

1 TO THE HONORABLE MITCHEL R. GOLDBERG, UNITED STATES
2 BANKRUPTCY JUDGE, INTERESTED PARTIES AND THEIR ATTORNEYS OF
3 RECORD:


4 K. Morgan Enterprises, Inc., as trustee (the "Trustee")
5 under the Trust for Certain Creditors of Consolidated Freightways
6 Corporation and Certain Affiliates (collectively, the "Debtors")
7 created pursuant to the Debtors' Consolidated Plan of Liquidation
8 (the "Plan"), dated July 1, 2004 (As Amended), confirmed by Order
9 of the Court entered on November 22, 2004, hereby files its
10 motion (the "Motion") for an order authorizing modification of
11 the Plan pursuant to 11 U.S.C. § 1127(b). As more fully
12 discussed in the memorandum of points and authorities
13 concurrently filed herewith in support of the Motion, the
14 contemplated Plan modification is designed to reconcile the
15 provisions of the Plan with the provisions of the liquidating
16 trust created under the Plan so as to preserve the status of the
17 trust as a grantor trust for federal income tax purposes. The
18 Trustee believes that the proposed modification does not
19 adversely change the treatment of any creditor under the Plan,
20 and that the proposed modification is purely technical in nature,
21 but clarifies the income allocation methodology set forth in the
22 trust agreement and in the Plan. In addition, the proposed
23 modification is reflective of the actual methodology that has
24 been adopted by the Trustee in the treatment of creditors under
25 the Plan, and would ratify the Trustee's use of such methodology.
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WHEREFORE, the Trustee respectfully requests that the Court enter an order: (i) granting the Motion in its entirety; and (ii) granting such other and further relief as the Court deems just and proper under the circumstances of this case.

DATED: March 6, 2008

K. MORGAN ENTERPRISES, INC., AS TRUSTEE UNDER THE TRUST FOR CERTAIN CREDITORS OF CONSOLIDATED FREIGHTWAYS CORPORATION AND CERTAIN AFFILIATES

By: 
DAVID L. NEALE
TANIA M. MOYRON
LEVENE, NEALE, BENDER, RANKIN
& BRILL L.L.P.
Special Counsel for the Trust
and the Oversight Committee

MEMORANDUM OF POINTS AND AUTHORITIES

I.
STATEMENT OF FACTS

The Debtors commenced these cases by filing voluntary petitions for relief under chapter 11 of title 11, United States Code on September 3, 2002. No trustee was appointed, and the Debtors managed their affairs as debtors in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

On November 22, 2004, the Court confirmed the Debtors' Plan. The Plan and that certain trust agreement (the "Trust Agreement") attached thereto as Exhibit K created a liquidating trust (the "Trust") with the primary objective of liquidating the Debtors' property and distributing the net proceeds to creditors under the Plan. Attached as Exhibits "A" and "B," respectively, to the accompanying Declaration of Kerry K. Morgan (the "Morgan Declaration") are true and correct copies of the Plan and Trust Agreement.¹

Section 9.4 of the Plan provides that "[a]ll Distributions to Holders of Allowed Claims in Classes 4, 5 and 6 under the Plan shall be *Pro Rata* within each such Class." Section 1.2.56 of the Plan defines "distribution" to mean "any transfer of Cash or other property, pursuant to the terms of the Plan, from the Trust to the Holders of Allowed Class 4 Claims." Section 1.2.91 of the Plan defines "pro rata" to mean "proportionately so that, with

¹ Any terms not defined herein shall have the meanings ascribed to them in the Plan and the Trust Agreement.

1 respect to any Class, the ratio of (a) the amount of
2 consideration distributed on account of a particular Allowed
3 Claim to (b) the amount of the Allowed Claim, is the same as the
4 ratio of (x) the amount of consideration distributed on account
5 of all Allowed Claims in the Class in which the particular
6 Allowed Claim is included to (y) the aggregate amount of all
7 Allowed Claims of that Class."

