *any benefit* from the \$5.5 million of total coverage under E&O Policies, either in the Bankruptcy Case or other private suits brought against the individual Insureds, even if the Trustee or they prevail in these cases.

73. As a sum total of these agreements, the Estates will realize \$ 4.4 million pursuant to these settlements, and that in light of the risks of not settling, the Trustee believes the Former Owner Settlement Agreements are beneficial to the Estates.

74. The salient terms of the Former Owner Settlement Agreements are:¹¹

- (i) Payment of the Settlement Amounts: The payment amounts are set forth above. The sums have been deposited into an interest bearing, money market account to be held in escrow by Former Owners' attorneys or the Trustee.
- (ii) Schedule of Payment: The settlement amounts to be paid pursuant to the Former Owner Settlement Agreements will be distributed to the Trustee within ten days of entry of approval of the Bankruptcy Court and entry of the required injunctive relief by the Bankruptcy Court and/or the Class Action Court.
- (iii) Injunction Order: In the case of the Former Owners, the Trustee must obtain an order from either the Bankruptcy Court or the Class Action Court, *inter alia*, permanently staying, restraining and enjoining all Exchangers who have held or asserted, who hold or assert, or who may in the future hold or assert any claim against any of the Former Owners arising out of, derived from or attributable to their involvement with any of the 1031 Debtors, or otherwise related to *The 1031 Tax Group, et al.*
- (vi) Final Orders: The Former Owner Settlement Agreements and the consummation of the transactions contemplated thereby are subject to approval by this Court pursuant to Bankruptcy Rule 9019(a) and entry of the injunctive relief described above, and such orders must become final orders.
- (vii) Non-Compete Agreement: Upon entry of the required final orders, the Trustee shall be deemed to have released the Former Owners from any non-compete agreements to which both they and any of the 1031 Debtors are parties in connection with their employment with the 1031 Debtors.
- (viii) Releases and Claims: Effective upon entry of the required final orders,
 - 1. The Former Owners shall dismiss all filed and scheduled claims against the Trustee and the 1031 Debtors with prejudice, and such claims shall be deemed dismissed with prejudice;

¹¹ The following is a summary of the terms of the Settlement Agreements and does not purport to recite all the terms of the Settlement Agreements in full. Parties are encouraged to read the entirety of the Former Owner Settlement Agreements, which can be obtained (i) from the docket of bankruptcy case 07-14448, Docket #1686, (ii) from the Trustee's website at <http://trustee1031taxgroup.com/>, or (iii) by written request to Golenbock Eiseman Assor Bell & Peskoe LLP, 437 Madison Avenue, 35th Floor, New York, New York 10022 (Attn.: Michael S. Weinstein, Esq.).

2. The Former Owners forever release and discharge the Trustee and the 1031 Debtor from all claims and causes of action whatsoever, in law or in equity related to 1031 Debtors.
3. The Former Owners assign to the Trustee the Coverage Claims, and each and every claim each Former Owner may have under the E&O Policies and any other insurance policies of any kind.
4. The Trustee, for himself and on behalf of all the 1031 Debtors, releases and discharges the Former Owners from all claims and causes of action, whatsoever relating to the claims asserted by the Trustee or anything else related to the 1031 Debtors.
5. The Former Owners are barred from seeking contribution or non-contractual indemnity from other defendants and other parties are barred from seeking same from the Former Owners.

5. *The E&O Settlement Agreement*

75. The Trustee has entered into the E&O Settlement Agreement with the E&O Insurers to settle all claims under the E&O Policies (as described *supra* in Section A.2).

76. Under the E&O Settlement Agreement, the E&O Insurers will pay \$4.6 million (the “E&O Settlement Amount”), which represents 84% of the total limits under the E&O Policies. \$4,350,000 of the E&O Settlement Amount is to be paid to the Estates, and the remaining \$250,000 from the E&O Settlement Amount is to be set aside and allocated, on a pro rata basis per the applicable insured 1031 Debtor, to five separate “Non-Debtor Interest Funds” for the purpose of protecting any alleged “Non-Debtor Interests” in the five E&O Policies.

77. Payments to any non-debtor in connection with any non-debtor interests in a particular E&O Policy are to be limited to the amounts available in the “Non-Debtor Interest Fund” established for that particular E&O Policy. Any person alleging a Non-Debtor Interest in a particular E&O Policy will be subject to the terms, conditions, and defenses to insurance

coverage available under that E&O Policy, and the Trustee will be entitled to assert any and all of the Insurers' previously held rights, claims, and defenses under the E&O Policies against actual or purported holders of Non-Debtor Interests in the E&O Policies, including against any purported non-Debtor insureds. To the extent that a person establishes a valid Non-Debtor Interest in an E&O Policy, any funds available to pay such interest shall be allocated based on such person's relative legal exposure arising out of claims covered under that E&O Policy as compared with all other persons' relative legal exposures arising out of claims covered under that E&O Policy, provided, however, that first-come-first-served principles will apply to claims for coverage under the E&O Policies, and the Trustee may apply such principles to established Non-Debtor Interests in any E&O Policy.

78. No earlier than one year following the payment date, to the extent that any amounts in a Non-Debtor Interest Fund have not been claimed, or, if claimed, have been determined by adjudication or settlement agreement not to be owed, such amounts shall become property of the Estates of the 1031 Debtors (and thus will be delivered to the Liquidation Trust).

79. Notwithstanding the provisions for the creation of Non-Debtor Interests Funds, the Trustee contends that no person or entity has a valid Non-Debtor Interest in any E&O Policy. Moreover, as described below, in light of the assignments by the Former Owners to the Estates of their interests in the E&O Policies and lack of any other claims despite the passage of time, the Trustee believes it highly unlikely that any further claims against the E&O Policies will be asserted. As of now, the Trustee is not aware of any non-debtor that currently has or asserts an interest in the E&O Policies (or proceeds thereof). To the extent that any non-debtor may purport to have an interest in the E&O Policies (or proceeds thereof), such interest would be disputed by the Trustee.

80. A number of Exchangers filed suits against former employees of one or more of the 1031 Debtors. At one time, some of those employees asserted that they were entitled to coverage under the E&O Policies. To the best of the Trustee's knowledge, however, with the exception of Okun, Coleman, Simring, and Field, all of the individuals who have asserted (or are ever likely to assert) such coverage claims under the E&O Policies have assigned such claims to the Trustee pursuant to the Former Owner Settlement Agreements. Okun, Coleman, Simring, and Field have made no such assignments to the Trustee, but because each of them has pled guilty to federal crimes relating to the losses at issue, coverage for them individually would be excluded under the E&O Policies, even if such coverage otherwise would have been available (which the Trustee does not concede).

81. The Trustee believes that the E&O Settlement Agreement is highly advantageous to the Estates. The E&O Settlement Agreement provides \$4.6 million for the benefit of the Estates (subject to the \$250,000 set aside), which might otherwise never be available to the Estates or the Exchangers. The Trustee believes that litigating the E&O Insurers' defenses to coverage, even if such litigation were successful, would (i) be very substantial; (ii) present risk as to the outcome; and (iii) significantly undermine, and possibly destroy, the value of any payments due under the E&O Policies.

