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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re	Case No. 03-32715-DM7
BROBECK, PHLEGER & HARRISON LLP,	Chapter 7
Debtor.	**NOTICE OF MOTION AND MOTION FOR ORDER (A) APPROVING SETTLEMENT AGREEMENTS WITH 189 FORMER PARTNERS OF THE DEBTOR; (B) FINDING THAT THE SETTLEMENTS ARE IN GOOD FAITH; (C) STAYING LITIGATION BETWEEN TRUSTEE AND SETTLING PARTNERS PENDING EFFECTIVENESS OF SETTLEMENTS; (D) AUTHORIZING ADDITIONAL SETTLEMENTS WITH FORMER PARTNERS UNDER BANKRUPTCY RULE 9019(B); AND (E) LIMITING SCOPE OF NOTICE OF MOTION**
	Hearing Date
	Date: March 21, 2005
	Time: 9:30 a.m.
	Dept: Courtroom 22
	235 Pine Street, 22nd Floor
	San Francisco, CA 94104
	Judge: Hon. Dennis Montali

TABLE OF CONTENTS

PLEASE TAKE NOTICE THAT, on March 21, 2005, at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 22 located at 235 Pine Street in San Francisco, California, the Honorable Dennis Montali, United States Bankruptcy Judge, will hold a hearing on this Motion filed by Ronald F. Greenspan, chapter 7 trustee (the "Trustee") for Brobeck, Phleger & Harrison LLP ("Brobeck"). Pursuant to Rules 7007-1(b) and 9014-1(c)(1) of the Bankruptcy Local Rules of the United States District Court for the Northern District of California, **any objection to the relief requested in this Motion must be filed with the Bankruptcy Court and served upon counsel for the Trustee at the address noted above so as to be received at least fourteen (14) days prior to the date of the hearing.** Only those parties who have timely filed and served responses will be heard at the hearing. If there is no timely objection to the requested relief, the Court may enter an order granting such relief without further notice or hearing.

I. RELIEF REQUESTED

By this Motion, the Trustee moves this Court for the entry of an order, substantially in the form of the proposed order attached hereto as Exhibit A, (a) approving the agreements and mutual releases (together, the "Settlement Agreements"), which provide for the settlement of claims of the Brobeck estate against approximately 189 former Brobeck partners (together, the "Settling Partners"); (b) finding that the settlements and releases embodied in the Settlement Agreements have been entered into and made in good faith within the meaning of sections 877 and 877.6 of the California Code of Civil Procedure; (c) staying litigation between the Trustee and the Settling Partners pending the approval of the Settlement Agreements pursuant to this Motion; (d) authorizing the Trustee, pursuant to Rule 9019(b) of the Federal Rules of Bankruptcy Procedure, to enter into mutual releases, under the terms of the MLB/CC Settlement Agreement, with certain non-Settling Partners; and (e) limiting the scope of notice required to be given of this Motion to the parties identified below.

This Motion is based upon the record in this case, the accompanying Declaration of Ronald F. Greenspan (the "Greenspan Declaration") and the facts and argument set forth below.

II. INTRODUCTION

1. By this Motion, the Trustee seeks, among other things, this Court's approval of the Settlement Agreements, which provide for the settlement of claims of the Brobeck estate against the Settling Partners.[1] Under the settlements with Settling Partners, substantially all claims of the estate will be released and returned for cash payments, set forth by partner on Exhibit A to the Greenspan Declaration. These settlements total in excess of $22,409,719, range from $4,732 to over $500,000, and average approximately $118,570 per partner.[2] (The terms of the settlements are described in detail in Paragraphs 52 to 57 below.) In order to provide a comprehensive depiction of the bases of the Settlement Agreements, this Motion lays out the process and results of the Trustee's investigation into the reasons for Brobeck's financial collapse. This Motion also lays out in detail

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[1] The settlements fall into two groups, depending on whether the Settling Partner was already the beneficiary of a release of so-called *Jewel* claims in connection with the settlement agreements previously approved by this Court with Morgan, Lewis & Bockius LLP ("Morgan Lewis") and Clifford Chance, respectively. As set forth in detail below, the partners who went to these firms are already beneficiaries of a limited release of estate claims previously approved by the Court in connection with the approval of the settlement agreements with the respective law firms. The Settling Partners in this category (together, the "MLB/CC Settling Partners") will receive an individual, express release of so-called *Jewel* claims in their respective Settlement Agreements (together, the "MLB/CC Settlement Agreements") and are listed on the schedule attached hereto as Exhibit B. Other partners (together, the "Non-MLB/CC Settling Partners") will receive a release, which excludes *Jewel* claims under their proposed Settlement Agreements (together, the "Non-MLB/CC Settlement Agreements") and are listed on the schedule attached hereto as Exhibit C. The form of the MLB/CC Settlement Agreement is attached hereto as Exhibit D, and the form of the Non-MLB/CC Settlement Agreement is attached hereto as Exhibit E. The form of Settlement Agreement with Stephen M. Snyder, redacted to delete the settlement amount, is attached hereto as Exhibit F.

[2] Because the Trustee has described in detail the methodology used to determine settlement amounts, the Trustee believes it is unnecessary and would violate the legitimate privacy interests of Settling Partners to reveal the individual settlement payment due from each on the public record. For that reason, the form of the Greenspan Declaration filed publicly redacts Exhibit A, and a motion to seal the unredacted Greenspan Declaration has been filed concurrently with this Motion. The Trustee or his counsel will make available this information, as well as copies of the individual Settlement Agreements, to any objecting party subject to an appropriate confidentiality agreement. Copies of the Settlement Agreements will also be available to the Court at the hearing on this Motion.

the reason for the Trustee's conclusion that prior to 2001, Brobeck placed an unwarranted "big bet" on continued, accelerated growth during the dot com bubble by undertaking leases for expensive, unused office space, making costly tenant improvements, and incurring massive bank borrowings to maintain partner cash flow. As a result, prior to January 1, 2001, it was evident that Brobeck would not be able to pay its lease obligations and bank debt and general creditors in the usual or ordinary course of business. The following section describes the legal remedies available to the bankruptcy estate for the return of distributions made to partners while Brobeck was insolvent in 2001 and 2002, as well as other legal remedies against partners.

2. These factual and legal conclusions are the bases for complaints filed by the Trustee in January 2005, which are part of the public record. In order to understand the settlements, it is critical to understand what preceded the filing of the complaints. For that reason, the Trustee has described the efforts he undertook to develop fair and reasonable settlement proposals, which the Trustee extended to all former Brobeck partners (together, the "Former Partners") who received distributions in 2001 and 2002. In particular, the Trustee describes how he developed a formula applying consistent rules to each former partner, which was reflective of the traditional settlement factors - most notably the risks of collection, cost and delay in litigation, and legal risks. This Motion also contains a description of his initial proposal to all Former Partners in November 2004, his revised proposal to former partners in mid-January, 2005, and the series of meetings and presentation where he undertook, together with his professionals, to present the proposals and obtain feedback from former partners. Lastly, the Trustee describes the final phase of discussions with former partners, involving a last round of adjustments to settlement proposal reflective of feedback received in response to his revised proposal.

3. The Trustee believes these settlements, which are supported fully by the largest creditors of this estate, represent a major achievement and are well within the standards for approval of a settlement as fair and reasonable under applicable law. As a result of these settlements, and prior settlements and collection upon other assets, the estate is likely to be in a position to make a

substantial interim distribution to creditors in 2005, following reconciliation of claims filed in the case. The settlements will also provide the estate with ample resources to pursue litigation against non-Settling Partners in the adversary proceedings initiated by the Trustee earlier this year. As a result, the Trustee is hopeful that creditors will receive ultimate distributions in the case on a substantial fraction of their claims, depending on the outcome of litigation against non-Settling Partners, realization upon other assets of the estate, and the ultimate allowed amount of claims.

4. For the reasons described below, the Trustee submits that the proposed settlement with the Settling Partners is well within the range of reasonableness and in the best interests of the estate. By this Motion, the Trustee therefore requests that the Court approve the Settlement Agreements and grant the other relief requested herein so that the bankruptcy estate can reap the benefits of the hard-fought and well-earned compromises described in greater detail below.

III. BACKGROUND

The Trustee's Investigation into Brobeck's Financial Collapse

5. In 2004, the Trustee and his professionals undertook to investigate the facts and circumstances surrounding Brobeck's collapse. The Trustee did so with an open mind and without bias. His investigation included, among other things, the following:

- Obtaining and evaluating Brobeck's historical financial statements, and other files and records, including internal presentations made to Former Partners;
- Performing an extensive review and analysis of the financial audit files for 2000 (KPMG) and 2001-02 (PricewaterhouseCoopers);
- Conducting interviews with the firms that prepared Brobeck's tax returns for 2000 (KPMG) and 2001-02 (PricewaterhouseCoopers);
- Conducting interviews with members of the Liquidation Committee (as that term is defined herein) and individual partners;
- Conducting interviews with Citibank, Brobeck's lead lender;

- Obtaining and evaluating due diligence materials prepared by Morgan Lewis in conjunction with the failed merger discussions with Brobeck in 2003, including term sheets and detailed analyses of Brobeck's leases and other assets;

- Reviewing materials assembled by Latham & Watkins LLP, Brobeck's former general counsel;

- Developing an understanding of Brobeck's compensation philosophy and partner distribution methodology, including the allocation of distributions, partner bonuses (signing and year-end), and participation in investment funds.