8 In compliance with Section 9.4 of the Plan, the Trust has
9 made *pro rata* distributions to holders of certain Allowed Class 4
10 Claims following confirmation of the Plan. Under the Plan, the
11 holder of a disputed claim does not receive a distribution;
12 instead, the Plan creates a reserve for disputed claims. See,
13 Plan, Section 9.8. To the extent that a disputed claim
14 subsequently becomes an Allowed Class 4 Claim, the Plan provides
15 that the claimant will at that time receive a distribution of
16 cash equal to its *pro rata* share of any distributions which were
17 made on account of Allowed Class 4 Claims prior to the date that
18 the disputed claim became an Allowed Class 4 Claim (a "Catch Up
19 Payment"). See, Plan, Section 9.7.

21 The computation of distributions to Trust Beneficiaries
22 (i.e., holders of Allowed Class 4 Claims) on a *pro rata* basis
23 under the Plan did not take into account the fact that there
24 would be income earned on the cash held in the Trust, which
25 income would have to be allocated to Trust Beneficiaries at the
26 end of each tax year. In contrast, this specific issue was dealt
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1 with in the Trust Agreement. Consistent with applicable federal
2 tax law, Section 8(b)(1) of the Trust Agreement provides:

3 All interest or other earnings on Cash held
4 in the Trust, including interest or earnings
5 on Cash allocated by the Trustee to any
6 reserve accounts, will be allocated to the
7 Trust Beneficiaries on an annual basis as of
8 the end of the Trust's tax year, and each
9 Trust Beneficiary shall be responsible to
10 report and pay the taxes due on its share of
11 such income or earnings, whether or not
12 amounts are actually distributed by the
13 Trustee or the Disbursing Agent to the Trust
14 Beneficiaries to pay such taxes. No interest
15 or earnings on Cash held in the Trust shall
16 be allocated to Persons who, as of the end of
17 the Trust's tax year, are Holders of disputed
18 claims.
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20 As required under Section 8(b)(1) of the Trust Agreement,
21 the Trust has allocated interest and earnings in proportion to
22 the amount of a Trust Beneficiary's Allowed Class 4 Claim as of
23 the end of each Trust's tax year. The Trust has issued
24 beneficiary statements on an annual basis to Trust Beneficiaries,
25 specifying the amount of income, expenses and gains allocable to
26 the Beneficiary and detailing the Beneficiary's beginning and
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1 ending interest (known as a beneficial interest account) in the
2 Trust.²

3 Also pursuant to Section 8(b)(1) of the Trust Agreement, the
4 Trust does not allocate interest and/or earnings to holders of
5 disputed claims. If the holder of a disputed claim becomes the
6 holder of an Allowed Class 4 Claim in a later year, the holder
7 will then be entitled to distributions of interest and earnings
8 for that and any subsequent tax year. By way of contrast, the
9 holder of a disputed claim that becomes a Trust Beneficiary will
10 receive a Catch Up Payment so that the distribution on account of
11 the principal amount of that claimant's Allowed Class 4 Claim
12 shall be equal to the distribution received by all similarly-
13 situated holders of Allowed Class 4 Claims.

14 However, the definition of *pro rata* distributions under the
15 Plan does not account for the fact that a Trust Beneficiary whose
16 claim is allowed will be entitled to receive a share of the
17 interest income earned by the Trust, whereas, under the Trust
18 Agreement and applicable tax law, the holder of a disputed claim,
19 while receiving a Catch Up Payment, cannot receive an allocation
20 of income earned by the Trust for any year prior to the time the
21 holder of a disputed claim became a Trust Beneficiary (i.e., not
22 until the disputed claim became an Allowed Class 4 Claim).
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27 ² The Trust has not yet made a cash distribution of any interest and/or
28 earnings or gains realized by the Trust and plans to do so only in connection
with the entry of a final decree in the case.

1 Section 8(a) of the Trust Agreement provides that the
2 "Trustee acknowledges that it intends to administer the Trust so
3 that it qualifies as a liquidating trust under Treasury
4 Regulation § 301.7701-4(d) that will be a 'grantor trust' under
5 the United States federal income tax laws." Similarly, pursuant
6 to Plan Section 7.2, the Trust is to be classified for U.S.
7 federal income tax purposes as a "liquidating trust" in
8 accordance with Treasury Regulation 301.7701-4(d). Attached as
9 Exhibit "C" to the Morgan Declaration is a true and correct copy
10 of Treas. Reg. 301.7701-4.

