**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**FORT LAUDERDALE DIVISION**
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| In re:<br>TOUSA, INC., *et al.*,<br><br>Debtors.[1] | Chapter 11 Cases<br><br>Case No. 08-10928-JKO<br><br>Jointly Administered |

**JOINT MOTION OF THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ENTRY OF AN ORDER PURSUANT TO SECTIONS 105(A) AND 363(B) OF THE BANKRUPTCY CODE AND RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE APPROVING THE SETTLEMENT OF THE FIDUCIARY DUTY ACTION AND THE D&O INSURANCE COVERAGE ACTION**

The Debtors and the Official Committee of Unsecured Creditors of TOUSA, Inc., et al. (the "Committee" and, together with the Debtors, the "Parties") by and through their respective undersigned counsel, hereby submit this motion (the "Motion"), pursuant to sections 105(a) and 363(b) of title 11 of the United States Code (the "Bankruptcy Code") and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for entry of an order approving the settlement agreement by and among (i) the Debtors, (ii) the Committee (iii) Citicorp North America, Inc., in its capacity as the Administrative Agent (the "First Lien Term Loan Agent") for the July 31, 2007 First Lien Term Loan Credit Agreement (as amended, amended and restated, supplemented, waived or otherwise modified from time to time, the "First

[1] The Debtors are: Engle Homes Commercial Construction, LLC; Engle Homes Delaware, Inc.; Engle Homes Residential Construction, L.L.C.; Engle Sierra Verde P4, LLC; Engle Sierra Verde P5, LLC; Engle/Gilligan LLC; Engle/James LLC; LB/TE #1, LLC; Lorton South Condominium, LLC; McKay Landing LLC; Newmark Homes Business Trust; Newmark Homes Purchasing, L.P.; Newmark Homes, L.L.C.; TOUSA Texas, LP.; Preferred Builders Realty, Inc.; Reflection Key, LLC; Silverlake Interests, L.L.C.; TOI, LLC; TOUSA Associates Services Company; TOUSA Delaware, Inc.; TOUSA Funding, LLC; TOUSA Homes Arizona, LLC; TOUSA Homes Colorado, LLC; TOUSA Homes Florida, L.P.; TOUSA Homes Investment #1, Inc.; TOUSA Homes Investment #2, Inc.; TOUSA Homes Investment #2, LLC; TOUSA Homes Mid-Atlantic Holding, LLC; TOUSA Homes Mid-Atlantic, LLC; TOUSA Homes Nevada, LLC; TOUSA Homes, Inc.; TOUSA Investment #2, Inc.; TOUSA Mid-Atlantic Investment, LLC; TOUSA Realty, Inc.; TOUSA, LLC; and TOUSA/West Holdings, Inc, (collectively, the "Conveying Subsidiaries"), together with TOUSA, Inc. ("TOUSA"), TOUSA Homes, L.P. and Beacon Hill at Mountain's Edge, LLC.

Lien Term Loan Agreement") on behalf of itself and all lenders party to the First Lien Term Loan Agreement (the "First Lien Term Loan Lenders"); (iv) Citicorp North America, Inc., in its capacity as the Administrative Agent (the "First Lien Revolver Agent") for the July 31, 2007 Second Amended and Restated Revolving Credit Agreement (as amended, amended and restated, supplemented, waived or otherwise modified from time to time, the "First Lien Revolving Credit Agreement") and Gleacher Products Corp. in its capacity as the Administrative Sub-Agent for the First Lien Revolving Credit Agreement (the "First Lien Revolver Sub-Agent"), on behalf of themselves and all lenders party to the First Lien Revolving Credit Agreement (the "First Lien Revolver Lenders"); (v) Wells Fargo Bank, N.A., in its capacity as the Successor Administrative Agent (the "Second Lien Term Loan Agent" and, together with the First Lien Term Loan Agent, the First Lien Revolver Agent and the First Lien Revolver Sub-Agent, the "Agents") for the July 31, 2007 Second Lien Term Loan Credit Agreement (as amended, amended and restated, supplemented, waived or otherwise modified from time to time, the "Second Lien Term Loan Agreement") on behalf of itself and all lenders party to the Second Lien Term Loan Agreement (the "Second Lien Term Loan Lenders" and, together with the First Lien Term Loan Lenders, the "Term Loan Lenders" and, together with the First Lien Revolver Lenders, the "Prepetition Secured Lenders"); (vi) Konstantinos Stengos; Antonio Mon; Tommy McAden; Andreas Stengos; George Stengos; Larry Horner; William Hasler; Michael Poulos; Marianna Stengou; Susan Parks; J. Bryan Whitworth; Paul Berkowitz; Candace Corra; Russell Devendorf; Brian Konderik; Tom McAndrew; Dave Schoenborn; Gordon Stewart; and Stephen Wagman (each a "Defendant Director and Officer" and, together the "Defendant Directors and Officers") and Technical Olympic S.A. ("TOSA," and, together with the Defendant Directors and Officers, the "Settling Defendants"); and (vii) Federal Insurance Company ("Federal"); XL Specialty Insurance Company ("XL"); Zurich American Insurance Company; St. Paul Mercury Insurance