- Evaluating stock participation agreements and memoranda;

- Evaluating records of Participated Investments (as that term is defined herein) maintained by Burr, Pilger & Mayer LLP, Brobeck's former accountants and accounts to the estate;

- Examining internal documentation regarding Brobeck's operations and leadership structure; and

- Obtaining and analyzing the contemporaneous monthly partner draw statements and annual re-caps maintained by Brobeck.

6. The following summarizes the Trustee's conclusions, which also form the basis of the Trustee's claims for relief against former partners.

A. Brobeck's Formation.

7. Brobeck was organized as a general partnership under the California Uniform Partnership Act by adoption of a General Partnership Agreement dated as of September 1, 1989, of Brobeck, Phleger & Harrison (the General Partnership Agreement, as thereafter amended and restated, through and including that certain Amendment No. 6 dated March 15, 2002, to that certain

Amended and Restated General Partnership Agreement dated as of March 15, 1999, shall be referred to herein as the "Amended and Restated General Partnership Agreement").

8. As acknowledged in Section 1(b) of the Amended and Restated General Partnership Agreement, Brobeck was governed by the Revised Uniform Partnership Act, Cal. Corp. Code § 16100 et seq. ("RUPA").

B. Brobeck's Registration as a Limited Liability Partnership.

9. Brobeck filed a registration as a limited liability partnership on or before September 30, 1997, pursuant to Section 16953 of RUPA.

10. At all relevant times, Brobeck was subject to Section 16957 of RUPA, which, in pertinent part, (a) prohibits transfers of money or property to the partners of a limited liability partnership on the terms and conditions stated therein (Cal. Corp. Code § 16957(a)(1) and (2)); and (b) provides a cause of action to the limited liability partnership to recover wrongful distributions within four years of such distributions (*id*. § 16957(b)). Section 16957 is a "no fault" remedy. No showing of malfeasance or negligence or other culpable conduct is necessary.

11. At all relevant times, Brobeck was subject to Section 16401 of RUPA. Accordingly, the Brobeck partners were "not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership." Cal. Corp. Code § 16401(h) (2004).

C. Brobeck's "Big Bet" on Continual Rapid Growth and Incurrence of Excessive Liabilities.

12. Prior to its dissolution, Brobeck had been a prominent national law firm with as many as 900 lawyers and offices in California, New York, Colorado, Virginia, Texas, Washington D.C., and, through a joint venture, in London, United Kingdom.

13. In the late 1990s and early 2000s, Brobeck adopted a business plan, which required continual rapid growth. Fueled by a booming technology-sector practice, Brobeck rapidly expanded through 2000, nearly doubling the number of its attorneys in just over three years. During that

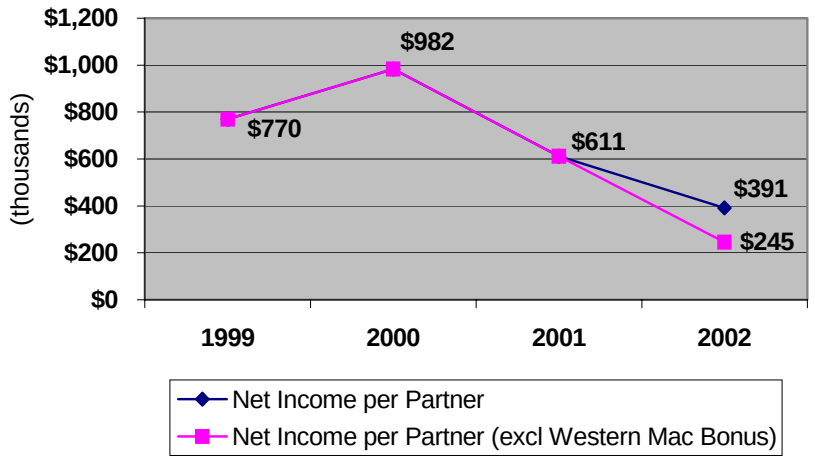
period, Brobeck also opened several lavish new offices and expanded others in like manner, incurring substantial debt and excessive and expensive lease obligations.

14. Brobeck's aggressive growth strategy constituted an enormous one-way bet on its continued expansion. Throughout, Brobeck declined to fund its expansion plans out of its cash flow, which would have reduced distributions to its partners, including the former partners and chose to finance it with borrowed funds. In the first quarter of 2001, when the expansion had failed to materialize, Brobeck dramatically increased its bank borrowings from approximately $34 million to over $71 million. As set forth in more detail below, these factors—excessive leasehold commitments and other costs, rising debt obligations, declining revenues, and excessive distributions to partners—combined inevitably and predictably to create a death spiral from which Brobeck could not recover:

a) As set forth in the following chart, Brobeck's occupancy costs and leasehold burden skyrocketed from 1999 (when it approximated law firm averages) to December 31, 2002 (when it exceeded such averages by nearly two and a half times):

	1999	2000	2001	2002
Total Revenues	$ 316,897,206	$ 481,760,075	$ 445,577,450	$ 323,626,589
Occupancy Costs	20,833,056	27,731,143	36,813,280	49,281,382
Occupancy Costs as a % of Revenue	**6.6%**	**5.8%**	**8.3%**	**15.2%**
Partner Headcount (EOY)	*163*	*197*	*207*	*163*
Annual Occupancy Cost per Partner	**$ 127,810**	**$ 140,767**	**$ 177,842**	**$ 302,340**
Leased Sq Feet	685,000	985,000	1,213,000	1,253,000
Sq Feet per Partner	**4,202**	**5,000**	**5,860**	**7,687**

b) At the same time, beginning in the second half of 2000, Brobeck suffered a dramatic decline in income, from a high in 2000 of nearly $1 million per partner to net per partner income in 2002 of only $245,000 (adjusted for a one-time contingent bonus payment related to prior work on behalf of the Western MacArthur Company and affiliated debtors in chapter 11 cases):



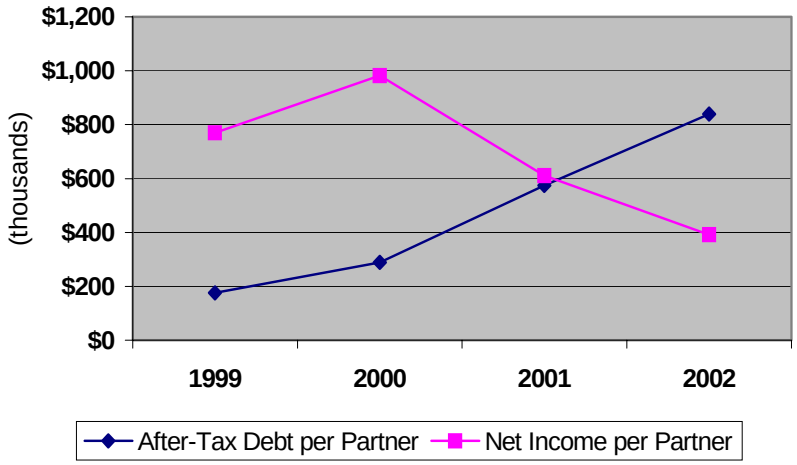
c) Brobeck's partners, however, did not correspondingly reduce the distributions they received, taking for themselves and spending on leasehold improvements more than $100 million in excess of Brobeck's net income for 2001 and 2002:

(thousands)	12/31/1999	12/31/2000	12/31/2001	12/31/2002
Net Income	**$ 125,459**	**$ 193,510**	**$ 126,514**	**$ 63,814**
Distributions to Partners	(95,968)	(149,057)	(162,924)	(94,099)
Distributions to Retired Partners	(1,995)	(1,159)	(1,177)	(1,330)
Total Distributions	**(97,963)**	**(150,216)**	**(164,101)**	**(95,429)**
Income in Excess of (Less Than) Distributions	**$ 27,496**	**$ 43,294**	**$ (37,587)**	**$ (31,615)**
% of Income Distributed	**78.1%**	**77.6%**	**129.7%**	**149.5%**
Capital Expenditures	(8,439)	(33,417)	(39,378)	(19,125)
Depreciation and Amortization	8,080	10,580	12,830	13,645
Additional Cash Consumed	**(359)**	**(22,837)**	**(26,548)**	**(5,480)**
Cash Distributed and Consumed (in Excess) of Income	**$ 27,137**	**$ 20,457**	**$ (64,135)**	**$ (37,095)**

d) Brobeck accomplished this sleight of hand with extraordinary new levels of debt. As set forth below, in the 18 months between December 31, 2000, and June 30, 2002, total debt increased from $34 million to $89 million, and debt per partner increased over 2.5 times, while income per partner declined by more than half:

	12/31/2000	3/31/2001	3/31/2002	6/30/2002
Total Outstanding Debt	**$ 34,083,334**	**$ 71,316,600**	**$ 82,057,900**	**$ 89,498,902**
Number of Partners	197	200	204	177
Debt per Partner	**$ 173,012**	**$ 356,583**	**$ 402,245**	**$ 505,644**
Annual Income	**$ 193,510,349**	**$ 126,513,978**	**$ 63,814,456**	**$ 63,814,456**
Assumed Tax Rate	40%	40%	40%	40%
After Tax Income	**116,106,209**	**75,908,387**	**38,288,674**	**38,288,674**
Years of Income to Retire Debt (Debt/After Tax Income)	**0.29**	**0.94**	**2.14**	**2.34**

e) As a result, by 2001, Brobeck's per-partner debt essentially equaled its after-tax income and by early 2002 (even including the non-recurring Western Mac contingency fees) its after-tax income was less than half of the after-tax debt per partner. By 2001, Brobeck was in a free fall "death spiral" from which there was no reasonable prospect of recovery.