E. Crime Policy Settlement Agreements

1. The Crime Policies

82. The 1031 Debtors are variously insured under primary crime policies issued by CNA, and umbrella and excess crime policies issued by Federal and Twin City (Federal, Twin City and CNA, collectively, the "Crime Insurers"), respectively, for two consecutive annual policy periods commencing on August 15, 2005 (the "Crime Policies"). Set forth below is a

general description of the Crime Policies, but the language of the Crime Policies controls. The Crime Policies generally cover the 1031 Debtors for direct losses of covered property resulting from “Employee Theft” or “Employee Dishonesty,” as those terms are defined in the Crime Policies, subject to the applicable terms, conditions, and limitations of the Crime Policies.

83. A number of the Crime Policies cover single QIs within the 1031 Tax Group, while other Crime Policies cover multiple QIs within the 1031 Tax Group. The umbrella and excess policies are “following form” policies, meaning that they follow, or incorporate, the relevant terms and conditions of the underlying primary policies, except for the amount of the limits of liability and where the excess policies expressly provide otherwise. Quotations of policy language below are taken from the primary policies issued by CNA, but the language generally controls the overlying umbrella and excess policies as well.

84. Crime policies are potentially subject to three types of limits of liability: per-loss limits, per-occurrence limits, and aggregate limits. A per-loss or per-occurrence limit is the maximum amount the insurer is obligated to pay for one “loss” or “occurrence” under the policy. An aggregate limit is the maximum amount the insurer is obligated to pay, regardless of the number of losses or occurrences, for all losses to which the aggregate limit applies. Here, the primary policies are subject to per-occurrence limits, and the excess policies are subject to per-loss limits.

85. What constitutes an occurrence or a loss has a significant effect on the amount of coverage potentially available and the allocation of the losses among the insurers. If the thefts involve multiple occurrences or losses – as the Trustee contends – the per-occurrence or per-loss limits might not as a practical matter limit the amount of coverage potentially available,

meaning the losses could be covered in full, subject to any other coverage limitations or defenses that might apply, as discussed below.

86. If, however, all of the thefts constitute a single loss or all of the conduct at issue constitutes a single occurrence – as the Crime Insurers contend – the per-occurrence or per-loss limits of the policies would cap the potential recovery, potentially at a fraction of the total amount of losses. The Trustee contends that the total amount of the potentially applicable per-occurrence and per-loss limits is at least \$51 million; the Crime Insurers contend that the total amount is as little as \$25 million. Regardless which figure might apply, the coverage still would be subject to any other coverage limitations or defenses that might apply, as discussed below.

87. Each of the policies contains a deductible provision stating that the insurers will pay only for the amount of each occurrence or loss which is excess of the deductible amount. The amounts of these deductibles are either \$10,000 or \$25,000.

88. The 2005-2006 policies provide that the insurer will pay for “loss of . . . Covered Property resulting directly from the Covered Cause of Loss.” Covered Cause of Loss is defined as “Employee dishonesty.” The policies contain an exclusion regarding “indirect loss.” The exclusion provides however that “[the Insurers] will pay compensatory damages arising directly from a loss covered under this insurance.”

89. Similarly, the 2006-2007 policies provide that “[the Insurers] will pay for direct loss of ... ‘money’, ‘securities’ and ‘other property’ resulting from ‘employee theft.’” Like the 2005-2006 policies, these policies contain an exclusion regarding “indirect loss,” but the policies provide that they will cover “compensatory damages arising directly from a loss covered under this insurance.”

90. Under the 2006-2007 policy form, “Employee Theft” is defined as “the unlawful taking of ‘money’ ...to the deprivation of the ‘insured’ by an ‘employee,’ ...acting alone or in collusion with others.” The 2005-2006 Policies provide coverage for acts that are “dishonest” rather than “unlawful” where the dishonest employee had the “manifest intent to: (1) [c]ause [the QI] to sustain loss; and to (2) [o]btain financial benefit (other than employee benefits earned in the normal course of employment, including: salaries, commissions, fees, bonuses, promotions, awards, profit sharing or pensions) for: (a) [t]he ‘employee’; or (b) [a]ny person or organization intended by the ‘employee’ to receive that benefit.”

91. Exclusion A.1 of the policies states that “[l]oss resulting from any dishonest or criminal act committed by you or any of your partners whether acting alone or in collusion with others” is excluded. Endorsement FEA-3 to the policies, however, titled “INCLUDE OWNERS AND PARTNERS FOR LOSSES INVOLVING CLIENT PROPERTY,” provides that this exclusion does not apply “to losses involving the funds of client/exchangers while the Insured is acting as a qualified intermediary in a tax-deferred exchange of property intended to qualify under Internal Revenue Code 1031.”

92. The 2005-2006 policies are triggered by “acts or events” that occur during the policy period and lead to loss that is “discovered no later than one year from the end of the policy period.” The 2006-2007 policies are triggered by any loss that occurs and is discovered prior to the end of the policy period, 12:01 a.m. on August 15, 2007.

93. Endorsement FEA-4 of the policies, titled “Internal Controls Requirements,” states that “[a]ny payment of loss under this policy for ‘Employee Dishonesty’ involving a transaction intended to qualify as a tax-deferred exchange of property under Internal Revenue Code 1031 is conditioned upon the insured’s having complied with the following requirements:

(i) A written contractual agreement will be maintained between the Insured Intermediary and each exchanger/client stipulating the manner in which proceeds will be held and subsequently released ... (ii) Proceeds from the relinquished property ... will be held in a financial institution account segregated from the intermediary's operating funds, and each single exchange transaction shall be identified by a specific file number or like tracking tool...[and] (iii) Countersignature is required for the release of all funds, or a monthly reconciliation of accounts involving exchange transaction proceeds will be performed within two weeks of receipt of the account statement.”

94. The 2006-2007 policies provide that the insured is to give notice “as soon as possible” after “discovery by you or any of your partners, officers or directors of a loss or a situation that may result in loss.” The 2005-2006 Policies provide that the insured is to give notice “as soon as possible ... after you discover a loss or a situation that may result in loss.” “You” is defined simply as the Named Insured.

95. The policies provide that upon discovery of loss or a situation that may result in loss the policyholder is to provide a detailed sworn proof of loss within 120 days.

2. Overview of Potential Disputes Between Trustee and Crime Insurers

96. In addition to the limits of liability issue discussed above, the Insurers have raised (or may raise) various defenses to coverage or other issues that they contend negate or at least significantly limit any coverage obligations for the losses at issue. Among those defenses or other issues are the following:

- **Rescission and Related Issues.** On October 16, 2008, Twin City filed a complaint in the District Court for the Southern District of New York, currently stayed by agreement of the parties, in which Twin City sought to rescind its policy on the basis of certain alleged material misrepresentations or omissions in the application for that policy. The other Insurers also have argued that their policies should be rescinded, or

that they are otherwise excused from providing coverage, on the same or similar bases.