Company (incorrectly named in the D&O Insurance Coverage Action as "The St. Paul Travelers Co., Inc."); National Union Fire Insurance Company of Pittsburgh, Pa; Arch Insurance Company; AXIS Reinsurance Company; Westchester Fire Insurance Company; Allied World Assurance Company (U.S.) Inc.; and Beazley Insurance Company, Inc. (collectively, the "Settling D&O Insurers" and, together with the Committee, the Debtors, the Settling Defendants, and the Agents acting on behalf of themselves and their respective Prepetition Secured Lenders, the "Settlement Parties," each a "Settlement Party")[2] attached hereto as Exhibit A (the "Settlement Agreement"). The Settlement Agreement settles disputes with respect to Adversary Proceeding No. 09-01616 (the "Fiduciary Duty Action"), Adversary Proceeding No. 09-02281 (the "D&O Insurance Coverage Action"), the Prepetition Secured Lender Claims[3] and related claims. In support of this Motion, the Parties respectfully state as follows:

**PRELIMINARY STATEMENT**

1. By the Motion, the Parties seek entry of an order approving an agreement that resolves the Fiduciary Duty Action, the D&O Insurance Coverage Action and other claims between and among, on the one hand the Debtors, the Committee and the Agents on behalf of themselves and their respective Prepetition Secured Lenders and, on the other hand, the Settling Defendants and Settling D&O Insurers. Specifically, the Settlement Agreement requires the Settling D&O Insurers to make cash payments to the Conveying Subsidiaries and the Prepetition Secured Lenders in the aggregate amount of $67,000,000 in settlement of the claims asserted against the Settling D&O Insurers and the Settling Defendants. The Settlement Agreement also provides that certain of the Settling D&O Insurers shall pay Defense Costs incurred by the

[2] Neither RSUI Indemnity Company ("RSUI,") nor XL Insurance (Bermuda) LTD ("XL Bermuda") are parties to this Settlement Agreement. It is anticipated that XL Bermuda will be a party to a separate settlement agreement. RSUI, XL Bermuda together with the Settling D&O Insurers are referred to as the "Insurers"). XL Bermuda issued Policies numbered BM00021502DO05A and BM00022535DO06A (the "XL Bermuda Policies").

[3] Terms not otherwise defined herein shall have the meanings ascribed to such terms in the Settlement Agreement.

Defendant Directors and Officers to the D&O Defense Counsel. In addition, the Settlement Parties will exchange mutual releases with respect to the Fiduciary Duty Action, the D&O Insurance Coverage Action, and other claims and causes of action as set forth more fully in the Settlement Agreement.

2. The Settlement Agreement is part of larger "grand bargain" resolving claims among many parties in interest in these chapter 11 cases. Indeed, this Court's approval of the Settlement Agreement is a condition precedent to the confirmation of the *Amended Joint Plan of Liquidation of TOUSA, Inc. and Its Affiliated Debtors and Debtors in Possession Under Chapter 11 of the Bankruptcy Code*, which was filed on May 15, 2013. (ECF No. 9168.) This Settlement Agreement and the settlements embodied in the Plan will finally bring to a close these chapter 11 cases that have been pending for over five years.