15. By the time Brobeck's bank financing came up for renewal in January 2002, the gravity of the situation was apparent to Citibank. As a condition to renew (and expand) the firm's borrowings in January 2002, Citibank not only required the firm to pledge the entirety of its assets but also, for the first time, Citibank expanded the personal guaranty by all Brobeck partners of the now $90,000,000 borrowings, regardless of collateral coverage. Despite these circumstances, Brobeck drew a fresh $39 million on the expanded Citibank line between January and March 2002, and contemporaneously distributed $43.3 million to its partners.

D. Brobeck's Loss of Key Partners and Practice Groups.

16. The inevitability of the financial death spiral was apparent to many of Brobeck's partners. As soon as the millions of borrowed funds were distributed to the partners in the first quarter of 2002, many headed for the exits. Twenty-five percent of the partners, including some among the most lucrative practice groups, announced their resignations in just the ensuing six months. The already excessive leasehold liabilities and bank debt burden were made proportionately greater for the remaining partners as the firm's earning capacity diminished. The incentive for additional partners to leave became even more acute.

17. During Brobeck's inevitable decline and the exodus from the firm, Brobeck's books and records failed to reflect its true financial condition. Among other things, Brobeck's obligations on excess space should have been stated as current liabilities given that Brobeck was not using and had no legitimate expectation that it would be using the space in its business going forward. Similarly, Brobeck's investment of tens of millions of dollars in lavish tenant improvements should have been substantially marked down to cents on the dollar given the inevitable return of the excess space to landlords. The valuation of other assets, including the firm's accounts receivable, was also significantly impaired by its financial death spiral in ways not reflected on Brobeck's balance sheet.

E. Brobeck's Dissolution and Bankruptcy.

18. Brobeck's downward spiral culminated in its formal cessation of operations and dissolution, effective February 10, 2003, under Section 16801 of RUPA, pursuant to certain

Amended and Restated Partnership Agreement dated as of February 10, 2003 (the "Final Partnership Agreement"). Under the Final Partnership Agreement, a Liquidation Committee (the "Liquidation Committee") was formed to carry out Brobeck's dissolution.

19. Notwithstanding that Brobeck's insolvency was admitted by all concerned following its dissolution, the Liquidation Committee, in the Trustee's view, failed to apply its full efforts toward its responsibilities to Brobeck's unpaid creditors but rather took many actions favoring the interests of Brobeck's equity owners, i.e., Brobeck's partners. Among other things, the Liquidation Committee directed Brobeck's counsel, at Brobeck's expense, to undertake activities to assist the partners in protecting themselves from liability to Brobeck, including liability to return wrongful distributions. As a result, I analyzed whether and to what extent compensation paid to the members of the Liquidation Committee could be recoverable as a fraudulent transfer because of a lack of "reasonably equivalent value" in exchange.[3]

20. On September 17, 2003, certain of Brobeck's creditors filed with this Court an involuntary bankruptcy petition against Brobeck under chapter 7 of the title 11 of the United States Code (the "Bankruptcy Code"). On October 14, 2003, this Court entered an order for relief with respect to that petition.

21. The Trustee was elected as chapter 7 trustee for Brobeck on November 21, 2003, and was certified and qualified by the Office of the United States Trustee on December 12, 2003.

22. The bar date for claims in the case was June 3, 2003. Approximately 1,145 creditors have filed claims in the case, totaling $258 million in alleged liabilities. As set forth in the chart below, the approval of the Settlement Agreements as requested herein will reduce the number and amount of potential claims that will ultimately be allowed in this case.

[3] The Trustee's investigation has not included, nor do the proposed settlements with Liquidation Committee members resolve other claims related to their service, such as for negligence or breach of duty in connection with their service on the Liquidation Committee.

	Amount	# of Claims
Total Claims	$ 257,999,789	1,145
Claims Resolved by Clifford Chance Settlement	11,971,178	21
Total Partner Claims	40,294,292	185
Claims Resolved by Settlement	33,934,131	158
Remaining Partner Claims	6,360,161	27
Remaining Claims	$ 212,094,480	966

The Trustee's Investigation into the Estate's Remedies

23. Soon after becoming Trustee, he gave direction to his professionals to undertake a thorough investigation of not only the financial facts and circumstances described above, but also the legal rights and remedies available to the estate arising from these facts and circumstances. This investigation continued throughout most of 2004, and included in-depth analysis of Brobeck's financial condition compared to the measure of insolvency under various definitions set forth in applicable law, research into applicable statutory law, analysis of decisional law interpreting relevant statutes, and review of relevant legislative history and other materials. Based on all the foregoing, the Trustee was able to reach a series of conclusions respecting the timing of Brobeck's insolvency and the resulting legal rights and remedies of the estate.

24. The first conclusion that the Trustee reached was that Section 16957 of the California Corporations Code provides a specific legal remedy uniquely available to LLPs such as the Brobeck estate for the return of all distributions made to former partners during Brobeck's insolvency, as defined in that statute. Section 16957 provides as follows:

> (a) No distribution shall be made by a registered limited liability partnership. If, after giving effect to the distribution:
>
> > (1) The registered limited liability partnership would not be able to pay its debts as they become due in the usual course of business.
> >
> > (2) The registered limited liability partnership's total assets would be less than the sums of its total liabilities plus the amount that would be needed. If the registered limited liability partnership were to be dissolved at the time of the distribution, to satisfy the preferential rights of other partners upon dissolution that are superior to the rights of the partners receiving the distribution.

> (b) A cause of action with respect to an obligation to return a distribution is extinguished unless the action is brought within four years after the distribution is made.
>
> (c) A distribution for purposes of this section means the transfer of money or property by a registered limited liability partnership to its partners without consideration.

25. The statute is very simple in its structure. It provides for the recovery of distributions under Subsection (a)(1) if the definition of insolvency is met, and under Subsection (a)(2) if the test articulated therein is met. Under Subsection (c), distributions, to be recoverable, must be "without consideration." The Trustee concluded this standard would be met for several reasons. As described above, under a companion statute within RUPA, Section 16401, partners are not entitled to remuneration for the services they render to the partnership, other than reasonable compensation following dissolution. Also supporting the Trustee's conclusion was the "black letter" rule of contract law that performance of a pre-existing duty, such as a partner's fiduciary duty imposed on all partners to render services to the partnership, is not consideration. In other words, in order to establish a distribution was for consideration, the partner would have to show something other than the performance of legal services, such as loans to the partnership or other business transactions between partners and partnerships broadly permitted under Section 16404(f) of RUPA.

26. The Trustee believes his analysis of Section 16957 was fully in accord with basic principles of debtor-creditor law, which put payments to creditors ahead of payments to equity owners, here, Brobeck's partners. The terms of Brobeck's Amended and Restated Partnership Agreement supports the Trustee's conclusion, as it provides for its partners to receive a share of profits of the firm and in no way provides for partners to receive a salary or other forms of compensation for services rendered to the partnership. As an insolvency professional with over two decades in the field, it is the Trustee's opinion that during the firm's insolvency, the application of Section 16957 to all distributions received by Brobeck partners makes eminent sense. Prior to 1995, limited liability partnerships did not exist in the State of California. When the LLP was established as a business entity, general personal liability for the debts of the partnership on the part of

the LLP's partners was eliminated. It makes sense to create Section 16957 as a statutory remedy to assure the LLP structure was not abused by the LLP's equity owners, who could otherwise deplete the assets of the firm to the creditors' detriment. It is fair that equity owners, who enjoy equity upside, not be permitted to harm creditors in this way without a remedy.

27. The Trustee also concluded that the factual record would establish that Brobeck met the test of insolvency under both Subsection 16957(a)(1) and (a)(2). Subsection (a)(1) of Section 16957 would require the Trustee to show that Brobeck "would not be able to pay its debts in the usual course of business." The Trustee concluded this was true as of not later than January 1, 2001, as a result of the "big bet" Brobeck placed on continued, accelerated growth. Brobeck would not be able to pay its debts (most notably its bank debt and debts to landlords for expensive, unused office space), absent being rescued by one or more events outside the usual course of its business. It could no longer count on acquiring a large number of lawyers to occupy the unused space, given the bursting of the dot com bubble in 2000. Instead, it would have to restructure its lease obligations to dramatically cut its rent roll, and/or restructure its debt to Citibank, and/or find a merger partner, or a combination of all three. None of these was within Brobeck's "usual" course of business.

28. In fact, Brobeck launched a desperate attempt at all three of these things beginning in 2002. It achieved both a major restructuring of its lease obligations, involving a give back of tens of thousands of square feet of office space and a rewriting of its contractual rental rates, and a restructuring of the Citibank debt. Despite these accomplishments, the need for each one of which demonstrates the firm's insolvency, it still failed either to achieve a merger with Morgan Lewis (or anyone else) or comply with its new bank covenants. The firm dissolved almost immediately thereafter.

