

Objection Deadline: November 8, 2010
Hearing Date: November 18, 2010 at 10:00 a.m.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADELPHIA RECOVERY TRUST, : No. 05 Civ. 9050 (LMM)
: :
Plaintiff, : :
: :
- against - : :
: :
BANK OF AMERICA, N.A., *et al.*, : :
: :
Defendants. : :
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**ADELPHIA RECOVERY TRUST’S MOTION WITH RESPECT TO
SETTLEMENT AGREEMENT WITH THE BANK DEFENDANTS
AND DISMISSAL OF CLAIMS**

The Adelpia Recovery Trust (the “Trust”), by its undersigned counsel, files this motion (the “Motion”) for entry of an order (a) finding that the Trustees of the Trust have exercised valid and proper business judgment in entering into a settlement agreement, dated as of October 18, 2010, between the Trust and the Bank Defendants¹ (the “Settlement Agreement”),

¹ ABN AMRO Bank, N.V., ABN AMRO Inc., Banc of America Securities LLC, Bank of America, N.A., Bank of Montreal, BMO Capital Markets Corp., BNY Mellon Capital Markets LLC (f/k/a BNY Capital Markets, Inc.), The Bank of New York Mellon (f/k/a The Bank of New York), The Bank of Nova Scotia, Barclays Bank PLC, Barclays Capital Inc., Crédit Agricole Corporate and Investment Bank (formerly known as Calyon and successor to Crédit Lyonnais) and Crédit Agricole Securities (USA) Inc. (formerly known as Calyon Securities (USA) Inc. and successor to Crédit Lyonnais Securities (USA) Inc.), CIBC Inc., CIBC World Markets Corp., Citibank, N.A., Citicorp USA, Inc., Citigroup Global Markets Holdings Inc. (f/k/a Solomon Smith Barney Holdings, Inc.), Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., “Rabobank Nederland,” New York Branch, Cowen and Company, LLC (f/k/a Cowen & Co., LLC, f/k/a SG Cowen & Co., LLC, f/k/a SG Cowen Securities Company, LLC), Credit Suisse, New York Branch (f/k/a Credit Suisse First Boston, New York Branch), Credit Suisse Securities (USA) LLC (f/k/a Credit Suisse First Boston Corporation and Donaldson, Lufkin & Jenrette Securities Corporation), and Credit Suisse Capital Funding, Inc. (f/k/a DLJ Capital Funding, Inc.), Deutsche Bank Securities, Inc. (f/k/a Deutsche Banc Alex. Brown Inc.), Deutsche Bank Trust Company Americas (f/k/a Bankers Trust Company), Fleet National Bank, Fleet Securities Inc., JPMorgan Chase Bank, N.A., J.P. Morgan Securities, Inc., Merrill Lynch & Co., Inc., Merrill Lynch Capital Corp., Mizuho Corporate Bank, Ltd. (f/k/a The Fuji Bank,

which Settlement Agreement is fair to and in the best interests of the Trust; and (b) granting the ancillary relief described herein and in the Settlement Agreement. While the Settlement Agreement has not yet been executed by the Trust and the Bank Defendants at the time this Motion is being served and filed, and while it remains subject to those Parties' final review, it will be substantially in the form annexed hereto as Exhibit A.² A proposed order (the "Order") granting this Motion is annexed as Exhibit B.

In support of this Motion, the Trust respectfully represents as follows:

INTRODUCTION AND BACKGROUND

1. The Trust and the Bank Defendants have entered into the Settlement Agreement which, except as expressly provided in the Settlement Agreement, resolves all of the multiple causes of action, claims, objections, and other issues pending between them. As detailed in Exhibit A and summarized below,³ the essential elements of the Settlement Agreement, which is the product of mediation sessions conducted by the Honorable Daniel Weinstein, include a payment to be made by the Bank Defendants to the Trust in the amount of \$175 million; releases among the parties with respect to claims and counterclaims asserted, or that could have been asserted, in this Action; and additional provisions barring potential claims for contribution or indemnification against the Bank Defendant Releasers by third parties that may be sued by the

Limited, and including The Dai-Ichi Kangyo Bank, Limited, The Industrial Bank of Japan, Limited, IBJ Whitehall Funding 2001 Trust, Mizuho Global Limited, Mountain Capital CLO I, and Mountain Capital CLO II); Morgan Stanley & Co. Incorporated, Morgan Stanley Senior Funding, Inc., PNC Bank, NA, PNC Capital Markets LLC, The Royal Bank of Scotland plc, Scotia Capital (USA) Inc., Société Générale, SunTrust Bank, SunTrust Robinson Humphrey Inc. (f/k/a SunTrust Equitable Securities), TD Securities (USA) LLC (f/k/a TD Securities (USA) Inc.), Toronto Dominion (Texas) LLC (f/k/a Toronto Dominion (Texas), Inc.), Wells Fargo Bank, N.A., as successor to Wachovia Bank, National Association, and Wells Fargo Securities, LLC, as successor to Wachovia Capital Markets, LLC.

² A final, executed version of the Settlement Agreement will be filed with the Court as soon as it is fully executed with sufficient time before the hearing on this Motion, scheduled for November 18, 2010.

³ All capitalized terms not otherwise defined in this Motion shall have their respective meanings as set forth in the Settlement Agreement.

