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Charles W. Azano
Greenberg Traurig, LLP | Boston

Eric A. Henzy
Zeisler & Zeisler, P.C. | Bridgeport, Conn.

Ryan A. Maupin
Deloitte CRG | Parsippany, N.J.

Hon. Elizabeth S. Stong
U.S. Bankruptcy Court (E.D.N.Y.) | Brooklyn

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An Analysis of Structured Dismissal Orders Since the Onset of the Pandemic

Charles W. Azano, Greenberg Traurig LLP

An Analysis of Structured Dismissal Orders Since the Onset of the Pandemic

It has now been more than five years since the United States Supreme Court reigned-in the use of structured dismissals in *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973 (2017) when it held that a bankruptcy court cannot approve a structured dismissal that violates the basic priority rules that apply under the Bankruptcy Code without the affected creditors' consent. Since that decision, notwithstanding arguments that bankruptcy courts lack the authority to enter structured dismissal orders with the additional provisions frequently found in such orders, the practice of using structured dismissals as an exit strategy, as a more cost-effective alternative to a plan, is undoubtedly alive and well.

The prevalence of structured dismissals is evidenced in the chart included at the end of these materials, which identifies and describes 20 structured dismissal orders entered since the onset of the pandemic. As the chart shows, over the past few years, structured dismissals have continued to be used across the county and are not limited to any particular fact pattern, ranging from cases that are administratively insolvent to those that pay creditors in full and return funds to equity. They also range from relatively simple orders that are only a few pages, to complex, negotiated orders that start to resemble a plan.

What is a Structured Dismissal?

Traditionally, chapter 11 debtors were faced with one of three ways to exit a case: (i) confirmation of a plan of reorganization or liquidation; (ii) conversion of a case to chapter 7; or (iii) dismissal. Bankruptcy practitioners are well-versed in the problems inherent in these three options. Confirmation of a plan can be an expensive process, especially from the perspective of an under-secured lender following a sale process permitting payment of substantial administrative expenses from a DIP loan or the lender's cash collateral. Asking such lenders (who are paying for the process) to consent to the "gold standard" of a plan may be perceived as too big of an ask when the lender is not being paid in full and the proposed plan provides a distribution to unsecured creditors or even payment of substantial priority or unbudgeted administrative claims. Similarly, conversion to a case under chapter 7 may be unattractive given its additional layers of administrative costs and the unpredictable nature of adding a chapter 7 trustee to the case. A straight dismissal may also be less-than-ideal since it returns parties to the *status quo ante* and preserves their state-law rights under Section 349 of the Bankruptcy Code, thereby undoing "the bankruptcy case, as far as practicable, [and restoring] all property rights to the position in which they were found at the commencement of the case."[1]

[1] *See* Nan Roberts Eitel, T. Patrick Tinker & Lisa L. Lambert, "Structured Dismissals, or Cases Dismissed Outside of Code's Structure?", 30 Am. Bankr. Inst. J. 20 (March 2011) (citing H.R. Rep. No. 95-595, at 338 (1977); S. Rep. 95-89, at 48-49 (1978)).

Given the shortcomings of each of these three options, creative bankruptcy attorneys have sought to combine the predictability and other benefits of a plan with the speed and cost-effectiveness of a dismissal, through the creation of the structured dismissal.[2]

The Court in *Jevic* relied on the American Bankruptcy Institute to define a "structured dismissal" as a:

> "hybrid dismissal and confirmation order . . . that . . . typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case."[3]

Structured dismissal orders can, and frequently do, include numerous "bells and whistles" including the following:[4]

- The ability to fix claim resolution and distribution procedures;
- Establishing procedures for submission of final fee applications;
- Authorization to pay certain claims;
- Approving "gifting" by secured creditors from their collateral to pay recoveries to unsecured creditors;[5]
- Releases and exculpation of professionals and others;
- Waivers of preference actions and other claims;
- Provision that certain orders entered during the case remain in effect notwithstanding Section 349 of the Bankruptcy Code;
- Retention of jurisdiction over specific matters or any orders and disputes from the case;
- Authorization to dispose of remaining property and records;
- Clarification that debtors will pay US Trustee fees through the date of dismissal, or other clarification regarding US Trustee fees; and

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[2] See Norman L. Pernick & G. David Dean, "Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Asset Sales", 29 Am. Bankr. Inst. J. 1 (June 2010).

[3] *Czyzewski v. Jevic Holding Corp. ("Jevic")*, 137 S.Ct. 973, 979 (2017) (citing American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 270 (2014)).

[4] *See* 15 Collier on Bankruptcy § 18.95[1] (16th ed.) (partial list) and the chart included in these materials.

[5] While gifting is appropriate in some circumstances, gifting that skips over a class of creditors without their consent will run afoul of the holding in *Jevic*.

- Termination of the retention of professionals and dissolution of committees.

Authority for Structured Dismissals

The Bankruptcy Code does not expressly authorize structured dismissals or specifically use that term. Over time, however, consensus has built around four sections of the Bankruptcy Code – Sections 105(a), 305(a)(1), 349(b) and 1112(b) – to support a court's ability to enter structured dismissal orders.

A common approach taken by many debtors is to start by arguing that cause for dismissal exists under Section 1112(b)(1).[6] That section provides that a court "shall" dismiss a case if cause exists, so long as dismissal is in the best interest of creditors. Many debtors add that the 2005 amendments to the Bankruptcy Code changed this section from discretionary to mandatory and quote the legislative history in support thereof.[7] Section 1112(b)(4) provides a non-exhaustive list of what constitutes cause, which includes "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation" and "inability to effectuate substantial consummation of a plan," facts that will be present in nearly every case following a 363 sale that failed to produce sufficient proceeds to pay the secured lender in full.

Movants generally turn next to a showing that dismissal (as opposed to conversion) is in the best interest of the estate to address the option given to the court under Section 1112(b), and then pivot to arguing that dismissal is also warranted under Section 305(a) of the Bankruptcy Code, which provides that "the court, after notice and a hearing, may dismiss a case under this title … if at any time – (1) the interest of creditors and the debtor would be better served by such dismissal or suspension…."[8] Movants may discuss these two "best interest" tests together or separately,

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[6] *See*, *e.g.*, *In re NPE Winddown Holdings, Inc.*, Debtors' Motion for Entry of an Order (I) Dismissing the Chapter 11 Cases, (II) Establishing Procedures with Respect to Final Fee Applications (III) Authorizing the Debtor Entities To Be Dissolved; and (IV) Granting Related Relief, Case No. 21-10570 (MFW), Docket No. 841, at p. 18-20 (Bankr. D. Del. Feb. 2, 2022); *In re. Live Primary,* LLC, Debtor's Motion for Entry of Order Authorizing Dismissal of Debtor's Chapter 11 Case, Case No. 20-11612 (MG), Docket No. 207, at p. 6 (Bankr. S.D.N.Y. Dec. 1, 2021); *In re. SVXR, Inc.*, Debtor's Motion for Entry of an Order (I) Approving Procedures for the Dismissal of the Debtor's Chapter 11 Case and (II) Granting Related Relief, Case No. 21-51050 (SLJ), Docket No. 125, at p. 7-9 (Bankr. N.D. Cal. Sept. 27, 2021.

[7] *See*, *e.g.*, *In re. Live Primary,* LLC, Debtor's Motion for Entry of Order Authorizing Dismissal of Debtor's Chapter 11 Case, Case No. 20-11612 (MG), Docket No. 207, at p. 6 (citing H.R. Rep. No. 109-31(I), at 442, reprinted in 2005 U.S.C.C.A.N. 88, 94 (stating that the act "mandate[s] that the court convert or dismiss a chapter 11 case, whichever is in the best interest of creditors and the estate, if the movant establishes cause, absent unusual circumstances."); *In re NPE Winddown Holdings, Inc.*, Debtors' Motion for Entry of an Order (I) Dismissing the Chapter 11 Cases, (II) Establishing Procedures with Respect to Final Fee Applications (III) Authorizing the Debtor Entities To Be Dissolved; and (IV) Granting Related Relief, Case No. 21-10570 (MFW), Docket No. 841, at p. 18 (same).

[8] *See*, *e.g.*, *In re NPE Winddown Holdings, Inc.*, Debtors' Motion for Entry of an Order (I) Dismissing the Chapter 11 Cases, (II) Establishing Procedures with Respect to Final Fee Applications (III) Authorizing the Debtor Entities To Be Dissolved; and (IV) Granting Related Relief, Case No. 21-10570 (MFW), Docket No. 841, at p. 21-22; *In re. Live Primary,* LLC, Debtor's Motion for Entry of Order Authorizing Dismissal of Debtor's Chapter 11 Case, Case No. 20-11612 (MG), Docket No. 207, at p. 9-10; *In re. SVXR, Inc.*, Debtor's Motion for Entry of an Order (I) Approving Procedures for the Dismissal of the Debtor's Chapter 11 Case and (II) Granting Related Relief, Case No. 21-51050 (SLJ), Docket No. 125, at p. 9-10.

although differing standards apply for each section. With respect to Section 1112(b), movants generally argue that a structured dismissal is preferable to conversion since dismissal will reduce fees and therefore increase distribution to creditors, again facts that will exist in most cases where a structured dismissal is sought. As to Section 305(a), courts look to seven factors to determine whether dismissal is appropriate: (1) the economy and efficiency of administration; (2) whether another forum is available to protect the interests of the parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better services all interests of the estate; (6) whether a non-federal insolvency proceeding has processed so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which the bankruptcy jurisdiction has been sought.[9] A finding of dismissal under Section 305 has the additional benefit that the order is not subject to appeal.[10]

Finally, some movants cite to the introductory language of Section 349(b) ("Unless the court, for cause orders otherwise …") as authority that the court can alter a dismissal order to do more than return parties to the *status quo ante*,[11] and to Section 105(a) of the Bankruptcy Code to support the additional provisions requested.

The Caselaw – Jevic and Other Decisions

Notwithstanding the increased use of structured dismissals in the past two decades, and the seemingly controversial nature of such orders, there are very few published decisions providing guidance as to what is and is not permissible. Any discussion of the caselaw surrounding structured dismissals must begin with the 2017 Supreme Court decision, *Czyzewski v. Jevic Holding Corp.* which provided a clear rule that structured dismissal orders may not deviate from the Bankruptcy Code's priority scheme without the consent of affected creditors.[12]

The facts[13] of *Jevic* emerged from a failed leveraged buyout (LBO) pursuant to which Sun Capital Partners purchased the stock of Jevic Transportation Corp. with funds loaned by CIT Group. In connection with the loan and purchase, Sun Capital Partners granted CIT Group a

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[9] *See*, *e.g.*, *In re FSO Jones, LLC*, Case No. 22-10196, Docket No. 160, at p. 12-13 (Bankr. E.D. La. Apr. 27, 2022).

[10] 11 U.S.C. §305(c).

[11] *See*, *e.g.*, *In re. SVXR, Inc.*, Debtor's Motion for Entry of an Order (I) Approving Procedures for the Dismissal of the Debtor's Chapter 11 Case and (II) Granting Related Relief, Case No. 21-51050 (SLJ), Docket No. 125, at p. 11; *In re. Live Primary,* LLC, Debtor's Motion for Entry of Order Authorizing Dismissal of Debtor's Chapter 11 Case, Case No. 20-11612 (MG), Docket No. 207, at p. 11.

[12] *See Jevic*, 137 S.Ct., at 987.

[13] *See Jevic*, 137 S.Ct., at 980-982.

security interest in Jevic's assets. After Jevic filed for chapter 11 relief, two lawsuits were commenced that would become relevant to the issues before the Court.

The first lawsuit was a brought against Jevic and Sun Capital by a group of former truck drivers for Jevic's alleged failure to comply with state and federal Worker Adjustment and Retraining Notification (WARN) Acts. Although Sun Capital ultimately prevailed on its appeal to the Third Circuit, the bankruptcy court granted summary judgment against Jevic in favor of the plaintiffs that resulted in a judgment that included an approximately $8.3 million priority wage claim under Section 507(a)(4) of the Bankruptcy Code.

The second lawsuit was a derivative action suit brought by the unsecured creditors' committee on behalf of the estate, alleging fraudulent transfers on the basis that Sun Capital and CIT Group hastened Jevic's bankruptcy by saddling it with debts it could not service. After the bankruptcy court found that the committee had adequately pled its avoidance action claims, the committee, Sun Capital, Jevic and CIT Group reached a settlement whereby Sun Capital would assign its lien to a liquidating trust, and CIT Group would make a payment of $2 million to the trust, which would then distribute all the cash to general unsecured creditors, but would not distribute anything to the WARN Act claimants (Sun Capital apparently insisted on funds not being distributed to the WARN Act claimants since the case against Sun Capital was still pending and it did not want to help fund the case). The settlement agreement was conditioned on the dismissal of the bankruptcy case.

The bankruptcy court overruled the US Trustee's and the WARN Act claimants' objection to the settlement agreement, which order was affirmed by the district court and the Third Circuit Court of Appeals. The Supreme Court majority opinion, authored by Justice Stephen Breyer, reversed the Third Circuit's affirmation of the bankruptcy court's order, but in so doing, implicitly approved the use of structured dismissals so long as the relief granted does not violate the basic priority structure of the Bankruptcy Code without the consent of the affected creditors.[14] The Court could have reached the same result with respect to the case before it if it had found that structured dismissals are never authorized by the Bankruptcy Code, but did not do so. Instead, the Court focused on the fact that structed dismissals "appear to be increasingly common" as an alternative to the three traditional chapter 11 outcomes of confirmation of a plan, conversion to a chapter 7 or dismissal that restores the parties to the prepetition *status quo*.[15] The opinion stressed the importance of the distribution priority scheme in bankruptcy and reasoned that while there are circumstances that arise in cases that justify deviation from that scheme to advance important bankruptcy objectives, Congress did not intend to give bankruptcy courts the power to alter

[14] *See Jevic*, 137 S.Ct., at 987.

[15] *Jevic*, 137 S.Ct., at 979 (citing American Bankruptcy Institute Commission To Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 270, at n. 973).

bankruptcy's priority scheme by allowing courts to "order otherwise" when restoring parties to their state law rights in a dismissal under Section 349(b).[16]

Those few courts addressing structured dismissals since *Jevic* was decided have been receptive to approving structured dismissal orders so long as the requested order would not violate the absolute priority rule. For example, two recent rulings from the Southern District of New York overruled objections seeking to expand the reasoning of the United States Supreme Court in *Jevic*, and in so doing confirmed that structured dismissals may be approved so long as they do not violate the priority rules that apply under the Bankruptcy Code.

The first of these rulings occurred in *In re Atlantic & Pacific Tea Co*.[17] Following a sale of the debtors' assets and a case that was administratively insolvent, the debtors sought to exit bankruptcy by using a structured dismissal order that would transfer the debtors' remaining assets to the lead debtor that would then complete the remaining administrative tasks in the case. The cases of the other debtors would be dismissed. Distributions from the remaining debtor would be made in accordance with the Bankruptcy Code, with administrative claims being paid on a *pro rata* basis, and no expected recovery to general unsecured creditors. The proposed order operated much in the way that a liquidating trust would, which formed the basis of objections from the US Trustee and another creditor that the case should be converted to a chapter 7. Judge Drain, in an oral ruling, disagreed, and instead identified how each portion of the requested relief was consistent with the Bankruptcy Code and commonly granted outside of a plan of reorganization.

The second case, *In re KG Winddown, LLC*,[18] also involved a proposal to dismiss some cases before others, in this case because some of the debtors needed to transfer liquor licenses and other permits to complete a prior sale transaction. The proposed order contemplated a two-step process whereby the debtors would administer claims, and then once completed, would close the cases, allowing for some cases to close before others. The US Trustee objected to the requested relief on the basis that the proposed sequenced dismissal was premature and dismissal should not be authorized until the cases were fully administered. Judge Glenn disagreed, writing that "the Supreme Court in *Jevic* imposed limits on structured dismissals, but the Court left the door open where such dismissals do not violate the absolute priority rule and otherwise comply with the applicable provisions of the Bankruptcy Code. Here the Debtors' request for structured dismissals fits neatly through that open door."[19] The court then addressed the specific objections of the US Trustee and the appropriateness of specific provisions (including the proposed distribution scheme

[16] *See Jevic*, 137 S.Ct., at 985 (reasoning that the "for cause" exception in Section 349(b) is "too weak a reed upon which to rest so weighty a power").