29. The circumstances of the collapse of the Morgan Lewis merger discussions, and Brobeck's immediate dissolution, support the Trustee's analysis that Brobeck's assumption of outsized lease obligations and massive bank debt rendered it unable to pay its debts in the usual

course of business as early as January, 2001. Based on in-depth interviews with representatives of Morgan Lewis, the Trustee learned that as a condition to the merger, Morgan Lewis would require Citibank to further restructure Brobeck's debts so that the merged firm would not be liable for a material portion of it. And, notwithstanding that Citibank received a $26.5 million partial payment on Brobeck's outsized bank debt on January 20, 2003, Brobeck faced an imminent default under its post-restructuring financial covenants at month end, i.e., just days later.

30. The facts the Trustee learned about Brobeck's financial condition also support a finding its assets would be less than its liabilities under a proper measure of each. Most notably, the fact that Brobeck would not be able to use its vacant leased office space via internal growth was true before the end of 2000, meaning it was improper to carry the entirety of its lease obligations as prospective operating expenses rather than a current obligation to be deducted from the firm's net worth.

31. Based on all of the foregoing, the Trustee concluded that he could show that Brobeck, as of January 1, 2001, met the standards for insolvency under both Sections 16957(a)(1) and 16957(a)(2). Thus, Brobeck would be entitled to a return of all distributions made to its partners from and after January 1, 2001, distributions totaling in excess of $263,795,389 million, of which $164,955,832 was distributed in 2001 and $98,839,557 in 2002.

32. The Trustee further concluded that Section 16957 was not the sole legal basis for recovery of distributions made to Brobeck partners on or after January 1, 2001. The distributions were subject to recovery under other legal theories as well, including both federal and state fraudulent conveyance law. Unlike California law, each of these statutes has restrictions, including a requirement to show that the distributions were made without a sufficient corresponding value being received in return. Moreover, the reachback period of one year under the federal fraudulent conveyance statute would cover only part of the distributions received by partners in the relevant time period.

33. Brobeck partners had significant liabilities apart from obligations to repay distributions. Many Brobeck partners owed the firm for capital. These liabilities included, but were not limited to obligations under notes given by the former partners evidencing their obligation to pay for an initial allocation of capital, as well as obligations reflected as entries on Brobeck's books and records.

34. In addition, many partners had executed notes payable to Brobeck, often including terms providing for forgiveness of the outstanding balance, in whole or in part, based on the partner's longevity of service at the firm. Except where the partner had served long enough for all or a portion of such a note to be forgiven, these obligations also represented valid and enforceable debts owed to the Brobeck estate.

35. Many partners had received bonuses in excess of $100,000 in or about March, 2001. Under Brobeck's bonus plan, partners were required to repay such bonuses if they were not at the firm as of March 1, 2003. Certain partners in this category had voluntarily departed the firm prior to Brobeck's dissolution, and no partner was practicing at the firm as of March 1, 2003, as a result of its prior dissolution.

36. Certain partners, who were defined as "remaining partners" in the January, 2003 restructuring of Brobeck's bank debt, were also liable for a percentage share of the portion of the Citibank debt outstanding as of the conclusion of the Trustee's settlement agreement with Citibank. Pursuant to this Court's order approving the settlement with Citibank, and subject to certain reservations of rights and defenses as stated in the order, the estate received an assignment of Citibank's right to collect the sums from the relevant partners. The Trustee determined that he would seek to enforce the rights of Citibank assigned to the Trustee.

37. Former partners who were members of the Liquidation Committee, Messrs. Miller, Orton, Snyder and Engel (who asserts he was an "*ex officio*" member), faced additional exposure in connection with their service. Each received substantial compensation as a member of the Liquidation Committee, often including signing bonuses. As a result of the Trustee's investigation

into the Liquidation Committee's affairs, including review of documents produced by Brobeck's then-counsel, the Pachulski, Stang law firm, the Trustee concluded that a substantial portion of the Liquidation Committee's work had been of no benefit to Brobeck, a plainly insolvent entity at the time. Rather, these efforts had been aimed at benefiting Brobeck's equity owners. Accordingly, these partners would, in the Trustee's view, have liability for the excess of the compensation they received over the reasonable value of the services they rendered, measured by the benefit to Brobeck without regard to benefit to its equity owners and for the diversion of firm assets to benefit equity owners at the expense of creditors.

Development of Settlement Proposals

38. It is the Trustee's strong belief that as Trustee, he should explore settlement possibilities prior to initiating litigation against parties with substantial liabilities to the estate. The Trustee followed this practice regarding Morgan Lewis, Clifford Chance, and Citibank, and the Trustee determined to do the same thing with respect to Brobeck's former partners. Accordingly, in late Fall 2004, the Trustee and his advisors set about the task of developing a "settlement algorithm" (formula) respecting the various potential claims against partners. Under the settlement algorithm, the exposure of each partner in a given category would be assigned a weight, discounted from 100%, based on a variety of factors. The weights for each category would be the same for all similarly situated partners.

39. First, all of the weights would be discounted to reflect likely difficulties in collection. In this regard, the most certain recoveries were discounted less, in the view that these could be recovered more quickly such as upon motions for summary judgment, and thus have a first claim against partners' assets. Secondly, the Trustee considered the relative weight of his likelihood of success among the various categories of recovery. While the Trustee believed, for example, that his case was strong, with respect to all distributions received by partners after January 1, 2001, the Trustee was aware of certain asserted defenses or issues relevant to some categories of distributions, but not others. These factors included, without limitation, distributions made earlier in the two-year

period as opposed to later, monthly distributions as opposed to extraordinary distributions, and the distributions representing a return of invested or retained capital as opposed to other distributions. Claims not related to partner distributions received discounts for other reasons. These included, for example, possible defenses to the collection of the assigned Citibank debt, which were preserved in the order approving the settlement with Citibank.

40. In addition, the Trustee considered a variety of equitable factors in arriving at the settlement. The Trustee's goal was to present a settlement proposal which would be fair to the estate and its creditors and also appear to be fair to all former partners. Independent of the Trustee's consideration of collection and litigation risks, the Trustee believed a careful and consistent application of a formula, together with equitable factors that provided "inter partner" fairness, would be more likely to lead to a higher acceptance level of the Trustee's settlement proposal. For example, partners who remained with the firm until the "bitter end" lost all of their accumulated capital in the firm. Partners who departed beforehand who received capital should therefore, from an equitable standpoint, be required to repay a relatively high proportion of the capital returned to them. For the same reason, partners who had outstanding obligations to purchase capital as of the dissolution of the firm should be required to pay a relatively higher percentage of these amounts. The Trustee also carefully considered the appropriateness of seeking recoveries from the estates of deceased partners, and from partners who have developed serious medical problems that restrict their earning capacity. The Trustee determined to seek no recovery from the former, nor any recovery from partners with what amounted to a full disability, and to cut in half the settlement demand for partners with substantial, but not full, disabilities that demonstrably affect their earning capacity. Also, partners who first became partners in 2001 and 2002, at times when a full disclosure of the firm's financial condition would have shown it to be insolvent, and who did not benefit as a partner in prior years should not owe as much.

41. As there are still approximately 33 (out of 222 partners subject to pending adversary proceedings) who still have not settled, the precise percentage weights used, the Trustee believes,

represent confidential settlement material and should not be disclosed in connection with the Motion. However, the various categories of distributions and liabilities for which percentage weightings were assigned are as follows:

Categories of Distributions/Liabilities
Jan – March 2001 Payments
2001 Monthly Draws
Jan – March 2002 Payments
Jan '02 Directed Bonus > $100K
Jan '02 Aloc and Dir Bonus , $100K
2002 Monthly Draws Jan-Jun 2002
2002 Monthly Draws Jul-Dec 2002
2001 Capital Pay-Outs
2002 Capital Pay-Outs
2002 Capital Notes Forgiven
Capital Notes Outstanding 12/31/02
Remaining Citibank Liability

As stated below, the relative settlement weightings were ultimately adjusted in response to many comments from partners and creditors. However, the above listing is submitted as a useful indication to the Court as to the distinctions which the Trustee drew in developing an appropriate model to make settlement proposals on a consistent basis based on traditional settlement factors, equitable considerations, and with rules applied fairly across similarly situated partners.

42. The Trustee determined prior to advancing his initial proposal that it would be in the interest of the estate to have a large number of partners settle early and, accordingly, offered two forms of discounts in the Trustee's November proposal. The Trustee offered a substantial discount to partners who accepted before December 31, 2004, and a lesser discount to partners who accepted by January 31, 2005. Secondly, the Trustee offered a discount based on a high percentage level of participation by the various groups of partners who the Trustee placed in several basic categories:

partners who departed prior to June 2002, partners who remained with the firm as of December 2002, those who stayed to the end, and so forth. It soon became apparent, however, that partners within these groupings were not organized in a coherent way which would permit them to take advantage of the "group" discounts, and the Trustee determined to waive the requirement of a high level of "group" participation and make the group discounts available to all who timely accepted during the first discount period.

43. Before making proposals to former partners, the Trustee conducted a series of meetings and presentations with representatives of the estate's principal creditors, certain landlords affiliated with Equity Office Properties, Inc. (the "EOP Landlords") and University Circle Investors, LP (the "UCI Landlord").[4] The purpose of these meetings was three-fold: First, the Trustee understood that the applicable standards for approval of a settlement and compromise include consideration of the views of major creditors. The Trustee viewed it as critical that he obtain the informed assessment of the significant creditors of the estate in advance as to all aspects of the Trustee's strategy with respect to claims against Former Partners. In that way, the interest of creditors would be reflected in the settlement not as the result of presenting them with a *fait accompli* following extended negotiations, but at the outset, when the Trustee could consider their views on all various aspects of settlement strategy.