Trust and, in accordance with applicable law, providing for any judgment that might be obtained by the Trust against such third parties to be reduced by the Bank Defendant Releasers' allocable share of any such liability.

JURISDICTION

2. This Court has presided over this Action and has jurisdiction over this matter.

RELIEF REQUESTED

3. By the Motion, the Trust seeks an order, in the form annexed hereto as Exhibit B.^{4,5}

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

4. On June 25, 2002, Adelphia Communications Corporation (“ACC”) and its related entities (collectively, “Adelphia”) filed voluntary petitions for relief under Chapter 11 in the United States Bankruptcy Court for the Southern District of New York (Hon. Robert E. Gerber) (the “Bankruptcy Court”). (*In re Adelphia Communications Corp.*, Case No. 02-41729-reg, Docket Entry No. 1).

5. On July 1, 2002, the Bankruptcy Court appointed Adelphia’s Official Committee of Unsecured Creditors (the “Committee”). (*Id.*, Docket Entry No. 59). Shortly thereafter, the Committee commenced an investigation (“the Investigation”) of potential claims against Adelphia’s pre-petition lenders pursuant to Federal Rule of Bankruptcy Procedure 2004.

6. On July 6, 2003, as a result of the Investigation, Adelphia and the Committee jointly sought leave to commence the above-captioned action (the “Action”). (*Id.*, Docket Entry No. 1855). On the same day, Adelphia and the Committee filed an adversary complaint (“the

⁴ The Trust does not believe that court approval of the Settlement Agreement is required. The Trust nevertheless is filing this Motion to give interested Persons notice of the Settlement Agreement and an opportunity to be heard.

⁵ The Trust is in discussions with the Non-Agent Lenders about a potential separate settlement pursuant to which the Trust and Non-Agent Lenders exchange releases, and to the extent such a settlement is reached, the Trust will seek similar relief with respect to that settlement as well.

Original Complaint,” and as amended, the “Complaint”) against approximately 400 financial institutions. (Adv. Pro. No. 03-04942-reg, Docket No. 1). These financial institutions included (i) the pre-petition facilities’ agent banks (the “Agent Banks”) and their affiliated investment banks (the “Investment Banks”) as defined in the Complaint’s paragraphs 24 and 25, respectively, and (ii) other non-agent lenders that were original participants in the pre-petition facilities (the “Syndicate Banks”) or that acquired their interest in such facilities from the Agent Banks or the Syndicate Banks (the “Assignees”), as defined in the Complaint’s paragraphs 74 and 146, respectively.

7. The Complaint detailed the alleged looting of Adelphia by the Rigas Family through three co-borrowing credit facilities: UCA/HHC in 1999, CCH in 2000, and Olympus in 2001 (the “Co-Borrowing Facilities”) to which the Bank Defendants were parties.

8. The Complaint also alleged that: (i) the Bank Defendants conceived and structured the Co-Borrowing Facilities allowing the Rigas Family’s privately owned entities (the “RFEs”) to “co-borrow” funds together with the publicly-owned Adelphia, using Adelphia’s assets and credit to support the loans; and (ii) the Bank Defendants knew that the purpose of these loans, as concealed from the public and the Independent Directors, was to provide the Rigas Family with unlimited access to the Co-Borrowing Facilities for their personal benefit that Adelphia would be obligated to repay without receiving any benefit. As such, the Complaint asserted multiple tort claims against the Bank Defendants, including gross negligence (Claims 39-40), breach of fiduciary duty (Claim 36), aiding and abetting breach of fiduciary duty (Claim 37), and aiding and abetting fraud (Claim 38) (the “Tort Claims”).

9. In addition, the Complaint alleged that the Agent Banks conditioned extension of credit to Adelphia on the condition or requirement that Adelphia also obtain additional services

from the Agent Banks or their affiliated Investment Banks. As such, the Complaint asserted a claim for violation of the Bank Holding Company Act against the Agent Banks (Claim 32 or the “BHCA Claim”).

10. The Complaint also alleged that the Co-Borrowing Facilities were obligations that the Adelpia borrowers incurred for less than fair consideration, rendering them insolvent and undercapitalized, and that the Rigas Family caused the Adelpia entities to incur these obligations with the intent to hinder, delay, and defraud creditors. As such, the Complaint asserted multiple bankruptcy claims (the “Bankruptcy Claims”) including claims for: (i) avoidance and recovery of intentionally or constructively fraudulent obligations and transfers under sections 544 and 548 of the Bankruptcy Code (Claims 1-16, 41-42); (ii) avoidance and recovery of voidable preferences under section 547 of the Bankruptcy Code (Claims 43-44, 49-52); (iii) equitable subordination or equitable disallowance under section 510 of the Bankruptcy Code (Claim 33); and (iv) recharacterization of debt as equity (Claim 34-35).

11. The Complaint also asserted claims, which did not arise directly from the Co-Borrowing Facilities, for avoidance and recovery of fraudulent conveyance under: (i) sections 544 and 548 of the Bankruptcy Code against The Bank of Nova Scotia (“BNS”) (Claims 25-28); (ii) section 544 of the Bankruptcy Code against CIBC, Inc. (“CIBC”) (Claims 29-30); and (iii) section 548 of the Bankruptcy Code against four margin lenders⁶ (the “Margin Lenders”)(the “Margin Loan Claim” or Claim 31).