[17] *See In re Atlantic & Pacific Tea Co. Inc.*, Case no. 15-23007 (RDD), Docket No. 4813 (transcript), (Bankr. S.D.N.Y. May 18, 2021).

[18] 628 B.R. 739 (Bankr. S.D.N.Y. 2021).

[19] *See id.*, at 741 (internal citations omitted).

and the survival of orders, including an exculpation provision in the previously-entered sale order) contained in the proposed order.

Analysis of Structured Dismissal Orders Since the Onset of the Pandemic

The willingness of courts to enter structured dismissal orders so long as they do not violate the narrow no-priority-skipping rule established in *Jevic* appears to be the approach most courts have taken in the past few years. These materials include a chart of 20 structured dismissal orders entered since the onset of the pandemic.[20] Based on a review of these 20 orders, certain trends are worthy of note:

- Procedure: Approximately half of the entered orders (9 of 20) dismissed the case pursuant to a single order. The other half (11 of 20) contemplated two (or more) orders, with the first order authorizing certain procedures to wind-up the case (such as a fee application process or distribution of proceeds) following by entry of a second order, generally based on certification from counsel that the conditions set out in the first order had been met.

- Fulcrum Class: There is no single fact pattern leading to the use of structured dismissals. Of the 20 cases surveyed, five involved situations where creditors were paid in full and there was a return to equity, two involved situations where administrative and priority claims were paid in full and there was a *pro rata* distribution to general unsecured creditors, eight cases involved situations where there were sufficient proceeds to pay administrative and/or priority claims in whole or in part but proceeds were not sufficient to provide a distribution to unsecured creditors (not including cases where a specific carve out was negotiated and consented-to by the secured lender), and the remaining five cases failed to procure sufficient proceeds to pay a DIP lender or pre-petition secured lender in full.

- Releases: At one time structured dismissal orders regularly included release and exculpation provisions. This appears to no longer be the case. Of the 20 orders reviewed, only two included express release or exculpation provisions.[21] Perhaps this is the result of the increased scrutiny given to such provisions in recent years, and the movant's desire to limit the arguments that an objecting party (in particular the US Trustee) might raise.

- Distribution Provisions and Claims Process: Most orders include some authorization for distribution of claims or a mechanism to determine claims. Some orders include abbreviated claims procedures where claims to be paid are listed in an exhibit and parties

[20] The fact that the attached chart includes 20 structured dismissal orders should not be read to imply that such orders are always approved. Some courts have cited *Jevic* when denying entry of a structured dismissal order or other requested relief. *See* Dennis J. Connolly & Christopher K. Coleman, The Increasing Utilization (and Challenges) of Structured Dismissals as an Alternative Disposition of Bankruptcy Cases, 2021 Ann. Surv. of Bankr. Law 1, 8 (Oct. 2021) (providing three examples where requested relief was denied).

[21] Some other cases included release and exculpation provisions in previously entered orders, which orders were then preserved in the structured dismissal order.

are given the opportunity to dispute the proposed amounts or the fact that they are omitted from the list entirely.

- Retention of Jurisdiction Provisions and Giving Effect to Prior Orders: Nearly all orders include provisions that permit the court to retain jurisdiction over certain (and generally all) orders, and provisions that clarify that all orders previously entered by the court shall survive dismissal.

- Other Provisions: Many orders also include provisions that authorize the debtor to abandon or destroy remaining assets, dissolve committees and terminate the retention of professionals. In addition, most orders provide that the debtor will continue to pay US Trustee fees through the date of dismissal.

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
RM Wind-Down Holdco LLC, Case No. 18-11795 (MFW), Docket Nos. 635 and 721 (Bankr. D. Del. Apr. 30, 2019 and Feb. 18, 2020)	Following a sale that was sufficient to pay the DIP Lender but not the prepetition secured lenders, debtors filed a motion seeking a structured dismissal order that would pay allowed secured claims (other than the prepetition lender) and priority claims. Used two-order process pursuant to which certain wind-down procedures were authorized by first order and then case was dismissed pursuant to second order.		First order contemplated paying administrative claims but did not specifically set up an objection process. The motion seeking dismissal referenced a separate claims resolution process. Process established for payment of professional fees. Paid certain secured claims and administrative claims, with other amounts paid to pre-petition secured lender.	All prior orders remain in full force and effect, with Sale Order and Final DIP Order specifically identified.	In first and second order, court retained jurisdiction with respect to all matters arising from or related to the implementation, interpretation or enforcement of order.	First order authorized destruction or abandonment of records.
Peninsula Airways Inc., d/b/a Penair, Case No. 17-00282, Docket No. 882 (Bankr. D. Alaska May 1, 2020)	Chapter 11 trustee sought dismissal order paying general administrative creditors on a *pro rata* basis. Prior to filing the motion, the debtors' assets had been sold for a price sufficient to pay secured creditors in full, administrative creditors, and unsecured creditors on a *pro rata* basis, which distribution was made prior to the dismissal order.		Claims reconciliation process occurred prior to filing of motion. Dismissal order provided for payment of identified general administrative creditors on a *pro rata* basis.		Retained jurisdiction to enforce sale order and global settlement order and claims by or against the chapter 11 trustee.	Order exonerated chapter 11 trustee bond.

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
SSW International, Inc., Case No. 20-20232 (TPA), Docket No. 108 (Bankr. W.D. Penn. May 22, 2020)	Cases were commenced to resolve litigation with a purchaser of certain business and other assets of the debtors. Purchaser had taken over assets prior to the case so the debtors were not operating entities when the cases were filed. The dispute was resolved during the bankruptcy and the debtors moved to dismiss the case. The motion to dismiss contemplated an order entering and once conditions were met, certification of counsel stating such.		Contemporaneously entered settlement agreements provided for payment of certain claims from escrow account. Dismissal order provided procedure for filing and payment of professional fees. Motion indicated that debtors had assets sufficient to make a *pro rata* distribution to unsecured creditors after the cases were dismissed.	All prior orders remain in full force and effect, with Sale Order and Final DIP Order specifically identified.	Retained jurisdiction to enforce dismissal and all other orders entered during the cases.	Dismissal was conditioned on payment of professional fees and there being no open adversary proceedings. Once counsel filed a certification stating this to be true, cases were dismissed.
Foodfirst Global Restaurants, Inc., Case No. 20-02159 (LVV), Docket No. 408 (Bankr. M.D. Fla. Aug. 10, 2020)	A prior sale provided for partial payment to the secured lender and an amount for administrative claims and a separate carve-out for committee counsel, but did not provide sufficient funds for payment of priority claims.		Motion included a list of administrative expense claims and provided creditors the opportunity to dispute the amount of their claim, or a failure to list them at all. Order provided for payment of administrative claims.	Parties reverted to their pre-petition rights, except as set forth in orders entered during the cases.		

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
Virtual Citadel, Inc. Case No. 20-62725 (JWC), Docket No. 199 and 207 (Bankr. N.D. Ga. Sept. 1, 2020 and Oct. 14, 2020)	Proceeds from a sale, after payment of administrative expenses, were not sufficient to pay DIP Lender in full. Used a two-order process. The first order paid certain administrative expenses, authorized the debtors to liquidate remnant assets, transferred a remaining property, and distributed the proceeds thereof. The second order dismissed the case.		First order authorized payment of certain administrative claims (including professional fees) and other claims. First order paid remaining cash to DIP Lender.	All prior orders remain in full force and effect, with certain sale orders and Final DIP Order specifically identified.	Retained jurisdiction with respect to all matters arising from the implementation, interpretation or enforcement of order.	Motion included a sources and uses chart to demonstrate that the secured lender was not being paid in full or receiving a windfall.
Freedom Oil & Gas, Inc., Case No. 20-32582, Docket No. 192 (Bankr. S.D. Tex. Sept. 25, 2020)	Following a sale that was not sufficient to pay the pre-petition secured lender in full, the debtors moved for a structured dismissal.		Authorized payment of administrative claims to identified claimants, as well as professional fees and US Trustee fees. Remaining amounts were distributed to the pre-petition lender.		Retained jurisdiction to hear and determine disputes from the dismissal order.	
VIPC Holdings Liquidating, Inc, Case No. 20-10345 (MFW), Docket Nos. 383 and 418 (Bankr. D. Del. Sept. 29, 2020 and Dec. 4, 2020)	Sale proceeds were not sufficient to pay DIP Loan. Used two-order process pursuant to which wind-down procedures were authorized by first order and then case was dismissed pursuant to second order.		Process established for payment of professional fees. Excess amounts paid to DIP Lender.	All prior orders remain in full force and effect, with Sale Order and Final DIP Order specifically identified.	In first and second order, court retained jurisdiction with respect to all matters arising from or related to the implementation, interpretation or enforcement of order.	First order authorized destruction or abandonment of records.

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
John Varvatos Enterprises, Inc., Case No. 20-11043 (MFW), Docket Nos. 555 and 808 (Bankr. D. Del. Nov. 30, 2020 and June 30, 2021)	Sale provided for payment of secured claims, and provided sufficient funds for wind-down costs and a pool for unsecured creditors. Used two-order process pursuant to which certain wind-down procedures were authorized by first order and then case was dismissed pursuant to second order.		Order established process for professional fees and a deadline for certain administrative claims (carved out dispute regarding payment of insurance premium). First order authorized the payment of administrative claims and priority claims, US Trustee fees and *pro rata* distributions to general, unsecured creditors.	All prior orders remain in full force and effect, with Sale Order and Final DIP Order specifically identified.	In first and second order, court retained jurisdiction with respect to all matters arising from or related to the implementation, interpretation or enforcement of order.	Permitted abandonment of remaining assets.
Toojay's Management LLC, Case No. 20-14782 (EPK), Docket Nos. 478 and 486 (Bankr. S.D. Fla. Dec. 9, 2020 and Dec. 23, 2020)	Sale to affiliate of senior secured lender provided sufficient funds to pay administrative claims, but not to pay general unsecured claims. Motion sought two orders, one dismissing all cases except for a lead case that would retain jurisdiction to hear final fee applications, and a second order dismissing that final case.		Following payment of administrative claims, and subject to certain holdbacks, remaining amounts paid to purchaser of assets.	Both orders specified that orders entered in case remain in effect.	First order retained jurisdiction with respect to all matters related to implementation of the sale order and the dismissal order, and to adjudicate the final fee applications and any disputes relating to the escrow. Second order included similar retention of jurisdiction, but added additional disputes.	

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
Transformation Tech Investors, Inc., Case No. 20-12970 (MFW), Docket Nos. 90 and 103 (Bankr. D. Del. Feb. 3, 2021 and Mar. 25, 2021)	Case was commenced to allow debtor to sell membership interest in operating subsidiary. Sale process provided for elimination of all pre-petition claims and proceeds of sale were sufficient to pay administrative expense claims in case. Used two-order process pursuant to which certain wind-down procedures were authorized by first order and then case was dismissed pursuant to second order.		Motion indicated that, following sale, there were no claims against the debtor other than administrative claims. Only claims were professional fees and US Trustee fees. Order established process for professional fees. Excess funds to be distributed to equity.	All prior orders remain in full force and effect, with Sale Order and Final DIP Order specifically identified.	In first and second order, court retained jurisdiction with respect to all matters arising from or related to the implementation, interpretation or enforcement of order.	
The Great Atlantic & Pacific Tea Company, Inc. Case No. 15-23007 (RDD), Docket No. 4810 (Bankr. S.D.N.Y. May 14, 2021)	Employed a two-order dismissal, whereby cases of all debtors except one were dismissed and consolidated under remaining case, which administered wind-down, similar to a liquidating trust. Second order dismissing remaining debtor to enter once administration of remaining issues has been completed. Administrative claimants to receive a partial recovery	Included an exculpation provision (limited to events during the chapter 11 cases) in favor of the debtors, the creditors' committee, the secured creditor, the unions, and their respective	Provided list of disputed claims, and authority to resolve claims. Provided for reserve for disputed administrative claims, secured claims, and union claims, and for catch-up distribution process. Process established for payment of professional fees.	All prior orders remain in full force and effect and survive dismissal of the chapter 11 cases pursuant to Section 349. Global settlement specifically referenced.	Court retained jurisdiction to hear and determine all matters relating to the dismissal order and other orders entered during the cases. Allowed certain litigation to continue, and for retention of additional causes of action.	Approves "Case Resolution Procedures" that effectuates dismissal. Kept creditors' committee in place until dismissal. Keeps insurance contracts in effect.

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
	and general unsecured creditors receive no recovery.	professionals. The order also preserved any releases set forth in other orders entered during the cases.	Remaining case administered payment of claims, including administrative claims, secured claims, and claim(s) of pension plans (from identified litigation)			Addressed ability of remaining debtor to dispose of assets.
KG Winddown, LLC, Case No. 20-11723 (MG), Docket Nos. 499, 522 and 529 (Bankr. S.D.N.Y. June 11, 2021, February 16, 2022, and March 11, 2022)	Following a credit bid sale to the debtors' secured lender that included a $100,000 cash payment reserved for distribution, cash to cover cure costs, and assumption of certain liabilities, debtors moved to dismiss case. Motion sought two-part process, the first of which authorized the debtors to pay certain claims and established procedures for paying administrative claims and professional fees. Upon certifications of counsel, cases dismissed in two groups due to need to transfer liquor licenses.	Specifically references that releases made during the cases, including pursuant to the sale order, are unaffected by the dismissal of the cases. The prior sale order included an exculpation clause in favor of the lender/buyer.	Initial order authorized payment of $100,000 to general unsecured creditors and allowed administrative claims (after debtors file a schedule of such). Professional fees allowed to be paid after final fee application process.	All prior orders remain in full force and effect and survive dismissal of the chapter 11 cases.	Court retains jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the implementation, interpretation, or enforcement of any orders of the court or with respect to a specific, identified adversary proceeding.	

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
Forever 21, Inc., Case No. 19-12122 (MFW), Docket Nos. 2118 and 2343 (Bankr. D. Del. Oct. 4, 2021 and Feb. 7, 2022)	Approximately 18 months after the debtors closed on a sale of their assets, the debtors moved for a structured dismissal. At the same time, the US Trustee filed a renewed motion to convert the cases to chapter 7. The debtors sought three orders, one that would approve procedures, including a claims reconciliation process, a second that would distribute all cash in excess of amounts owed to secured creditors to administrative creditors on a *pro rata* basis, and a third that would dismiss the cases after all conditions are met.		First order established a claims resolution process for secured and administrative claims (proceeds were not sufficient to pay all administrative creditors in full), as well as a process for filing of professional fee applications. Second order to distribute available proceeds to secured creditors and to administrative claimants on a *pro rata* basis. Second order also allowed a federal tax claim.	All prior orders remain in full force and effect and survive dismissal of the chapter 11 cases. The provision specifically references the DIP Order and the Sale Order.	Court retains jurisdiction to hear disputes arising from the various orders.	Authorized destruction or abandonment of certain property.
TPS Oldco, LLC, Case No. 20-40743 (CJP), Docket No. 564-1 (Bankr. D. Mass. Oct. 21, 2021)	Following a sale of the debtors' businesses that did not provide sufficient proceeds to pay the debtors' prepetition lenders, but did provide for a $500,000 distribution for unsecured creditors, the debtors moved for a dismissal order.		Dismissal order provided for payment of 50% of 503(b)(9) claims (buyer paid other 50%), priority claims, and *pro rata* distribution to unsecured creditors. Omnibus objection had previously been filed. Excess cash distributed to buyer.	All prior releases, stipulations, settlements, liens, rulings, orders, and judgments including the Sale Order and the dismissal order, remained in full force and effect.	Court retained jurisdiction with respect to final fee applications and any matters, claims rights, or disputes arising or related to orders entered during the cases.	Order dismissed cases notwithstanding certain actions remained to be taken, but court retained jurisdiction and debtors were authorized to take all actions under order.