44. Second, the EOP Landlords and UCI Landlord are highly sophisticated parties and well-advised by experienced bankruptcy attorneys. Throughout this case, the Trustee has found their probing and questioning of his analysis and reasoning to be highly valuable. At each and every important stage of this case, including the settlements with Clifford Chance, Morgan Lewis, and with Citibank, and now with the Settling Partners, as well as other matters not involving settlements

[4] The Trustee conducted these discussions pursuant to confidentiality arrangements among these parties. The estate's other largest landlord creditors, affiliates of Kilroy Realty, Inc. (the "Kilroy Landlords," and together with the EOP Landlords and the UCI Landlord, the "Landlords") have not requested periodic meetings in the course of the case.

and compromises, my dialogue with these highly-sophisticated business people has stimulated the Trustee thinking and the thinking of the Trustee's professionals. The Trustee believes a better understanding of difficult issues has been reached by having the benefit of this creative interaction.

45. Third, the partners wanted assurance that the Landlords were not going to assert "indirect" claims against them individually after they settled with the estate. In other words, the partners wanted "finality" from claims held by the estate (this does not apply to direct "cut-through" liability to the landlords). This is discussed in greater detail in paragraphs 82 through 86 below.

46. The Trustee's initial settlement proposals were distributed to the partners on or about November 19, 2004. At around this time or soon thereafter, the Trustee's professional advisors and the Trustee met with the law firms (and partner "Steering Committees") representing principal groups of partners. The Trustee also invited all Former Partners and their counsel (in person and via web and teleconference call) to an "all partners" meeting held in San Francisco on December 9, 2004. Through these meetings, based on the list of counsels' clients and the attendance sheets for the all partners meeting, both in person and by telephone, the Trustee believes substantially all of the former partners participated. The presentation at each of these meetings had four phases: (a) a report on the results of the Trustee's investigation into Brobeck's financial collapse; (b) a description of the legal remedies available to the estate, principally under Section 16957 of the Corporations Code; (c) a description of the settlement and the Trustee's reasoning in developing the categories of exposure and the relative recovery rates on each; and (d) a question and answer period. Each meeting lasted two or more hours. In addition, partners were invited to communicate with me directly by email or telephone, and a detailed 18-page set of "Frequently Asked Questions" ("FAQs") was distributed to all partners for their consideration.

47. As the Trustee had hoped, the Trustee's advisors and the Trustee were deluged with responses to these settlement proposals and the issues raised at the meetings and through the FAQs. From these communications, it became clear that the settlement proposals should be revised. Accordingly, the December 31, 2004, acceptance deadline to receive the highest discount was

extended one month to January 31, 2005, and the second tier discount deadline extended to February 28, 2005. Rapidly, the Trustee's professionals and the Trustee assimilated the feedback from partners and determined to issue revised settlement proposals making a discreet number of corrections or revisions. Among other matters, it was clear that the Trustee's use of certain of Brobeck's records had led to an inadvertent double counting of amounts placed in both the "return of capital" and monthly or other draw categories. This was because Brobeck's management, following the departure of a partner, would often recharacterize a certain portion of the partner's distributions during the year as a return of capital. The records the Trustee relied upon with respect to return of capital included these amounts, but so did the records respecting the original distributions that had been recharacterized. Also, it became clear that the effect of the settlement formula on the most junior partners was disproportionate because they owed the majority of capital notes.

48. For all of these reasons, the Trustee issued revised settlement proposals to all partners, on or about January 14, 2005, using a modified algorithm. At around this time, the Trustee determined it would be in the best interest of the estate for several reasons to commence adversary proceedings against the former partners. While preserving the Trustee's right to litigate vigorously, settlement remained the Trustee's primary objective and the Trustee offered a standstill arrangement extending the time to answer until after the scheduled expiration of the settlement offer, i.e., March 2005. All told, on average, the Trustee's revised settlement proposals were approximately 10.5% of the exposure sought through the complaints filed against the Settling Partners and approximately 22.7% of 2002 distributions. In the Trustee's view, litigation over the complaints or over remedies former partners might pursue should not distract from consideration of the settlement proposals. The Trustee believed the estate, its creditors, and the partners would all benefit from an equitable settlement rather than protracted litigation, even with the estate likely to prevail.

49. The dissemination of the revised settlement proposals, and the filing and service of complaints, helped partners focus on settlement and also led partners to bring issues to the Trustee's attention which had not been raised previously. Some showed the Trustee potential errors in calculation, others raised certain particular legal risks or equitable factors. Certain groups of partners approached the Trustee raising particularized issues peculiar to them, including the group of partners who had worked postpetition on collecting approximately $25 million of Western MacArthur receivables and believed, on an equitable basis, they should receive recognition for their postpetition efforts. In addition, junior partners admitted in 2000 or later pointed out that the relative amount of high-recovery exposure for amounts due for purchases of capital would disproportionately burden them compared to the value they obtained from the very limited lifetime of distributions from the firm. Partners who departed in 2002, and who had thereby been obligated to return bonuses paid early in 2002, presented evidence that Brobeck had argued that the bonuses had been repaid by those partners upon departure. Partners Debra Pole and Bill Fitzgerald presented both legal and equitable arguments to reduce their settlement payment based on the value to Brobeck of the assignment of their recoveries from the litigation with the Dickson Carlson firm, which had approached in the aggregate of $1 million, as well as Brobeck's failure to provide defense counsel in that litigation, as Brobeck had allegedly promised to do in return for the assignment.

50. While the Trustee had indicated at the outset the initial and revised settlement proposals would not be subject to modification based on individual or group circumstances, it became clear that some legal and equitable factors, while few in number, were truly unique and should be reflected in a fair compromise.

51. In addition, three groups of partners each represented by different law firms approached the Trustee to consider making available concessions for their group conditioned upon a high level of participation in the settlement by the group. The proposed settlements reflect these conditional concessions, as in each instance the Trustee's willingness to make adjustments, not great in amount, had the desired effect of encouraging partners in excess of the required number to

participate in the settlement. In reaching these agreements for contingent settlements, the Trustee pointed out to the law firms in question that if their group participated at or above the required threshold, the Trustee would make the concession available to all similarly situated partners, including those not represented by such counsel or formally in that group. In so doing, the Trustee believes to have preserved a fundamental fairness in reality and in perception that the settlements would be driven by objective criteria consistent with the law, rather than by "horse trading" or personal persuasion or a "one off" basis.

52. Simultaneously, the Trustee's counsel and the Trustee were deluged by comments from lawyers concerning the form of the settlement agreement. Initially, the Trustee determined that the settlement agreement should not be negotiated, so as to avoid the impossible situation where a 100 or more lawyers, either represented by counsel or acting as their own, would make an overwhelming number of inconsistent comments on what should be, in the Trustee's view, a simple and straightforward settlement and mutual release. As it came to pass, a large group of partners volunteered to have a single lawyer represent them in connection with the settlement agreement. The Trustee welcomed the vigorous participation of Robert J. Moore of Milbank, Tweed, Hadley & McCloy, who spoke for over 40 of the Settling Partners and was instrumental in negotiating and finalizing the terms of settlement. The form of settlement agreement ultimately was heavily but successfully negotiated as the deadline to accept settlements at the initial favorable discount came closer. This settlement agreement was then used for all partners settling (and offered to all partners who had executed previous versions of the settlement agreement.

53. Ultimately, and to the Trustee's enormous satisfaction, as Trustee, fully 189 partners accepted the Trustee's final proposals. Their payments vary substantially as a result of the application of the settlement algorithm to their different circumstances. The following depicts the range and number of settlement payments.

Settlement Amount	Number of Partners	Total Settlement	Average Per Partner
Less than $50,000	30	$ 866,092	
$50,000 to $99,999	66	4,985,704	
$100,000 to $199,999	71	9,909,226	
$200,000 to $299,999	12	2,974,948	
$300,000 to $399,999	6	2,144,530	
More than $400,000	3	1,360,851	
Total	**188**	**$ 22,241,351**	**$ 118,305**

Overview of the Settlement Agreements

54. The Settlement Agreements may be summarized as follows:[5]

- The Settling Partner releases the bankruptcy estate from all claims related to Brobeck other than those related to malpractice or professional liability.

- The Trustee releases the Settling Partner generally from all claims related to Brobeck other than related to malpractice or professional liability, for service on the Liquidation Committee, for any breach in cooperation in the collection of receivables occurring after the date of the agreement, and claims under the settlement agreement itself.

- The Settling Partner also releases other Former Partners and Brobeck's former employees conditionally and automatically if such former partner or former employee delivers a commensurate release to the Trustee.

- The Settling Partner covenants not to sue other Former Partners or employees based on any Brobeck related matter other than malpractice and professional liability and certain claims under Section 1(e) of the Amended and Restated Partnership Agreement, which governs intra-partner claims arising where one partner pays more of a partnership obligation than his or her proper share.

[5] The following is a summary only and the Settlement Agreements rather than anything stated herein governs all aspects of the settlements with Settling Partners.

- The Settling Partner agrees to withdraw existing proofs of claim (approximately 158 claims in the aggregate amount of approximately $33,934,131) and requests for payment of administrative expenses and not to file any in the future.

- The estate quitclaims to Settling Partners their share of so-called "Participated Investments," meaning investments held in Brobeck's name for which Settling Partners advanced their portion of the purchase price "side-by-side" at acquisition.