12. Finally, the Complaint asserted claims for (i) unjust enrichment (Claims 45-47), and (ii) equitable estoppel (Claim 48).

13. In October 2003, various Bank Defendants filed (i) more than twenty Rule

⁶ The Margin Lenders included Bank of America, N.A., Citigroup Global Markets Holdings Inc. (f/k/a Solomon Smith Barney Holdings, Inc. (“SSB”)), Deutsche Bank Securities, Inc. (f/k/a Deutsche Banc Alex. Brown Inc.), and Goldman, Sachs & Co. (Goldman, Sachs & Co. is not a party to the Settlement Agreement).

12(b)(6) motions to dismiss the Original Complaint (Adv. Pro. No. 03-04942-reg, Docket Nos. 7-16, 20-21, 43-44, 53-54, 57-59, 63, 65-68), and (ii) five separate objections to the Committee's standing. (Case No. 02-41729-reg, Docket Nos. 2557, 2642, 2646-2647, 2657).

14. On August 30, 2005, the Bankruptcy Court held that the Committee had standing to pursue the claims in the Original Complaint on behalf of, and together with, Adelpia. (Adv. Pro. No. 03-04942-reg, Docket No. 326). In response, the Agent Banks and Investment Banks sought leave to appeal the standing decision (*Id.*, Docket No. 391), which was subsequently denied.

15. On October 24, 2005, the Bank Defendants filed a motion requesting that the Court withdraw the reference of the Action from the Bankruptcy Court. (*Adelpia Recovery Trust v. Bank of America, N.A., et al.*, Case No. 1:05-cv-9050-reg, Docket No. 1). On February 9, 2006, the Court granted the Bank Defendants' motion to withdraw the reference, although, with the consent of all parties, the motions to dismiss remained with the Bankruptcy Court for decision. (*Id.*, Docket No. 22).

16. On January 5, 2007, the Bankruptcy Court entered an order confirming the First Modified Fifth Amended Chapter 11 Plan of Reorganization of Adelpia Communications Corporation and Certain Affiliated Debtors (the "Bankruptcy Plan"). (Case No. 02-41729-reg, Docket Entry No. 12952). On February 13, 2007, the Bankruptcy Plan became effective.

17. As set forth more completely in the Bankruptcy Plan, the Debtors' rights and title to certain "Causes of Action" (as that term is defined in the Bankruptcy Plan), including the causes of action asserted in the Action, were transferred to the Adelpia Contingent Value Vehicle, a Delaware statutory trust created under the Bankruptcy Plan to pursue the Causes of Action and administer the proceeds from the Causes of Action. On March 15, 2007, the

Contingent Value Vehicle changed its name to the “Adelphia Recovery Trust,” (referred to herein as the “Trust”).

18. On June 11, 2007, the Bankruptcy Court decided the Rule 12(b)(6) motions, denying the moving Bank Defendants’ motions with respect to the Trust’s claims for: (i) gross negligence (Claims 39-40) and breach of fiduciary duty (Claim 36), except as to the Administrative Agent Banks and as to those Investment Banks with written agreements that expressly disclaimed the existence of a fiduciary duty; (ii) aiding and abetting breach of fiduciary duty (Claim 37), except to the extent the claim applied to the Non-Co-Borrowing Facilities FrontierVision, Parnassos, and Century-TCI; (iii) the BHCA claim (Claim 32); (iv) avoidance and recovery of intentionally and constructively fraudulent obligations and transfers in relation to the Co-Borrowing Facilities (Claims 1-16, 41-42); (v) avoidance and recovery of voidable preferences (Claims 43-44, 49-52); (vi) equitable disallowance or subordination (Claim 33); (vii) avoidance and recovery of intentionally and constructively fraudulent obligations and transfers against BNS and CIBC (Claims 25-30); and (viii) the Margin Loan Claim (Claim 31). (Adv. Pro. No. 03-04942-reg, Docket No. 463). The Bankruptcy Court dismissed the claims for: (i) aiding and abetting fraud (Claim 38) with leave to replead; (ii) recharacterization of debt as equity (Claims 34-35); (iii) unjust enrichment (Claims 45-47); and (iv) equitable estoppel (Claim 48). (*Id.*).

19. On July 11, 2007, all of the original moving Bank Defendants sought leave to appeal from the Bankruptcy Court’s June 11, 2007 decision that upheld the Trust’s claims. (Case No. 1:05-cv-9050-reg, Docket No. 38).

20. On September 5, 2007, the Court granted leave to appeal only as to the BHCA Claim (Claim 32), equitable disallowance or subordination (Claim 33), and aiding and abetting

breach of fiduciary duty (Claim 37). (*Id.*, Docket No. 79).

21. On October 31, 2007, the Trust filed an Amended Complaint, which asserted additional tort claims for negligence (Claim 53), fraudulent concealment (Claim 54), and fraud (Claim 55) as allowed by the Bankruptcy Court. (*Id.*, Docket No. 132). On or about December 21, 2007, and thereafter, the Bank Defendants filed respective motions (including motions to dismiss the Bankruptcy Claims) or answers, as amended from time to time, to the Amended Complaint and asserted various counterclaims.