11 Treasury Regulation 301.7701-4(d) describes the purposes of
12 a liquidating trust but does not specify how a liquidating trust
13 is taxed. Treas. Reg. § 301.7701-4(d). In the context of a
14 liquidating trust established pursuant to a chapter 11 case,
15 Revenue Procedure 94-45 describes the circumstances under which
16 the IRS will rule that a trust established pursuant to a
17 confirmed chapter 11 will qualify as a liquidating trust for
18 federal income tax purposes and specifies how the liquidating
19 trust will be taxed. Treas. Reg. § 301.7701-4(d).

21 Revenue Procedure 94-45 provides that a liquidating trust is
22 a "grantor trust" wherein each beneficial interest holder is a
23 "grantor" and is considered for purposes of federal income tax
24 law to directly own an undivided share of the property held by
25 the Trust. Rev. Proc. 94-45, 1994-28 I.R.B. 124; attached as
26 Exhibit "D" to the Morgan Declaration is a true and correct copy
27 of Rev. Proc. 94-45, 1994-28 I.R.B. 124. This analysis is
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1 straightforward with respect to holders of Allowed Class 4 Claims
2 but with respect to holders of disputed claims there is no clear
3 answer as to whether a holder of a disputed claim should be
4 deemed to own a share of the Trust unless and until the disputed
5 claim becomes an Allowed Class 4 Claim.

6 This issue is further complicated by Internal Revenue Code
7 Section 468B(g) which requires all income and deductions of a
8 liquidating trust be allocated to trust beneficiaries on a
9 current yearly basis and expressly prohibits the trust from
10 suspending the allocation of a portion of the Trust's income and
11 deductions until disputed claims are resolved. I.R.C. § 468B(g).
12 In order to comply with the foregoing, the Trust allocates
13 interest and income only to Trust Beneficiaries on an annual tax
14 basis, and holders of disputed claims receive no such allocation.
15

16 What the foregoing highlights is the irreconcilable and
17 technical inconsistency between the Plan and the Trust Agreement
18 that needs to be resolved. The Plan provides that all Trust
19 Beneficiaries are to receive *pro rata* distributions on account of
20 their respective Allowed Class 4 Claims. However, the Plan does
21 not contemplate that not all claims will be allowed at the same
22 time. Holders of earlier Allowed Class 4 Claims must, for
23 federal income tax purposes, be allocated income from the
24 interest earned by the Trust. Holders of later Allowed Class 4
25 Claims will, by virtue of the lapse of time between the point at
26 which the disputed claim becomes an Allowed Class 4 Claim, be
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1 allocated less of the interest income earned by the Trust. See,
2 Morgan Declaration.

3 In contrast, the Trust Agreement does take this timing
4 differential into account, and the Trust has been operating in
5 good faith in accordance with the Trust Agreement which, in turn,
6 comports with the requirements of federal tax law. Strict
7 compliance with the terms of the Plan could result in potentially
8 severe adverse tax consequences both for the Trust and the
9 individual Trust Beneficiaries.

10 In order to address this inconsistency between the Plan and
11 the Trust Agreement, avoid any argument regarding the tax issues
12 relative to the Trust itself and the Trust Beneficiaries, and
13 ratify the methodology used by the Trust as described above, the
14 Trustee suggests that the Plan be modified, as follows (amendment
15 appears in bold italics):
16

17 1.2.91 **Pro Rata** means proportionately so
18 that, with respect to any Class, the ratio of
19 (a) the amount of consideration distributed
20 on account of a particular Allowed Claim to
21 (b) the amount of the Allowed Claim, is the
22 same as the ratio of (x) the amount of
23 consideration distributed on account of all
24 Allowed Claims in the Class in which the
25 particular Allowed Claim is included to (y)
26 the aggregate amount of all Allowed Claims of
27 that Class; **provided however, that the**
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1 requirement that any consideration be
2 distributed to holders of Allowed Claims in
3 any particular Class on a Pro Rata basis
4 shall not require the Trust to make any
5 distributions to holders of Allowed Claims
6 that would be inconsistent with Section
7 8(b)(1) of the Trust Agreement or its
8 compliance with federal tax laws, rules
9 and/or regulations concerning the tax status
10 of the Trust.
11

12 This proposed modification of the Plan is consistent with
13 the Plan's stated primary objective which is that the Trust be
14 classified as a "liquidating trust" in compliance with Treasury
15 Regulation section 301.7701-4(d). Plan Section 7.2 provides:

16 It is intended that the Trust will be
17 classified for U.S. federal income tax
18 purposes as a 'liquidating trust,' with the
19 primary objective of liquidating the Trust
20 Property and distributing the net proceeds
21 thereof, with no objective to continue or
22 engage in the conduct of a trade or business
23 in accordance with Treasury Regulation
24 301.7701-4(d), and, notwithstanding anything
25 to the contrary in the Plan, all actions
26 taken by the Trust or any person acting on
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1 The Plan may be modified at any time after
2 the Confirmation Date and before substantial
3 consummation with the consent of the
4 Committee or the Oversight Committee, as may
5 be applicable, provided that the Plan, as
6 amended or modified, satisfies the
7 requirements of section 1122 and 1123 of the
8 Bankruptcy Code and the Court, after notice
9 and a hearing, confirms the Plan, as amended
10 or modified, under section 1129 of the
11 Bankruptcy Code and the circumstances warrant
12 such amendments or modifications. A Holder
13 of a Claim that has accepted the Plan shall
14 be deemed to have accepted the Plan, as
15 amended or modified, if the proposed
16 amendment or modification does not adversely
17 change the treatment of the Claims of such
18 Holder.
19

20 See, Plan Section 15.4.

21 Based on the relevant facts herein, discussed *supra*, the
22 Trust believes that Section 1.2.91 of the Plan should be modified
23 as set forth above. This proposed modification has been
24 discussed with the Oversight Committee, and the Oversight
25 Committee has consented to the proposed modification of the Plan.

26 See, Morgan Declaration, ¶ 17, Declaration of Robert Coco, ¶ 3.

27 The proposed modifications do not adversely affect any creditor
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1 under the Plan since the ultimate distribution to Trust
2 Beneficiaries on account of the principal balance of each such
3 Beneficiary's Allowed Class 4 Claim will, in fact, be *pro rata*.³
4 The only differential in distributions made to Trust
5 Beneficiaries will be in the amount of income allocated based
6 upon the timing of the allowance of a particular claim, all as
7 dictated by the Trust Agreement and its compliance with
8 applicable tax requirements necessary to preserve the tax status
9 of the Trust.

10 III.

11 CONCLUSION

12 Based on the foregoing, the Trustee respectfully requests
13 that the Court enter an order: (i) granting the Motion in its
14 entirety, authorizing the proposed modification of the Plan, and
15 ratifying the methodology employed by the Trust as described
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17 _____
18 ³ As already described in this Motion, were the Trust to handle income related
19 beneficial interest allocations other than as described in the Trust
20 Agreement, the estate could suffer significant tax exposure and added
21 administrative cost. This potential tax exposure more than offsets any
22 detriment a creditor may incur from income being allocated at the time a claim
23 is allowed (consistent with the provisions of the Trust) versus on a *pro rata*
24 basis (consistent with the provisions of the Plan in its current form).

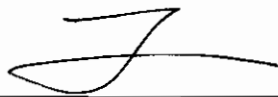
25 Based upon the analysis provided by the Trustee's tax professionals, were the
26 "grantor trust" structure deemed invalid, the income tax liability, including
27 interest and penalties, could pass directly to the estate and amount to
28 between \$5.1 million and \$7.5 million. Additionally, over the course of the
bankruptcy, the administrative burden of handling beneficial interests
consistent with the Plan in its current form could be in excess of \$925,000.
If the Plan is not modified as requested herein, added expense to creditors
could range between \$6.0 million and \$8.4 million.

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herein; and (ii) granting such other and further relief as is just and proper under the circumstances.

DATED: March 6, 2008

K. MORGAN ENTERPRISES, INC., AS
TRUSTEE UNDER THE TRUST FOR CERTAIN
CREDITORS OF CONSOLIDATED
FREIGHTWAYS CORPORATION AND CERTAIN
AFFILIATES

By: 

DAVID L. NEALE
TANIA M. MOYRON
LEVENE, NEALE, BENDER, RANKIN
& BRILL L.L.P.
Special Counsel for the Trust
and the Oversight Committee

DECLARATION OF KERRY K. MORGAN

I, Kerry K. Morgan, hereby declare as follows:

1. I am the President of K. Morgan Enterprises, Inc., the Trustee under the Trust for Certain Creditors (the "Trust") of Consolidated Freightways Corporation and Certain Affiliates created pursuant to the Debtors' Consolidated Plan of Liquidation, dated July 1, 2004 (As Amended), confirmed by Order of the Court entered on November 22, 2004. I have personal knowledge of the facts set forth below and, if called as a witness, I would and could competently testify thereto.

