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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: § CASE NO. 09-33886
PROVIDENT ROYALTIES, LLC, *et al.*, §
Debtors. § Chapter 11
§ (Jointly Administered)
§

**MOTION FOR APPROVAL OF SETTLEMENT AND COMPROMISE
WITH DIRECTOR AND OFFICER DEFENDANTS
AND RESOLUTION OF RELATED ADVERSARY PROCEEDING**

TO THE HONORABLE HARLIN D. HALE, UNITED STATES BANKRUPTCY JUDGE:

Milo H. Segner, Jr. (the “Trustee”), as the duly-appointed Liquidating Trustee of the PR Liquidating Trust (the “Trust”) pursuant to the confirmed *Fourth Amended Consolidated Plan of*

Liquidation for Debtors' Estates Under Chapter 11 of the United States Bankruptcy Code [Docket No. 748] (the "Plan"),¹ files his *Motion for Approval of Settlement and Compromise with Director and Officer Defendants and Resolution of Related Adversary Proceeding* (the "Motion"). In support of the Motion, the Trustee respectfully states as follows:

I. BACKGROUND

A. Jurisdiction and Venue

1. The Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157(a) and 1334 and Article XIII of the Plan. The Motion constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and (O). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are section 105 of title 11 of the United States Code, § 101, *et seq.* (the "Bankruptcy Code") and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

B. General Overview of the Bankruptcy Cases and the Transfer of the Causes of Action to the Trust

3. On June 22, 2009 (the "Petition Date"), the Debtors filed their respective voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, thereby initiating the above-referenced cases with the Court (collectively, the "Bankruptcy Cases").

4. On June 10, 2010, the Court entered the Confirmation Order, thereby confirming the Plan. On June 14, 2010 (the "Effective Date"), all conditions precedent to the effectiveness of the Plan were satisfied or waived and the Plan became effective.

5. On or about the Effective Date and pursuant to section 6.2.2. of the Plan, the Initial Trust Assets (as defined in the Plan) were transferred to and vested in the Trust. The Initial Trust Assets included the Causes of Action. *See* Plan § 1.1.53. The Causes of Action, as defined by

¹ The Court entered its order [Docket No. 860] (the "Confirmation Order") confirming the Plan on June 10, 2010.

section 1.1.21. of the Plan, included, among other things, any action, cause of action, or suit for damages related to or based on: (i) fraud, negligence, gross negligence, willful misconduct, or any tort actions, (ii) violations of federal or state securities laws, (iii) violations of applicable corporate or partnership laws, (iv) breaches of fiduciary or agency duties, or (v) causes of action based upon alter ego or other liability theories.

6. Additionally, pursuant to section 6.2.6. of the Plan, the Trustee was appointed as the Liquidating Trustee of the PR Liquidating Trust.

C. The D&O Adversary Proceeding

7. On March 9, 2011, the Trustee filed his *Original Complaint* (the “Complaint”) against Robert Jordan (“Jordan”), Mark Miller (“Miller”), Brian Grindem (“Grindem”), Keith Flowers (“Flowers”), Paul Melbye (“Melbye”), Brendan Coughlin (“Coughlin”), and Henry Harrison (“Harrison”) (collectively, the “D&O Defendants”), thereby commencing Adversary Proceeding No. 11-03148-HDH, styled *Segner vs. Jordan, et al.* (the “Adversary Proceeding”). Through the Complaint, the Trustee asserted, among other things, common law officer and director liability claims and fraudulent transfer claims against the D&O Defendants.

8. On or about July 14-15, 2011, the Trustee attended mediation with the D&O Defendants (the “Mediation”). Christopher Nolland was the mediator for the Mediation. The Mediation was also attended by Navigators Insurance Company, Beazley Insurance Company, and the United States Securities and Exchange Commission (the “SEC”).