- Okun's Conduct Allegedly Not Covered. The Insurers contend that Okun's conduct is not covered because he was an owner rather than an employee of the insureds or because the Okun Parties operated the insureds as criminal enterprises.
- Time-Related Defenses. The Insurers contend that the insureds failed to provide timely notice or timely, sworn proofs of loss under these provisions, and that therefore the Insurers are relieved of any coverage obligations they might otherwise have for the losses at issue.
- Timing of Losses. The Insurers contend that the losses at issue are the open Exchanges rather than earlier Misappropriations, and that those losses occurred after the Okun Parties' conduct was discovered. Accordingly, the Insurers contend that those losses are not covered either because the Okun Parties' conduct was excluded from coverage once such conduct was discovered or because the open Exchanges resulted in whole or in part from a failure to mitigate loss after discovery.
- Alleged Conditions Precedent. The Insurers contend that the insureds failed to comply, or cannot establish that they complied, with one or more alleged conditions precedent to coverage under the policies set forth in the endorsement to the policies known as "FEA-4."

97. The Trustee contends that the losses resulting from the Misappropriations are covered in full under the Crime Policies, and the Trustee, on behalf of the Estates, has submitted proofs of losses substantiating the Trustee's claims for these amounts. As discussed previously, the Class Representatives have also sued the Insurers as part of the Class Action.

3. *The Crime Policy Settlement Agreements*

98. Although the Trustee disagrees with the Insurers' defenses and other issues described above, litigating the coverage claims would involve significant risk as to the ultimate outcome, as well as considerable expense, burden, and delay. Accordingly, the Trustee expended a great deal of effort to explore whether it would be possible to reach reasonable settlements of the coverage claims.

99. Following extended negotiations, the Trustee reached settlements with each of the Insurers, subject to Bankruptcy Court approval and certain other contingencies, pursuant to which CNA has paid to the Trustee to hold in escrow \$13,000,000, Federal has paid to the Trustee to hold in escrow \$7,000,000 and Twin City has paid to the Trustee to hold in escrow \$3,250,000 (the “Crime Policy Settlement Amounts”).¹² The Crime Insurers may not seek reimbursement of the Crime Policy Settlement Amounts from any other person or entity except their reinsurers in their capacity as such.

100. The contingencies, which must occur before the Crime Policy Settlement Amounts are released from escrow for the benefit of the Estates, include that there are orders of the Bankruptcy Court approving the Crime Policy Settlement Agreements that are final orders and that there are orders of the Class Action Court that have become final orders among other things barring and enjoining every Exchanger from prosecuting any Claims against the Insurers. The Crime Policy Settlement Agreements provide for broad releases of claims as between the Trustee, on behalf of the Estates, and the Insurers, and related covenants not to sue or assign released claims.

F. Former Attorney Settlement Agreements

1. KPKB

101. The Trustee has entered into a settlement agreement with KPKB (the “KPKB Settlement Agreement”). KPKB previously represented Okun, one or more of the Debtors or their affiliates, and other Okun Entities (the “Legal Services”). At various times, KPKB submitted bills (“Bills”) for the Legal Services. KPKB contends that it is owed no less than \$1.9 million in connection with the Bills already submitted plus an additional sum for unbilled Legal

¹² The description of the Crime Policy Settlement Agreements in this Motion is subject in all respects to the specific terms of the Crime Policy Settlement Agreements themselves.

Services. KPKB has advised the Trustee that approximately \$1,600,000 of the Bills is attributable to Legal Services rendered on behalf of the IPofA Debtors and the Okun Entities.

102. In May 2007, Okun granted KPKB a mortgage on real estate owned by him, directly or indirectly, at 12 Christian Cove Road, Tuftonboro, NH to secure legal fees owed to KPKB by himself, the Debtors and the Okun Entities. Pursuant to Stipulation between the Trustee and KPKB dated as of November 19, 2007, which was approved by Order of the Bankruptcy Court dated December 7, 2007, that real estate was sold and the proceeds in the amount of approximately \$1,630,000 (the “Christian Cove Escrow”) were placed into escrow pending resolution of the disputes between the Estates and KPKB.

103. The Trustee and his counsel have been conducting an investigation of any potential claims that the Debtors could assert against KPKB. The Trustee asserts that KPKB, in summary, breached its duty of loyalty by representing multiple clients, including the 1031 Debtors, certain IPofA entities, and Okun and, in so doing, rendered inadequate advice. In this connection, the Trustee would allege that the foregoing prolonged the Misconduct.

104. In response, KPKB, among other things, denies these allegations by the Trustee and further denies that, to the extent the allegations could have any validity, there is no causal link with respect to Okun’s Misconduct. To the contrary, KPKB contends that it engaged in good faith efforts to advise its clients with respect to an orderly transition away from the problems they faced and, in so doing, reasonably relied upon representations made by management.

105. KPKB has represented that certain insurance carriers issued certain policies (the “KPKB Policies”) to KPKB as follows: (1) an insurance policy with policy limits of \$5,000,000; and (2) an excess insurance policy with policy limits of \$5,000,000, which KPKB represents are

the full limits of coverage under these KPKB Policies and the total amount of insurance available to KPKB in connection with any potential claims of the Debtors or other Okun Entities against it. These are wasting policies and KPKB would thus be entitled to use the policies to defend against the potential claims, and there is a risk of exhaustion of the KPKB Policies.

106. Under the KPKB Settlement Agreement, KPKB has agreed to pay:

- (i) a total of \$10,000,000 from the two KPKB Policies, without deduction for any fees or expenses incurred by KPKB in its defense;
- (ii) \$750,000 as follows: \$250,000 within 10 days of the execution of the KPKB Settlement Agreement (which sum has been received); \$250,000 within five days of obtaining final court approval; and \$250,000 nine months after the second payment; and
- (iii) release of the Christian Cove Escrow to the Estates and release of all claims for payment for Legal Services.

107. The KPKB Settlement Agreement is otherwise generally similar to the Former Owner Settlement Agreements, except that in order for the KPKB Settlement Agreement to become effective, the Trustee must obtain an injunction barring further claims against KPKB relating to the 1031 Debtors from the Class Action Court or the Bankruptcy Court. In addition, the KPKB Settlement Agreement provides for the parties to exchange releases, including releases of KPKB by all of the Okun Entities.

2. *Rosen*

108. The Trustee has entered into a settlement agreement with Rosen (the “Rosen Settlement Agreement”), former criminal counsel to Okun and, according to the Trustee, former counsel to one or more of the 1031 Debtors and other Okun Entities. Rosen contends that he is owed in excess of \$400,000 for legal services rendered, repayment of which is secured by a junior mortgage on 39 and 49 Aaron Road, Wolfeboro, New Hampshire (the “NH Property”). Rosen has represented that a certain insurance carrier has issued a policy to it with a policy limit

of \$1 million, which is a “wasting policy” in that defense costs incurred in litigation would diminish, and potentially exhaust, the policy.

109. With respect to Rosen, the Trustee alleges, in essence, that his retention by Okun as well as the 1031 Debtors created an impermissible dual loyalty which may have assisted in prolonging Okun’s Misconduct. In this connection, the Trustee alleges that Rosen provided inadequate advice which prolonged Okun’s Misconduct.

110. Rosen vigorously denies these allegations, and, furthermore, submits that, even if valid, there are significant causation issues with the Trustee’s proposed case.