3. As explained in detail below, the Settlement Agreement provides the Conveying Subsidiaries and the Prepetition Secured Lenders with a certainty of recovery that continued litigation alone cannot ensure. While all of the Settlement Parties are confident in their litigation positions, litigation has inherent risks and uncertainties. Furthermore, a principal motivation for the Settlement Parties to enter into this Settlement Agreement is that its approval is a necessary part of certain "grand bargain" settlements that have been reached in connection with these cases and are embodied in the Plan. For the reasons set forth herein, the Parties submit that entry into the Settlement Agreement is in the best interests of the Debtors' estates and satisfies the relevant standards for approval of a compromise under Bankruptcy Rule 9019 and Bankruptcy Code section 363.

## JURISDICTION

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The bases for the relief requested herein are Bankruptcy Code sections 105 and 363 and Bankruptcy Rule 9019.

**FACTUAL BACKGROUND**

6. Certain of the Debtors (including the Conveying Subsidiaries) filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on January 29, 2008 (the "Petition Date").[4]

7. Prior to the Petition Date, TOUSA, through one of its subsidiaries entered into a joint-venture (the "Transeastern JV") with Falcone/TEP Holdings, LLC, f/k/a Falcone/Ritchie LLC. The Transeastern JV was designed as a non-recourse joint venture, meaning that its equity would be applied to TOUSA's value without exposing TOUSA or any of the Conveying-Subsidiaries to the Transeastern JV's debt.

8. Eventually, the Transeastern JV foundered and the lenders to the Transeastern JV commenced suit against TOUSA and certain of its subsidiaries on account of unsecured completion guaranties they had issued. The Debtors settled the litigation with the lenders to the Transeastern JV on July 31, 2007 (the "Transeastern Settlement") by obtaining new secured debt from the Prepetition Secured Lenders to pay off the Transeastern JV lenders. This new debt was secured by substantially all of the assets of the previously unencumbered Conveying Subsidiaries.

9. The Committee successfully challenged the Transeastern Settlement as a series of fraudulent conveyances. *See Official Comm. of Unsecured Creditors of TOUSA, Inc. v. Citicorp N.A., Inc. (In re TOUSA, Inc.)*, 422 B.R. 783 (Bankr. S.D. Fla. 2009). This decision was quashed on appeal to the district court, but the district court was reversed by the United States Court of Appeals for the Eleventh Circuit. *See 3V Capital Master Fund, Ltd. v. Official Comm. of*

[4] Debtor Beacon Hill at Mountain's Edge, LLC filed its chapter 11 petition on July 30, 2008.

*Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.)*, 444 B.R. 613 (S.D. Fla. 2011); *Citicorp N.A., Inc. v. Official Comm. of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.)*, 680 F.3d 1298 (11th Cir. 2012). Certain claims regarding the fraudulent conveyance litigations have been settled and certain other claims will be resolved by the Plan.

10. Pursuant to an order of the Court dated June 1, 2009, granting the Committee standing, on June 9, 2009, the Committee, on behalf of the Conveying Subsidiaries, initiated the Fiduciary Duty Action. (ECF No. 2506; Adv. Pro. No. 09-01616, ECF No. 1.) Specifically, the Committee alleged that the Defendant Directors and Officers breached their fiduciary duties by failing to act in the best interests of the Conveying Subsidiaries and all of their constituencies, including creditors, and that certain of the Settling Defendants aided and abetted those breaches. The Committee filed an amended complaint on February 19, 2010. (Adv. Pro. No. 09-01616, ECF No. 93.)

11. The Settling Defendants filed six motions to dismiss the Committee's complaint, which were opposed by the Committee. (Adv. Pro No. 09-01616, ECF Nos. 107-114, 129, 130, 171.) The Court denied each of the motions to dismiss. *Official Comm. of Unsecured Creditors of TOUSA, Inc. v. Technical Olympic, S.A. (In re TOUSA, Inc.)*, 437 B.R. 447 (Bankr. S.D. Fla. 2010). Certain of the Settling Defendants filed a motion for leave to appeal to the district court, which was denied. *Official Comm. of Unsecured Creditors of TOUSA, Inc. v. Technical Olympic, S.A. (In re TOUSA, Inc.)*, 10-62201-MC (S.D. Fla. May 23, 2011).

12. On March 22, 2011, the Committee moved to stay the Fiduciary Duty Action, which motion was granted on April 22, 2011. (Adv. Pro No. 09-01616, ECF Nos. 283, 299.) The Fiduciary Duty Action has been stayed since April 22, 2011 and the parties thereto have engaged in mediation. (Adv. Pro No. 09-01616, ECF No. 340.)