9. At the conclusion of the Mediation, the Trustee and the “Presently Settling D&O Defendants” Jordan, Miller, Grindem, Flowers and Melbye agreed to the terms of a settlement and compromise of the Adversary Proceeding and all the Trustee’s claims against the D&O Defendants asserted therein. The Trustee contends a settlement was also reached with the “Remaining Defendants” Harrison and Coughlin and may be moving to enforce the settlement as to them. The

Remaining Defendants contend otherwise. The Trustee and the Presently Settling D&O Defendants have prepared, signed, and, subject to the Court's approval, intend to consummate that certain Settlement and Mutual Release Agreement (the "Agreement"). A true and correct copy of the Agreement is attached hereto as Exhibit A and incorporated herein for all purposes.

II. RELIEF REQUESTED

10. By and through the Motion and pursuant to Bankruptcy Rule 9019, the Trustee respectfully requests the Court to approve that certain Agreement attached hereto as Exhibit A.²

A. **Terms of the Settlement Agreement**

11. By and through the Agreement, the Trustee and the Presently Settling D&O Defendants will settle and otherwise resolve certain claims. The following is a summary of the salient terms and conditions of the Agreement:

- a. Jordan, Miller, Grindem, and Flowers have each already paid \$100,000.00 into the escrow account of the PR Liquidating Trust.
- b. Melbye has already paid \$300,000.00 into the escrow account of the PR Liquidating Trust. The \$700,000 total of these amounts is the "Settlement Amount."
- c. The Trustee hereby acknowledges receipt of \$100,000.00 each from Jordan, Miller, Grindem, and Flowers and \$300,000.00 from Melbye, into the escrow account of the PR Liquidating Trust for purposes of funding their obligations under the Settlement. When the Order approving the Settlement Agreement becomes final, the Trust may take full possession and ownership of the \$700,000 Settlement Amount.
- d. Dismissal of the Adversary Proceeding. Within 5 business days of the Order approving the Settlement Agreement becoming final, the Trustee will dismiss the Adversary Proceeding with prejudice as to the Presently Settling Defendants only, but not as to the Remaining Defendants whose settlement will also need to be enforced and approved by the Court.
- e. Release Granted to the D&O Defendants. Within 5 days of the Agreement becoming effective and contingent on the Trust receiving full possession and ownership of the Settlement Amount, the Trustee, in his capacity as the Liquidating Trustee of the PR Liquidating Trust, for and on behalf of the

² This Motion, along with a Notice of Hearing thereon, will be served on all remaining creditors of the Debtors on or about December 21, 2011.

Trust, will release all claims held by the Trust on behalf of the Debtors, Debtors' Bankruptcy Estate as well as his/their respective agents, attorneys and any successors, and on behalf of any investors in the Debtors who assigned their claims to the Trust, fully, generally, unconditionally, and irrevocably release as to only each of the Presently Settling D&O Defendants and all of their respective successors and attorneys, but not otherwise, so that the Remaining Defendants receive no release, whether directly, indirectly or by operation of law from the Settlement by the Presently Settling Defendants. Even if an investor did not assign his claims to the Trust, this settlement by law may eliminate that investor's ability to bring any shareholders' derivative action against the Presently Settling Defendant Officers and Directors for the type claims brought in the Adversary.

- f. Release Granted to the Trustee, the Trust, the Debtors and the Debtors' Estate and Investors Who Assigned Their Claims to the Trust. Within 5 days of the Agreement becoming effective and contingent on the Trust receiving the Settlement Amount, each of the Presently Settling D&O Defendants as well as their respective agents, attorneys and any successors, fully, generally, unconditionally, and irrevocably release the Trustee, the Trust, the Debtors and the Debtors' Estate and all of their respective successors and attorneys, and all investors who assigned their claims to the Trust.
- g. Effect of Failure to Obtain Court Approval. In the event the Court elects not to approve the Motion and the Agreement, the Agreement shall be null and void and of no further force or effect whatsoever. In such circumstances, neither the fact of the Parties' negotiation of, nor their entry into the Agreement, nor any of the Parties' statements made in connection therewith, shall be utilized by any Party, offered or admitted into evidence at any trial or hearing, disclosed to persons other than the Parties, or used in any other fashion except as may be required by applicable law or permitted by court order.
- h. Effect of a Reversal on Appeal of Order. If, after exhaustion of all appeals, any order approving the Motion and the Agreement is reversed in whole or in any material part, the Agreement shall be null and void and of no further force or effect whatsoever. In such circumstances, neither the fact of the Parties' negotiation of, nor their entry into the Settlement Agreement, nor any of the Parties' statements made in connection therewith, shall be utilized by any Party, offered or admitted into evidence at any trial or hearing, disclosed to persons other than the Parties, or used in any other fashion except as may be required by applicable law or permitted by court order.