111. Under the Rosen Settlement Agreement, the sum of \$925,000 shall be paid to the Estates from the policy. The Rosen Settlement Agreement is otherwise generally similar to the Former Owner Plan Funding Agreements in that in order for the Rosen Settlement Agreement to become effective, it must receive either a Bankruptcy Court injunction or a Class Action bar order. In addition, the Rosen Settlement Agreement provides for the parties to exchange releases, including releases of Rosen by all of the Okun Entities

G. Wachovia Settlement Agreement

112. On October 3, 2008, the Trustee brought an adversary proceeding against Wachovia¹³ seeking to recover damages of no less than \$140 million, as well as equitable relief. In summary, the Trustee alleged that Wachovia (i) assisted Okun, Coleman and others in misappropriating funds of the 1031 Debtors and that, as a result of such conduct, Wachovia was liable to the 1031 Debtors for aiding and abetting breach of fiduciary duties by the Okun and his cohorts; and (ii) received various fraudulent transfers of assets of the 1031 Debtors, including (x) funds misappropriated from the 1031 Debtors and paid to Wachovia in repayment of loans

¹³ Adv. No. 08-01604 (MG).

made to third parties, and (y) liens obtained by Wachovia, and proceeds received by Wachovia in connection with such liens, on assets that were acquired in whole or in part with funds misappropriated from the 1031 Debtors. The Trustee asserted equitable interests (constructive trust and equitable liens) in assets acquired in whole or in part with funds misappropriated from the 1031 Debtors.

113. As of May 28, 2009, the Trustee entered into the Wachovia Settlement Agreement with the Class Representatives and Wachovia. The Wachovia Settlement Agreement provides, among other things, for the payment by Wachovia of \$45 million (“Wachovia Settlement Amount”) in full settlement of all claims asserted by the Trustee and both plaintiff classes and the exchange of mutual releases.

114. The Wachovia Settlement Agreement provides for the payment by Wachovia of the \$45 million Settlement Amount into escrow within 21 days after the Agreement is signed. Ten days after the “Payment Release Date,” the Wachovia Settlement Amount will be released to the Trustee for the benefit of the Estates and the Class, pursuant to the Class Action Agreement. The “Payment Release Date” will occur seven business days after (i) an order in agreed form approving the Wachovia Settlement Agreement has become a final order (the “Approval Order”), and (ii) (a) an order of the Bankruptcy Court permanently barring, enjoining and restraining all Exchangers and other creditors of the 1031 Debtors from prosecuting Claims against Wachovia (“Bankruptcy Court Protection Order”) and/or (b) an order of the Class Action Court releasing Wachovia from all liability to Exchangers, barring and enjoining all Exchangers from prosecuting any Claims against Wachovia, and containing a contribution bar and judgment reduction provision in agreed form (“Class Action Bar Order”), has become a final order.

115. The Wachovia Settlement Agreement will become null and void 20 days after the entry of a final order refusing to enter the Approval Order, or by notice from the Trustee to Wachovia or from Wachovia to the Trustee if the Approval Order, and either the Bankruptcy Court Protection Order or the Class Action Bar Order, have not been entered within one year after the Wachovia Settlement Agreement is signed.

116. For all of these reasons, the Trustee determined that the offered settlement in the amount of \$45 million was reasonable and appropriate.¹⁴

G. Injunctive Relief for Crime Policy Insurers and KPKB

117. As mentioned previously, the Crime Policy Settlement Agreements and the KPKB Settlement Agreement require that the Trustee seek both the Class Action Bar Order and the Bankruptcy Court Protection Order. By subsequent letter agreements with the Insurers and KPKB, it has been agreed that in addition to seeking the full bar order from the Class Action Court against all claims of Exchangers, the Trustee will seek from the Bankruptcy Court a limited injunction similar to the injunction previously provided by this Court in the settlement with Cordell Funding LLLP and its affiliates pursuant to the Order dated December 1, 2008 (Docket #1401 in Bankruptcy Case 07-11448). Such injunction is limited to claims that are based upon or derivative of any claim or cause of action that could have been asserted by, or injury to, the Estates. The Trustee, however, will not be obligated to seek the full injunction barring all claims.

LEGAL BASIS FOR THE RELIEF REQUESTED

A. The Plan Funding Party Settlement Agreements Should Be Approved as a Disposition of Estate Assets Pursuant to Section 363 of the Bankruptcy Code

1. Generally

¹⁴ Pursuant to the Class Action Agreement, 40% of the \$45 million settlement amount belongs to the Class and will be distributed through the Class Litigation.

118. Section 363(b)(1) of the Bankruptcy Code provides in pertinent part that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1).

119. Although section 363 does not set forth a standard for determining when it is appropriate for a court to authorize the sale or disposition of a debtor’s assets, courts in the Second Circuit and others, in applying this section, have required that it be based upon the sound business judgment of a trustee. *See In re Chateaugay Corp.*, 973 F.2d 141 (2d Cir. 1992) (holding that a judge determining a § 363(b) application must find from the evidence presented a good business reason to grant such application); *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) (same); *Stephens Indus. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (holding that “bankruptcy court can authorize a sale of all of a chapter 11 debtor’s assets under § 363(b)(1) when a sound business purpose dictates such action”); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (stating that judicial approval of a section 363 sale requires a showing that the propose sale is fair and equitable, a good business reason exists for completing the sale and that the transaction is in good faith).

120. Section 105(a) of the Bankruptcy Code empowers the Court to “issue any order, process, or judgment that is necessary to carry out the provisions of this title.” 11 U.S.C. § 105(a). In practice, section 105(a) of the Bankruptcy Code grants bankruptcy courts broad statutory authority to enforce the Bankruptcy Code’s provisions either under the specific statutory language of the Bankruptcy Code or under equitable common law doctrines. *See Momentum Mfg. Corp. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994) (“[i]t

is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process”).

2. *The E&O Settlement*

121. Approval of the E&O settlement under section 363(f) of the Bankruptcy Code is a condition to such settlement. Such approval is appropriate. At the outset, it bears emphasis that in the Trustee’s view, all of the potentially available limits under the E&O Policies belong to the 1031 Estates. Although the E&O Settlement Amount is only 84 percent of the potentially available limits, the E&O Settlement Amount is a compromise on coverage claims by the 1031 Debtors that far exceed those limits. The E&O Policies are structured so that covered claims are to be paid out on a first-come-first-served basis. *Cf. Newby v. Enron Corp. (In re Enron Corp. Securities, Derivative & “ERISA” Litigation)*, 391 F. Supp. 2d 541, 554 (S.D. Tex. 2005) (“New York law allows insurers to pay claims on a chronological basis until policy proceeds are exhausted without breaching their duty of good faith”) (citations omitted); *In re Global Crossing Securities and ERISA Litigation*, 225 F.R.D. 436, 444 (S.D.N.Y. 2004) (finding settlement reasonable in light of insurance policy’s “first-come, first-served coverage [which] significantly jeopardized the potential recovery at stake . . .”). Lloyd’s reserves its right to deny any obligation to provide coverage, but if Lloyd’s were to acknowledge coverage obligations to the 1031 Debtors, the 1031 Debtors’ claims instantly would exhaust the E&O Policies. In other words, even if a non-Debtor were to claim coverage, such a person would be entitled to no proceeds under the E&O Policies, as all of the proceeds would be property of the Estates.¹⁵

122. The fact that the 1031 Debtors would exhaust the E&O Policies with their claims alone has several implications under section 363(f). First, because the 1031 Debtors do not

¹⁵ The Trustee notes in this respect that Notice of this Motion was served on all known former directors, officers and employees of the 1031 Debtors.

believe that any non-Debtor has any right to collect any proceeds under the E&O Policies, to the extent that any non-Debtor asserts an interest in the unexhausted limits of the E&O Policies, “such interest is in bona fide dispute.” *See* 11 U.S.C. § 363(f)(4). Second, because the Debtors have the right under nonbankruptcy insurance law to consume the entire limits of the E&O Policies, “applicable nonbankruptcy law permits the sale of such property free and clear of such interests.” Third, to the extent that any non-Debtor actually had a valid interest in interest in unexhausted E&O Policy limits, “such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.” *See* 11 U.S.C. § 363(f)(5). Finally, to the extent that any non-Debtor receives notice of this Motion and fails to object, the Court can declare that “such entity consents” to the relief requested. *See* 11 U.S.C. § 363(f)(2).