13. Prior to the Petition Date, the Settling D&O Insurers issued director and officer insurance policies to the Debtors as follows: (i) Federal Insurance Company issued Policy No. 8181-4693; (ii) Zurich American Insurance Company issued Policy No. DOC 5862274 01; (iii) St. Paul Mercury Insurance Company issued Policy No. 568CM2572; (iv) National Union Fire Insurance Company of Pittsburgh, Pa. issued Policy No. 625-16-37; (v) Arch Insurance Company issued Policy No. DOX0011857-00; (vi) AXIS Reinsurance Company issued Policy No. RAN723167; (vii) XL Specialty Insurance Company issued Policy No. ELU095600-06; (viii) National Union Fire Insurance Company of Pittsburgh, Pa. issued Policy No. 965-90-16; (ix) Westchester Fire Insurance Company issued Policy No. DOX G23821527 001; (x) AXIS Reinsurance Company issued Policy No. RAN723167/01/2006; (xi) Allied World Assurance Company (U.S.) Inc. issued Policy No. AW3259052; (xii) Beazley Insurance Company, Inc. issued Policy No. V15FA606PNDM; (xiii) Arch Insurance Company issued Policy No. ABX0019259-00.

14. The Debtors notified the Insurers of the Fiduciary Duty Action and sought coverage for the Debtors and the Defendant Directors and Officers. Certain Insurers denied coverage of the Fiduciary Duty Action and the Debtors filed the D&O Insurance Coverage Action on November 5, 2009, seeking a declaration that the Insurers are liable to cover the claims and related defense costs asserted as a result of the Fiduciary Duty Action. (Adv. Pro. No. 09-02281, ECF No. 1.)

15. Certain Insurers moved to dismiss the D&O Insurance Coverage Action and certain other Insurers moved to withdraw the reference to the district court. (Adv. Pro. No. 09-02281, ECF Nos. 86, 91, 92, 94, 96.) On March 29, 2011 the motions to dismiss were granted in part. (Adv. Pro. No. 09-02281, ECF No. 213.) On March 29, 2011 the district court entered an order denying the motion to withdraw the reference. (Adv. Pro. No. 09-02281, ECF No. 214.)

The Debtors and the Defendant Directors and Officers filed an amended complaint on May 21, 2011. (Adv. Pro. No. 09-02281, ECF No. 227.)

16. After the D&O Insurance Coverage Action was commenced, Federal and XL agreed by way of a written Interim Funding Agreement to fund the Defense Costs incurred by the Defendant Directors and Officers in connection with the Fiduciary Duty Action subject to a complete reservation of rights including, without limitation, a right of recoupment as between XL and Federal in the event coverage was determined to be afforded by one but not the other of their respective policies and a right of recoupment from the Settling Defendants if, and to the extent, it ultimately were to be determined that there is no insurance coverage for the Fiduciary Duty Action. The Court entered an order approving the interim funding agreement on January 28, 2011. (Adv. Pro. No. 09-02281, ECF No. 156.)

17. On December 11, 2009, counsel to the First Lien Term Loan Agent and the First Lien Revolver Agent sent a demand letter providing notice of alleged claims by the First Lien Term Loan Lenders and the First Lien Revolver Lenders against the Settling Defendants and others, and the Debtors notified the Insurers and sought coverage of such claims, which certain Insurers denied.

18. On December 11, 2009, counsel to Monarch Alternative Capital LP and Trilogy Capital LLC, which are Prepetition Secured Lenders, sent a demand letter providing notice of alleged claims against the Settling Defendants and others, and the Debtors notified the Insurers and sought coverage of such claims, which certain Insurers denied.

19. The Court ordered certain parties to mediation on August 27, 2010, the scope of which was expanded by the Court on October 7, 2010. (ECF Nos. 6042, 6142.)

20. The Settlement Parties, with the assistance of the Court appointed mediator, entered into mediation and engaged in good faith settlement negotiations to resolve all respective

claims asserted by (x) the Debtors, the Committee, the Prepetition Secured Lenders and the Agents against (y) the Settling Defendants and the Settling D&O Insurers, and have reached the agreement set forth in the Settlement Agreement.