- The settlement becomes effective on the last to occur of this Court's order being entered into and becoming final, with certain conditions for the form of order stated in the Settlement Agreements, and payment in full of the settlement amount.

- Each Settling Partner has delivered 10% of his/her settlement amount with the Trustee. The balance of the settlement payment is payable in cash and in full on April 15, 2005, or in four installments in April, August and December 2005, and April 2006, together with simple interest payable at each installment at the rate of 12% per annum.

- The adversary proceedings against the Settling Partners are to be dismissed with prejudice following the effectiveness of the settlement date and, among the required terms of the order approving settlement, the parties agree not to commence or continue litigation until such time.

- The parties acknowledged their intention not to affect, and I acknowledge I assert no claim as Trustee to, distributions from Brobeck's qualified pension plans.

- The parties agree to, and agree to take no position inconsistent with, certain terms and requirements of Brobeck's malpractice insurance coverage.

- The Settling Partner agrees not to cooperate with third parties in litigation with the estate on terms and conditions stated in the Settlement Agreements.

- The parties admit no liability in connection with the settlement.

55. The Trustee believes the terms of the Settlement Agreements are standard and straightforward, with the possible exception of the terms related to Participated Investments. Prior

to its dissolution, Brobeck entered into agreements with a large number of its partners under which Brobeck and the partners would purchase interests in non-public entities and the interests would be owned by Brobeck. These investments were of two varieties: (i) unregistered stock of closely held corporations, typically startup companies in the technology area where an ultimate "initial public offering" ("IPO") was anticipated by investors; and (ii) interests in venture capital limited partnerships ("VC LPs"). The participation arrangements between Brobeck and the partners followed two common formats. Restricted Stock was issued in Brobeck's name and Brobeck and the participating partners executed a "Participation Agreement" defining the relative rights of the parties. These Participation Agreements were not sophisticated documents, but provided generally that when and if a "liquidity event" (*e.g.*, an IPO), was to occur, Brobeck would contact the issuer of the Restricted Stock at that point and have certificates reissued in the name of the individual partners to enable their participation in the IPO. The arrangements for VC LPs, on the other hand, were memorialized by a memorandum to the file identifying the participating partners and their respective percentage interests. With respect to the VC LPs, Brobeck would execute the limited partnership agreement as a limited partner. Typically, these required Brobeck to commit to make investments of capital (a "capital call") up to a defined maximum amount. Under the file memorandum for a VC LP investment, each participating partner committed to pay his or her percentage of the capital call.

56. Prior to September 17, 2003 (the "Petition Date"), but after Brobeck's dissolution, the Liquidation Committee made numerous transfers of Restricted Stock, and, in some cases, broke out limited partnership interests and caused the VC LP to recognize partners as separate investors.

57. With respect to each of the Restricted Stock and VC LP investments, the Trustee confirmed that partners had paid Brobeck for their participation with their own funds, and that Brobeck had funded only a residual interest, net of participation, if any. For this reason, and because of the potential cost, complexity, and risk of litigation, the Trustee determined that in an otherwise reasonable settlement of claims against partners, the proper course would be to quitclaim the estate's interest in the participated portions of the investments, as well as to waive and release

the avoidance claims to recover investments which were split out before or after the petition date. The Trustee reached this conclusion for several reasons. The investments in question are not traded in a public market, and have speculative value as a result. On the merits, it would be likely that partners would seek to impose some form of equitable trust on the investments, even though nominally in Brobeck's names. Given the cost and delay of litigation and likelihood of success, it did not warrant seeking to preserve claims to defeat the participation arrangements in an otherwise reasonable settlement with the affected partners.

58. As of the Petition Date, the Trustee held cash or non-cash proceeds of the participated portion of certain of the Restricted Stock or VCLP investments, including cash or substitute securities received in mergers and acquisitions and similar transactions. Similar proceeds have been paid to me since that time. Under the Settlement Agreements, the Trustee will quitclaim, and therefore will transfer, these "Participated Investment Proceeds" to the respective Settling Partners. This obligation applies to Participated Investment Proceeds in hand or which the Trustee may receive within six months of the order approving a settlement agreement. This will allow Settling Partners sufficient time to arrange for the transfer of the participated investments to them by the relevant issuers and limited partnerships. The Settling Partners have each agreed to use commercially reasonable efforts to effect such transfers, and the Trustee has agreed likewise, with the caveat that the estate is under no obligation to expend funds in that regard.

59. As noted above, all of the Settlement Agreements are identical in form,[6] provided that only the Settlement Agreements with settling Partners who had Participated Investments include language providing for the quitclaim and transfer of these Participated Investments and Participated Investment proceeds to them. Following the dissemination of draft settlement agreements, many Former Partners have come forward to question the completeness of the Trustee's list of

[6] Technically, "two" forms are utilized, differing only in the Jewel-claim release discussed above.

investments, or to ask that certain investments not be quitclaimed to them at this time. On the first issue, the Trustee has committed that if Settling Partners are able to demonstrate to me by evidence satisfactory to the Trustee of the existence of another participated investment not identified in a settlement agreement, the Trustee will quitclaim such investments to them on the same terms as set forth in the agreement. On the second, the Trustee has required Settling Partners to accept all Participated Investments in order to speed the winding up of the estate.

Settlements with Liquidation Committee Members

60. The proposed settlement agreements with former members of the Liquidation Committee are based upon the form of the MLB/CC Settlement Agreement, but included additional terms unique to the terms of the settlements with these partners.[7] Each of the form agreements is identical, except with respect to the amount being paid by the relevant partner and respect to Participated Investments. In addition to the regular settlement terms, the Liquidation Committee's settlement agreements provide a framework for the estate to pursue certain claims against them even after confirmation of the settlement. These reserved claims include claims arising out of, related to, or in connection with their service on the Liquidation Committee other than claims for recovery of avoidable transfers or claims in excess of the policy limits under an insurance policy obtained by Brobeck following its dissolution under the Liquidation Committee are named insureds. The agreement includes a number of specific terms related to the liability coverage. This includes an express obligation on the part of the individuals to fully cooperate with the insurer respecting claims as required under the policy and applicable law. In addition, $30,000 of the settlement payment

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[7] As referenced above, the form of Settlement Agreement with Stephen M. Snyder (a member of the Liquidation Committee), redacted to delete the settlement amount, is attached hereto as Exhibit F. In addition, one Settling Partner, David Makarechian, presents a unique situation requiring a material modification of his Settlement Agreement. Mr. Makarechian had given Brobeck a lien on real property to secure obligations under one or more promissory notes. These note obligations, which were given due weight under the settlement algorithm, are to be released under the Settlement Agreement. Accordingly, Mr. Makarechian's Settlement Agreement includes a "further assurances" clause committing me to execute documentation necessary to release this lien.

being made by each of these partners will be escrowed for the purpose of defraying certain litigation costs, as set forth in the settlement agreement. Any excess funds in the escrow account will revert to the estate. Moreover, under the settlement agreement, in the event of the denial of coverage by the insurer, I have the option of taking an assignment of the partners' claim against the insurer on terms set forth in the settlement agreement.

IV. BASIS FOR THE REQUESTED RELIEF

60. By this Motion, the Trustee seeks an order (a) approving the Settlement Agreements; (b) finding that the settlements and releases embodied in the Settlement Agreements have been entered into and made in good faith within the meaning of sections 877 and 877.6 of the California Code of Civil Procedure; (c) staying litigation between the Trustee and the Settling Partners pending the approval of the Settlement Agreements pursuant to this Motion; (d) authorizing the Trustee, pursuant to Rule 9019(b) of the Federal Rules of Bankruptcy Procedure, to enter into mutual releases, under the terms of the MLB/CC Settlement Agreement, with certain non-Settling Partners; and (e) limiting the scope of notice required to be given of this Motion to the parties identified below. Each component of this requested relief is well-founded under applicable law.

A. Approval of the Settlement Agreements Is Appropriate Under Bankruptcy Rule 9019

61. Rule 9019(a) of the Federal Rules of Bankruptcy Procedure provides that, on motion by the trustee, the Court may approve a compromise or settlement. Fed. R. Bankr. P. 9019(a).

62. Courts have "great latitude in approving compromise agreements" under Bankruptcy Rule 9019(a) and, in general, compromise agreements should be approved if they are fair, equitable and in the best interest of creditors. *Fireman's Fund Ins. Co. v. Woodson (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1988); *accord, e.g., CAM/RPC Elec. v. Robertson (In re MGS Mktg.)*, 111 B.R. 264, 267 (9th Cir. B.A.P. 1990); *see also In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996) ("[t]o minimize litigation and expedite the administration of a bankruptcy estate, '[c]ompromises are favored in bankruptcy'") (*quoting* 9 *Collier on Bankruptcy* ¶ 9019.03[1] (15th ed. 1993)).