22. On January 17, 2008, the Court affirmed the Bankruptcy Court's June 11, 2007 decision with the exception of Claim 32 (the BHCA Claim), which was dismissed as to (i) the Investment Banks, and (ii) the Agent Banks with leave to replead. (*Id.*, Docket No. 420).

23. On January 28, 2008, the Investment Banks filed a motion for reconsideration of the Court's January 17, 2008 decision. (*Id.*, Docket No. 461). On May 2, 2008, the Court granted the Investment Banks' motion, but on reconsideration, adhered to its original determination. (*Id.*, Docket No. 764).

24. On March 4, 2008, the Trust filed a Second Amended Complaint ("SAC"), which amended the pleading relating to the BHCA claim. (*Id.*, Docket No. 541). On or about March 28, 2008 and thereafter, the Bank Defendants filed respective answers to the SAC, denying liability, and asserted various affirmative defenses as well as counterclaims.

25. On June 17, 2008, the Court granted the Bank Defendants' motion to dismiss the Bankruptcy Claims. (*Id.*, Docket No. 799). On July 13, 2009, the Trust filed an appeal with the Court of Appeals for the Second Circuit (the "Second Circuit"). (Case No. 09-0039-cv). On May 26, 2010, the Second Circuit affirmed this Court's June 17, 2008 decision.⁷ (*Id.*).

⁷ On July 29, 2010, and again on September 28, 2010, the United States Supreme Court granted the Trust an extension of time in which to file a petition for a writ of certiorari.

26. On May 4, 2009, the Court granted the Bank Defendants' motion to dismiss the Trust's claim for fraudulent concealment (Claim 54) against the Investment Banks, and several subclaims of the fraud claim (Claim 55, 1572 (i)-(ii), (v)-(viii) and 1573 (iii), (iv), and (vi)), but otherwise denied the Bank Defendants' motions to dismiss (i) the Margin Loan Claim (Claim 31), and (ii) the remaining Tort Claims. (Case No. 1:05-cv-9050-reg, Docket No. 981).

27. On March 26, 2009, the Bank Defendants filed a motion to strike the Trust's demand for jury trial. (*Id.*, Docket No. 960). On July 8, 2009, the Court granted the Bank Defendants' motion to strike the Trust's demand for jury trial as to all claims, except as to claims asserted by ACC and as to the following claims (whether asserted by ACC or one or more of its subsidiaries): (i) the Margin Loan Claim (Claim 31); (ii) negligence against SSB (Claim 53); and (iii) subclaims 1572 (iv), (ix) and 1573 (v) of the fraud claim (Claim 55). (*Id.*, Docket No. 1062).

28. On July 15, 2009, the Trust filed a revised Claim 31. In response, the Bank Defendants filed various letters seeking its dismissal. (*Id.*, Docket No. 1067). On July 30, 2009, the Court affirmed its July 8, 2009 decision and directed the Margin Lenders to respond to the revised Claim 31 in their summary judgment submissions. (*Id.*, Docket No. 1094).

29. On July 27, 2009, the Court denied the Agent Banks' motions to dismiss the BHCA Claim, except as to Rabobank Nederland, Mizuho Corporate Bank, Ltd. (f/k/a The Fuji Bank, Limited), and Toronto Dominion (Texas) LLC. (*Id.*, Docket No. 1077).

30. On October 2, 2009, the Bank Defendants filed a motion for an order determining that the Trust lacked standing to pursue the Tort Claims on behalf of ACC. (*Id.*, Docket No. 1127). On December 21, 2009, the Court held that the Trust did not have standing to sue the Bank Defendants on behalf of ACC. (*Id.*, Docket No. 1210). On January 25, 2010, the Trust

filed a motion for reconsideration or certification for leave to appeal the Court's December 21, 2009 decision. (*Id.*, Docket No. 1226). On May 14, 2010, the Court affirmed its December 21, 2009 decision with some modifications, and denied the Trust's request for certification for leave to appeal. (*Id.*, Docket No. 1312).

31. On November 18, 2009, the Investment Banks filed a motion for summary judgment dismissing the claims for breach of fiduciary duty (Claim 36) and gross negligence (Claim 40). (*Id.*, Docket No. 1175). Also on November 18, 2009, the Bank Defendants filed a motion for summary judgment dismissing the Tort Claims on *in pari delicto* grounds. (*Id.*, Docket No. 1180).

32. On February 12, 2010, the Trust filed an opposition to the Investment Banks' motion for summary judgment and a motion to reinstate the claim for gross negligence against the Agent Banks (Claim 39) and gross negligence against SSB and Banc of America Securities LLC (Claim 40).⁸ On February 12, 2010, the Trust also filed its opposition to the Bank Defendants' motion for summary judgment dismissing the Tort Claims on *in pari delicto* grounds. (*Id.*, Docket No. 1236 (corrected filing)).