21. The Debtors, the Committee and the Agents on behalf of themselves and their respective Prepetition Secured Lenders wish to preserve all claims by the Debtors, the Committee, the Prepetition Secured Lenders and the Agents against RSUI—the lone Insurer that refused to participate in the Settlement Agreement. The Settling Defendants wish to assign all rights and causes of action against RSUI to the Conveying Subsidiaries. It is the Parties' intent that, as contemplated by the Plan, the Liquidation Trust will pursue litigation against RSUI.

## DESCRIPTION OF SETTLEMENT AGREEMENT

22. Following lengthy discussions and intense negotiations over several months during the mediation process, the Settlement Parties have reached the resolution reflected in the Settlement Agreement, the general terms of which are outlined below.[5]

a. Pursuant to the Settlement Agreement, the Settling D&O Insurers shall pay $67,000,000 in the aggregate (the "Settlement Payments") to settle the Fiduciary Duty Action, the D&O Insurance Coverage Action and the Prepetition Secured Lenders' claims. The Settlement Payments will be deposited into an escrow account[6] following, *inter alia*, approval of the Motion and entry of the 9019 Order, in accordance with the terms of the Settlement Agreement and will be released from escrow (i) within five (5) business days after the Effective Date of the Plan (as defined in the Plan), or (ii) in the event that the Effective Date of the Plan has not yet occurred within six months after the Effective Date of the Settlement Agreement, then the Settlement Payments will be disbursed within five (5) business days after the date occurring six months after the Effective Date of the Settlement Agreement. The Settlement Payments will be distributed as follows: (i) $47,857,142.86 for the benefit of the unsecured creditors of the Conveying Subsidiaries (the "Unsecured D&O Recovery Payment"); (ii) $7,657,142.85 for the benefit of the First Lien Term Loan Lenders and the First Lien Revolver Lenders (the "First Lien Payment"); and (iii) $11,485,714.28 for

[5] To the extent the description herein conflicts with the terms of the Settlement Agreement, the terms of the Settlement Agreement control.

[6] A draft escrow agreement is appended to the Settlement Agreement as Annex B. The anticipated parties to this escrow agreement expect to enter into it in a form substantially similar to that set forth in Annex B.

the benefit of the Second Lien Term Loan Lenders (the "Second Lien Payment" and, together with the Unsecured D&O Recovery Payment and the First Lien Payment, the "Settlement Recoveries"). The Settlement Recoveries shall be distributed in accordance with the terms of the Plan.

b. Certain of the Settling D&O Insurers shall pay the Defense Costs of the D&O Defense Counsel, subject to the terms and caps provided for in the Settlement Agreement. Specifically, XL and Federal shall pay up to $8,270,000 for fees and expenses incurred prior to March 19, 2013, and XL Bermuda shall pay up to $250,000 for fees and expenses incurred from and after March 19, 2013.

c. Each Settlement Party shall grant releases to the other Settlement Parties as provided for in the Settlement Agreement.

d. In consideration for the Payments, the Settling D&O Insurers shall receive a policy release for each of the Insurance Policies.

e. The Settling D&O Insurers and the Settling Defendants shall receive a Bar Order barring the prosecution of D&O Insurance Coverage Released Claims, among other claims, including for indemnity and contribution, and providing for a judgment reduction mechanism with respect to any awards obtained against Barred Persons relating to the claims subject to the Bar Order.

f. The Defendant Directors and Officers shall assign all claims and causes of action against RSUI to the Debtors for the benefit of the estates of the Conveying Subsidiaries and the Prepetition Secured Lenders. The Parties intend that the Liquidation Trust will prosecute claims against RSUI for the benefit of the unsecured creditors of the Conveying Subsidiaries and the Prepetition Secured Lenders.

g. On the Settlement Effective Date, the Fiduciary Duty Action will be dismissed with prejudice and the D&O Insurance Coverage Action will be dismissed as against the Settling D&O Insurers, but will continue as against RSUI.

## RELIEF REQUESTED

23. The Parties believe that the Settlement Agreement represents a fair and reasonable settlement and compromise of the matters addressed therein. The Settlement Agreement will result in an immediate and substantial recovery to the Conveying Subsidiaries and their estates, while at the same time alleviating the financial burden and uncertainty attendant with continued litigation of the Fiduciary Duty Action and the D&O Insurance Coverage Action. Accordingly, the Parties, with the full support of the Agents, on behalf of themselves and their respective

Prepetition Secured Lenders, respectfully request that the Court enter an order, identical to the form attached to the Settlement Agreement as Annex A, pursuant to Bankruptcy Code section 363 and Bankruptcy Rule 9019 approving the Settlement Agreement.