123. Furthermore, to the extent that any Non-Debtor Interests in the E&O Policies exist, there is no reason to believe such interests exceed \$250,000. Such interests are therefore adequately protected. *See* 11 U.S.C. § 363(e).

124. The Bankruptcy Court’s decision in *In re Adelphia Communications Corp.*, 364 B.R. 518 (Bankr. S.D.N.Y. 2007), although reaching a contrary result, is distinguishable. First, and perhaps most importantly, there are no known Non-Debtor Interests here. When analyzing whether an insurance policy is property of one party, property of another, or shared by both, courts do not confine their inquiry to the language of the policies. Rather, they look at the actual facts, including the existence or absence of actual claims for coverage. When, as in this case, an entity is listed as an insured but has no actual prospect of obtaining coverage, it is deemed not to have an interest in the insurance proceeds. As the federal district court put it *Adelphia* (at a point in the proceedings when the debtors had not yet established their own potentially covered liabilities):

Claiming the debtors now have a property interest in those proceeds makes no sense at this juncture. Such argument would be akin to a car owner with collision coverage claiming he has the right to proceeds from his policy simply because there is a prospective possibility that his car will collide with another tomorrow, or a living person having a death benefit policy, and claiming his beneficiaries have a property interest in the proceeds even though he remains alive.

In re Adelpia Communications Corp., 298 B.R. 49, 53 (S.D.N.Y. 2003).

125. A Delaware bankruptcy court similarly has held that potentially recoverable insurance proceeds are not property of a debtor's estate if the debtor's potentially covered liability "either has not occurred, is hypothetical, or speculative." *In re Allied Digital Technologies Corp.*, 306 B.R. 505, 512 (Bankr. D. Del. 2004).

126. Second, the bankruptcy court's ruling in *Adelpia* involved directors & officers ("D&O") coverage, which is a special form of insurance coverage that differs materially from the E&O insurance coverage at issue here. As a number of courts have observed, the main purpose of D&O coverage is to protect a narrow group of corporate directors and officers, and that remains true even when the policy also provides coverage for the corporation's own liabilities. For example, the U.S. Bankruptcy Court for the Eastern District of New York has explained that, "at its core, a D&O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection." *In re First Central Financial Corp.*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999). Furthermore, "[u]nlike an ordinary liability insurance policy, in which a corporate purchaser obtains primary protection from lawsuits, a corporation does not enjoy direct coverage under a D&O policy." *Id.* The bankruptcy court acknowledged that the D&O policy before it contained a "slight twist" – entity coverage for securities claims – but the court concluded that the "mere appendage of entity coverage to this Policy by way of a rider, providing the Debtor with protection from securities claims, does not provide sufficient

predicate, per se, to metamorphose the proceeds into estate property.” *Id.* at 14, 17. Similarly, the U.S. District Court for the District of Delaware described one a D&O policy as follows: “The Policy is designed primarily to provide insurance coverage to [the insured company’s] directors and officers for defense costs, settlements and judgments incurred in suits against the directors and officers alleging wrongful acts committed by them while acting in their capacity as directors and officers of the company.” *In re World Health Alternatives, Inc.* 369 B.R. 805, 808 (Bankr. D. Del. 2007). Again, that D&O policy included entity coverage, but such coverage was not regarded as the main purpose of the insurance.

127. By contrast, E&O coverage – the type of liability coverage at issue here – is primarily designed to protect the entities likely to be sued for professional errors, and it is the individuals’ coverage, not the entity coverage, that is added on.

128. The *Adelphia* court may also contain an unfortunate analytical misstatement.

The court stated that:

The Objectors [i.e., the individual insureds] have no interest, disputed or otherwise, in the Estate’s Policies, nor to the Estate’s entitlement to policy proceeds, and have no claim to either of them. To the extent there are disputes, they are between the Estate and the Insurers, on the one hand, and the Objectors and the Insurers, on the other. The Objectors’ entitlements, if any to policy proceeds are not to the *Estate’s* recovery of policy proceeds, but rather to whatever proceeds are available when any of the Objectors makes a request – even if that is only what is left after the Estate gets whatever policy proceeds to which the Estate is entitled.

129. This court can decline to follow *Adelphia* on the ground that the case is factually distinguishable, and the court need not decide whether *Adelphia* was wrongly decided, but the Court should be aware of the *Adelphia* court’s possible misstatement. In fact, there are many occasions in which a debtor and a non-debtors both claim to be entitled to the same policy limits. Perhaps it is true that a debtor cannot sue a non-debtor for proceeds paid by the insurer

to the non-debtor (that issue is not present here), and perhaps it is true that the non-debtor cannot sue the debtor for proceeds paid by the insurer to the debtor (again, that issue is not present here). But, contrary to the *Adelphia* court's suggestion, before the insurer pays out the proceeds, the debtor and the non-debtor may both claim a right to precisely the same money. Insurers, for example, routinely file interpleader actions in which the insurer acknowledges that it has to pay its limits to someone but the insurer wants the court to resolve the competing claims among insureds, which are adverse to one another with respect to the allocation of the insurance proceeds. Similarly, when corporations file for bankruptcy protection, directors and officers often seek relief from the automatic stay in order to obtain payment under D&O policies issued to debtors, and D&O insurers often seek relief from the automatic stay in order to make payments to non-debtors under such policies, precisely because the insureds have interests in the same potentially recoverable proceeds.

130. But even if one were to accept the *Adelphia* court's premise that the debtor's interest and the non-debtor's interest are properly treated as "independent," and even if this case were factually indistinguishable from *Adelphia*, the Trustee would nevertheless submit that the E&O Policies can be sold free and clear of non-debtors' interests. At worst, the debtor and non-debtor insureds can be regarded as "joint tenants" with "undivided interests" in the policy for the purpose of section 363(h). Under section 363(h), selling property free and clear of non-debtor interests is permitted where, as in this case, partitioning the property would be impracticable; selling the estate's interest alone would realize significantly less for the estate than sale of such property free of the interests of such co-owners; the benefit to the estate of the sale would outweigh any detriment to co-owners; and the property is not used in the production or sale of electric energy or gas. (The *Adelphia* court did not address section 363(h).)

B. The Motion Should Be Approved as a Compromise and Settlement under Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019(a)

131. The Trustee also requests approval of the Plan Funding Party Settlement Agreements pursuant to Bankruptcy Rule 9019(a), which governs approval of compromises and settlements of claims. Bankruptcy Rule 9019(a) provides, in pertinent part:

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 debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a).