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
SVXR, Inc., Case No. 21-51050 (SLJ). Docket Nos. 153 and 193 (Bankr. N.D. Cal. Oct. 28, 2021 and Feb 17, 2022).	Following a sale, the debtor purportedly had sufficient proceeds to pay unsecured creditors a substantial (if not full) recovery and return funds to equity. Two-step process was used where, under the first order, the debtor resolved administrative claims and provided for the filing of fee applications. Second order dismissed case.		First order (procedures order) authorized debtor to wind-down its corporate affairs in accordance with state law, but clarified debtor was not authorized to make distributions in violation of the priority schemes set forth in the Bankruptcy Code. Remaining property revested in successor debtor.	All prior orders remain in full force and effect and survive dismissal of the chapter 11 case.	Court retained jurisdiction to enforce all prior orders.	
Live Primary, LLC, Case No. 20-11612 (MG), Docket No. 223 (Bankr. S.D.N.Y. Dec. 21, 2021)	Following a sale that generated proceeds sufficient to pay administrative claims, including the claims of retained professionals, the debtor sought dismissal of the case. Following the sale, the debtor had no assets to distribute under a plan.			All prior orders remain in full force and effect and survive dismissal of the chapter 11 case.	Court retained jurisdiction to enforce all prior orders.	

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
Destination Maternity Corp., Case No. 19-12256 (BLS), Docket Nos. 1220 and 1229 (Bankr. D. Del. Dec. 17, 2021 and Dec. 28, 2021).	Following a sale to stalking horse bidder, conducting going-out-of-busines sales, and complying with transition agreement with buyer, debtors filed a motion seeking entry of two orders, one approving distributions on account of secured and administrative claims and one for dismissal (conditioned on completion of claims process). The two orders entered within a few weeks of one another.	Included an exculpation clause for the debtors (and their directors, officers and employees), the committee, and their professionals.	Substantially contemporaneously-entered order provided for payment of secured claims and *pro rata* payment of administrative claims. The order provided procedures for undeliverable distributions	All prior orders remain in full force and effect and survive dismissal of the chapter 11 cases.	Court retained jurisdiction to enforce all prior orders.	Authorized destruction or abandonment of certain property.
NPE Winddown Holdings, Inc., Case No. 21-10570 (MFW), Docket No. 861 (Bankr. D. Del. Feb. 18, 2022)	Following a sale of substantially all of the debtors' assets to an affiliate of the prepetition and DIP lender, which sale did not provide sufficient funds for a distribution to unsecured creditors, the debtors sought to dismiss the cases pursuant to a motion seeking entry of an order to establish a procedure for payment of wind-down expenses (including professional fees) and a subsequent order dismissing the cases.		Established procedure for filing of fee applications and payment from reserve. Funded reserve for payment of wind-down expenses, including professional fees once final fee applications were filed and resolved.	All prior orders remain in full force and effect and survive dismissal of the chapter 11 cases.	Proposed dismissal order would have court retain jurisdiction over pending adversary proceeding. Proposed order would have court retain jurisdiction over prior orders, including disputes arising therefrom and certain pending matters.	Order provided for abandonment or destruction of retained books and records.

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Case Name	Background on Case and Order	Releases	Process and Payment of Claims	Effectiveness of Prior Orders	Retention of Jurisdiction	Other
Crossplex Village Qalicb, LLC, Case No. 20-02586 (DSC), Docket No. 302 (Bankr. N.D. Ala. Feb. 18, 2022)	Structured dismissal order incorporated terms of settlement reached in mediation. All creditors not a party to the settlement agreement retained their non-bankruptcy rights and remedies.	Settlement agreement contained mutual releases.	Settlement agreement included payment on account of certain resolved claims. Settlement agreement included payment of professional fees.		Court retained jurisdiction over the order and the settlement.	Structured dismissal order approved settlement agreement and incorporated it by reference into the order.
FSO Jones, LLC, Case No. 22-10196, Docket No. 177 (Bankr. E.D. La. May 13, 2022)	The debtors sought entry of an order that sought a structured dismissal and approval of the assumption and assignment of the debtors' remaining assets (two distribution agreements) to the debtors' parent as part of a larger transaction that paid the debtors' secured debt obligations. The transaction was conditioned on dismissal of the bankruptcy cases.		Funds placed into escrow for payment of professionals, with excess returned to debtors' parent.	All prior orders remain in full force and effect and survive dismissal of the chapter 11 cases.	Cases could be reopened in the event cure costs to be paid by debtors' parent were not made. Court retained jurisdiction to enforce all prior orders.	

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Wind-down Approach – Overview

Treat the process with the discipline of a transaction

Launch wind-down management procedures and commence PMO	• Develop clear project governance and decision-making mediums • Establish guiding principles to set the boundaries • Establish appropriate priorities and cadence for the managed exit
Collaborate with management to effectively control the wind-down	• Develop structure and processes to ensure a smooth transition • Oversee the wind-down process • Assist in identifying critical issues and action plans (e.g. contracts, tax / legal entity simplification) • Identify key company personnel
Develop wind-down plan based on specific objectives and requirements	• Develop specific plans to separate, migrate or discontinue operations or business segments depending on strategic needs and requirements • Assess wind-down initiatives undertaken to date • Identify and reach out to key staff and management team to assist with wind-down initiatives • Identify shared resources; map resources to organizations and identify shared personnel, facilities, systems and contracts
Develop tax record retention plan	• Transition and preserve books and records to support current and future tax and statutory audits • Identify local subject matter specialists to provide specific input on key tax reporting and compliance areas
Perform financial impact analysis	• Identify ongoing or one-time expenses related to wind-down • Establish budget to drive a more cost-efficient process and bring visibility to the financial impact of the wind-down
Create an experience that facilitates a successful transition	• Evaluate transition plans and timing • Develop a communication protocol • Providing account management support, as necessary
Address security, controls and regulatory compliance	• Maintain controls, and regulatory compliance throughout the transition • Monitor and manage process, IT, security and privacy controls
Identify tax optimization scenarios	• Consider tax consequences of various asset transfer and/or disposal scenarios with a focus on efficiency • Tax return reporting obligations and other tax reconciliations • Optimize for state and federal tax reporting • Evaluate existing corporate structure to ensure dissolution of entities does not trigger undesirable tax events
Address legal and other obligations	• Support legal counsel in ensuring the satisfaction of obligations to creditors, contract counterparties, employees and government agencies • Work with legal counsel to evaluate legal and regulatory considerations, such as, Employee Retirement Income Security Act (ERISA), the Worker Adjustment and Retraining Notification Act (WARN), Environmental Regulations (state & federal), etc.

Wind Down Process Activities

#	Workstream / Activity	Pre-Announcement		Absorption / Wind Down			
		Month 1	Month 2	Month 3	Month 4	Month 5	Month 6
1	**People**						
	Organizational planning, analysis, and management						
	Org chart analysis	■	■				
	"Personnel to customer" allocation analysis and contract assignment	■	■				
	Benefits planning and administration	■	■				
	Employee liability analysis	■	■				
	Key employee retention plan (KERP) development and execution	■	■				
	Payroll management, monitoring, and reconciliation	■	■	■	■	■	■
	Workforce reduction, relocation, and repurposing						
	Detailed future state organization plan development	■	■				
	Severance planning and execution	■	■	■	■	■	■
	Job re-skilling and job relocation program		■	■	■	■	■
	Exit Interviews			■	■	■	■
2	**Operations & Business Continuity Execution**						
	Customer planning, analysis, and management						
	Customer Servicing - 3rd Party - administration and execution						
	Customer Servicing - Affiliate - administration and execution						
	Customer receipt management, monitoring, and reconciliation						
	Vendor planning, analysis, and management						
	Vendor agreements and liabilities administration						
	Vendor payment management, monitoring, and reconciliation			■	■	■	■
	Professional fees planning, monitoring, and payment management			■	■	■	■
	Shared Services/TSA						
	Detailed shared services analysis	■	■				
	Process management, transition, and dissolution			■	■	■	■
	TSA administration and monitoring			■	■	■	■
3	**Asset Wind-down**						
	Planning						
	Detailed wind-down plan development	■	■				
	Asset decommissioning, closure, and disposal						
	IT decommissioning			■	■	■	■
	Office closure			■	■	■	■
	Fixed assets disposal			■	■	■	■
	Other assets disposal			■	■	■	■
	Other stranded cost management and closure			■	■	■	■
	Administration						
	Treasury administration			■	■	■	■
	Vendor relationship management and dissolution			■	■	■	■
	Data/document retention and disposal			■	■	■	■
	Adhoc support to tax advisors and final tax return sign off			■	■	■	■
4	**Real Property**						
	Real estate asset planning and execution						
	Options analysis	■	■				
	Detailed plan development	■	■				
	Transfer/sale of property execution, management, and monitoring			■	■	■	■
5	**Tax**						
	Filings						
	File requisite tax paperwork	■	■	■	■		
	Data/document retention and disposal			■	■	■	■
	Adhoc support to legal advisors	■	■	■	■	■	■
	Final tax return sign off						■
6	**Legal**						
	Filings						
	Document decision of dissolution	■	■	■	■	■	■
	File requisite paperwork					■	■

EXHIBIT 1

TRUST AGREEMENT AND DECLARATION OF TRUST

This liquidating trust agreement and declaration of trust (the "Agreement"), dated as of _____, is made by and among Clinton Nurseries, Inc. ("CNI"), Clinton Nurseries of Maryland, Inc. ("CNM"), and Clinton Nurseries of Florida, Inc. ("CNF") (each, a "Plan Debtor," and collectively, the "Plan Debtors"), and Anthony Calascibetta ("Trustee," and together with the Plan Debtors, each, a "Party" and collectively, the "Parties").

RECITALS

A On December 18, 2017, the Plan Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Connecticut (the "Bankruptcy Court"), and their chapter 11 cases are being jointly administered as *In re Clinton Nurseries, Inc., et al.*, Case No. 17-31897 (JJT) (the "Bankruptcy Case").

B The Plan Debtors filed on December 18, 2019 the *First Amended Joint Plan of Reorganization* (the "Plan"), which was confirmed on _____, 2019 (ECF No. 1045).[1]

C On _____, the Bankruptcy Court entered an order ("Confirmation Order") (ECF No. ____) confirming the Plan, which became effective on _____ ("Effective Date").

D The Plan provides for the establishment of this trust (as further defined by Article 2.1) effective on the Effective Date of the Plan.

E The Confirmation Order provides for the appointment of the Trustee as Trustee of the Trust, and the Plan and this Agreement provide for the appointment as necessary of any successor Trustee of the Trust.

[1] All capitalized terms used in this Agreement but not otherwise defined herein shall have the same meanings set forth in the Plan.

F The Trust is established for the benefit of the Holders of Allowed Unsecured Claims against Plan Debtors entitled to Distributions under the Plan (collectively, "Beneficiaries").

G The Trust is established for the purpose of collecting, holding, administering, distributing, and liquidating the Trust Assets (as defined in Section 1.2.7) for the benefit of the Beneficiaries in accordance with the terms and conditions of this Agreement and the Plan and with no objective to continue or engage in the conduct of a trade or business, except to the extent necessary to, and consistent with, the Plan and liquidating purpose of the Trust.

H Pursuant to the Plan, the Plan Debtors, Trust, Trustee, and Beneficiaries are required to treat, for all federal income tax purposes, the transfer of the Trust Assets to the Trust as a transfer of the Trust Assets by the Plan Debtors to the Beneficiaries in satisfaction of their Allowed Claims, as applicable, followed by a transfer of the Trust Assets by the Beneficiaries to the Trust in exchange for the beneficial interest herein, and to treat the Beneficiaries as the grantors and owners of the Trust for federal income tax purposes.

I Pursuant to the Plan, the Trust is intended for federal income tax purposes (i) to be treated as a grantor trust within the meaning of sections 671-677 of the Internal Revenue Code of 1986, as amended ("IRC"), and also (ii) to qualify as a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d).

J In accordance with the Plan, the Trust is further intended to be exempt from the requirements of (i) pursuant to section 1145 of the Bankruptcy Code, the Securities Exchange Act of 1933, as amended, and any applicable state and local laws requiring registration of securities, and (ii) the Investment Company Act of 1940, as amended, pursuant to sections 7(a) and 7(b) of that Act and section 1145 of the Bankruptcy Code.

NOW, THEREFORE, in accordance with the Plan and the Confirmation Order, and in consideration of the promises, and the mutual covenants and agreements of the Parties contained in the Plan and herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and affirmed, the Parties agree and declare as follows:

DECLARATION OF TRUST

The Plan Debtors and the Trustee enter into this Agreement to effectuate the Distribution of the Trust Assets to the Beneficiaries pursuant to the Plan and the Confirmation Order;

Pursuant to the Plan, paragraphs ____ through ____ of the Confirmation Order, and section 2.3 of this Agreement, all right, title, and interest in, under, and to the Trust Assets shall be absolutely and irrevocably transferred to the Trust and to its successors in trust and its successors and assigns;

TO HAVE AND TO HOLD unto the Trustee and its successors in trust; and

IT IS HEREBY FURTHER COVENANTED AND DECLARED**,** that the Trust Assets (as defined in Section 1.2.7) are to be held by the Trust and applied on behalf of the Trust by the Trustee on the terms and conditions set forth herein, solely for the benefit of the Beneficiaries and for no other party.

ARTICLE I

RECITALS, PLAN DEFINITIONS, OTHER DEFINITIONS, INTERPRETATION, AND CONSTRUCTION

1.1 Recitals. The Recitals are incorporated into and made terms of this Agreement.

1.2 Definitions. For purposes of this Agreement:

1.2.1 "CN Trust Cash" means US$200,000.00 paid to the Trust (a) US$100,000 paid on the Effective Date and (b) US$100,000 on or before June 1, 2020.

1.2.2 "Creditors' Committee" means the official committee of unsecured creditors appointed in the Bankruptcy Case.

1.2.3 "Disputed Claim" means any Claim against a Plan Debtor that is Disputed within the meaning of the Plan.

1.2.4 "Distribution" means a delivery of Cash by the Trustee to the Holder of an Allowed Claim pursuant to the Plan.

1.2.5 "Holder" means an entity (as that term is defined by the Bankruptcy Code) holding an unsecured Claim.

1.2.6 "Person" means any person or organization created or recognized by law, including any association, company, cooperative, corporation, entity, estate, fund, individual, joint stock company, joint venture, limited liability company, partnership, trust, trustee, unincorporated organization, or government or any political subdivision thereof.

1.2.7 "Trust Assets" means the Avoidance Actions (as defined in the Plan), the CN Trust Cash, and the Unsecured Claim Annual Payments (as defined in the Plan), and any proceeds thereof and earnings thereon.

1.2.8 "Trust Avoidance Actions" or "Avoidance Actions" means the Avoidance Actions and any other claims, causes of action, or choses in action, transferred by the Plan Debtors to the Trust.

1.2.9 "Trust Indemnified Party" means the Trustee, the Trust Committee, and their respective firms, companies, affiliates, partners, officers, directors, members, employees, professionals, advisors, attorneys, financial advisors, investment bankers, disbursing agents, and duly designated agents or representatives, and any of such Person's successors and assigns.

1.3 Interpretation; Headings. All references herein to specific provisions of the Plan or Confirmation Order are without exclusion or limitation of other applicable provisions of the Plan or Confirmation Order. Words denoting the singular number shall include the plural number and vice versa, and words denoting one gender shall include the other gender. The headings in this Agreement are for convenience of reference only and shall not limit or otherwise affect the provisions of this Agreement.