## SUPPORTING AUTHORITY

### A. Standard to be Applied by the Bankruptcy Court

24. Bankruptcy Code section 105(a) authorizes the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). In practice, section 105(a) of the Bankruptcy Code grants bankruptcy courts broad statutory authority to enforce the Bankruptcy Code's provisions either under the specific statutory language of the Bankruptcy Code or under equitable common law doctrines. *See Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994) ("It is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process.").

25. In some instances, a compromise or settlement under Bankruptcy Rule 9019 is considered to be a use of property of the estate outside the ordinary course of business under Bankruptcy Code section 363(b). *See, e.g.*, *Northview Motors, Inc. v. Chrysler Motors Corp.*, 186 F.3d 346, 350–51 (3d Cir. 1999) (noting that settlements and compromises are generally considered to be a use of property of the estate). To the extent that the proposed entry into and performance of the Settlement Agreement is viewed as a use of estate property, the requested relief should be considered under the business judgment standard. *See, e.g.*, *In re Friedman's Inc.*, 336 B.R. 891, 895 (Bankr. S.D. Ga. 2005) ("Courts review a debtor's use of estate property outside of the ordinary course of business pursuant to a debtor's demonstration of sound business judgment"); *In re Phx. Steel Corp.*, 82 B.R. 334, 335–36 (Bankr. D. Del. 1987) (stating that

judicial approval under section 363 of the Bankruptcy Code requires a showing that the proposed action is supported by, among other things, a good business reason).

26. In exercising its review under both Bankruptcy Code section 363(b) and Bankruptcy Rule 9019, a bankruptcy court gives weight to the estate representative's sound business judgment. *See, e.g., In re Lorraine Brooke Assocs., Inc.*, No. 07-12641-AJC, 2007 WL 2257608, at *4 (Bankr. S.D. Fla. Aug. 2, 2007) (approving a sale pursuant to a settlement agreement under Bankruptcy Code section 363 and finding the agreement to be within the sound business judgment of the trustee); *Abeles v. Infotechnology, Inc. (In re Infotechnology, Inc.*), No. 95-5024, 1995 WL 723099, at *2 (2d Cir. Nov. 9, 1995) (noting that in determining whether to approve a debtor's motion to settle a controversy, a court does not substitute its judgment for that of the debtor).

27. In the instant case, the Committee, the Debtors, and the Agents, on behalf of themselves and their respective Prepetition Secured Lenders, in their respective sound business judgment, believe that entering into and performing under the Settlement Agreement is fair and equitable, and is in the best interests of the Debtors' estates and their creditors. As outlined herein, the financial benefits associated with entry into the Settlement Agreement outweigh any potential benefit in declining to settle. Indeed, the Settlement Agreement is the product of good faith negotiations among the Settlement Parties spanning many months and facilitated by the Court-appointed mediator. Lastly, the Settlement Parties are hopeful that once the Settlement Agreement is approved the Parties can quickly move towards confirmation of the Plan.

28. Bankruptcy Rule 9019(a) authorizes a debtor in possession to compromise and settle claims, subject to approval by the Court. *See* Fed. R. Bankr. P. 9019(a) ("On motion by the [debtor in possession] and after notice and a hearing, the court may approve a compromise or

settlement."). The decision to approve a particular settlement lies within the sound discretion of the bankruptcy court. *See Nellis v. Shugrue*, 165 B.R. 115, 122–23 (S.D.N.Y. 1994)

29. "Settlements are generally favored in bankruptcy proceedings, in that they provide for an often needed and efficient resolution in a bankruptcy case." *Tindall v. Mavrode (In re Mavrode*), 205 B.R. 716, 719 (Bankr. D. N.J. 1997); *see also In re Stein*, 236 B.R. 34, 37 (D. Or. 1999) ("Pursuant to Bankruptcy Rule 9019(a), compromises are favored in bankruptcy . . .").