2. I submit this Declaration in support of the motion (the "Motion") for an order authorizing modification of the Plan pursuant to 11 U.S.C. § 1127(b).

3. The Debtors commenced these cases by filing voluntary petitions for relief under chapter 11 of title 11, United States Code on September 3, 2002. No trustee was appointed, and the Debtors managed their affairs as debtors in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

4. On November 22, 2004, the Court confirmed the Debtors' Plan. The Plan and that certain trust agreement (the "Trust Agreement") attached thereto as Exhibit K created a liquidating trust (the "Trust") with the primary objective of liquidating the Debtors' property and distributing the net proceeds to creditors

1 under the Plan. Attached as Exhibits "A" and "B," respectively,
2 are true and correct copies of the Plan and Trust Agreement.⁴

3 5. Section 9.4 of the Plan provides that "[a]ll
4 Distributions to Holders of Allowed Claims in Classes 4, 5 and 6
5 under the Plan shall be Pro Rata within each such Class."
6 Section 1.2.56 of the Plan defines "distribution" to mean "any
7 transfer of Cash or other property, pursuant to the terms of the
8 Plan, from the Trust to the Holders of Allowed Class 4 Claims."
9 Section 1.2.91 of the Plan defines "pro rata" to mean
10 "proportionately so that, with respect to any Class, the ratio of
11 (a) the amount of consideration distributed on account of a
12 particular Allowed Claim to (b) the amount of the Allowed Claim,
13 is the same as the ratio of (x) the amount of consideration
14 distributed on account of all Allowed Claims in the Class in
15 which the particular Allowed Claim is included to (y) the
16 aggregate amount of all Allowed Claims of that Class."
17

18 6. In compliance with Section 9.4 of the Plan, the Trust,
19 through my direction and oversight, has made pro rata
20 distributions to holders of certain Allowed Class 4 Claims
21 following confirmation of the Plan. Under the Plan, the holder
22 of a disputed claim does not receive a distribution; instead, the
23 Plan creates a reserve for disputed claims. See, Plan, Section
24 9.8. To the extent that a disputed claim subsequently becomes an
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26 _____
27 ⁴ Any terms not defined herein shall have the meanings ascribed to them in the
28 Plan and the Trust Agreement.

1 Allowed Class 4 Claim, the Plan provides that the claimant will
2 at that time receive a distribution of cash equal to its *pro rata*
3 share of any distributions which were made on account of Allowed
4 Class 4 Claims prior to the date that the disputed claim became
5 an Allowed Class 4 Claim (a "Catch Up Payment"). See, Plan,
6 Section 9.7.

7 7. The computation of distributions to Trust Beneficiaries
8 (i.e., holders of Allowed Class 4 Claims) on a *pro rata* basis
9 under the Plan did not take into account the fact that there
10 would be income earned on the cash held in the Trust, which
11 income would have to be allocated to Trust Beneficiaries at the
12 end of each tax year. In contrast, this specific issue was dealt
13 with in the Trust Agreement. Section 8(b)(1) of the Trust
14 Agreement provides:

15 All interest or other earnings on Cash held
16 in the Trust, including interest or earnings
17 on Cash allocated by the Trustee to any
18 reserve accounts, will be allocated to the
19 Trust Beneficiaries on an annual basis as of
20 the end of the Trust's tax year, and each
21 Trust Beneficiary shall be responsible to
22 report and pay the taxes due on its share of
23 such income or earnings, whether or not
24 amounts are actually distributed by the
25 Trustee or the Disbursing Agent to the Trust
26 Beneficiaries to pay such taxes. No interest
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1 or earnings on Cash held in the Trust shall
2 be allocated to Persons who, as of the end of
3 the Trust's tax year, are Holders of disputed
4 claims.