12. The Agreement represents a negotiated, arm's length resolution of any and all past, current, and future disputes and claims between the Parties.

III. BASIS FOR RELIEF REQUESTED

13. Bankruptcy Rule 9019 grants a court the authority to approve a compromise or settlement after notice and a hearing. FED. R. BANKR. P. 9019. Under this authority, courts have routinely approved compromises and settlements that minimize litigation and benefit the bankruptcy estate. See *In re Mirant Corp.*, 334 B.R. 800, 811 (Bankr. N.D. Tex. 2005) (stating “[o]ne of the goals of Congress in fashioning the Bankruptcy Code was to encourage parties in a distress situation to work out a deal among themselves”); see also *Marandas v. Bishop (In re Sassalos)*, 160 B.R. 646, 653 (D. Or. 1993) (stating that “compromises are favored in bankruptcy”). Whether to approve or deny a compromise involving the bankruptcy estate is committed to the discretion of the bankruptcy court; an appellate court will reverse the bankruptcy court’s decision only when the bankruptcy court abused its discretion. *In re Jackson Brewing Co.*, 624 F.2d 599, 602-03 (5th Cir. 1980).

14. In deciding whether to approve a proposed settlement agreement or compromise of controversy, a court should consider the following factors:

- a. the probability of success on the merits and the resolution of the dispute;
- b. the complexity of the litigation being settled;
- c. the expense, inconvenience, and delay associated with litigating the dispute; and
- d. all other factors bearing on the wisdom of the compromise, such as the paramount interests of creditors with proper deference to their reasonable views.

Conn. Gen. Life Ins. Co. v. United Companies Fin. Corp. (In re Foster Mortgage Corp.), 68 F.3d 914, 917 (5th Cir. 1995); see also *Jackson Brewing*, 624 F.2d at 602 (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968); *Drexel v. Loomis*, 35 F.2d 800, 806 (8th Cir. 1929)).

15. When considering these factors, a court should determine whether the settlement is “fair and equitable” as a whole instead of focusing on one factor in particular. *Jackson Brewing Co.*,

624 F.2d at 602. Finally, settlements should be allowed unless they fall below the lowest point of the range of reasonableness. *See In re W.T. Grant Co.*, 699 F.2d 599, 608 (2nd Cir. 1983); *see also In re Nw. Corp.*, 2004 WL 1661012 at *3 (Bankr. D. Del. July 23, 2004).

16. Applying the foregoing standards, the Court's approval of the Agreement is warranted under the circumstances. Although the Trustee believes that he would ultimately prevail on his claims against the D&O Directors, the outcome of the Adversary Proceeding, like the outcome of all litigation, is uncertain. Moreover, litigating the Trustee claims against the D&O Directors to final conclusion would be a lengthy, expensive endeavor, which could include multiple appeals.

17. Additionally, the approval and consummation of the Agreement is in the best interests of all parties-in-interest. The Agreement provides for a total of \$700,000.00³ to be paid to the Trustee for the benefit of the Trust, which was created to benefit the numerous investors harmed by the D&O Defendants' actions.

18. Therefore, the Trustee believes, in his business judgment, that the Agreement and the terms thereof are fair and equitable and in the best interests of all parties-in-interest under the circumstances and should be approved.

IV. PRAYER

WHEREFORE, the Trustee respectfully requests entry of an order: (i) approving the Agreement and all terms contained therein; and (ii) granting related relief as is just and proper.

DATED: December 16, 2011

³ Although the Trustee and the Trust, along with the Debtors and Debtors' Estate, are releasing any and all claims against the Presently Settling D&O Defendants in exchange for payment of the Settlement Amount of \$700,000.00, there exists the possibility that the Trust may receive additional recoveries from the Remaining Defendants.

Respectfully submitted,

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