30. A central inquiry in determining whether to approve a settlement or compromise under Bankruptcy Rule 9019 is whether the proposed settlement is "fair and equitable," and is in the best interests of the estate. *See, e.g.*, *In re Degenaars*, 261 B.R. 316, 319 (Bankr. M.D. Fla. 2001) (citing *In re Kay*, 223 B.R. 816, 819 (Bankr. M.D. Fla. 1998) ("A court should approve a compromise if the compromise is fair and equitable and in the best interest of an estate")); *see also Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd*.), 898 F.2d 1544, 1549 (11th Cir. 1990) (setting forth four factors to be considered in review of settlements).

31. The standard for approving a settlement or compromise is well established. The court must evaluate whether the proposed compromise falls below the "lowest point in the range of reasonableness." *Martin v. Pahiakos (In re Martin)*, 490 F.3d 1272, 1275–76 (11th Cir. 2007) (citing *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983)). Approval of a settlement "does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable." *Fla. Trailer and Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). Rather, the court's responsibility is only to "canvass the issues and see 'whether the settlement fall[s] below the lowest point in the range of reasonableness.'" *In re W.T. Grant Co.*, 699 F.2d at 608 (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). Accordingly, if a settlement passes this low threshold, the court should approve the compromise.

32. More specifically, in evaluating a proposed settlement or compromise of litigation pursuant to Bankruptcy Rule 9019, a court in this District must consider the four factors set forth by the Eleventh Circuit in *Justice Oaks II* (the "*Justice Oaks II* Factors"):

> (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; [and] (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

898 F.2d at 1549. Each of the *Justice Oaks II* Factors is met by the Settlement Agreement for the reasons explained below.

**B. Application to the Settlement Agreement**

33. Applying each of these factors to the circumstances of these cases, it is readily apparent that the Settlement Agreement falls well above the lowest point in the range of reasonableness and, accordingly, should be approved.

*(i) Probability of success in the litigation*

34. First, although the Settlement Parties are confident with respect to the merits of their respective claims and defenses in the Fiduciary Duty Action and the D&O Insurance Coverage Action, as well as the Prepetition Secured Lender Claims, no litigation can be predicted with certainty. Here, the Settlement Agreement provides the Conveying Subsidiaries' estates and the Prepetition Secured Lenders with a guaranteed recovery, subject to the terms of the Settlement Agreement. Despite the Settlement Parties' confidence in the strength of their claims and defenses, continued litigation cannot guarantee success for any Settlement Party. Indeed, both the Settling D&O Insurers and the Settling Defendants assert that they have strong arguments in the Fiduciary Duty Action and the D&O Insurance Coverage Action, respectively. Thus, entering into the Settlement Agreement provides the Settlement Parties with a guaranteed recovery and satisfies the first *Justice Oaks II* Factor.

*(ii) Difficulties to be encountered in the matter of collection*

35. Second, consistent with the second *Justice Oaks II* Factor, the Settlement Agreement eliminates any potential collection risk with respect to the Settling D&O Insurers and assures timely payment. Because the Settlement Payments will be paid to the Escrow Agent upon the Payment Date, the Settlement Agreement provides certainty of collection. Conversely, in the absence of the Settlement Agreement there is the risk that the Fiduciary Duty Action could be found not to be covered by the Insurance Policies, leaving the Committee with a significant risk of being unable to collect from the Defendant Directors and Officers should it obtain a judgment in its favor.

*(iii) Complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending*

36. Third, the Fiduciary Duty Action, D&O Insurance Coverage Action and the Prepetition Secured Lender Claims are, without question, complex litigations and claims. The Fiduciary Duty Action involves twenty defendants and many complicated issues of law and fact. If discovery in the Fiduciary Duty Action were to continue, it is anticipated that the parties would need to engage in extensive document review and analysis. Moreover, each of the Settling Defendants would need to be deposed, as would various third parties, some of whom reside outside the United States. The costs of litigating the Fiduciary Duty Action through trial and potential appeals could be very high. Indeed, the parties to this litigation have already incurred millions of dollars in fees and expenses, and the Fiduciary Duty Action is still in the nascent phases of discovery.