1.4 Construction of Agreement. This Agreement shall not be construed to impair or limit in any way the rights of any Person under the Plan.

1.5 Conflict Among Plan Documents. In the event of any inconsistency between the Plan and the Confirmation Order, as applicable, on the one hand, and this Agreement, on the other hand, the Confirmation Order shall control and take precedence over the Plan and this Agreement; and this Agreement shall take precedence over the Plan, but not the Confirmation Order.

ARTICLE II
ESTABLISHMENT OF TRUST

2.1 Effectiveness of Agreement; Name of Trust. This Agreement shall become effective on the Effective Date. The Trust shall be officially known as the **CN Trust** and may be referred to herein as the "Trust" or "CN Trust".

2.2 Purpose of Trust. The Plan Debtors and the Trustee, pursuant to the Plan and in accordance with Bankruptcy Code, hereby create the Trust for the primary purpose of collecting, holding, administering, distributing and liquidating the Trust Assets for the benefit of the Beneficiaries in accordance with the terms and conditions of this Agreement and the Plan, and with no objective to continue or engage in the conduct of a trade or business, except to the extent reasonably necessary to, and consistent with, the liquidating purpose of the Trust.

2.3 Transfer of Trust Assets.

2.3.1 Conveyance of Trust Assets. Pursuant to the Plan, the Plan Debtors hereby grant, release, assign, transfer, convey and deliver, on behalf of the Beneficiaries, the Trust Assets to the Trust as of the Effective Date in trust for the benefit of the Beneficiaries to be administered and applied as specified in this Agreement and the Plan. The Plan Debtors shall take or cause to be taken such further action as the Trustee may reasonably deem necessary or appropriate, to vest or perfect in the Trust or confirm to the Trustee title to and possession of the Trust Assets. The Trustee shall have no duty to arrange for any of the transfers contemplated under this Agreement or by the Plan or to ensure their compliance with the terms of the Plan and the Confirmation Order, and shall be conclusively entitled to rely on the legality and validity of such transfers.

2.3.2 Title to Trust Assets. Pursuant to the Plan, all of the Plan Debtors' right, title and interest in and to the Trust Assets, including all such assets held or controlled by third parties, are automatically vested in the Trust on the Effective Date, free and clear of all liens, claims, encumbrances and other interests, except as specifically provided in the Plan, and such transfer is on behalf of the Beneficiaries to establish the Trust. The Trust shall be authorized to obtain possession or control of, liquidate, and collect all of the Trust Assets in the possession or

control of third parties, pursue all of the Trust Avoidance Actions, and pursue, assert and/or and exercise all rights of setoffs and recoupment and defenses of the Plan Debtors or their Estates to any counterclaims that may be asserted by any and all defendants as to any Trust Avoidance Actions, any Holder of any Claim against any of the Plan Debtors. Without limiting the generality of the foregoing, and without the need for filing any motion for such relief, in connection with the Trust Assets, the Trust or the Trustee (as applicable) hereby shall be deemed substituted for the Plan Debtors or the Creditors' Committee (if the Creditors' Committee has initiated contested matters or adversary proceedings), related to the Plan Assets and Trust Avoidance Actions. On the Effective Date, the Trust shall stand in the shoes of the Plan Debtors for all purposes with respect to the Trust Assets, prosecution of Avoidance Actions and/or administration of Claims against the Plan Debtors. To the extent any law or regulation prohibits the transfer of ownership of any of the Trust Assets from the Plan Debtors to the Trust and such law is not superseded by the Bankruptcy Code, the Trust's interest shall be a lien upon and security interest in such Trust Assets, in trust, nevertheless, for the sole use and purposes set forth in section 2.2, and this Agreement shall be deemed a security agreement granting such interest thereon without need to file financing statements or mortgages. By executing this Agreement, the Trustee on behalf of the Trust hereby accepts all of such property as Trust Assets, to be held in trust for the Beneficiaries, subject to the terms of this Agreement and the Plan.

2.4 Capacity of Trust. Notwithstanding any state or federal law to the contrary or anything herein, the Trust shall itself have the capacity, in its own right and name, to act or refrain from acting, including the capacity to sue and be sued and to enter into contracts. The Trust may alone be the named movant, respondent, party plaintiff or defendant, or the like in all

adversary proceedings, contested matters, and other state or federal proceedings brought by or against it, and may settle and compromise all such matters in its own name.

2.5 Cooperation of Plan Debtors. The Plan Debtors and their professionals shall use commercially reasonable efforts to cooperate with the Trust and Trustee and their professionals in effecting the transition from the Plan Debtors to the Trust of administration of the Trust Assets. Such cooperation shall include, but not be limited to reasonably attempting to identify and facilitate access to (i) any evidence and information the Trustee reasonably requests (including but not limited to reasonable access to the Plan Debtors' books and records) in connection with the Trust's investigation, prosecution or other pursuit of the Trust Avoidance Actions and objections to Disputed Claims.

2.6 No Retention of Excess Cash. Notwithstanding anything in this Agreement to the contrary, under no circumstances shall the Trust or Trustee retain cash or cash equivalents in excess of a reasonable amount to meet claims, expenses, and contingent liabilities or to maintain the value of the Trust Assets during liquidation other than reserves established pursuant to sections 3.2.14, 3.2.23 and/or 4.1.2 of this Agreement, and shall distribute all amounts not required to be retained for such purposes to the Beneficiaries as promptly as reasonably practicable in accordance with the Plan and this Agreement.

2.7 Acceptance by Trustee. The Trustee accepts its appointment as Trustee of the Trust.

ARTICLE III
ADMINISTRATION OF TRUST

3.1 Rights, Powers, and Privileges of Trustee Generally. Except as otherwise provided in this Agreement, the Plan, or the Confirmation Order, as of the date that the Trust Assets are transferred to the Trust, the Trustee on behalf of the Trust may control and exercise

authority over the Trust Assets, over the acquisition, management and disposition thereof, and over the management and conduct of the affairs of the Trust. In administering the Trust Assets, the Trustee shall endeavor not to unduly prolong the Trust's duration, with due regard that undue haste in the administration of the Trust Assets may fail to maximize value for the benefit of the Beneficiaries and otherwise be imprudent and not in the best interests of the Beneficiaries.

3.1.1 Power to Contract. In furtherance of the purpose of the Trust, and except as otherwise specifically restricted in the Plan, Confirmation Order, or this Agreement, the Trustee shall have the right and power on behalf of the Trust, and also may cause the Trust, to enter into any covenants or agreements binding the Trust, and to execute, acknowledge and deliver any and all instruments that are necessary or deemed by the Trustee to be consistent with and advisable in furthering the purpose of the Trust.

3.1.2 Ultimate Right to Act Based on Advice of Counsel or Other Professionals. Nothing in this Agreement shall be deemed to prevent the Trustee from taking or refraining to take any action on behalf of the Trust that, based upon the advice of counsel or other professionals, the Trustee determines it is obligated to take or to refrain from taking in the performance of any duty that the Trustee may owe the Beneficiaries or any other Person under the Plan, Confirmation Order, or this Agreement.

3.2 Powers of Trustee. Without limiting the generality of the above section 3.1, in addition to the powers granted in the Plan, the Trustee shall have the power to take the following actions on behalf of the Trust and any powers reasonably incidental thereto that the Trustee, in its reasonable discretion, deems necessary or appropriate to fulfill the purpose of the Trust, unless otherwise specifically limited or restricted by the Plan or this Agreement:

3.2.1 hold legal title to the Trust Assets and to any and all rights of the Plan Debtors and the Beneficiaries in or arising from the Trust Assets;

3.2.2 receive, manage, invest, supervise, protect, and where appropriate, cause the Trust to abandon the Trust Assets, including causing the Trust to invest any moneys held as Trust Assets in accordance with the terms of section 3.7 hereof;

3.2.3 open and maintain bank accounts on behalf of or in the name of the Trust;

3.2.4 cause the Trust to enter into any agreement or execute any document or instrument required by or consistent with the Plan, the Confirmation Order or this Agreement, and to perform all obligations thereunder;

3.2.5 collect and liquidate all Trust Assets, including the sale of any Trust Assets, consistent with the Plan;

3.2.6 protect and enforce the rights to the Trust Assets vested in the Trust and Trustee by this Agreement by any method deemed appropriate, including, without limitation, by judicial proceedings or otherwise;

3.2.7 if the Trustee deems appropriate, seek to establish a bar date for filing additional proofs of claims and/or a supplemental bar date for Claims against the Plan Debtors;

3.2.8 investigate any Trust Assets, including any potential Trust Avoidance Actions, and any objections to Claims against the Plan Debtors, and cause the Trust to seek the examination of any Person pursuant to Federal Rule of Bankruptcy Procedure 2004;

3.2.9 cause the Trust to employ and pay professionals, disbursing agents, and other agents and third parties pursuant to this Agreement;

3.2.10 cause the Trust to pay all of its lawful expenses, debts, charges, taxes and other liabilities, and make all other payments relating to the Trust Assets;

3.2.11 cause the Trust to pursue, commence, prosecute, compromise, settle, dismiss, release, waive, withdraw, abandon, or resolve all Trust Avoidance Actions, subject to any limitations as may be determined by the Trust Committee;

3.2.12 calculate and make all Distributions on behalf of the Trust to the Beneficiaries provided for in, or contemplated by, the Plan and this Agreement;

3.2.13 establish, adjust, and maintain reserves for Disputed Claims required to be administered by the Trust;

3.2.14 cause the Trust to withhold from the amount distributable to any Person the maximum amount needed to pay any tax or other charge that the Trustee has determined, based upon the advice of its agents and/or professionals, may be required to be withheld from such Distribution under the income tax or other laws of the United States or of any state or political subdivision thereof;

3.2.15 resolve any disputes over the status of any party as a Beneficiary, including, but not limited to, whether an Claim filed against an Plan Debtor has been properly asserted and/or should be Allowed against that Debtor;

3.2.16 in reliance upon the Debtors' schedules and the official Claims register maintained in the Chapter 11 Cases, review, and where appropriate, cause the Trust to allow or object to Claims against the Plan Debtors, and supervise and administer the Trust's commencement, prosecution, settlement, compromise, withdrawal or resolution of all objections to Disputed Claims required to be administered by the Trust;

3.2.17 in reliance upon the Debtors' schedules and the official Claims register maintained in the Chapter 11 Cases, maintain a register evidencing the beneficial interest herein held by each Beneficiary and, in accordance with section 3.8 of this Agreement, such register

may be the official Claims register maintained in the Chapter 11 Cases to the extent of any Claims against Plan Debtors reflected thereon;

3.2.18 cause the Trust to make all tax withholdings, file tax information returns, file and prosecute tax refund claims, make tax elections by and on behalf of the Trust, and file tax returns for the Trust as a grantor trust under IRC section 671 and Treasury Income Tax Regulation section 1.671-4 pursuant to and in accordance with the Plan and Article VII hereof, and pay taxes, if any, payable for and on behalf of the Trust; provided, however, that notwithstanding any other provision of this Agreement, neither the Trust nor the Trustee shall have any responsibility in any capacity whatsoever for the preparation, filing, signing or accuracy of the Plan Debtors' income tax returns that are due to be filed after the Effective Date or for any tax liability related thereto, which shall be the sole responsibility of the Plan Debtors, as applicable;

3.2.19 cause the Trust to abandon or donate to a charitable organization any Trust Assets that the Trustee determines to be too impractical to distribute to Beneficiaries or of inconsequential value to the Trust and Beneficiaries;

3.2.20 cause the Trust to send annually to Beneficiaries, in accordance with the tax laws, a separate statement stating a Beneficiary's interest in the Trust and its share of the Trust's income, gain, loss, deduction or credit, and to instruct all such Beneficiaries to report such items on their federal tax returns;

3.2.21 cause the Trust to seek a determination of tax liability or refund under section 505 of the Bankruptcy Code;

3.2.22 cause the Trust to establish such reserves for taxes, assessments and other expenses of administration of the Trust as may be necessary and appropriate for the proper operation of matters incident to the Trust;

3.2.23 cause the Trust to purchase and carry all insurance policies that the Trustee deems reasonably necessary or advisable and to pay all associated insurance premiums and costs;

3.2.24 undertake all administrative functions of the Trust, including overseeing the winding down and termination of the Trust;

3.2.25 undertake all administrative functions remaining in the Chapter 11 Cases of the Plan Debtors to the extent that they relate to the Trust Assets;

3.2.26 exercise, implement, enforce, and discharge all of the terms, conditions, powers, duties, and other provisions of the Plan, the Confirmation Order, and this Agreement; and

3.2.27 take all other actions consistent with the provisions of the Plan that the Trustee deems reasonably necessary or desirable to administer the Trust.

3.3 Exclusive Authority to Pursue Trust Avoidance Actions. The Trust shall have the exclusive right, power, and interest to pursue, settle, waive, release, abandon, or dismiss the Trust Avoidance Actions, subject only to any limitations as determined by the Trust Committee. The Trust shall be the sole representative of the Estates under section 1123(b)(3) of the Bankruptcy Code with respect to the Trust Avoidance Actions. The Trust shall be vested with and entitled to assert all setoffs and defenses of the Plan Debtors, the Trust or any entity that contributed such Trust Avoidance Actions to the Trust under the Plan to any counterclaims that may be asserted by any defendant with respect to any Trust Avoidance Actions. The Trust shall

also be vested with and entitled to assert all of the Plan Debtors' and the Estates' rights with respect to any such counterclaims, under section 558 of the Bankruptcy Code.

3.4 Abandonment. If, in the Trustee's reasonable judgment, any non-cash Trust Assets cannot be sold in a commercially reasonable manner or the Trustee believes in good faith that such property has inconsequential value to the Trust or its Beneficiaries, the Trustee shall have the right to cause the Trust to abandon or otherwise dispose of such property, including by donation of such property to a charitable organization.

3.5 Responsibility for Administration of Claims against Plan Debtors. From and after the Effective Date, the Trust shall become responsible for administering and paying Distributions to the Beneficiaries. The Trust shall have the exclusive right to object to the allowance of any Claim against any Plan Debtor on any ground, to file, withdraw or litigate to judgment objections to Claims against any Plan Debtor, to settle or compromise any Disputed Claim without any further notice to or action, order or approval by the Bankruptcy Court, and to assert all defenses of the Plan Debtors and their Estates to any Claim against any Plan Debtor. The Trust shall also be entitled to assert all of the Plan Debtors' and the Estates rights under, without limitation, section 558 of the Bankruptcy Code. The Trust may also seek estimation of any Claims against any Plan Debtor under subject to section 502(c) of the Bankruptcy Code.

3.6 Agents and Professionals. Subject to the pre-approval of the Trust Committee, the Trustee may, but shall not be required to, consult with and retain attorneys, financial advisors, accountants, appraisers, independent contractors and other professionals or third parties the Trustee believes have qualifications necessary to assist in the administration of the Trust, including professionals previously retained by any of the Plan Debtors, or any individual members of the Trust Committee in the Chapter 11 Cases. For the avoidance of doubt, and

without limitation of applicable law, nothing in this Agreement shall limit the Trustee from engaging counsel or other professionals, including the Trustee itself or the Trustee's firm or their affiliates, to do work for the Trust, and nothing herein shall disqualify counsel or any other professional from rendering services to the Trust solely because of its prior retention as counsel to any of the Plan Debtors, or any of the individual members of the Trust Committee in the Chapter 11 Cases. The Trustee may pay the reasonable salaries, fees and expenses of such Persons out of the Trust Assets in the ordinary course of business.