5 8. As required under Section 8(b)(1) of the Trust
6 Agreement, the Trust, through my direction and oversight, has
7 allocated interest and earnings in proportion to the amount of a
8 Trust Beneficiary's Allowed Class 4 Claim as of the end of each
9 Trust's tax year. The Trust has issued beneficiary statements on
10 an annual basis to Trust Beneficiaries, specifying the amount of
11 income, expenses and gains allocable to the Beneficiary and
12 detailing the Beneficiary's beginning and ending interest (known
13 as a beneficial interest account) in the Trust.⁵

14 9. Also pursuant to Section 8(b)(1) of the Trust
15 Agreement, the Trust does not allocate interest and/or earnings
16 to holders of disputed claims. If the holder of a disputed claim
17 becomes the holder of an Allowed Class 4 Claim in a later year,
18 the holder will then be entitled to distributions of interest and
19 earnings for that and any subsequent tax year. By way of
20 contrast, the holder of a disputed claim that becomes a Trust
21 Beneficiary will receive a Catch Up Payment so that the
22 distribution on account of the principal amount of that
23 claimant's Allowed Class 4 Claim shall be equal to the
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26 _____
27 ⁵ The Trust has not yet made a cash distribution of any interest and/or
28 earnings or gains realized by the Trust and plans to do so only in connection
with the entry of a final decree in the case.

1 distribution received by all similarly-situated holders of
2 Allowed Class 4 Claims.

3 10. However, the definition of *pro rata* distributions under
4 the Plan does not account for the fact that a Trust Beneficiary
5 whose claim is allowed will be entitled to receive a share of the
6 interest income earned by the Trust, whereas, under the Trust
7 Agreement and applicable tax law, the holder of a disputed claim,
8 while receiving a Catch Up Payment, cannot receive an allocation
9 of income earned by the Trust for any year prior to the time the
10 holder of a disputed claim became a Trust Beneficiary (i.e., not
11 until the disputed claim became an Allowed Class 4 Claim).

12 11. Section 8(a) of the Trust Agreement requires that the
13 Trust be administered "so that it qualifies as a liquidating
14 trust under Treasury Regulation § 301.7701-4(d) that will be a
15 'grantor trust' under the United States federal income tax laws."
16 Similarly, pursuant to Plan Section 7.2, the Trust is to be
17 classified for U.S. federal income tax purposes as a "liquidating
18 trust" in accordance with Treasury Regulation 301.7701-4(d).

19 12. In order to comply with the Trust Agreement and what I
20 understand to be the relevant federal tax laws more fully
21 discussed in the annexed memorandum of points and authorities,
22 the Trust allocates interest and income only to Trust
23 Beneficiaries on an annual tax basis, and holders of disputed
24 claims receive no such allocation.
25

26 13. In administering the Trust, I have found that there is
27 an irreconcilable and technical inconsistency between the between
28

1 the Plan and the Trust Agreement that needs to be resolved. The
2 Plan provides that all Trust Beneficiaries are to receive pro
3 rata distributions on account of their respective Allowed Class 4
4 Claims. However, the Plan does not address the situation where,
5 as here, claims will not all be allowed at the same time.
6 Holders of earlier Allowed Class 4 Claims must, for what I
7 understand to be federal income tax purposes, be allocated income
8 from the interest earned by the Trust. Holders of later Allowed
9 Class 4 Claims will, by virtue of the lapse of time between the
10 point at which the disputed claim becomes an Allowed Class 4
11 Claim, be allocated less of the interest income earned by the
12 Trust.

13
14 14. In contrast, the Trust Agreement does take this timing
15 differential into account, and the Trust has been operating in
16 good faith in accordance with the Trust Agreement which, in turn,
17 comports with what I understand to be the requirements of federal
18 tax law. I am informed and believe that strict compliance with
19 the terms of the Plan could result in potentially severe adverse
20 tax consequences both for the Trust and for the individual Trust
21 Beneficiaries.

22 15. In order to address this inconsistency between the Plan
23 and the Trust Agreement, avoid any argument regarding the tax
24 issues relative to the Trust itself and the Trust Beneficiaries,
25 and ratify the methodology used by the Trust as described above,
26 I suggest that the Plan be modified, as follows (amendment
27 appears in bold italics):
28