37. In order to realize a significant recovery in the Fiduciary Duty Action, the D&O Insurance Coverage Action would also have to be prosecuted successfully to conclusion, including through any appeals, or else the only assets available to recover against in the Fiduciary Duty Action would be the personal assets of the Defendant Directors and Officers and

the assets of TOSA. The D&O Insurance Coverage Action involves twenty-one plaintiffs and fourteen defendants, and discovery has not commenced. The costs of litigating the D&O Insurance Coverage Action would be significant. Given the foregoing, entry into the Settlement Agreement is a fair compromise for all of the Settlement Parties as it provides a guaranteed recovery to unsecured creditors and the Prepetition Secured Lenders, regardless of the unpredictable nature of these complex litigations without the attendant costs of litigation.

*(iv) Paramount interest of the creditors and a proper deference to their reasonable views in the premises*

38. Finally, consistent with the fourth *Justice Oaks II* Factor, the Committee, the Debtors and the Agents on behalf of themselves and their respective Prepetition Secured Lenders, support entry into the Settlement Agreement. In connection with their analysis of the proposed settlement, the Parties reviewed the potential economic impact on their respective constituents, weighed the relevant costs and benefits and concluded that the benefits outweigh the costs. The Settlement Agreement provides $47,857,142.86 to the Conveying Subsidiaries for the benefit of the estates of the Conveying Subsidiaries and such estates' unsecured creditors, $7,657,142.85 for the benefit of the First Lien Term Loan Lenders and the First Lien Revolver Lenders, and $11,485,714.28 for the benefit of the Second Lien Term Loan Lenders. These amounts represent significant value to the Conveying Subsidiary Distribution and the Prepetition Secured Lenders that might not be realized absent the Settlement Agreement. As such, the Parties believe that the Settlement Agreement is fair and equitable with respect to all Settlement Parties.

39. Accordingly, the Parties believe that the terms of the Settlement Agreement satisfy the *Justice Oaks II Factors*, and should be approved.

**C. The Bar Order is Appropriate and Warranted**

40. The Bar Order is a necessary and material component of the Settlement Agreement. *See In re Rothstein Rosenfeldt Adler, PA*, No. 09-34791-BKC-RBR, 2010 WL 3743885, at *7 (Bankr. S.D. Fla. Sept. 22, 2010) (granting a bar order of a settlement agreement because, among other things, the bar order was a critical required term of the settlement agreement and was necessary to achieve the complete resolution of the issues contained in the Settlement Agreement, without which the settling parties would not proceed with the Settlement Agreement). Contribution bars facilitate settlement because "[d]efendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation." *Munford v. Munford, Inc. (In re Munford, Inc.)*, 97 F.3d 449, 455 (11th Cir. 1996) (alterations in original) (quotations omitted). This is especially true here, where additional parties were named in the D&O Insurance Coverage Action—specifically, RSUI—that are not included in the group of parties receiving mutual releases pursuant to the Settlement Agreement.

41. Contribution bars are routinely entered in connection with settlement agreements. *See, e.g., Eichenholtz v. Brennan*, 52 F.3d 478, 486 (3d Cir. 1995) ("Many states have enacted settlement bar statutes, which allow a bar to the right of contribution if the settlement is made in good faith and the non-settling defendants are entitled to a setoff against any judgment ultimately entered against them."); *Schadel v. Iowa Interstate R.R. Ltd.*, 381 F.3d 671, 677 (7th Cir. 2004) (affirming approval of contribution bar with judgment reduction); *Scholes v. Stone, McGuire & Benjamin*, 839 F. Supp. 1314, 1320 (N.D. Ill. 1993) (entering contribution bar in conjunction with good faith finding). The Bar Order and its judgment reduction provisions also serve the strong public policies in favor of settlement. *See, e.g., In re Mavrode*, 205 B.R. at 719.

42. For all of the foregoing reasons, the Parties respectfully request that this Court approve the Settlement Agreement.

**NOTICE**

43. Notice of the Motion has been provided: (a) to the Office of the United States Trustee for the Southern District of Florida; (b) to the Internal Revenue Service; (c) to the Securities and Exchange Commission; (d) to all parties who have filed notices of appearance and requests for pleadings in these chapter 11 cases; and (e) in accordance with Section 14 of the Settlement Agreement. In light of the nature of the relief requested, the Parties respectfully submit that no further notice is necessary.

WHEREFORE, the Parties respectfully request the entry of an order approving the Settlement Agreement, and providing such other and further relief as the Court deems just and proper.

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Dated: June 6, 2013

Respectfully Submitted,

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