33. On May 2, 2010, the Bank Defendants filed four omnibus motions for summary judgment (to which each Bank Defendant filed a separate bank-specific joinder and supplement) and two bank-specific summary judgment motions variously seeking dismissal of the remaining Tort Claims, the BHCA Claim, the Margin Loan Claim, and the bankruptcy avoidance claims against BNS and CIBC. On June 1, 2010, the Trust filed its oppositions to the motions. On July 26, 2010, the Bank Defendants filed their reply papers. In August 2010, the Court held a three-day hearing to consider the summary judgment motions concerning the Tort Claims, the BHCA

⁸ The Trust's February 12, 2010 opposition was filed under seal to preserve confidentiality.

claim, the Margin Loan Claim, and the bankruptcy avoidance claims against BNS and CIBC. In addition to the multi-day oral argument, the Court received over 4,000 pages of briefs and over 30,000 pages of exhibits in connection with these motions. As the Court is aware, the motions remain under advisement.

34. On August 17, 2010, the Court (i) granted the Investment Banks' motion for summary judgment dismissing Claim 36 and Claim 40 and (ii) denied the Trust's Motion to reinstate Claim 39 and Claim 40. (*Id.*, Docket No. 1355). On August 25, 2010, the Court denied the Bank Defendants' motion for summary judgment on *in pari delicto* grounds in its entirety. (*Id.*, Docket No. 1356).

35. At the time of the settlement, the Parties were preparing for trial, which the Court had scheduled to begin on October 25, 2010, in the event that the Court did not otherwise dispose of the Trust's remaining claims on the pending summary judgment motions.

36. During the course of the Action, the Trust and the Bank Defendants have engaged in extensive fact and expert discovery, including taking hundreds of days of deposition testimony and reviewing millions of pages of documents.

37. The Trust and the Bank Defendants have participated in several mediation sessions with the Honorable Daniel Weinstein and, with his assistance, reached the settlement that is the subject of the Settlement Agreement.

THE SETTLEMENT AGREEMENT

38. The Settlement Agreement is designed to bring a final resolution (except as otherwise specified in the Settlement Agreement) to all of the matters pending between the Trust and the Bank Defendants in the Action upon terms that include a cash payment to the Trust and a mutual release of all claims between the Trust and the Bank Defendants in the Action. The Court is referred to the Settlement Agreement for its complete terms, which

will govern in the event there is any inconsistency between such terms and the summary contained in this Motion. The primary terms of the Settlement Agreement are summarized as follows:

Settlement Payment. Within 15 business days following the execution of the Settlement Agreement, in consideration of the contemplated release and dismissal described in the Settlement Agreement, each Bank Defendant shall transfer its respective share (“Respective Share”) of the sum of One Hundred Seventy-Five Million Dollars (\$175,000,000.00) (the “Settlement Amount”) in immediately available funds to an escrow account. The money will remain in escrow until at least the first business day that is at least 15 calendar days after entry of this Court’s Order granting this Motion. So long as there is no stay of the Order then in effect (in which case, such first business day will be the “Approval Date” as more fully defined in the Settlement Agreement), the Bank Defendants will provide notice to the escrow agent that it may release the Settlement Amount (plus any interest earned thereon but less applicable fees and taxes) to an account specified by the Trust (the “Settlement Payment”), and legal and equitable title shall pass irrevocably to the Trust. Thereafter, the Parties will promptly file a stipulation of dismissal with prejudice of the Action. The Trust may then make a distribution to its beneficiaries from funds obtained from the Settlement in accordance with the Bankruptcy Plan and the JV Plan. Thus, the Order sought by the Trust provides that, unless a stay of the effectiveness of the Order is obtained before the Settlement Payment and other amounts in the escrow account are released to the Trust, any modification of the Order on appeal will not undo any of the actions taken, transfers made, or releases granted in reliance upon the entry of the Order and the occurrence of the Approval Date. If the Court declines to enter the Order or the Approval Date does not otherwise occur, the Respective Share of the Settlement Amount

(including interest earned thereon but excluding applicable fees and taxes) shall be returned to each Bank Defendant, this Agreement shall otherwise be void and of no further effect, and all Parties shall be restored to their respective positions in the Action without prejudice.

Mutual Releases. Once the Settlement Amount is transferred to the Trust (the “Release Effective Date”), the Trust and the Bank Defendants will be deemed to have released all claims against each other in the Action, except for claims specifically preserved under the Settlement Agreement. The claims that will be preserved include claims by the Bank Defendant Releasers or their successors in interest, that have been or will be asserted against the Trust or Adelpia in any and all proceedings and matters arising out of or in connection with or relating to the JV LIF Litigation or the Grid Interest Litigation, both of which are pending in Bankruptcy Court, and other “Bank Preserved Claims.” The Court is referred to the Settlement Agreement for the full definition of all Bank Preserved Claims and all Trust Preserved Claims.

Assignment of Claims. Upon the Release Effective Date, and except as otherwise provided in the Settlement Agreement, any claims that the Bank Defendant Releasers may have against Buchanan Ingersoll & Rooney PC (“BIPC”) or any of its current or former attorneys that are based upon, relate to, or arise from or in connection with BIPC’s legal representation of Adelpia, the Rigas Family, or any Rigas Entities, including, without limitation, claims relating to or concerning the Chapter 11 Cases, the Action, the Complaint or the Counterclaims, or the allegations therein or the issuance of opinion letters to any Bank Defendant Releasers in connection with BIPC’s representation of Adelpia, the Rigases, or any Rigas Entity (the “Assigned BIPC Claims”), shall be irrevocably assigned to the Trust. The Trust may seek to recover on the Assigned BIPC Claims only in connection with a

settlement of, or mediation or other alternative dispute resolution process concerning, BIPC's legal representation of Adelphia, any of the Rigases, or any Rigas Entity. The Trust will not prosecute the Assigned BIPC Claims outside of such settlement, mediation or other alternative dispute resolution process. The Trust will be solely responsible for its prosecution or other use of the Assigned BIPC Claims and shall indemnify the Bank Defendant Releasors for any reasonable losses or expenses they may reasonably incur in connection with the Trust's prosecution or other use of the Assigned BIPC Claims.