1 1.2.91 **Pro Rata** means proportionately so
2 that, with respect to any Class, the ratio of
3 (a) the amount of consideration distributed
4 on account of a particular Allowed Claim to
5 (b) the amount of the Allowed Claim, is the
6 same as the ratio of (x) the amount of
7 consideration distributed on account of all
8 Allowed Claims in the Class in which the
9 particular Allowed Claim is included to (y)
10 the aggregate amount of all Allowed Claims of
11 that Class; **provided however, that the**
12 **requirement that any consideration be**
13 **distributed to holders of Allowed Claims in**
14 **any particular Class on a Pro Rata basis**
15 **shall not require the Trust to make any**
16 **distributions to holders of Allowed Claims**
17 **that would be inconsistent with Section**
18 **8(b)(1) of the Trust Agreement or its**
19 **compliance with federal tax laws, rules**
20 **and/or regulations concerning the tax status**
21 **of the Trust.**

24 16. This proposed modification of the Plan is consistent
25 with the Plan's stated primary objective which is that the Trust
26 be classified as a "liquidating trust" in compliance with
27
28

1 Treasury Regulation section 301.7701-4(d). Plan Section 7.2
2 provides:

3 It is intended that the Trust will be
4 classified for U.S. federal income tax
5 purposes as a 'liquidating trust,' with the
6 primary objective of liquidating the Trust
7 Property and distributing the net proceeds
8 thereof, with no objective to continue or
9 engage in the conduct of a trade or business
10 in accordance with Treasury Regulation
11 301.7701-4(d), and, notwithstanding anything
12 to the contrary in the Plan, all actions
13 taken by the Trust or any person acting on
14 behalf of the Trust shall be consistent with
15 such primary objective.
16

17 17. I believe that Section 1.2.91 of the Plan should be
18 modified as set forth above. I have discussed this proposed
19 modification with the Oversight Committee, and the Oversight
20 Committee has consented to the proposed modification of the Plan.
21 See, Declaration of Robert Coco, ¶ 3. In my opinion, the
22 proposed modifications do not adversely affect any creditor under
23 the Plan since the ultimate distribution to Trust Beneficiaries
24 on account of the principal balance of each such Beneficiary's
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1 Allowed Claim will, in fact, be pro rata. The only differential
2 in distributions made to Trust Beneficiaries will be in the
3 amount of income allocated based upon the timing of the allowance
4 of a particular claim.

5 18. More specifically, were the Trust to handle beneficial
6 interest other than as described the Trust Agreement, the estate
7 could suffer significant tax exposure and added administrative
8 cost. I believe this potential exposure more than offsets any
9 detriment a creditor may incur from income being allocated at the
10 time a claim is allowed (consistent with the Trust) versus on a
11 pro rata basis (consistent with the Plan in its current form).

12 19. Based upon my discussions with tax professionals hired
13 by the estate, it is my opinion that, were the "grantor trust"
14 structure deemed invalid, the income tax liability, including
15 interest and penalties, could pass directly to the estate and
16 amount to between \$5.1 million and \$7.5 million. Additionally,
17 over the course of the bankruptcy, the administrative burden of
18 handling beneficial interests consistent with the Plan in its
19 current form could be in excess of \$925,000. Therefore, if the
20 Plan is not modified as requested herein, the added expense to
21 creditors could range between \$6.0 million and \$8.4 million.

22 Executed on this 4th day of March, 2008, at Vancouver,
23 Washington.

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25
26 KERRY H. MORGAN
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DECLARATION OF ROBERT COCO

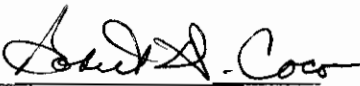
I, Robert Coco, hereby declare as follows:

1. I am chairman of the Oversight Committee (as such term is defined in the Debtors' Consolidated Plan of Liquidation Dated July 1, 2004 (As Amended)) (the "Plan"). I have personal knowledge of the facts set forth below and, if called as a witness, I would and could competently testify thereto.

2. I submit this Declaration in support of the motion (the "Motion") for an order authorizing modification of the Plan pursuant to 11 U.S.C. § 1127(b).

3. In my capacity as chairman of the Oversight Committee, I have participated in numerous discussions with Kerry K. Morgan, President of K. Morgan Enterprises, Inc., the Trustee under the Trust for Certain Creditors (the "Trustee"), and counsel concerning the proposed Plan modification. At a regularly scheduled meeting of the Oversight Committee, the Oversight Committee voted to support the proposed modification of the Plan, and determined that the Motion is in the best interest of all creditors and the estate. The Oversight Committee has therefore authorized me to offer this declaration in support of the Motion.

Executed on this 4th day of March, 2008, at Rosemont, Illinois.



ROBERT COCO