3.7 Safekeeping and Investment of Trust Assets. All moneys and other assets received by the Trustee shall, until distributed or paid over as provided herein and in the Plan, be held in trust for the benefit of the Beneficiaries, but need not be segregated in separate accounts from other Trust Assets, unless and to the extent required by law or the Plan. The Trustee shall not be under any obligation to invest Trust Assets. Neither the Trust nor the Trustee shall have any liability for interest or producing income on any moneys received by them and held for Distribution or payment to the Beneficiaries, except as such interest shall actually be received by the Trust or Trustee, which shall be distributed as provided in the Plan. Except as otherwise provided by the Plan, the powers of the Trustee to invest any moneys held by the Trust, other than those powers reasonably necessary to maintain the value of the assets and to further the Trust's liquidating purpose, shall be limited to powers to invest in demand and time deposits, such as short-term certificates of deposit, in banks or other savings institutions, or other temporary liquid investments, such as treasury bills; provided, however, that the scope of permissible investments shall be limited to include only those investments that a liquidating trust, within the meaning of Treas. Reg. § 3.01.7701-4(d), may be permitted to hold pursuant to the Treasury Regulations, or any modification of the IRS guidelines, whether set forth in IRS

rulings, IRS pronouncements, or otherwise. For the avoidance of doubt, the provisions of section 11-2.3 of the Estates, Power, and Trusts Law of New York shall not apply to this Agreement. Notwithstanding the foregoing, the Trustee shall not be prohibited from engaging in any trade or business on its own account, provided that such activity does not interfere or conflict with the Trustee's administration of the Trust.

3.8 Maintenance and Disposition of Trust and Debtor Records. The Trustee shall maintain accurate records of the administration of Trust Assets, including receipts and disbursements and other activity of the Trust. The Trust may, but has no obligation to, engage a claims agent to continue to maintain and update the Claims register maintained in the Chapter 11 Cases throughout the administration of the Trust; otherwise, any fees and costs associated with maintaining and updating any Claims register shall be the sole responsibility of the Plan Debtors. To the extent of any Claims against Plan Debtors reflected thereon, the Claims register may serve as the Trustee's register of beneficial interests held by those Beneficiaries. The books and records maintained by the Trustee and any records of the Plan Debtors transferred to the Trust may be disposed of by the Trustee at the later of (i) such time as the Trustee determines that the continued possession or maintenance of such books and records is no longer necessary for the benefit of the Trust or its Beneficiaries and (ii) upon the termination and completion of the winding down of the Trust.

3.9 Reporting Requirements. Within 30 days after the end of each calendar quarter in which the Trust shall remain in existence, beginning with the quarter ended March 31, 2020, the Trustee shall provide to the Trust Committee a report on the status of the Trust Avoidance Actions and an operating report, which will include a summary of cash receipts and

disbursements, and such other information as the Trust Committee shall reasonably request concerning Trust administration.

3.10 No Bond Required; Procurement of Insurance. Notwithstanding any state or other applicable law to the contrary, the Trustee (including any successor Trustee) shall be exempt from giving any bond or other security in any jurisdiction and shall serve hereunder without bond. The Trustee is hereby authorized, but not required, to obtain all reasonable insurance coverage for itself and the Trust Committee, their respective agents, representatives, members, employees or independent contractors, including, without limitation, coverage with respect to the liabilities, duties and obligations of the Trustee and the Trust Committee, and their respective agents, representatives, members, employees or independent contractors under this Agreement. The cost of any such insurance coverage shall be an expense of the Trust and paid out of Trust Assets.

ARTICLE IV
DISTRIBUTIONS

4.1 Distribution and Reserve of Trust Assets. Following the transfer of Trust Assets to the Trust, the Trustee shall make continuing efforts on behalf of the Trust to collect, liquidate, and distribute all Trust Assets, subject to the reserves required under the Plan or this Agreement.

4.1.1 Distributions. The Trustee shall cause the Trust to distribute, at least annually, the Trust's net Cash income and net Cash proceeds from the liquidation of the Trust Assets to the Beneficiaries, except the Trust may retain an amount of net income and other Trust Assets reasonably necessary to maintain the value of the Trust Assets or to meet expenses, claims and contingent liabilities of the Trust and Trustee, and retention of such amount may preclude Distributions to Beneficiaries.

4.1.2 Reserves; Pooling of Reserved Funds. Before any Distribution can be made, the Trustee shall, in its reasonable discretion, establish, supplement, and maintain reserves in an amount sufficient to meet any and all expenses and liabilities of the Trust, including, but not limited to, attorneys' fees and expenses, the fees and expenses of other professionals. In accordance with section 3.2.14 of this Agreement, the Trust may also maintain as necessary a reserve for Disputed Claims of Beneficiaries required to be administered by the Trust. For the avoidance of doubt, the Trustee may withhold any Distribution pending the Trust's determination of whether to object to a Claim against a Plan Debtor. Any such withheld Distribution shall become part of the Trust's reserve for Disputed Claims of Beneficiaries and shall be distributed to the appropriate Beneficiary no later than the first Distribution date after a decision is made not to object to the pertinent d against an Plan Debtor, or alternatively, such Claim becomes Allowed. The Trustee need not maintain the Trust's reserves in segregated bank accounts and may pool funds in the reserves with each other and other funds of the Trust; provided, however, that the Trust shall treat all such reserved funds as being held in a segregated manner in its books and records.

4.1.3 Distributions Net of Reserves and Costs. Distributions shall be made net of reserves in accordance with the Plan and this Agreement, and also net of the actual and reasonable costs of making the Distributions.

4.1.4 Right to Rely on Professionals. Without limitation of the generality of section 6.6 of this Agreement, in determining the amount of any Distribution or reserves, the Trustee may rely and shall be fully protected in relying on the advice and opinion of the Trust's financial advisors, accountants, or other professionals.

4.2 Method and Timing of Distributions. Distributions to Beneficiaries will be made from the Trust in accordance with the terms of the Plan and this Agreement. The Trust may engage disbursing agents and other Persons to help make Distributions.

4.3 Withholding from Distributions. The Trustee, in its discretion, may cause the Trust to withhold from amounts distributable from the Trust to any Beneficiary any and all amounts as may be sufficient to pay the maximum amount of any tax or other charge that has been or might be assessed or imposed by any law, regulation, rule, ruling, directive, or other governmental requirement on such Beneficiary or the Trust with respect to the amount to be distributed to such Beneficiary. The Trustee shall determine such maximum amount to be withheld by the Trust in its sole, reasonable discretion and shall cause the Trust to distribute to the Beneficiary any excess amount withheld.

4.4 Tax Identification Numbers. As more fully set forth in the Plan, the Trustee may require any Beneficiary to furnish its taxpayer identification number as assigned by the Internal Revenue Service, including without limitation by providing an executed current Form W-9, Form W-8 or similar tax form, and may condition any Distribution to any Beneficiary upon receipt of such identification number and/or tax form. If a Beneficiary does not timely provide the Trustee with its taxpayer identification number in the manner and by the deadline established by the Trustee, then the Distribution to such Beneficiary shall be administered as an unclaimed Distribution in accordance with section 4.5 of this Agreement and Section 8.3 of the Plan.

4.5 Unclaimed and Undeliverable Distributions. If any Distribution to a Beneficiary is returned to the Trustee as undeliverable or is otherwise unclaimed, no further Distributions to such Beneficiary shall be made unless and until the Beneficiary claims the Distributions by timely notifying the Trustee or other Distribution in writing of any information necessary to

make the Distribution to the Beneficiary in accordance with this Agreement, the Plan, and applicable law, including such Beneficiary's then-current address or taxpayer identification number. If a Beneficiary timely provides the Trustee the necessary information within the 120-day or 60-day (as applicable) reserve period, all missed Distributions shall be made to the Beneficiary as soon as is practicable, without interest. Undeliverable or unclaimed Distributions shall be administered in accordance with the Plan.

4.5.1 No Responsibility to Attempt to Locate Beneficiaries. The Trustee may, in its sole discretion, attempt to determine a Beneficiary's current address or otherwise locate a Beneficiary, but nothing in this Agreement or the Plan shall require the Trustee to do so.

4.5.2 Disallowance of Claims. All Claims against Plan Debtors in respect of undeliverable or unclaimed Distributions that have been deemed to have reverted back to the Trust for all purposes (including, but not limited to, for Distribution to Holders of other Claims against Plan Debtors against Plan Debtors) pursuant the Plan shall be deemed disallowed and expunged without further action by the Trust or Trustee and without further order of the Bankruptcy Court, and the corresponding beneficial interests in the Trust of the Beneficiary holding such disallowed claims. The Holder of any such disallowed Claims against Plan Debtors shall no longer have any right, claim, or interest in or to any Distributions in respect of such Claim. The Holder of any such Disallowed Claim against a Plan Debtor is forever barred, estopped, and enjoined from receiving any Distributions under the Plan or this Agreement and from asserting such Disallowed Claim against the Trust or Trustee.

4.5.3 Inapplicability of Unclaimed Property or Escheat Laws. Unclaimed property held by the Trust shall not be subject to the unclaimed property or escheat laws of the United States, any state, or any local governmental unit.

4.6 Voided Checks; Request for Reissuance. Distribution checks issued to Beneficiaries shall be null and void if not negotiated within one hundred twenty (120) days after the date of issuance thereof. Notwithstanding that section, Distributions in respect of voided checks shall be treated as unclaimed Distributions and administered under section 4.5 of this Agreement. Requests for reissuance of any check shall be made in writing directly to the Trustee by the Beneficiary that was originally issued such check. All such requests shall be made promptly and in time for the check to be reissued and cashed before the funds for the checks become unrestricted Trust Assets under section 4.5 of this Agreement. The Beneficiary shall bear all the risk that, and shall indemnify and hold the Trust and Trustee harmless against any loss that may arise if, the Trustee does not reissue a check promptly after receiving a request for its reissuance and the date established the Plan passes without the check being reissued or cashed.

4.7 Conflicting Claims. If any conflicting claims or demands are made or asserted with respect to the beneficial interest of a Beneficiary under this Agreement, or if there is any disagreement between the assignees, transferees, heirs, representatives or legatees succeeding to all or a part of such an interest resulting in adverse claims or demands being made in connection with such interest, then, in any of such events, the Trustee shall be entitled, in its sole discretion, to refuse to comply with any such conflicting claims or demands.

4.7.1 The Trustee may elect to cause the Trust to make no payment or Distribution with respect to the beneficial interest subject to the conflicting claims or demand, or any part thereof, and to refer such conflicting claims or demands to the Bankruptcy Court, which shall have continuing jurisdiction over resolution of such conflicting claims or demands. Neither the Trust nor the Trustee shall be or become liable to any of such parties for their refusal to

comply with any such conflicting claims or demands, nor shall the Trust or Trustee be liable for interest on any funds which may be so withheld.

4.7.2 The Trustee shall be entitled to refuse to act until either (i) the rights of the adverse claimants have been adjudicated by a Final Order of the Bankruptcy Court; or (ii) all differences have been resolved by a valid written agreement among all such parties to the satisfaction of the Trustee, which agreement shall include a complete release of the Trust and Trustee. Until the Trustee receives written notice that one of the conditions of the preceding sentence is met, the Trustee may deem and treat as the absolute owner under this Agreement of the beneficial interest in the Trust the Beneficiary identified as the owner of that interest in the books and records maintained by the Trustee. The Trustee may deem and treat such Beneficiary as the absolute owner for purposes of receiving Distributions and any payments on account thereof for federal and state income tax purposes, and for all other purposes whatsoever.

4.7.3 In acting or refraining from acting under and in accordance with this section 4.7 of the Agreement, the Trustee shall be fully protected and incur no liability to any purported claimant or any other Person pursuant to Article VI of this Agreement.

4.8 Priority of Expenses of Trust. The Trust must pay all of its expenses before making any Distributions.

ARTICLE V
BENEFICIARIES

5.1 Interest Beneficial Only. The ownership of a beneficial interest in the Trust shall not entitle any Beneficiary to any title in or to the Trust Assets or to any right to call for a partition or division of such assets or to require an accounting.

5.2 Ownership and Allocation of Beneficial Interests Hereunder.

5.2.1 Each Beneficiary shall own a beneficial interest herein which shall, subject to section 4.1 of this Agreement and the Plan, be entitled to a Distribution in the amounts, and at the times, set forth in the Plan.

5.2.2 Holders of Allowed Claims against one or more of the Plan Debtors in one or more Plan Debtors shall receive beneficial interests on a *pro rata* basis, the numerator of which shall be the Allowed amount of such Holder's Claim, and the denominator of which shall be the sum of all Allowed Claims against Plan Debtors.

5.3 Evidence of Beneficial Interest. Ownership of a beneficial interest in the Trust Assets shall not be evidenced by any certificate, security, or receipt or in any other form or manner whatsoever, except as maintained on the books and records of the Trust by the Trustee.

5.4 No Right to Accounting. Neither the Beneficiaries nor their successors, assigns, creditors, nor any other Person shall have any right to an accounting by the Trustee, and the Trustee shall not be obligated to provide any accounting to any Person. Nothing in this Agreement is intended to require the Trustee at any time or for any purpose to file any accounting or seek approval of any court with respect to the administration of the Trust or as a condition for making any advance, payment, or Distribution out of proceeds of Trust Assets.

5.5 No Standing. Except as expressly provided in this Agreement, a Beneficiary shall not have standing to direct or to seek to direct the Trust or Trustee to do or not to do any act or to institute any action or proceeding at law or in equity against any Person upon or with respect to the Trust Assets.

5.6 Requirement of Undertaking. The Trustee may request the Bankruptcy Court to require, in any suit for the enforcement of any right or remedy under this Agreement, or in any suit against the Trustee for any action taken or omitted by it as Trustee, the filing by any party

litigant in such suit of an undertaking to pay the costs of such suit, including reasonable attorneys' fees, against any party litigant in such suit; provided, however, that the provisions of this section 5.6 shall not apply to any suit by the Trustee.

5.7 Limitation on Transferability. It is understood and agreed that the beneficial interests herein shall be non-transferable and non-assignable during the term of this Agreement except by operation of law. An assignment by operation of law shall not be effective until appropriate notification and proof thereof is submitted to the Trustee, and the Trustee may continue to cause the Trust to pay all amounts to or for the benefit of the assigning Beneficiaries until receipt of proper notification and proof of assignment by operation of law. The Trustee may rely upon such proof without the requirement of any further investigation.

5.8 Exemption from Registration. The rights of the Beneficiaries arising under this Agreement may be deemed "securities" under applicable law. However, such rights have not been defined as "securities" under the Plan because (i) the parties hereto intend that such rights shall not be securities and (ii) if the rights arising under this Agreement in favor of the Beneficiaries are deemed to be "securities," the exemption from registration under section 1145 of the Bankruptcy Code is intended to be applicable to such securities. No party to this Agreement shall make a contrary or different contention.

5.9 Delivery of Distributions. Subject to the terms of this Agreement, the Trustee shall cause the Trust to make Distributions to Beneficiaries in the manner provided in the Plan.

ARTICLE VI
THIRD PARTY RIGHTS AND LIMITATION OF LIABILITY

6.1 Parties Dealing With the Trustee. In the absence of actual knowledge to the contrary, any Person dealing with the Trust or the Trustee shall be entitled to rely on the authority of the Trustee or any of the Trustee's agents to act in connection with the Trust Assets.

There is no obligation of any Person dealing with the Trustee to inquire into the validity or expediency or propriety of any transaction by the Trustee or any agent of the Trustee.

6.2 Limitation of Liability. In exercising the rights granted herein, the Trustee shall exercise the Trustee's best judgment, to the end that the affairs of the Trust shall be properly managed and the interests of all of the Beneficiaries safeguarded. However, notwithstanding anything herein to the contrary, neither the Trustee nor the Trust Committee, nor their respective firms, companies, affiliates, partners, officers, directors, members, employees, professionals, advisors, attorneys, financial advisors, investment bankers, disbursing agents, or duly designated agents or representatives, nor any of such Person's successors and assigns, shall incur any responsibility or liability by reason of any error of law or fact or of any matter or thing done or suffered or omitted to be done under or in connection with this Agreement or the Plan, whether sounding in tort, contract, or otherwise, except for fraud, gross negligence, or willful misconduct that is found by a final judgment (not subject to further appeal or review) of a court of competent jurisdiction to be the direct and primary cause of loss, liability, damage, or expense suffered by the Trust. Without limiting the foregoing, the Trustee and the Trust Committee shall be entitled to the benefits of the limitation of liability and exculpation provisions set forth in the Plan and Confirmation Order.