132. This rule empowers the bankruptcy court to approve a proposed compromise or settlement “if [it is] in the best interests of the estate.” *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991). The settlement need not result in the best possible outcome for the . . . Debtor[] but must not “fall below the lowest point in the range of reasonableness.” *Id.* (citation omitted).

133. Approval of a proposed compromise or settlement is within the sound discretion of the Court. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, *reh’g denied*, 391 U.S. 909 (1968); *In re W.T. Grant Co.*, 699 F.2d 599 (2d Cir.), *cert. denied sub nom.*, *Cosoff v. Rodman*, 464 U.S. 822 (1983); *Fischer v. Pereira (In re 47-49 Charles St. Inc.)*, 209 B.R. 618, 620 (S.D.N.Y. 1997).

134. In determining whether to approve a proposed compromise or settlement, the Bankruptcy Court need not decide the numerous issues of law and fact raised by the compromise or settlement but rather should “canvass the issues and see whether the settlement ‘fall[s] below the lowest point in the range of reasonableness.’” *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983). *See Purified Down Prods. Corp.*, 150 B.R. 519, 522 (S.D.N.Y. 1993)

(emphasizing that “the court need not conduct a ‘mini-trial’ to determine the merits of the underlying litigation”).

135. Among other things, “in making such a determination, the bankruptcy court should apprise itself ‘of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated’ and should review ‘all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.’” *In re Telcar Group, Inc.*, 363 B.R. 345, 352-53 (Bankr. E.D.N.Y. 2007) (quoting *Protective Comm. for Indep. Stockholders*, 390 U.S. at 424-25). These factors include:

- a. The balance between the likelihood of the plaintiff’s or the defendant’s success should the case go to trial as compared with the benefits of the settlement without the expense and delay of a trial;
- b. The prospect of a complex and protracted litigation if the settlement is not approved;
- c. The proportion of creditors who do not object to, or who affirmatively support, the proposed settlement;
- d. The proposed benefits to be received;
- e. The nature and breadth of releases to be issued as a result of the settlement; and
- f. The extent to which the settlement is truly the product of arms’ length bargaining and not the product of fraud or collusion.

Telcar Group, Inc., 363 B.R. at 352-53 (citing *In re Interstate Cigar Co., Inc.*, 240 B.R. 816, 822 (Bankr. E.D.N.Y. 1999)).

136. The Court should also consider additional factors such as weighing the informed judgments of the trustee and considering the competency and experience of counsel. *Telcar Group, Inc.*, 363 B.R. at 352 (citing *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991)).

**THE PLAN FUNDING PARTY SETTLEMENT AGREEMENTS SATISFY THE
LEGAL STANDARDS AND SHOULD BE APPROVED**

A. Former Owners

137. The Trustee submits that the Former Owner Settlement Agreements meet the above criteria. The Trustee has expended substantial amounts of time and resources investigating claims against the Former Owners and competing claims under the 1031 Debtors' E&O Policies. However, to commence an action, complete discovery and prepare for a trial would require further fact and legal development pursuant to formal discovery. Meanwhile, at a potential trial, both parties would incur extensive costs in preparing numerous witnesses and experts and conducting an evidentiary trial. The resolution contemplated by the Former Owner Settlement Agreements will avoid lengthy and expensive litigation between the Estates and the Former Owners.

138. The Trustee and his professionals have evaluated the relative merits of the case that could be brought against the Former Owners, as well as other factors which concern the evaluation of the settlement. The Trustee believes that any ensuing litigation against the Former Owners would encounter significant evidentiary and substantive difficulties and the result would not be free from doubt. For example, establishing these claims would rest primarily upon testimony and documents. In this respect, although there are some documents that could be used to support these claims, the Trustee is not aware of any "smoking gun" documents. The testimony would be contradictory in light of the fact that the Former Owners would testify in the manner consistent with the description of their responses to the Trustee's potential claims as described above. Furthermore, with respect to the fraudulent conveyance claim, the reasonableness of the purchase prices at the time is a subjective matter which would result in a "battle of the experts." Moreover, the damages would not be the full purchase price, but rather

the difference between the “reasonable” value and the amount received. Accordingly, the result of the litigation is uncertain, and the Trustee would be assuming substantial risk in litigating the case against the Former Owners. Lastly, in the event of an unsuccessful litigation outcome for the Trustee, the allowability of the Former Owners’ Claims would be enhanced.

139. Another factor supporting the settlements with the Former Owners is the fact that, as discussed in greater detail herein, approval of the Former Owner Settlement Agreements substantially enhances the likelihood that the E&O Settlement Agreement will be approved, for the reason that the Former Owners will not object to the E&O Settlement Agreement (assuming the Former Owner Settlement Agreements are approved). Further, the Former Owners will also assign to the Estates all of their claims and interests with respect to the E&O Policies, which will resolve NEC’s and AEC’s dispute over who owns their respective E&O Policy, and also resolve the Former Owners’ claims filed against the 1031 Debtors’ Estate that are in excess of \$4 million. Moreover, if the litigation route is pursued, the Former Owners will seek to have their defense costs paid from the E&O Policies, thereby depleting them.

140. This leads to the next consideration supporting the Former Owner Settlement Agreements, *i.e.*, that litigation would be very fact-intensive and accordingly protracted and expensive. Each side could easily expend a mid-six figure sum – particularly when the cost of experts is included. Approval of the settlement would avoid the incurrence of these expenses, as well as free up the time and resources of the Trustee, the Estates, and the Trustee’s professionals, to focus on many other pressing matters in the 1031 Debtors’ cases.

141. In addition, based upon information supplied to the Trustee by some of the Former Owners, the ability to collect any judgments, especially from Dashiell, the Shefmans

and the McCabe Group, are not free from doubt, and in no event could the Trustee collect a sum anywhere near the total amount of damages that would be sought.

142. In considering the factors discussed in the case law described above, it is respectfully submitted that the Former Owner Settlement Agreements satisfy the relevant factors:

- a. In light of the risk of taking the matter to trial, the Trustee submits that the benefits of the settlements outweigh the risk, expense and delay of trial;
- b. In the event the settlements are not approved, there is a prospect of complex and protracted litigation;
- c. Although it cannot be known yet how creditors will react to the settlements, the Trustee submits that it is likely that the creditor body will either generally support, or not object to, the proposed settlements;
- d. The Trustee submits that the proposed benefits to be received in the amount of \$4.4 million plus the assignment of the insurance claims and waiver of the Former Owners' Claims represent a material benefit to the Estates;
- e. The nature and breadth of the releases contemplated in the Former Owner Settlement Agreements are reasonable and consistent with settlements of this type. The Former Owners shall release all claims against The 1031 Debtors and their Estates, and the

Trustee, on behalf of the Estates, will provide a mutual release;
and

- f. The Former Owner Settlement Agreements were the result of protracted arms-length bargaining, and was not the product of any fraud or collusion. *See Protective Comm. for Indep. Stockholders*, 390 U.S. at 424-425.

143. For the foregoing reasons, the Trustee respectfully submits that the Former Owner Settlement Agreements represent a fair and equitable compromise, a sound exercise by the Trustee of business judgment and a decision that is in the best interest of the Estates and the creditors. Moreover, the Former Owner Settlement Agreements are above the lower range of reasonableness. Accordingly, the Trustee respectfully submits that the Court should approve the compromise of claims as embodied in the Former Owner Settlement Agreements pursuant to Bankruptcy Rule 9019(a).