63. Applying the Ninth Circuit's decision in *In re A&C Properties*, 784 F.2d 1377 (9th Cir. 1986), this Court recently articulated the basic standards for approval of a compromise under Rule 9019 as follows:

> This court's role in approving any settlement under Rule 9019 is limited. Rather than an exhaustive investigation or a mini- trial on the merits, this court need only find that the settlement was negotiated in good faith and is reasonable, fair and equitable. *A & C Properties*, 784 F.2d at 1381. It has been held that the court's proper role is "to canvas the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 496-97 (Bankr. S.D.N.Y. 1991) (citations and internal quotation marks omitted); 10 L. King, *Collier on Bankruptcy* ¶ 9019.02 at p. 9019-5 (15th ed. rev.2003). Applying these general principles, this court must consider:
>
> (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;
>
> (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.
>
> *A & C Properties*, 784 F.2d at 1381 (paragraph lettering added; citations omitted).
>
> It is not necessary to satisfy each of these factors provided that the factors as a whole favor approving the settlement. *See, e.g., In re WCI Cable, Inc.*, 282 B.R. 457, 473-74 (Bankr. D. Or. 2002) (although debtor "likely would prevail on one or more causes of action" and court-appointed examiner suggested that "probability of success on the merits, considered in isolation, militated against the proposed settlement," nevertheless court agreed with examiner that settlement should be approved because of other factors).

In re Pacific Gas & Electric Co., 304 B.R. 395, 416-17 (Bankr. N.D. Cal. 2004); *see also Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). Each of the *A&C* factors favors approval of the Settlement Agreements here.

64. Risks of Collection. Unlike previous settlements submitted to this Court, the risks and costs of collection are a major, perhaps the most significant factor, in considering the overall

fairness of the settlements with the Settling Partners outlined in this Motion. The Trustee's faces the daunting prospect, even if the Trustee is completely successful at trial, in collecting judgments against personal assets across at least six states. The Trustee's defendants are not businesses with retained earnings, physical assets, marketable securities, and transferable equity value. Instead, the Trustee seeks recovery against partners who will have paid substantial taxes on the distributions the Trustee would seek to recover and would have saved and added to their net worth only a small fraction of these distributions. The prospect of personal bankruptcies is real. The Trustee believes as well that many partners may determine they will not fully pursue their income-earning capacity if they are doing so for the Trustee and the Brobeck creditors rather than their families. All these factors are significant risks. For all these reasons, the Trustee believes the settlement fairly reflects a discount for collection risk. In litigation the Trustee would expect to prevail, but it would take a substantial period of time. Settlements now, rather than a later return after months or even years of delay, are beneficial.

65. Probability of Success in Litigation. The Trustee believes his case is strong on all of the counts of the pending complaints against Settling Partners. Still, as Trustee, it is prudent to consider the possible defenses and counterclaims to the causes of action in question. The Trustee has become well familiar with the legal arguments against the causes of action set forth in the Trustee's complaints. The partners, organized and well represented, have not been shy in stating their views. In addition, the Trustee gained access to the analysis performed by the Pachulski firm in its work for the Liquidation Committee, which, as noted, focused on assisting partners in defending themselves against a Brobeck Trustee or other creditor representative.

66. The central cause of action, under Section 16957, poses a set of unique challenges from the standpoint of risk assessment. In the Trustee's experience as an insolvency professional, the Trustee is generally called upon to evaluate causes of action aided by legal analysis drawn from a well-developed body of precedent. Such is not the case here. Section 16957 is unique to the state of California and applies only to LLPs organized in California. Other states with statutes providing

for recovery of distributions to partners of LLPs have entirely different wording. (Indeed, California partnership law expressly states that LLP provisions should not be interpreted in comity with the uniform laws enacted in other states. Cal Corp Code Section 16108). The language in Section 16957 defining insolvency is different from that employed in other contexts, such as fraudulent transfer law. The Trustee therefore believes that he has an obligation to assign a degree of risk to the absence of precedent, notwithstanding the solid doctrinal analysis underlying the Trustee's complaints.

67. Other claims in the complaints were met with vigorous counterarguments, as to defense, setoffs and counterclaims. Former Partners owing for capital have argued they were defrauded into joining the firm, for example. Former Partners have alleged their withdrawals or separation arrangements excused such obligations. These arguments were appropriately considered in evaluating prospects for settlement. In addition, most partners filed claims, each typically well in excess of the average settlement payment. While the Trustee believes it would be appropriate to object to these claims and/or seek their subordination, the Trustee believes it was necessary to give these claims due consideration as potential offsets or counterclaims.

68. Complexity, Expense, Inconvenience, and Delay. In the absence of settlement, the estate would face lengthy, complex, and expensive litigation over the claims resolved in the settlements. Two hundred and twenty-two individual adversary proceedings are pending before this Court. From a case management perspective, the parties and the Court face difficult issues over how to coordinate initial disclosures, discovery, motions, pre-trial practice, and other key parts of the litigation calendar. The Trustee is aware that among the defenses likely to be asserted are those dependant on the individual facts and circumstances of the defendants. For example, the defendants have argued in discussions over the settlement proposal, and would argue before the Court, that the value of their production of work and collections from clients establish "consideration" under Section 16957 of the Corporations Code. As noted above, the defenses to other claims, such as for payment of capital, involved partner-specific arguments. Finally, each of the Settling Partner's

clams would have to be objected to individually absent settlement. The prospect for great litigation expense and interminable delays is manifest under these circumstances.

69. Following the settlements, approximately 33 of the complaints would remain on file. Many of those will likely settle under the Bankruptcy Rule 9019(b) relief sought herein or individually. Indeed, the Trustee is hopeful approval of the settlements before the Court would encourage holdouts to enter into negotiations, even though they will be ineligible for the package of discounts and adjustments offered to date. A significant number of complaints will remain pending – but a number that is manageable and can be litigated far more efficiently.

70. Paramount Wishes of Creditors. The Trustee has reported regularly to the principal landlord creditors of the estate during the formulation and advancement of the Trustee's settlement proposals and final round of negotiations. These are the most sophisticated, business savvy, and experienced creditors that hold at least one-half of the expected allowed claims. These discussions have maintained the privacy and confidentiality of the individual partner's exposure and settlement amount (that is, individual names and amounts have not been disclosed).

B. The Settlements Have Been Made In Good Faith

71. As noted above, a finding of good faith is a requirement to approval of a compromise under Bankruptcy Rule 9019. *E.g.*, *PG&E*, 304 B.R. at 416. The accompanying Greenspan Declaration establishes that the negotiations among the parties were hard-fought and at arms' length, with no collusion or fraud, and amply demonstrate that each of the proposed Settlement Agreements were negotiated in good faith.

72. The Trustee agreed to use best efforts to obtain from this Court a finding that the settlements are in good faith under Sections 877 and 877.6 of the California Civil Code. The standards for a finding of good faith under these sections are similar, if not identical, to the requirements of Rule 9019.

73. Section 877 of the California Code of Civil Procedures provides in pertinent part that, "[w]here a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce

judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall . . . discharge the party to whom it is given from all liability for any contribution to any other parties." Cal. Code Civ. Pro. § 877. Section 877.6 in turn provides that "[t]he issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response," and that "[a] determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." Cal. Code Civ. Pro. §§ 877.6(b) and (c).

74. The standards for evaluating whether a compromise qualifies as a "good faith" settlement under these provisions were first articulated by the California Supreme Court in *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 213 Cal. Rptr. 256 (Cal. 1985). In *Tech-Bilt*, the Court held that, to be in good faith, a settlement "must not be grossly disproportionate to what a reasonable person, at the time of settlement, would estimate the settling defendant's liability to be." *Id*. at 263 (quotation omitted).

75. The burden of proof is on the party asserting lack of good faith. Cal. Code Civ. Pro. § 877.6(d). The party seeking a good faith determination has the burden of establishing only that a settlement has occurred. Then, "[o]nce there is a showing made by the settlor of the settlement, the burden of proof on the issue of good faith shifts to the non-settlor who asserts that the settlement was not made in good faith." *City of Grand Terrace v. Superior Court*, 238 Cal. Rptr. 119, 125 (Cal. Ct. App. 1987).

76. A lack of good faith is not established simply by "showing that a settling defendant paid less than his theoretical proportionate or fair share." *Tech-Bilt*, 213 Cal. Rptr. at 263 (quotation omitted). Rather, the objecting party must demonstrate that "the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the

statute." *Abbott Ford, Inc. v. Superior Court*, 239 Cal. Rptr. 626, 636 (Cal. 1987) (quotation omitted). This evaluation, in turn, must be made on the basis of information available at the time of the settlement. *Id*. As the Supreme Court observed:

> [A] "good faith" settlement does not call for perfect or even nearly perfect apportionment of liability. In order to encourage settlement, it is quite proper for a settling defendant to pay less than his proportionate share of the anticipated damages. What is required is simply that the settlement not be grossly disproportionate to the settlor's fair share.

Id. at 637.

77. As explained above, Settling Partners are paying a fair settlement amount, averaging over $118,570 per partner under the settlement. The settlement algorithm was based on objective rules, applied even-handedly, as well as the weighting of equitable factors considered with meticulous regard to fairness across categories of partners and among individual partners. The Trustee submits that the settlement payments to be made by the Settling Partners clearly are within the reasonable range of the Settling Partners' potential exposure under the complaints, particularly when considering "that a settlor should pay less in settlement than he would if he were found liable after a trial." *Tech-Bilt*, 213 Cal. Rptr. at 263.

78. In addition, the parties are offering general releases, with limited exceptions targeted to such matters as malpractice and future obligations to collect accounts receivable. Among the released claims therefore, are claims which the estate could bring against the Settling Partners and others as joint tortfeasors. These include claims of breach of the partner's duty of loyalty and/or duty of care and fraud.

79. Finally, the Greenspan Declaration establishes that the negotiations among the parties were hard-fought and at arms' length, with no collusion or fraud. Thus, a finding of good faith within the meaning of sections 877 and 877.6 of the California Code of Civil Procedure is appropriate.