6.3 No Liability for Acts of Other Persons. None of the Persons identified in the immediately preceding section 6.2 of this Agreement shall be liable for the act or omission of any other Person identified in that section.

6.4 No Liability for Acts of Predecessors. No successor Trustee shall be in any way responsible for the acts or omissions of any Trustee in office prior to the date on which such successor becomes the Trustee, unless a successor Trustee expressly assumes such responsibility.

6.5 No Liability for Good Faith Error of Judgment. The Trustee shall not be liable for any error of judgment made in good faith, unless it shall be finally determined by a final judgment of a court of competent jurisdiction (not subject to further appeal or review) that the Trustee was grossly negligent in ascertaining the pertinent facts.

6.6 Reliance by Trustee on Documents and Advice of Counsel or Other Persons. Except as otherwise provided herein, the Trustee, the Trust Committee and the members thereof may rely and shall be protected in acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order or other paper or document believed by the Trustee, the Trust Committee or the members thereof (as applicable) to be genuine and to have been signed or presented by the proper party or parties. The Trustee also may engage and consult with its legal counsel and other agents and advisors. Notwithstanding such authority, neither the Trustee nor the Trust Committee hall be under any obligation to consult with its counsel, agents, or advisors, and their determination not to do so shall not result in the imposition of liability on the Trustee, the Trust Committee or its respective members or designees, unless such determination is based on willful misconduct, gross negligence or fraud.

6.7 No Liability For Acts Approved by Bankruptcy Court. The Trustee shall have the right at any time to seek instructions from the Bankruptcy Court concerning the administration or disposition of the Trust Assets and the Claims required to be administered by the Trust. The Trustee shall not be liable for any act or omission that has been approved by the Bankruptcy Court, and all such actions or omissions shall conclusively be deemed not to constitute fraud, gross negligence, or willful misconduct.

6.8 No Personal Obligation for Trust Liabilities. Persons dealing with the Trustee or the Trust Committee shall have recourse only to the Trust Assets to satisfy any liability incurred

by the Trustee or the Trust Committee, as applicable, to any such Person in carrying out the terms of this Agreement, and neither the Trustee, the Trust Committee nor the members thereof shall have any personal, individual obligation to satisfy any such liability.

6.9 Indemnification. The Trust Indemnified Parties shall, to the fullest extent permitted by applicable law, be defended, held harmless, and indemnified by the Trust from time to time and receive reimbursement from and against any and all liabilities, losses, claims, costs, expenses, or damages of any kind, type or nature, whether sounding in tort, contract, or otherwise, that the Trust Indemnified Parties such parties may incur or to which such parties may become subject in connection with any action, suit, proceeding or investigation brought by or threatened against such parties arising out of or due to their acts or omissions, or consequences of such acts or omissions, with respect to the implementation or administration of the Trust or the Plan or the discharge of their duties under the Plan or this Agreement (the "Indemnified Conduct"), including, without limitation, the costs of counsel or others in investigating, preparing, defending, or settling any action or claim (whether or not litigation has been initiated against the Trust Indemnified Party) or in enforcing this Agreement (including its indemnification provisions), except if such loss, liability, expense, or damage is finally determined by a final judgment (not subject to further appeal or review) of a court of competent jurisdiction to result directly and primarily from the fraud, gross negligence, or willful misconduct of the Trust Indemnified Party asserting this provision.

6.9.1 Expense of Trust; Limitation on Source of Payment of Indemnification. All indemnification liabilities of the Trust under this section 6.9 shall be expenses of the Trust. The amounts necessary for such indemnification and reimbursement shall be paid by the Trust out of the available Trust Assets after reserving for all actual and anticipated expenses and

liabilities of the Trust. None of the Trustee, the Trust Committee nor the members thereof shall be personally liable for the payment of any Trust expense or claim or other liability of the Trust, and no Person shall look to the Trustee or other Indemnified Parties personally for the payment of any such expense or liability.

6.9.2 Procedure for Current Payment of Indemnified Expenses; Undertaking to Repay. The Trust shall reasonably promptly pay an Indemnified Party all amounts subject to indemnification under this section 6.9 on submission of invoices for such amounts by the Indemnified Party. The Trustee shall approve the indemnification of any Indemnified Party and thereafter shall approve any monthly bills of such Indemnified Party for indemnification. All invoices for indemnification shall be subject to the approval of the Trustee. By accepting any indemnification payment, the Indemnified Party undertakes to repay such amount promptly if it is determined that the Indemnified Party is not entitled to be indemnified under this Agreement. The Bankruptcy Court shall hear and finally determine any dispute arising out of this section 6.9.

6.10 No Implied Obligations. The Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth herein, and no implied covenants or obligations shall be read into this Agreement against the Trustee.

6.11 Confirmation of Survival of Provisions. Without limitation in any way of any provision of this Agreement, the provisions of this Article VI shall survive the death, dissolution, liquidation, resignation, replacement, or removal, as may be applicable, of the Trustee, or the termination of the Trust or this Agreement, and shall inure to the benefit of the Trustee's and the Indemnified Parties' heirs and assigns.

ARTICLE VII
TAX MATTERS

7.1 Tax Treatment of Trust. Pursuant to and in accordance with the Plan, for all federal income tax purposes, the Plan Debtors, the Beneficiaries, the Trustee and the Trust shall treat the Trust as a liquidating trust within the meaning of Treasury Income Tax Regulation Section 301.7701-4(d) and IRS Revenue Procedure 94-45, 1994-2 C.B. 124 and transfer of the Trust Assets to the Trust shall be treated as a transfer of the Trust Assets by the Plan Debtors to the Beneficiaries in satisfaction of their Allowed Claims, as applicable, followed by a transfer of the Trust Assets by the Beneficiaries to the Trust in exchange for their pro rata beneficial interests in the Trust. The Beneficiaries shall be treated as the grantors and owners of the Trust for federal income tax purposes.

7.2 Annual Reporting and Filing Requirements. Pursuant to and in accordance with the terms of the Plan and this Agreement, the Trustee shall file tax returns for the Trust as a grantor trust pursuant to Treasury Income Tax Regulation Section 1.671-4(a).

7.3 Tax Treatment of Reserves for Disputed Claims. The Trustee may, in the Trustee's sole discretion, determine the best way to report for tax purposes with respect to any reserve for Disputed Claims, including (i) filing a tax election to treat any and all reserves for Disputed Claims as a Disputed Ownership Fund ("DOF") within the meaning of Treasury Income Tax Regulation Section 1.468B-9 for federal income tax purposes rather than to tax such reserve as a part of the Trust; or (ii) electing to report as a separate trust or sub-trust or other entity. If an election is made to report any reserve for disputed claims as a DOF, the Trust shall comply with all federal and state tax reporting and tax compliance requirements of the DOF, including but not limited to the filing of a separate federal tax return for the DOF and the payment of federal and/or state income tax due.

7.4 Valuation of Trust Assets. After the Effective Date, but in no event later than the due date for timely filing of the Trust's first federal income tax return (taking into account applicable tax filing extensions), the Trustee shall (a) determine the fair market value of the Trust Assets as of the Effective Date, based on the Trustee's good faith determination; and (b) establish appropriate means to apprise the Beneficiaries of such valuation. The valuation shall be used consistently by all parties (including, without limitation, the Plan Debtors, the Trust, the Trustee, and the Beneficiaries) for all federal income tax purposes.

ARTICLE VIII
TRUST COMMITTEE

8.1 Appointment and Composition of Trust Committee. As of the Effective Date, the Trust Committee shall comprise (i) Ken Hebert; (ii) David Watkins; and (iii) Greg Chouljian.

8.2 Rights and Duties of Trust Committee; Corresponding Limitations on Trustee's Actions. The rights and duties of the Trust Committee shall be those set forth in this Agreement and the Plan. The Trustee shall limit its actions on behalf of the Trust in accordance with the limits established by those provisions.

8.3 Approval and Authorization on Negative Notice. The Trustee may obtain any approval or authorization required under the Plan or this Agreement from the Trust Committee on two business days' negative notice. The Trustee may make requests on behalf of the Trust for approval or authorization by the Trust Committee in writing, which may be made in the form of an e-mail. In the event any Trust Committee member objects to the Trustee's request, the Trustee shall consult with the members of the Trust Committee about how to proceed. The Bankruptcy Court shall hear and finally determine any dispute arising out of this section or this Article.

8.4 Trust Committee Action. A majority of the members of the Trust Committee shall constitute a quorum for any action by the Trust Committee, and the act of a majority of those present at any meeting at which a quorum is present, shall be the act of the Trust Committee.

8.5 Appointment of Supplemental Trustee. The Trust Committee shall approve the Trustee's appointment of any Supplemental Trustee (defined below) under section 9.9 of this Agreement and the removal and replacement of any Supplemental Trustee underthat provision.

8.6 Reimbursement of Trust Committee Expenses. The Trustee shall pay from the Trust Assets all reasonable costs and expenses, including attorneys' fees and expenses, of members of the Trust Committee. The Bankruptcy Court shall hear and finally determine any dispute arising out of this section.

8.7 Trust Committee Member's Conflicts of Interest. The Trust Committee members shall disclose any actual or potential conflicts of interest that such member has with respect to any matter arising during administration of the Trust to the other Trust Committee members and the Trustee and such member shall be recused from voting on any matter on which such member has an actual or potential conflict of interest.

8.8 Trustee's Conflicts of Interest. The Trustee shall disclose to the Trust Committee any conflicts of interest that the Trustee has with respect to any matter arising during administration of the Trust. In the event that the Trustee cannot take any action, including without limitation the prosecution of any Trust Avoidance Actions or the objection to any Claim, by reason of an actual or potential conflict of interest, the Trust Committee acting by majority shall be authorized to take any such action(s) in the Trustee's place and stead, including without limitation the retention of professionals (which may include professionals retained by the

Trustee) for the purpose of taking such actions. The Bankruptcy Court shall hear and finally determine any dispute arising out of this section.

8.9 Resignation of Trust Committee Member. A member of the Trust Committee may resign at any time on notice (including e-mailed notice) to the other Trust Committee members and the Trustee. The resignation shall be effective on the later of (i) the date specified in the notice delivered to the other Trust Committee members and the Trustee or (ii) the date that is thirty days (30) after the date such notice is delivered.

8.10 Appointment of Replacement Trust Committee Members. In the event of the resignation, death, incapacity, or removal of a member of the Trust Committee, the Trustee shall nominate and the remaining members of Trust Committee shall approve, by a vote of at least one member of the Trust Committee, an additional member of the Trust Committee. To the extent that no additional member of the Trust Committee is identified that is willing to serve, this section may be disregarded.

8.11 Absence of Trust Committee. In the event that no one is willing to serve on the Trust Committee, or there shall have been no Trust Committee members for a period of thirty (30) consecutive days, then the Trustee may, during such vacancy and thereafter, ignore any reference in this Agreement, the Plan, or the Confirmation Order to a Trust Committee, and all references to the Trust Committee's rights and responsibilities in the Plan, this Agreement and the Confirmation Order will be null and void.

ARTICLE IX
SELECTION, REMOVAL, REPLACEMENT AND COMPENSATION OF TRUSTEE

9.1 Initial Trustee. The Trustee's selection has been approved by the Bankruptcy Court pursuant to the Confirmation Order, and the Trustee is appointed effective as of the Effective Date. The initial trustee shall be the Trustee.

9.2 Term of Service. The Trustee shall serve until (a) the completion of the administration of the Trust Assets and the Trust, including the winding up of the Trust, in accordance with this Agreement and the Plan; (b) termination of the Trust in accordance with the terms of this Agreement and the Plan; or (c) the Trustee's resignation, death, incapacity or removal. In the event that the Trustee's appointment terminates by reason of death, dissolution, liquidation, resignation or removal, the Trustee shall be immediately compensated for all reasonable fees and expenses accrued but unpaid through the effective date of termination, whether or not previously invoiced. The provisions of Article VI of this Agreement shall survive the resignation or removal of any Trustee.

9.3 Removal of Trustee. Any Person serving as Trustee may be removed at any time for cause. Any party in interest, on notice and hearing before the Bankruptcy Court, may seek removal of the Trustee for cause. The Bankruptcy Court shall hear and finally determine any dispute arising out of this section.

9.4 Resignation of Trustee. The Trustee may resign at any time by giving the Trust Committee at least 30 days' written notice of the Trustee's intention to do so. In the event of a resignation, the resigning Trustee shall render to the Trust Committee a full and complete accounting of monies and assets received, disbursed, and held during the term of office of that Trustee. The resignation shall be effective on the later of (a) the date specified in the notice;

(b) the date that is 30 days after the date the notice is delivered; or (c) the date the accounting described in the preceding sentence is delivered.

9.5 Appointment of Successor Trustee. Upon the resignation, death, incapacity, or removal of a Trustee, the Trust Committee shall appoint a successor Trustee to fill the vacancy so created. Any successor Trustee so appointed shall consent to and accept in writing the terms of this Agreement and agree that the provisions of this Agreement shall be binding upon and inure to the benefit of the successor Trustee and all of the successor Trustee's heirs and legal and personal representatives, successors or assigns. Notwithstanding anything in this Agreement, in the event that a successor Trustee is not appointed within 60 days of the occurrence or effectiveness, as applicable, of the prior Trustee's resignation, death, incapacity, or removal then the Bankruptcy Court, upon the motion of any party-in-interest, including counsel to the Trust, shall approve a successor to serve as the Trustee.

9.6 Powers and Duties of Successor Trustee. A successor Trustee shall have all the rights, privileges, powers, and duties of its predecessor under this Agreement, the Plan, and Confirmation Order.

9.7 Trust Continuance. The resignation, death, incapacitation, dissolution, liquidation, or removal of the Trustee shall not terminate the Trust or revoke any existing agency created pursuant to this Agreement or invalidate any action theretofore taken by the Trustee.

9.8 Compensation of Trustee and Costs of Administration. The Trustee shall receive fair and reasonable compensation for its services, which shall be a charge against and paid out of the Trust Assets. All costs, expenses, and obligations incurred by the Trustee (or professionals who may be employed by the Trustee in administering the Trust, in carrying out their other responsibilities under this Agreement, or in any manner connected, incidental, or related thereto)

shall be paid by the Trust from the Trust Assets prior to any Distribution to the Beneficiaries. The terms of the compensation of the Trustee are set forth on Exhibit A hereto.

9.9 Appointment of Supplemental Trustee. If the Trustee has a conflict or any of the Trust Assets are situated in any state or other jurisdiction in which the Trustee is not qualified to act as trustee, the Trustee shall nominate and appoint a Person duly qualified to act as trustee (the "Supplemental Trustee") with respect to such conflict, or in such state or jurisdiction, and require from each such Supplemental Trustee such security as may be designated by the Trustee in its discretion. In the event the Trustee is unwilling or unable to appoint a disinterested Person to act as Supplemental Trustee to handle any such matter, the Bankruptcy Court, on notice and hearing, may do so. The Trustee or the Bankruptcy Court, as applicable, may confer upon such Supplemental Trustee any or all of the rights, powers, privileges and duties of the Trustee hereunder, subject to the conditions and limitations of this Agreement, except as modified or limited by the laws of the applicable state or other jurisdiction (in which case, the laws of the state or other jurisdiction in which such Supplemental Trustee is acting shall prevail to the extent necessary). To the extent the Supplemental Trustee is appointed by the Trustee, the Trustee shall require such Supplemental Trustee to be answerable to the Trustee for all monies, assets and other property that may be received in connection with the administration of all property. The Trustee or the Bankruptcy Court, as applicable, may remove such Supplemental Trustee, with or without cause, and appoint a successor Supplemental Trustee at any time by executing a written instrument declaring such Supplemental Trustee removed from office and specifying the effective date and time of removal.