Final Claim Allowance. In the Chapter 11 Cases, certain of the Bank Defendant Releasees filed or otherwise asserted claims for principal, interest and costs and expenses under various credit agreements to which Adelphia entities were parties ("Bank Lender Claims"). Those Bank Lender Claims were provisionally allowed under the Bankruptcy Plan and the JV Plan, and payments thereon were made to those Bank Defendant Releasees (the "Payments"), subject to the Trust's right in the Action to seek the ultimate disallowance of the Bank Lender Claims and disgorgement of the Payments made thereon. Pursuant to the Settlement Agreement, the Bank Lender Claims will be finally allowed and will be deemed satisfied by the Payments made thereon, which Payments shall be treated as final and irrevocable and not subject to disgorgement or recovery by the Trust or Adelphia; provided, however, all Bank Preserved Claims, including without limitation any such claims for or in connection with the Grid Interest Litigation, the JV LIF Litigation, JV Plan Grid Interest, JV Plan Litigation Indemnification Fund, and JV Plan Bank Lender Post-Effective Date Fee Claims, shall remain preserved and outstanding, and the Bank Defendant Releasors shall retain all rights and claims with respect thereto, as otherwise provided in the Agreement. All claims that were allowed and/or paid in the Chapter 11 Cases (other than the Bank Preserved Claims)

shall be finally allowed and deemed satisfied by the payments made thereon, which payments shall be treated as final and irrevocable and not subject to disgorgement or recovery by the Trust or Adelpia.

Third Party Settlements and Judgment Reduction. The Settlement Agreement is conditioned on the inclusion by this Court in the Order of a provision permanently barring and enjoining the prosecution of any claim for contribution or indemnification against any and all Bank Defendant Releasees by anyone that is sued by the Trust or Adelpia and that is not a party to the Settlement Agreement to the extent such claim is based upon, relates to, or arises from or is otherwise connected to in any way the Chapter 11 Cases, the Action, the Complaint, the Counterclaims, or any of the allegations in the Complaint or the Counterclaims (the “Bar Order”). Moreover, the Settlement Agreement provides that, if the Trust enters into a settlement with any Person (“Settling Defendant”), of claims that could, but for the bar and injunction against such claims being included in the Order, give rise to a claim of contribution or indemnity against any Bank Defendant Releasee, the Trust will obtain from that Settling Defendant a full release of any claim for contribution or indemnity. Accordingly, if the Trust obtains a judgment against any other Person (a “Judgment Defendant”) on a claim for which the Judgment Defendant has or may have a claim for contribution against a Bank Defendant Releasee (a “Joint Claim”), the Trust will reduce the amount of the Joint Claim judgment by the percentage of the Bank Defendant Releasee’s responsibility, if any, as determined in the action in which the judgment against the Judgment Defendant is obtained (the “Judgment Reduction”). However, nothing contained in the Settlement Agreement will preclude the Trust from seeking (i) to establish, before or at trial or on appeal, that the Judgment Defendant has no right of contribution against a Bank Defendant Releasee that

should result in a reduction of the Joint Claim judgment, in which case, if the Trust prevails, no reduction of the Joint Claim judgment shall occur, or (ii) to take appropriate steps in order to avoid a double judgment reduction (as described more fully in the Settlement Agreement). The Trust agrees that in the action in which the judgment against the Judgment Defendant is sought, it will consent to the determination of percentage of responsibility of the Bank Defendant Releasee for the Joint Claim, if any, without the necessity of any Bank Defendant Releasee being joined as a party.

No Prejudice to Other Claims by the Trust. Except as otherwise specifically provided therein, the Settlement Agreement will have no effect on the Trust's claims against other parties, including without limitation, Goldman, Sachs & Co., Key Bank, N.A., HSBC Bank USA, Prestige Communications of North Carolina, Inc., FPL Group Inc., and Buchanan Ingersoll & Rooney PC.

THE LEGAL STANDARDS AND BASIS FOR RELIEF

39. Rule 41(a)(2) of the Federal Rules of Civil Procedure provides, in pertinent part, that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ Pro. 41(a)(2).

The Settlement Agreement Is a Valid and Proper Exercise of the Trustee's Business Judgment.

40. The Trust submits that the Settlement Agreement is fair and equitable to and in the best interests of the Trust and represents a valid and proper exercise of business judgment by the Trustees. The Court previously dismissed all the Bankruptcy Claims, and the Second Circuit affirmed that dismissal. The Court has also determined that the Trust lacks standing to bring suit on behalf of ACC and that the Trust has no right to trial by jury on the Tort Claims and BHCA Claim for claims brought on behalf of the "Obligor Debtors." If granted, the Bank

Defendants' pending motions for summary judgment would result in the complete dismissal of the case. If those motions are denied, most of the remaining claims will be tried to the Court, rather than a jury.