B. E&O Settlement Agreement

144. The Trustee submits that the E&O Settlement Agreement meets the above criteria governing approvals of asset sales under section 363 and approval of settlements under Bankruptcy Rule 9019.

145. The Trustee contends that the damages suffered by the Exchangers, as reflected in the Proofs of Claim filed by them, are covered under the E&O Policies for the benefit of the Estates. The Estates have notified the Insurers of the Exchangers' claims and have submitted appropriate requests for such coverage. The total damages incurred by the Exchangers far exceed the potentially available limits under the E&O Policies.

146. The E&O Insurers have asserted or reserved their rights to assert numerous defenses to coverage under the E&O Policies. Such defenses, if proven, would significantly limit or even defeat coverage. The E&O Insurers allege or may allege, among other things, that (i) the 1031 Debtors' insurance applications were incomplete or misleading and coverage is therefore invalidated; and (ii) the claims in question are not covered because they arise from intentional wrongdoing. There is currently no litigation over the E&O Policies between the E&O Insurers and the Trustee or any other insureds or alleged insureds.

147. The E&O Settlement Agreement provides the Estates with the benefits of the resolution of complex, highly-contested litigation. The Trustee has expended substantial amounts of time and resources investigating claims under the 1031 Debtors' E&O Policies. However, to commence an action, complete discovery and prepare for a trial would require further fact and legal development pursuant to formal discovery. Meanwhile, at a potential trial, the parties would incur extensive costs in preparing numerous witnesses and experts and conducting an evidentiary trial. The resolution contemplated by the E&O Settlement Agreement will avoid lengthy and expensive litigation.

148. In considering the factors discussed in the case law described above, it is respectfully submitted that the E&O Settlement Agreement satisfies the relevant factors:

- a. In light of the risk of taking the matter to trial, the Trustee submits that the benefits of the settlement outweigh the risk, expense and delay of trial;
- b. In the event the settlement is not approved, there is a prospect of complex and protracted litigation;

- c. Although it cannot be known yet how creditors will react to the settlement, the Trustee submits that it is likely that the creditor body will either generally support, or not object to, the proposed settlement;
- d. The Trustee submits that the proposed benefits to be received in the amount of \$4,600,000 (subject to the set-aside) represent a material benefit to the Estates;
- e. The nature and breadth of the releases contemplated in the E&O Settlement Agreement are reasonable and consistent with settlements of this type: the E&O Policies will be deemed exhausted, any rights of the 1031 Debtors' under the E&O Policies will be released, and any rights to the E&O Insurers to seek reimbursement with respect to the E&O Policies will be released (except for their right to seek reimbursement from their reinsurers); and
- f. The E&O Settlement Agreement was the result of protracted arms-length bargaining, and was not the product of any fraud or collusion. *See Protective Comm. for Indep. Stockholders*, 390 U.S. at 424-425.

149. For the foregoing reasons, the Trustee respectfully submits that the E&O Settlement Agreement represents a fair and equitable compromise, a sound exercise by the Trustee of business judgment and a decision that is in the best interest of the 1031 Debtors' Estates and creditors. Moreover, the E&O Settlement Agreement is above the lower range of

reasonableness. Accordingly, the Trustee respectfully submits that the Court should approve the compromise of claims as embodied in the E&O Settlement Agreement pursuant to Bankruptcy Rule 9019(a).

C. Crime Insurance Settlement Agreements

150. The Trustee submits that the Crime Policy Settlement Agreements meet the above criteria governing approvals of settlements under Bankruptcy Rule 9019.

151. The Crime Policy Settlement Agreements allow the Trustee, and hence the Estates, to avoid significant risk of an adverse litigation outcome. As noted above, the Crime Insurers have raised a host of issues and defenses that they contend would eliminate, or at the very least substantially diminish, their coverage obligations. Although the Trustee believes there are strong arguments in response to those issues and defenses, the outcome of a litigated resolution of these disputes is not free from doubt, and continued litigation creates significant risk for the Estates. For example, both the language of the policies as well as the existing case law creates significant risk on the “per occurrence” issue, which is crucial to determining the potential size of the claim against the Crime Policies. In addition, there are multiplicities of fact issues regarding the date of discovery of the Misconduct, and whether the Debtors met all of the other conditions to coverage described above. A negative ruling on any one of these issues could reduce the claims under the Crime Policies to zero.

152. In considering the factors discussed in the case law described above, it is respectfully submitted that the Crime Policy Settlement Agreements satisfy the relevant factors:

- a. In light of the risk of taking the matter to trial, the Trustee submits that the benefits of the settlements outweigh the risk, expense and delay of trial;

- b. In the event the settlements are not approved, there is a prospect of complex and protracted litigation;
- c. Although it cannot be known yet how creditors will react to the settlements, the Trustee submits that it is likely that the creditor body will either generally support, or not object to, the proposed settlements;
- d. The Trustee submits that the proposed benefits to be received in the amount of \$23,250,000 represent a material benefit to the Estates;
- e. The nature and breadth of the releases contemplated in the Crime Policy Settlement Agreements are reasonable and consistent with settlements of this type; and
- f. The Crime Policy Settlement Agreements were the result of protracted arms-length bargaining, and were not the product of any fraud or collusion. *See Protective Comm. for Indep. Stockholders*, 390 U.S. at 424-425.

153. For the foregoing reasons, the Trustee respectfully submits that the Crime Policy Settlement Agreements represent a fair and equitable compromise, a sound exercise by the Trustee of business judgment and a decision that is in the best interest of the Estates and the creditors. Moreover, the Crime Policy Settlement Agreements are above the lower range of reasonableness. Accordingly, the Trustee respectfully submits that the Court should approve the compromise of claims as embodied in the Crime Policy Settlement Agreements pursuant to Bankruptcy Rule 9019(a).

D. Former Attorney Settlement Agreements

154. In considering the case law described above, the Former Attorney Settlement Agreements are, the Trustee submits, very favorable to the Estates. Rosen's assets are limited and collecting a judgment against would be highly problematic, and his insurance policy will be almost completely exhausted by the settlement. The KPKB Policies will be completely exhausted by the KPKB Settlement. In addition, the defenses raised by Rosen and KPKB, particularly each party's causation defense, would be a significant factual obstacle at trial. For all of these reasons, and in light of the applicable legal standards, the Trustee submits that the Former Attorney Settlement Agreements do not fall below the lowest point on the range of reasonableness and, to the contrary, represent not only a very favorable settlement for the Estates, but also fair and equitable compromises, sound exercise by the Trustee of business judgment and are decisions that are in the best interest of the Estates and the creditors.

E. Wachovia Settlement Agreement

155. The Trustee submits that the Wachovia Settlement Agreement meets the above criteria. The Trustee has expended substantial amounts of time and resources investigating the claims against Wachovia and the defense asserted by Wachovia. The Trustee and his professionals have evaluated the relative merits of the case that could be brought against Wachovia, as well as other factors which concern the evaluation of the settlement. The Trustee believes that any ensuing litigation against Wachovia would encounter significant evidentiary and substantive difficulties and the result would not be free from doubt. For example, Wachovia's defenses pose a significant hurdle for the Trustee to overcome in any litigation against third parties, such as Wachovia, for aiding and abetting breaches of fiduciary duty by Okun against the 1031 Debtors. Further, Wachovia's defenses raised disputed issues of fact,

which would have to be established by the Trustee at a lengthy trial. The elements of an aiding and abetting claim, particularly actual knowledge or willful blindness on the part of Wachovia's employees, are difficult standards to meet, and the burden of proving such facts would have been on the Trustee. Accordingly, the result of the litigation is uncertain, and the Trustee would be assuming substantial risk in litigating the case against Wachovia.