C. Staying Litigation Between the Trustee and the Settling Partners Pending Effectiveness of the Settlements Is Appropriate Under The Circumstances.

80. An attractive component – to both the Trustee and the Settling Partners - of the settlements is an agreement to stay the litigation currently pending against the Settling Partners. The Trustee believes that the Settlement Agreements will be approved pursuant to this Motion, thus obviating the need to proceed with the current litigation against each of the Settling Partners. In order to avoid requiring Settling Partners to answer or other wise respond to complaints filed by the Trustee, the parties have agreed to terms staying such litigation.

81. Specifically, the Trustee has agreed to extend the date to answer or otherwise response to the Settling Partners' complaints until such time as this Court rules on this Motion. In the event that this Court approves the Settlement Agreements, this "standstill" will be extended an additional period of time to permit the order approving this Motion to become final. If this Court does not approve the Settlement Agreements, as requested herein, the Settling Partners will have twenty (20) days from the entry of the order denying this Motion to answer or otherwise respond to their respective complaint. The Trustee submits that such stay is reasonable, fair and appropriate under the circumstances.

D. Terms of the Order Approving this Motion Respecting Landlord Claims are Appropriate Under the Circumstances.

82. In the course of negotiations with counsel to the largest bloc of Former Partners, those who went to Morgan Lewis, the Trustee became aware of strongly felt concerns on the part of many Former Partners over the scope of the Trustee's release. Specifically, the Trustee learned that many partners would refuse to settle unless they were assured that, having received a release from the Trustee, Brobeck's principal landlords would not assert claims against them as a result of Brobeck's defaults under its leases. In these discussions, it was clear that the worried partners, and their counsel, understood that the so-called "cut-through" liability assumed by partners under the express terms of specific leases, would survive the Trustee's releases. Rather, the concern was that

landlords, as general creditors of Brobeck's estate could pursue partners, simply because payment on their claims in the Brobeck case would not fully satisfy the lease liabilities of Brobeck.

83. The Trustee responded that because Brobeck was an LLP, its partners lacked personal liability other than for cut-through claims. Moreover, under well-settled bankruptcy law, the claims described as the source of concern were derivative of claims of the Brobeck bankruptcy estate, rather than independent claims, and therefore were within the scope of the Trustee's power to release fully.

84. In order to allay concerns, the Trustee approached counsel to its principal landlords seeking their agreement to provide a "comfort letter" confirming they would not pursue derivative claims against the partners. As a result, the Landlords (the EOP Landlords, the Kilroy Landlords and the UCI Landlord) provided comfort letters copies of which are attached hereo as Exhibit G, Exhibit H and Exhibit I, respectively. By each letter, the Landlords consented to the inclusion in the order approving the settlement language stating that they would not pursue derivative claims against any Settling Partner, reserving only independent claims, defined, in the case of the EOP Landlords and Kilroy Landlords, as "cut-through" claims and claims unrelated to Brobeck, and, in the case of the UCI Landlord, solely as claims unrelated to Brobeck. However, each of the EOP Landlords and the Kilroy Landlords required (i) that the Court recognize their sole and exclusive authority to pursue the "cut-through" claims; and (ii) that the Settling Partners agree not to object to the Landlords' claims in the bankruptcy case.

85. The form of the letter was agreed to by counsel to the large bloc of Former Partners, and each letter was distributed to the Former Partners with the execution copy of the Settling Partner's respective settlement agreement. In addition, each Settling Partner received a form letter, a copy of which is attached hereto as Exhibit J, in "Word" format, which they could use to indicate their consent to the landlord's condition respecting no objection to claims of the Landlords. However, each Settling Partner, or such Settling Partner's counsel, further received the following notice:

> Many of you have raised questions about the "comfort letters" provided by Brobeck's three major landlord groups. These letters were revised to conform to comments from Milbank. Please note that the landlords have required that no settling partner object to their claims in the bankruptcy case in order to receive the comfort language in the order approving the settlement agreement. **As a result, the Trustee will ask the Court to require in the that partners agree to this condition in writing or be deemed to have agreed to this condition as part of the settlement to the extent they have not done so.** Should you wish to send such a writing, a form of letter the being used by some of the partners, prepared by Ron Moskovitz, is attached. You may send copies directly to the landlords or send it to Trustee's counsel, who will do so on your behalf.

(emphasis added). In response to this notice, only two partners, John Hilson and Kenneth Bender, declined to agree not to object to the claims of the EOP Landlords and the Kilroy Landlords.

86. Accordingly, the Trustee hereby requests that the Court include the following provisions in the Order approving this Motion: (i) the comfort language which sought by certain of the Settling Partners; (ii) the acknowledgment of the sole and exclusive right to pursue "cut-through" claims sought by the EOP Landlords and the Kilroy Landlords; and (iii) that by virtue of the foregoing notice, all Settling Partners will be deemed to have agreed not to object to the claims of the EOP Landlords and the Kilroy Landlords, other than Messrs. Hilson and Bender.

E. The Trustee Should be Authorized to Enter Into Mutual Releases with Certain Non-Settling Partners.

87. Bankruptcy Rule 9019(b) provides that "[a]fter a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice."

88. As set forth above, the Trustee has concluded that in a fair settlement, certain types of distributions to partners should be afforded a zero weighting if the other terms of settlement are fair and reasonable. By the reasoning set forth above, the Trustee believes it would be a fair and reasonable settlement to release the claims against partners who have a zero weighting under the settlement algorithm, in return for a withdrawal of the proofs of claim filed by any such partner in this case. In addition, the Trustee has concluded that it would be fair and reasonable to enter into a

similar mutual release, which may or may not involve a payment to the estate, with respect to (i) the estates of deceased partners; and (ii) partners who demonstrate to the Trustee's satisfaction that they are under a full disability and have no substantial earnings power as practicing lawyers. Accordingly, by the Motion, I seek prospective authority under Bankruptcy Rule 9019(b) to enter into mutual releases, under the terms of the MLB/CC Settlement Agreement, with respect to partners in the foregoing categories. Any such mutual releases shall be entered into only after notice under the "negative notice" provisions set forth in this Court's September 13, 2004, order.

F. Limiting The Scope Of Notice Of The Motion Is Appropriate Under The Circumstances.

89. Bankruptcy Rule 2002(a)(3) generally requires that notice of proposed compromises be given to "all creditors." Bankruptcy Rule 2002(i), however, provides that the Court may order that such notices be limited only to creditors who "file a request that all notices be mailed to them." Fed. R. Bankr. P. 2002(i).

90. Here, the Trustee has given notice of the Motion to (a) all creditors and other parties who have filed a request for notice in accord with Bankruptcy Rule 2002(i); (b) all persons who were partners of Brobeck at the time of its dissolution; (c) the Liquidation Committee and its counsel; and (d) all Settling Partners and their counsel (if applicable) (collectively, the "Notice Parties"). The Trustee submits that this is ample and sufficient notice and is appropriate under the circumstances, particularly given that there likely are thousands of creditors of Brobeck, that the Trustee does not currently have a database or other readily-available source of information regarding the names and addresses of "all creditors," and that it would be very expensive and time consuming to create that database and provide notice of the proposed compromise to "all creditors", thereby lessening the beneficial aspects of the compromise. Moreover, the Trustee submits that the Notice Parties are the entities most likely to have an interest in the Motion and the proposed compromise, and are likely to fully represent the interests of the creditors as a whole.

91. Accordingly, the Trustee submits that the notice given of the Motion is reasonable and appropriate under the circumstances. *See, e.g., Jonas v. United States Small Business Administration (In re Southland Supply, Inc.),* 657 F.2d 1076, 1081 (9th Cir. 1981) (holding that notice of a proposed sale, compromise, or settlement to an authorized creditors committee and to any creditors who file a request to receive all notices is adequate).

V. CONCLUSION

92. The approval of the Settlement Agreements and related relief requested herein is in the best interests of the bankruptcy estate and Brobeck's creditors. The aggregate of approximately $22,409,719 in settlement payments represents a substantial portion of the amount sought by the Trustee pursuant to the complaints, and approximates the likely net recoveries that would be attained in litigation of any claims against Settling Partners. After accounting for litigation risk, expense, and delay, the aggregate settlement amount is at the very high end of the range of reasonableness, and produces an immediate recovery without need to engage in protracted, expensive, and risky litigation with highly-motivated adversaries. Moreover, because the recoveries are free and clear of any liens or security interests, all unsecured creditors will benefit from the cash settlement payments.

WHEREFORE, for all of the foregoing reasons, the Trustee respectfully requests that the Court enter an order, substantially in the form of the proposed order attached as Exhibit A, (a) approving the Settlement Agreements; (b) finding that the settlements and releases embodied in the Settlement Agreements have been entered into and made in good faith within the meaning of sections 877 and 877.6 of the California Code of Civil Procedure; (c) staying litigation between the Trustee and the Settling Partners pending the approval of the Settlement Agreements requested herein; (d) authorizing, pursuant to Bankruptcy Rule 9019(b), the Trustee to enter into mutual releases, under the terms of the MLB/CC Settlement Agreement, with certain non-Settling Partners; and (e) limiting the scope of the notice required to be given of this Motion to the Notice Parties identified above.

DATED: February 18, 2005

HENNIGAN, BENNETT & DORMAN LLP
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By: _____
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