41. As to the Trust's remaining claims:

(a) The Tort Claims

42. With respect to the Tort Claims, the principal factual issues remaining to be decided at trial are whether the Bank Defendants aided and abetted the Rigases' breach of fiduciary duties and aided and abetted the Rigases' fraud thereby causing damages to ACC's subsidiaries that were parties to the Co-Borrowing Facilities. In order to prevail at trial, the Trust will need to prove that the Bank Defendants knew that the Rigases were breaching their fiduciary duties and/or committing fraud, and substantially assisted them.

43. The Trust believes there is a significant amount of evidence that supports the claim that the Banks aided and abetted the Rigases' misconduct. Among other things, the Trust believes that it can submit evidence that it could argue shows that the Bank Defendants: (i) knew at the inception of the Co-Borrowing Facilities that the loans were atypical and unprecedented to the extent they permitted the RFEs, which would otherwise have been unable to do so, to borrow up to the full amount of the facility while making ACC subsidiaries jointly and severally liable for all borrowings; (ii) knew or consciously disregarded that there was no benefit to ACC or its subsidiaries from allowing the RFEs to borrow unlimited amounts under the Co-Borrowing Facilities; and (iii) admitted after the public disclosure of the off-balance sheet debt associated with the RFE borrowings that they knew about the debt all along.

44. On the other hand, the Bank Defendants vigorously deny the Trust's claims. The Bank Defendants could submit evidence from which a finder of fact reasonably could conclude

that they did not knowingly aid and abet any breach of fiduciary duty or fraud; indeed, in seeking summary judgment, the Bank Defendants contend that no reasonable trier of fact could reach a contrary conclusion. In particular, the Bank Defendants could submit evidence that they contend demonstrates that: (i) they did not, and had no reason to, suspect the Rigases would engage in any misconduct; (ii) the Bank Defendants analyzed the creditworthiness of the borrowers under each of the Co-Borrowing Facilities on a combined basis and did not focus on the creditworthiness of any of the RFEs; (iii) they received representations from Adelphia and its outside law firm prior to the closing of each loan that the Co-Borrowing Facilities had been duly authorized by Adelphia, and that neither Adelphia's board of directors nor its auditors or external counsel ever advised the Bank Defendants that they did not fully understand the terms of the Co-Borrowing Facilities, or ever consulted with the Bank Defendants about the manner in which Adelphia accounted for its or the RFEs' borrowings under the facilities; and (iv) the Co-Borrowing Facilities were approved by Adelphia's board of directors and that their material terms were publicly disclosed..

45. To succeed on the Tort Claims, the Trust will also need to establish that the Bank Defendants' alleged misconduct proximately caused damage to the Obligor Debtors. The Trust believes it can introduce evidence that the Bank Defendants' conduct in arranging, structuring and funding the atypical Co-Borrowing Facilities was a substantial factor in causing looting of the proceeds of the Co-Borrowing Facilities, which were repaid by ACC's subsidiaries after Adelphia filed for bankruptcy.

46. On the other hand, the Bank Defendants could submit evidence that no damages were proximately caused by their alleged misconduct, and that any damage suffered by the Obligor Debtors was far less than those alleged by the Trust. In particular, the Bank Defendants

can submit evidence that they contend demonstrates that the proceeds of each of the Co-Borrowing Facilities were deposited in Adelpia bank accounts and later diverted by the Rigas Family. Moreover, relying on a recent opinion from the Third Circuit Court of Appeals and other cases in this District and this Circuit⁹ – as well as some of this Court’s decisions in this Action – the Bank Defendants have argued in their summary judgment papers, and likely would argue at trial, that any damages were proximately caused by the Rigas Family’s subsequent misuse of the loan proceeds, not by any purported misconduct by the Bank Defendants.

47. The Bank Defendants can also submit evidence from which they could argue that, because all loan proceeds were ultimately deposited in a concentration account at Adelpia (the “Concentration Account”), it is impossible to trace any alleged looting of the proceeds, that any damages were caused not by looting but by Adelpia’s accounting machinations, and that Adelpia was not damaged by any looting associated with acquisitions of assets by the RFEs because Adelpia recovered those assets, which were valued at \$967 million, as part of the settlement between the U.S. Government, the Rigas Family and Adelpia. The Bank Defendants also dispute other components of the alleged looting damages, and could submit evidence that they could argue shows that the expenses incurred by Adelpia during its bankruptcy, if any, were caused by other factors, such as Deloitte’s failure to certify Adelpia’s financial statements.

48. Although the Trust believes there are disputed factual issues that require a trial of the foregoing issues, it is difficult to predict how the Court would rule on these issues at trial, and prior to trial, the Court could grant the Bank Defendants’ summary judgment motions in whole or in part as to the issue of knowledge, substantial assistance, proximate cause, or damages.

⁹ See, e.g., *Marion v. TDI, Inc.*, 591 F.3d 137 (3d Cir 2010), *Bloor v. Carro, Spandbock, Londin, Rodman & Fass*, 754 F.2d 57 (2d Cir. 1985), *In re Parmalat Sec Litig.*, 501F. Supp. 2d 560 (S.D.N.Y. 2007).