ARTICLE X
DURATION OF TRUST

10.1 Duration. Once the Trust becomes effective upon the Effective Date of the Plan, the Trust and this Agreement shall remain and continue in full force and effect until the Trust is terminated.

10.2 Termination on Payment of Trust Expenses and Distribution of Trust Assets. Upon the payment of all costs, expenses, and obligations incurred in connection with administering the Trust, and the Distribution of all Trust Assets in accordance with the provisions of the Plan, the Confirmation Order, and this Agreement, the Trust shall terminate and the Trustee shall have no further responsibility in connection therewith except as may be required to effectuate such termination under relevant law.

10.3 Termination after Five Years. If the Trust has not been previously terminated pursuant to section 10.2 hereof, on the fifth (5th) anniversary of the Effective Date, unless the Trust term has been extended in accordance with section 5.4.17 of the Plan, the Trustee shall distribute all of the Trust Assets to the Beneficiaries in accordance with the Plan, and immediately thereafter the Trust shall terminate and the Trustee shall have no further responsibility in connection therewith except to the limited extent set forth in section 10.5 of this Agreement.

10.4 No Termination by Beneficiaries. The Trust may not be terminated at any time by the Beneficiaries.

10.5 Continuance of Trust for Winding Up; Discharge and Release of Trustee. After the termination of the Trust and solely for the purpose of liquidating and winding up the affairs of the Trust, the Trustee shall continue to act as such until its responsibilities have been fully performed. Except as otherwise specifically provided herein, upon the Distribution of the Trust

Assets including all excess reserves, the Trustee and the Trust's professionals and agents shall be deemed discharged and have no further duties or obligations hereunder. Upon a motion by the Trustee, the Bankruptcy Court may enter an order relieving the Trustee, its employees, professionals, and agents of any further duties, discharging and releasing the Trustee, its employees, professionals, and agents from all liability related to the Trust, and releasing the Trustee's bond, if any.

ARTICLE XI
MISCELLANEOUS

11.1 Cumulative Rights and Remedies. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights and remedies under law or in equity.

11.2 Notices. All notices to be given to Beneficiaries may be given by ordinary mail, or may be delivered personally, to the Holders at the addresses appearing on the books kept by the Trustee. Any notice or other communication which may be or is required to be given, served, or sent to the Trustee shall be in writing and shall be sent by registered or certified United States mail, return receipt requested, postage prepaid, or transmitted by hand delivery or facsimile (if receipt is confirmed) addressed as follows:

If to the Trust or Trustee:

with a copy to its counsel:

or to such other address as may from time to time be provided in written notice by the Trustee.

11.3 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Connecticut, without giving effect to rules governing the conflict of laws.

11.4 Successors and Assigns. This Agreement shall inure to the benefit of and shall be binding upon the Parties and their respective successors and assigns.

11.5 Particular Words. Reference in this Agreement to any Section or Article is, unless otherwise specified, to that such Section or Article under this Agreement. The words "hereof," "herein," and similar terms shall refer to this Agreement and not to any particular Section or Article of this Agreement.

11.6 Execution. All funds in the Trust shall be deemed *in custodia legis* until such times as the funds have actually been paid to or for the benefit of a Beneficiary, and no Beneficiary or any other Person can execute upon, garnish or attach the Trust Assets or the Trustee in any manner or compel payment from the Trust except by Final Order of the Bankruptcy Court. Payments will be solely governed by the Plan and this Agreement.

11.7 Amendment. This Agreement may be amended by written agreement of the Trustee and the Plan Debtors or by order of the Bankruptcy Court; provided, however, that such amendment may not be inconsistent with the Plan or the Confirmation Order.

11.8 No Waiver. No failure or delay of any party to exercise any right or remedy pursuant to this Agreement shall affect such right or remedy or constitute a waiver thereof.

11.9 No Relationship Created. Nothing contained herein shall be construed to constitute any relationship created by this Agreement as an association, partnership or joint venture of any kind.

11.10 Severability. If any term, provision covenant or restriction contained in this Agreement is held by a court of competent jurisdiction or other authority to be invalid, void, unenforceable or against its regulatory policy, the remainder of the terms, provisions, covenants

and restrictions contained in this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

11.11 Further Assurances. Without limitation of the generality of section 2.4 of this Agreement, the Parties agree to execute and deliver all such documents and notices and to take all such further actions as may reasonably be required from time to time to carry out the intent and purposes and provide for the full implementation of this Agreement and the pertinent provisions of the Plan, and to consummate the transactions contemplated hereby.

11.12 Counterparts. This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

11.13 Jurisdiction. The Bankruptcy Court shall have jurisdiction regarding the Plan Debtors, the Trust, Trustee, and Trust Assets, including, without limitation, the determination of all disputes arising out of or related to administration of the Trust. The Bankruptcy Court shall have continuing jurisdiction and venue to hear and finally determine all disputes and related matters among the Parties arising out of or related to this Agreement or the administration of the Trust. The Parties expressly consent to the Bankruptcy Court hearing and exercising such judicial power as is necessary to finally determine all such disputes and matters. If the Bankruptcy Court abstains from exercising, or declines to exercise, jurisdiction or is otherwise without jurisdiction over any matter arising in, arising under, or related to the Chapter 11 Cases of the Plan Debtors, including the matters set forth in this Agreement, the provisions of this Agreement shall have no effect on and shall not control, limit or prohibit the exercise of jurisdiction by any other court having competent jurisdiction with respect to such matter, and all

applicable references in this Agreement to an order or decision of the Bankruptcy Court shall instead mean an order or decision of such other court of competent jurisdiction.

IN WITNESS WHEREOF, the Parties have or are deemed to have executed this Agreement as of the day and year written above.

Clinton Nurseries, Inc.
Clinton Nurseries of Maryland, Inc.
Clinton Nurseries of Florida, Inc.

Plan Debtors

By: _____
Name: David Richards
Title: President

ANTHONY CALASCIBETTA

_____
Trustee

American Bankruptcy Institute Northeast Bankruptcy Conference
July 14-17, 2022
"You Can Check out Any Time You Like, But You Can Never Leave (Chapter 11, That is)"
Select Case Closing Issues

Eric Henzy
Zeisler & Zeisler, P.C.
Bridgeport, Connecticut

Who is paying at the checkout line?

To completely and properly wind down a business can be complex, time consuming and expensive. (See Wind Down Approach and Process Activities in these materials, put together by Ryan Maupin). Success or lack of success in properly winding down and closing a case is often/always a function of planning and funding. This is not a program on DIP loans or 363 sales, but many of the issues that arise early in cases in the context of DIP loans and 363 motions significantly impact the ability to "leave" Chapter 11. Adequate funding often will be decided early in a case. To what extent should the availability of sufficient resources, or lack thereof, to wind down a case at the end of the case be a controlling factor on early case issues?

The typical situation is a proposed sale or a financing proposal that may leave the bankruptcy estate administratively insolvent, for our purposes without sufficient assets to properly wind down the business and close the case. The secured creditor has a claim in excess of the value of the debtor's assets and is seeking to use Chapter 11 to liquidate its collateral, but does not want to fully fund the case including costs of wind down, i.e., the secured creditor wants to "play" but not to "pay." Terms of DIP financing may exacerbate the problem—the secured creditor may agree to limited DIP financing or use of cash collateral solely to finance a sale process, with short term bare bones budgets insufficient budget to pay all administrative expenses of the case. As part of

the DIP loan, the secured creditor will often seek to obtain liens on previously unencumbered assets, roll-ups of prepetition debt, and section 506(c) waivers.

Where the senior secured is not agreeing to fund or carve out for administrative claims, including costs of wind down, so that plan confirmation and orderly wind down and closing may not be possible, how should the case proceed? There is no per se rule in the Code against the administration of an administratively insolvent bankruptcy case for the primary benefit of a secured creditor, particularly where chapter 11 represents the best alternative to maximize the value of the debtor's assets. But is it OK to impose the costs of the case on administrative creditors, unsecured creditors and others, potentially leaving an unfunded mess post sale closing or liquidation of assets? Not surprisingly, because no two cases are completely alike, bankruptcy courts handle early case funding issues differently and bankruptcy court decisions answering that question are somewhat of a hodgepodge. A small sampling follows.

In In re Gulf Coast Oil Corp., 404 B.R. 407, 428 (Bankr. S.D. Tex. 2009), the bankruptcy court denied the debtor's motion seeking authority to sell its over-encumbered assets to its secured creditor under a credit bid where, among other things, the "[t]he only administrative expenses that will be paid are those that the purchaser has previously agreed to pay or that the purchaser decides subsequently to pay (such as post-petition trade creditors)."

> The § 363(b) movant should be prepared to prove, not just allege, why it is appropriate to provide extraordinary bankruptcy authority and remedies solely for the benefit of a party whose contract under state law does not provide those remedies and benefits. And if the proposed transaction will not even pay all of the expenses of the bankruptcy proceeding, it would be especially difficult to understand why the purchaser should get the benefit of extraordinary bankruptcy powers and remedies for which it did not pay.

Id. at 427.

In In re Summit Global Logistics, Inc., 2008 WL 819934, [*13] (Bankr. D.N.J. Mar. 26, 2008), the bankruptcy court approved a 363 sale to the secured lender over the objection of a creditor which contended that "the sale provides no recovery for administrative claimants," where the secured lender had provided "$3 million for a wind-down budget to satisfy such claims."

In In re Encore Healthcare Associates, 312 B.R. 52, 54 (Bankr. E.D. Pa. 2004), the bankruptcy court denied the debtor's motion to approve sale procedures where "the sole purpose [of the proposed sale] was to liquidate assets for the benefit of the secured creditor." The debtor acknowledged that the case would be converted to Chapter 7 following the sale. The court stated that while it understood the buyer's "interest in acquiring assets along with a bankruptcy court order insulating it from future claims and providing a federal forum to litigate any contract issue, I am hard pressed to see why the bankruptcy court should assume jurisdiction over this sale." Id. at 55-56.

In In re Haven Eldercare, LLC, 390 B.R. 762 (Bankr. D. Conn. 2008), the court approved a sale of the debtors' nursing homes pursuant to credit bids by the secured lenders with first liens on the homes they sought to purchase. The sales were preceded by an extensive but failed marketing effort by the debtors, and by the time the sales were approved the debtors were to the point of having insufficient liquidity to remain in business. The court approved the sale notwithstanding that after the consummation "there will be insufficient funds in these bankruptcy estates to pay administrative and priority claims in full, or make any distribution to general unsecured creditors." Id. at 768-69.

Should/can secured lenders be required to "pay to play," for purposes here to include adequate funding for wind down? A framework for answering that question distinguishes two situations. First is the situation where debtor files without the lender's consent and the lender is

not behind or even going along with sale process. See, e.g., In Latex Foam International, LLC, Case No. 19-51064 Bankr. D. Conn.) (court approved sale and payment in full of senior secured creditor, including post-petition interest and attorneys' fees, over objections by creditors' committee, where estate likely administratively insolvent, following heavily contested case vis the secured creditor and sale process that no party disputed had maximized value and preserved going concern). In that situation, it's very difficult equitably or legally to say that the secured creditor can or should be required to fund the case or give up any of its priority rights. See In re Flagstaff Foodservice Corp., 762 F.2d 10, 12 (2nd Cir. 1985) (preservation of going concern value "does not suffice to warrant section 506(c) recovery.").

Second is the situation where there is a forbearance agreement that directs the debtor to retain investment banker, maybe an investment banker not of the debtor's choosing, to seek a stalking horse and then file a 363 case. The argument is that there is consent within the meaning of Flagstaff—in fact, it's not really consent by the secured creditor to a debtor's chosen path, it's the debtor's consent to the path chosen by the lender—presumable based on the lender's belief that 363 process will preserve collateral value and that the lender will do better than in a liquidation. In re Flagstaff Foodservices Corp., 739 F.2d 73, 76 (2nd Cir. 1984) ("[I]f expenses for the preservation or disposition of property are incurred primarily for the benefit of a creditor holding a security interest in the property, such expenses, properly identified, may be charged against the secured creditor."). In that situation, it is supportable both equitably and legally to require that the lender pay for the case, including all costs of wind down.

Bottom line: properly winding down a business and closing a case is always more complicated and expensive than parties think it will be. All parties should give consideration to

the wind down and closing of the case early in the case, late in the case may be and often is too late.

Can you ever leave?

An end goal for the court and the parties in any Chapter 11 case is to get the case closed. This concern has been heightened by the increase in US Trustee fees. See In re MBF Insp. Servs., 2019 Bankr. LEXIS 3913, *9-10 (Bankr. D. N.M. 2019) ("At $3,200 a month, a more leisurely case wrap-up likely would be acceptable. At $42,000 a month … there is urgency to close the case. … [I]t is unfair to make the reorganized debtor pay $42,000 a month for the privilege of determining what it owes its former counsel.").

"A final decree is essentially an administrative task, a docket entry reflecting the conclusion of a case for record-keeping purposes." McClelland v. Grubb & Ellis Consulting Servs. Co. (In re McClelland), 377 B.R. 446, 453 (Bankr. S.D.N.Y. 2007). See also In re Fibermark, Inc., 369 B.R. 761, 767 (Bankr. D.Vt. 2007) ("[The final decree] does not, and is not designed to, identify the parties' rights, memorialize the parties' understandings, or establish any jurisdictional parameters."). Bankruptcy Code section 350(a) provides: "After an estate is fully administered and the court has discharged the trustee, the court shall close the case." Federal Rule of Bankruptcy Procedure 3022 provides: "After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on a motion of a party in interest, shall enter a final decree in the case."

"The phrase 'fully administered' is not defined by the Bankruptcy code or the Federal Rule of Bankruptcy Procedure. … Bankruptcy Rule 3022 is intended to allow bankruptcy courts flexibility in determining whether an estate is fully administered." Spierer v. Federated Dep't Stores, Inc. (In re Federated Department Stores, Inc.), 43 Fed. Appx. 820, 822 (6th Cir. 2002). See

also Nesselrode v. Provident Fin., Inc. (In re Provident Fin., Inc.), 2010 Bankr. LEXIS 5047, *26 (9th Cir. BAP 2010) ("[B]ankruptcy courts have flexibility in determining whether an estate is fully administered by considering the factors set forth in Rule 3022, along with any other relevant factors."), aff'd, 466 Fed. Appx. 672 (9th Cir. 2012); In re Clinton Nurseries, Inc., 2020 Bankr. LEXIS 567, [*7-8] (Bankr. D. Conn. March 4, 2020).

> [D]eterming when a case is 'fully administered' is a decision for the bankruptcy court based on consideration of numerous case-specific, procedural, and practical factors. The bankruptcy court is uniquely positioned to make this determination given that it will have overseen the particular debtor's case from the beginning and will have first hand knowledge of what matters have been, or need to be, completed before closure of the case. Further, the bankruptcy court will be very familiar with the debtors' confirmed plan of reorganization, the requirements for consummation of that plan, as well as the status of any pending motions, contested matters, and adversary proceedings.

In re Union Home & Indus., 375 B.R. 912, 917 (9th Cir. BAP 2007). See also In re Clinton Nurseries, Inc., 2020 Bankr. LEXIS 567, [*8] (same).

"While 'fully administered' is not defined in the Code or by the Federal Rules of Bankruptcy Procedure, the 1991 Advisory Committee Note accompanying Rule 3022 provides … guidance." In re Clinton Nurseries, Inc., 2020 Bankr. LEXIS 567, [*7].

> Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Factors that the court should consider in determining whether the state has been fully administered include (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.
>
> The court should not keep the case open only because of the possibility that the court's jurisdiction may be invoked in the future. A final decree closing the case after the estate is fully administered does not deprive the court of jurisdiction to enforce or interpret its own orders and does not prevent the court from reopening the case for cause pursuant to §350(b) of the Code.