156. This leads to the next consideration supporting the Wachovia Settlement Agreement, *i.e.*, that litigation would be very fact-intensive and accordingly protracted and expensive. Approval of the settlement would avoid the incurrence of these expenses, as well as free up the time and resources of the Trustee, the Estates, and the Trustee's professionals, to focus on many other pressing matters in the Debtors' cases.

157. The proposed settlement with Wachovia is reasonable given various defenses asserted by Wachovia to the Trustee's claims such as, *inter alia*: (i) certain offsets to which Wachovia would be reasonably entitled; (ii) the risk of litigation, particularly of an aiding and abetting claim, which requires a high level of proof; and (iii) the time and expense that would have been incurred in pursuing further litigation.

158. With regard to the aiding and abetting claim, for which the Trustee sought a recovery of the full amount of the Estates' \$140 million injury, Wachovia moved to dismiss the complaint on the ground (among others) that the Trustee was barred from asserting the claim based upon the *in pari delicto* defense and the *Wagoner* standing rule in the Second Circuit. These defenses pose a significant hurdle for the Trustee to overcome in any litigation against third parties, such as Wachovia, for aiding and abetting breaches of fiduciary duty by Okun against the 1031 Debtors. At the time of the settlement, the Court had not decided Wachovia's motion to dismiss.

159. Wachovia also contended that the Trustee had not alleged (and could not prove) Wachovia's actual knowledge of the Misconduct as required for an aiding and abetting claim, and further that Wachovia's conduct in transferring funds pursuant to directions of its customer (the 1031 Debtors) were routine transactions for which a bank could not be subject to aiding and abetting liability. These defenses raised disputed issues of fact, which would have to be established by the Trustee at a lengthy trial. The elements of an aiding and abetting claim, particularly actual knowledge or willful blindness on the part of Wachovia's employees, are difficult standards to meet, and the burden of proving such facts would have been on the Trustee. While the Trustee had considerable evidence against Wachovia, his ability to prove aiding and abetting was certainly not free from doubt.

160. With regard to the fraudulent conveyance claims, the Trustee sought recovery of \$18.9 million that was directly transferred to Wachovia from the 1031 Debtors in repayment of a loan made by Wachovia to one of the Okun Entities. Wachovia argued that these funds were received by another lender on that transaction, rather than Wachovia. While the Trustee disputed that fact, the Trustee's claim against Wachovia was stronger for recovery of 75% of that amount, rather than the full amount. As to the remaining fraudulent conveyance claims in the amount of approximately \$24.5 million, these were indirect transfers which are subject to a more difficult standard of proof for the Trustee than direct transfers, and therefore entailed a higher degree of risk. A portion of such amount (approximately \$6.25 million) also may have occurred prior to Wachovia's alleged knowledge of the Misconduct.

161. Finally, although the Trustee sought to recover the full amount of its losses from Wachovia on the aiding and abetting claim, the Trustee is not entitled to double recovery on the same loss from multiple sources, and some of the settlement funds obtained by the Trustee from

other third parties are properly deducted from the total losses in evaluating the amount that can be recovered from Wachovia.

162. In considering the factors discussed in the case law described above, it is respectfully submitted that the Wachovia Settlement Agreement satisfies the relevant factors:

- a. In light of the risk of taking the matter to trial, the Trustee submits that the benefits of the settlement outweigh the risk, expense and delay of trial;
- b. In the event the settlement is not approved, there is a prospect of a complex and protracted litigation;
- c. Although it cannot be known yet how creditors will react to the settlement, the Trustee submits that it is likely that the creditor body will either generally support, or not object to, the proposed settlement;
- d. The Trustee submits that the proposed benefits to be received in the amount of \$45 million represent a material benefit to the Estates;
- e. The nature and breadth of the releases contemplated in the Wachovia Settlement Agreement are reasonable and consistent with settlements of this type. Wachovia shall release all claims against The 1031 Debtors and their estates, and the Trustee, on behalf of the Estates, will provide a mutual release; and
- f. The Wachovia Settlement Agreement was the result of protracted arms-length bargaining, and was not the product of any fraud or

collusion. *See Protective Comm. for Indep. Stockholders*, 390 U.S. at 424-425.

163. For the foregoing reasons, the Trustee respectfully submits that the Wachovia Settlement Agreement represents a fair and equitable compromise, a sound exercise by the Trustee of business judgment and a decision that is in the best interest of the Estates and the creditors. Moreover, the Wachovia Settlement Agreement is above the lower range of reasonableness. Accordingly, the Trustee respectfully submits that the Court should approve the compromise of claims as embodied in the Wachovia Settlement Agreement pursuant to Bankruptcy Rule 9019(a).

NOTICE

164. On August 24, 2009, in the Trustee's Notice of Confirmation Hearing, the Trustee provided Notice that this Motion will be filed by September 14, 2009 to: (i) the United States Trustee; (ii) counsel to the Committee; (iii) counsel to all parties to Plan Funding Party Settlement Agreements; (iv) all creditors of the 1031 Debtors; (v) all persons and/or entities entitled to notice in these cases; and (vi) all parties required to receive notice pursuant to any Plan Funding Party Settlement Agreement. The Trustee submits that under the circumstances, such service is good and sufficient notice, as required by Bankruptcy Rule 2002 and Local Rules 2002-1 and 9013-1(c).

165. A copy of the each Plan Funding Party Settlement Agreement has been provided as part of the Supplement to the Second Amended Plan of Reorganization of Gerard A. McHale, Jr., as Chapter 11 Trustee for Each of the 1031 Debtors, and IPofA Shreveport Industrial Park, LLC, which can be obtained (i) from the docket of bankruptcy case 07-14448, Docket # 1686, (ii) from the Trustee's website at <http://trustee1031taxgroup.com/>, or (iii) by written request to

Golenbock Eiseman Assor Bell & Peskoe LLP, 437 Madison Avenue, 35th Floor, New York, New York 10022 (Attn.: Michael S. Weinstein, Esq.).

166. No previous motion for the entire relief requested herein has been made to this or any other Court. The Trustee previously filed a motion for Rule 9019 approval of the Plan Funding Party Settlement Agreement with the McCabe Group on December 10, 2008 (Docket #1410 in Bankruptcy Case 07-11448) with a hearing to be held on February 4, 2009. Such motion has been adjourned multiple times, and the Trustee requests such motion to be deemed subsumed into this Motion.

WHEREFORE, the Trustee respectfully requests that the Court (i) enter an Order approving the Plan Funding Party Settlement Agreements and authorizing the Trustee to take any actions necessary to consummate the transactions contemplated in the Plan Funding Party Settlement Agreements; and (ii) grant such other relief as is just.

Dated: New York, New York
September 14, 2009

Respectfully submitted,

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Trustee and Manager of IPofA Shreveport
Industrial Park, LLC*