Federal Rule of Bankruptcy Procedure 3022, 1991 Advisory Committee Note. "[N]ot all of the factors set forth in the Advisory Committee Note need to be present to establish that a case is fully administered for final decree purposes." Spierer, 43 Fed. Appx. At 822. See also In re Union Home & Indus., 375 B.R. at 917 ("The factors listed in the Advisory Note are not considered exhaustive, nor must a party demonstrate all of the factors, before the court may find a case to be fully administered."); In re Clinton Nurseries, Inc., 2020 Bankr. LEXIS 567, [*8-9] (same); In re Valence Tech., Inc., 2014 Bankr. LEXIS 4429, *7-8 (Bankr. W.D. Tex. 2014) ("[T]hese factors are not exhaustive nor must all six factors be present to establish that a case should be closed.").

Under the foregoing standards, courts have split on whether a Chapter 11 case may be closed when there are adversary proceedings, fee applications or other contested matters pending. See, e.g., In re Clinton Nurseries, Inc., 2020 Bankr. LEXIS 567 (granting debtor's motion to close case over objection of US Trustee notwithstanding pendency of 29 adversary proceedings brought by creditor litigation trust and appeal related to constitutionality of US Trustee fee increase, where court found that debtors' estates were fully administered, based on, *inter alia*, the debtors having taken all steps to consummate plan and make payments due by the effective date of the plan; all property of the debtors' estates having either revested in the reorganized debtors or been transferred to the creditor trust, leaving the debtors' estates with not property to administer; and the creditor trust being responsible for claims objections, adversary proceedings and distributions to unsecured creditors); In re MBF Insp. Servs., 2019 Bankr. LEXIS 3913, *12 ("A bankruptcy court may try adversary proceedings after entry of a final decree."); In re Valence Tech., Inc., 2014 Bankr. LEXIS 4429, *8 ("The existence of a pending matter … does not preclude closing a case."); In re Provident Fin., Inc., 2010 Bankr. LEXIS 5047, *26-27 (pendency of appeal did not militate in favor of keeping case open); In re McClelland, 377 B.R. at 453 (entry of a final decree "is not

necessarily contingent upon the resolution of a stand-alone adversary proceeding."); In re JMP-Newcor Int'l, 225 B.R. at 465 (pendency of adversary proceeding does not warrant keeping case open), **vs**. In re Atna Res., Inc., 576 B.R. 214, 220-21 (Bankr. D. Colo. 2017) (denying motion to close case where 24 adversary proceedings pending); In re Swiss Chalet, Inc., 485 B.R. 47, (Bankr. D. P.R. 2012) (denying motion to close case where adversary proceeding and contested matter pending); In re Kliegl Bros. Universal Elec. Stage Lighting Co., 238 B.R. 531, 546 (Bankr. E.D.N.Y. 1999) ("[A]n estate can not be fully administered while there are outstanding motions, contested matters, or adversary proceedings pending before the court."); In re 1095 Commonwealth Ave. Corp., 213 B.R. 794, 795-96 (Bankr. D. Mass. 1997) (denying motion to close case where appeal pending).

Bottom line: particularly with the increase in US Trustee fees, getting the case closed as soon as possible has become a potentially critical issue for many cases.

Who is never leaving?

Liquidating/litigation trusts

Where a debtor is liquidated pursuant to a plan or a reorganizing debtor does not want to be involved in claims resolution, pursuit of avoidance actions or liquidation of other assets going to creditors pursuant to a plan, the typical vehicle used is a liquidating or litigation trust. A liquidating/litigation trust is separate legal entity established by a state law trust agreement and governed by such trust agreement, the confirmation order and the chapter 11 plan. E.g., Grede v. Bank of N.Y. Mellon, 598 F.3d 899, 901-02 (7th Cir. 2010) ("Although the terms of the Bankruptcy Code govern the permissible duties of a trustee in bankruptcy, the terms of the plan of reorganization (and of the trust instrument) govern the permissible duties of a trustee after bankruptcy."); In re Insilco Technologies, Inc., 480 F.3d 212, 214 n.1 (3rd Cir. 2007) ("A typical

mechanism for effecting a Chapter 11 liquidation is the creation of a 'liquidating trust'—*a state-law trust* managed by a group of creditors that succeeds to the debtor's assets and administers the liquidation and distribution process." (emphasis added)); In re Health Diagnostic Lab, Inc., 584 B.R. 525, (Bankr. E.D. Va. 2018) ("The powers and duties of … a liquidating trustee, are dictated by such operative documents as the confirmation order, chapter 11 plan, and any applicable trust instruments."). The chief purpose of liquidating/litigation trusts is to monetize estate assets that have been transferred to the trust. Liquidating/litigation trusts will often also be charged with resolving claims of and making distributions to trust beneficiaries, former creditors of the debtor.

Trust agreements (see Clinton Nurseries Trust Agreement included with these materials) typically become effective on the plan effective date. The trust is formed pursuant to the trust agreement, and typically includes the following critical provisions:

- Creation—declaration of the creation of the trust.
- Appointment and acceptance of trustee.
- Transfer of assets—
    - Courts have disagreed over level of specificity required pursuant to Code section 1123(b)(3)(B) ("[A] plan may … provide for … the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest … .")—better to be over-inclusive. E.g., Wooley v. Haynes & Boone, L.L.P. (In re SI Restructuring, Inc.), 714 F.3d 860, 864 (5th Cir. 2013) ("For a reservation to be effective, it must be specific and unequivocal—blanket reservations of any and all claims are insufficient."); Fleet Nat'l Bank v. Gray (In re Bankvest Capital Corp.), 375 F.3d 51, 59 (1st Cir. 2004) (plan reserving right "to investigate, prosecute and,

if necessary, litigate any Cause of Action" was sufficiently clear to preserve claim where term "Cause of Action" expressly included avoidance actions); Browning v. Levy, 283 F.3d 761, 775 (6th Cir. 2002) (since reservation neither named proposed defendant nor the factual basis for the reserved claims, blanket reservation was of little value "because it did not enable the value of [the claims] to be taken into account in the disposition of the debtor's estate."); Katz v. I.A. Alliance Corp. (In re I. Appel Corp.), 300 B.R. 564, 570 (S.D.N.Y. 2003) (blanket reservation, combined with disclosure schedule notice that claims against specific defendant were being investigated, was sufficient to preserve claims).

- 10th Circuit test on standing: "We determine whether a party has standing to enforce estate claims under § 1123(b)(3)(B) using [a] two-part test … . First, we ask whether a confirmed plan expressly appointed the party to enforce the claims. Second, we ask whether the appointed party qualifies as a representative of the estate. … In evaluating the second element—whether a party represents the state—our primary concern is whether a successful recovery by the appointed representative would benefit the debtor's estate and particularly, the debtor's unsecured creditors." Search Market Direct, Inc. v. Jubber (In re Paige), 685 F.3d 1160, 1191-92 (10th Cir. 2012) (internal quotation marks omitted). But see Parker v. Titan Mining (US) Corp. (In re Star Mt. Res., Inc.), 2022 Bankr. LEXIS 1000 (Bankr. D. Arizona April 11, 2022) (holding that liquidating trust's recovery not capped at amount of allowed creditor claims).

- Termination date—typically when all assets liquidated and distributed, no more than five years unless extended, for tax purposes.
- Identification of beneficiaries.
- Tax treatment. Treas. Reg. §301.7702-4(d) ("An organization will be considered a liquidating trust if it is organized for the primary purpose of liquidating and distributing the assets transferred to it, and if its activities are all reasonably necessary to, and consistent with, the accomplishment of that purpose. A liquidating trust is treated as a trust for the purposes of the Internal Revenue Code because it is formed with the objective of liquidating particular assets and not as an organization having as its purpose the carrying on of a profit-making business which normally would be conducted through business organizations classified as corporations or partnerships. However, if the liquidation is unreasonably prolonged or if the liquidation purpose becomes so obscured by business activities that the declared purpose of liquidation can be said to be lost or abandoned, the status of the organization will no longer be that of a liquidating trust."). A liquidating trust is normally treated as a grantor type trust for the benefit of the beneficiaries of the trust—there is a deemed transfer to the creditor beneficiaries followed by a deemed transfer by the creditor beneficiaries to the trust. IRS Revenue Procedure 94-95.
- Powers and duties of liquidating/litigation trustee.
- Powers and duties of trust oversight committee.

<u>Some (relatively) recent caselaw involving liquidating/litigation trusts</u>

In re Paragon Offshore PLC, 629 B.R. 227 (Bankr. D. Del. 2021): denying US Trustee motion to compel filing of post-confirmation quarterly reports and payment of US Trustee fees based on distribution by liquidating trust of litigation recoveries—

- Court held that only "payments by or on behalf of the debtor" trigger quarterly fees, and that distribution of litigation recoveries did not meet that test.
- The litigation trust agreement expressly provided that after the transfer of claims, the debtors and their estates would have no further interest with respect to the claims or the litigation trust. But plan and litigation trust agreement also expressly provided that litigation trustee was "representative of the estate" within the meaning of Code section 1123(b)(3)(B). Can both things be true? Note: appellant in Siegel v. Fitzgerald, Case U.S. Supreme Court Case No. 19-2240, holding that 2017 US Trustee fee increase was unconstitutional, was liquidating trustee who was obligated to pay quarterly fees as "representative of the estate."
- Court's editorial: "In recent years, Congress has raised [US Trustee] fees dramatically, increasing the administrative burden on debtors, and reducing creditor recoveries. Unfortunately, the OUST has been compelled to act as tax collector, focused on increasing the coffers of the U.S. Treasury, perhaps, at times, in derogation of its original mission."

In re KiOR, Inc., 621 B.R. 313, 328-29 (Bankr. D. Del. 2020); holding, among other things, that liquidating trustee as co-holder with reorganized debtor of attorney-client privilege could not unilaterally waive privilege. Also, that "the Liquidating Trustee is not a 'successor' to the Debtor under Bankruptcy Code sections 323 and 1104, but rather is a trustee of a trust created pursuant to Bankruptcy Code section 1123(b)(3)."

Dilworth v. Diaz (In re Bal Harbour Quarzo, LLC), 638 B.R. 660 (Bankr. S.D. Fla. 2022): denying post-confirmation creditors' committee right to intervene under Federal Rule of Bankruptcy Procedure 1109(b) and Federal Rule of Civil Procedure 24 in adversary proceeding commenced by liquidating trustee—finding, among other things,

- that trust beneficiaries economic interest in the outcome of the litigation did not give committee the right to intervene,
- that committee itself had no economic interest or other legally cognizable interest in the litigation, and
- that liquidating trustee was already acting in fiduciary capacity with respect to former general unsecured creditors of debtor on whose behalf committee sought to act.

Valley Nat'l Bank v. Warren (In re Westport Holding Tampa, LP), 2022 U.S. App. LEXIS 8480 (11th Cir. March 31, 2022): holding that defendant in action brought by liquidating trustee did not have standing to object to liquidating trustee's entry into litigation funding agreement.

- "Valley National Bank is simply an adversary defendant whose sole interest is in avoiding liability by attempting to ensure that the Liquidating Trustee cannot continue to pursue litigation against it. Thus, Valley National Bank is not a person aggrieved by the bankruptcy court's order. This sole interest is also not protected by the Bankruptcy Code."

Faculty

Charles W. Azano is a senior attorney in Greenberg Traurig, LLP's Restructuring & Bankruptcy group in Boston. He represents parties in all areas of bankruptcy, most commonly representing indenture trustees, institutional investors and other creditors in receiverships, bankruptcies and out-of-court workouts involving tax-exempt municipal bonds. Mr. Azano works in a broad array of sectors, including energy, hospitality, housing, manufacturing, and most commonly senior-living facilities, frequently working in cases involving continuing care retirement communities and assisted-living facilities. He has been actively involved in ABI for more than 20 years, having edited and contributed to publications, authored articles and served on committees. He is a frequent speaker on bankruptcy and issues arising in bond workouts. Previously, Mr. Azano clerked for Hon. Joel B. Rosenthal in the U.S. Bankruptcy Court for the District of Massachusetts. He received his undergraduate degree from Colgate University and his J.D. from Boston College Law School.

Eric A. Henzy is a partner at Zeisler & Zeisler, P.C. in Bridgeport, Conn., and has represented debtors, creditors' committees, secured and unsecured creditors and other parties in bankruptcy cases and out-of-court workouts. He has appeared in bankruptcy courts around the country and has represented parties in a number of the first hedge fund insolvencies in the country. He has first-chair tried more than 30 contested matters and adversary proceedings to judgment. Previously, Mr. Henzy practiced in the bankruptcy group at Reid and Riege, P.C. in Hartford and at the New York firm Milbank, Tweed, Hadley and McCloy. He also clerked for Hon. Alan H. W. Shiff in the U.S. Bankruptcy Court for the District of Connecticut. Mr. Henzy is a member of ABI, the American Bar Association's Business and Litigation Sections, the Connecticut Bar Association's Commercial Law & Bankruptcy Section and the Turnaround Management Association. He is rated AV-Preeminent by Martindale-Hubbell, named in *The Best Lawyers in America* for Litigation - Bankruptcy "Lawyer of the Year" in the Hartford Metro Area (2016 and 2018), Bankruptcy and Creditor Debtor Rights "Lawyer of the Year" in the Hartford Metro Area (2014), Bankruptcy and Creditor Debtor Rights (2006-18), and Litigation - Bankruptcy (2011-18), and was listed in *Connecticut Super Lawyers* for Bankruptcy & Creditor Debtor Rights (2007-17). He is admitted to practice in Connecticut, New York, the U.S. District Court for the District of Connecticut, and the U.S. District Courts for the Eastern and Southern Districts of New York. Mr. Henzy received his B.A. in 1984 from the University of Connecticut and his J.D. in 1988 from the University of Connecticut School of Law.

Ryan A. Maupin is a managing director with Deloitte Transactions and Business Analytics LLP in Pasippany, N.J. in its M&A and Restructuring practice, and he has 20 years of experience advising boards, domestic and international company executives, secured and unsecured creditors, hedge funds and private equity funds in restructuring situations both in court and out of court. He is primarily focused on advising clients in complex financial turnarounds, § 363 sale processes, debt restructurings and liquidations. Mr. Maupin is a member of the Turnaround Management Association (TMA), ABI and the Association of Insolvency & Restructuring Advisors (AIRA). He was selected as part of ABI's inaugural class of "40 Under 40" in 2017. Mr. Maupin received his B.S. from Millikin University.

Hon. Elizabeth S. Stong has served as a U.S. Bankruptcy Judge for the Eastern District of New York in Brooklyn since 2003. Prior to her appointment the bench, she was a litigation partner and associate at Willkie Farr & Gallagher in New York, an associate at Cravath, Swaine & Moore, and law clerk to Hon. A. David Mazzone, U.S. District Judge in the District of Massachusetts. Judge Stong is a member of the Council on Foreign Relations, the Council of the American Law Institute, the Advisory Committee to Columbia University's Committee on Global Thought, and the Advisory Board of the ABA Center for Human Rights. She holds leadership roles in the Practising Law Institute, PRIME Finance, New York City Bar Association, New York County Lawyers Association, and the ABA's Business Law Section, International Law Section and Judicial Division, among other organizations. Judge Stong's past positions include Harvard Law School Association president, National Conference of Bankruptcy Judges International Judicial Relations Committee chair, co-chair of the American Bar Foundation New York Fellows and New York City Bar ADR Committee chair. She also served on the ABA's Standing Committees on Pro Bono and Public Service, the American Judicial System, and Continuing Legal Education, Commission on Women in the Profession, and Homelessness and Poverty, as well as on the Board of the Center for Innovation. Judge Stong is an adjunct professor at Brooklyn Law School and has trained judges in more than 25 countries on five continents, with ABA-ROLI, INSOL, the World Bank and U.S. Commerce Department. She has received many awards for her work to improve access to justice, and is an active community volunteer. Judge Stong received her A.B. *magna cum laude* from Harvard University and her J.D. from Harvard Law School, where she received the Williston Prize, and she studied at the Université des Sciences Sociales in Toulouse, France, as a Rotary Foundation Graduate Fellow.