(b) Margin Loan Claim

49. With respect to the claim for avoidance and recovery of allegedly intentionally fraudulent obligations and transfers against the Margin Lenders, the principal issues remaining to be decided are whether ACC, as the only debtor with unpaid creditors and standing to sue under the Court's prior rulings, was in fact the transferor of the margin loan payments, and whether the Margin Lenders received payments in good faith. In order to prevail, the Trust will need to prove that ACC paid cash to the Margin Lenders to cover the margin calls directed to the RFEs. While certain transfers were made directly from the Concentration Account to a Margin Lender, other transfers were made from the Concentration Account to a RFE and then transferred from the RFE to the Margin Lender.

50. The Trust believes there is evidence to support the claim that ACC repaid the RFEs' margin loans. Among other things, the Trust can submit evidence that it believes shows that the margin loan payments came from the Concentration Account owned and controlled by ACC, which was the central account that held nearly all of the cash of ACC, ACC's subsidiaries, and RFEs. The Trust can also submit evidence that it believe supports its argument that the margin loan transfers were made with the intention to hinder, delay, or defraud ACC's creditors.

51. On the other hand, the Margin Lenders can argue that ACC did not own the Concentration Account, and thus was not the transferor of the margin loan payments. The Margin Lenders can submit evidence that they believe shows that Adelphia management submitted schedules to the Bankruptcy Court identifying Adelphia Cablevision LLC as the owner of the Concentration Account, that Adelphia treated Adelphia Cablevision as the owner of the account for internal accounting purposes, and that the Trust's predecessor in interest

represented that ACC was not the owner of the Concentration Account. The Margin Lenders can also proffer evidence that they argue would demonstrate that they acted in good faith.

52. The Margin Lenders have moved for summary judgment on the Margin Loan claims, which are under submission. While the Trust believes that there is adequate evidence to support the Margin Loan Claim, it is unclear how the Court will rule on the standing issue or the alleged good faith of the Margin Lenders.

(c) Bankruptcy Avoidance Claims against BNS and CIBC

53. With respect to the remaining bankruptcy avoidance claims against BNS and CIBC, the principal issues remaining to be decided include: (i) whether ACC as the only debtor with unpaid creditors and standing to sue under the Court's prior rulings, is in fact the transferor of the payments to BNS and CIBC as described in Claims 25-28 and Claims 29-30, respectively (the "Transfers"); (ii) whether ACC received reasonably equivalent value for the Transfers; and (iii) whether ACC had unreasonably small capital at the time of Transfers. The Trust believes it can introduce evidence that ACC did not receive reasonably equivalent value for the Transfers since ACC was not paying its debts, and did not receive any consideration for the Transfers. The Trust can also submit evidence that it believes shows that the Transfers were made with the intent to hinder, delay, or defraud creditors. Finally, the Trust can submit expert testimony that it believes will demonstrate that ACC was inadequately capitalized and had unreasonably small capital at the time of the Transfers.

54. On the other hand, BNS and CIBC can submit evidence from which they would argue that: (i) ACC was not the owner of the Concentration Account, and thus it was not the transferor of the payments; (ii) BNS and CIBC were mere conduits of the Transfers, since the vast majority of the funds went to other lenders; (iii) ACC received reasonably equivalent value

for the Transfers, which were repayments of amounts funded by BNS and CIBC to the Concentration Account; and (iv) BNS and CIBC received the Transfers in good faith.

55. BNS and CIBC have moved for summary judgment on these claims. While the Trust believes that there is adequate evidence to support the bankruptcy avoidance claims against BNS and CIBC, it is unclear how the Court will rule on the issues of standing, conduit, reasonably equivalent value, capital adequacy or good faith.

(d) BHCA Claim

56. With respect to the BHCA Claim, the principal issues remaining to be decided are whether the Agent Banks conditioned the extension of credit to Adelphia on the requirement that ACC also obtain additional services from the Agent Banks or their affiliated Investment Banks, and whether Adelphia suffered any damages as a result. The Trust can submit evidence that it claims shows that each Bank Defendant against whom Claim 32 is asserted participated in at least one Co-Borrowing Facility and further provided at least one banking service, and that the Bank Defendants made demands and conditions in contemporaneous materials indicating that such services were tied. On the other hand, those Bank Defendants can submit evidence from which they can argue that there was no tying by the Agent Banks, and that, in fact, it was Adelphia that advised the Agent Banks that it would only use their Investment Bank affiliates if the Agent Banks participated in the Co-Borrowing Facilities. The Bank Defendants have also argued that there were no damages from any alleged illegal tying. The Bank Defendants have moved for summary judgment on the BHCA claim. While the Trust believes that there is adequate evidence to support the BHCA Claim, it is unclear how the Court will rule on this issue and there is little precedent regarding the types of damages sought by the Trust under the statute.

57. As noted above, summary judgment motions remain pending which, if granted,

could lead to the dismissal of all of the Trust's remaining claims in this Action. Moreover, as this Court is well aware, even if all the summary judgment motions are denied, the remaining fact issues would be sharply contested, and turn on the analysis of a complicated record of documents and transactions. Accordingly, further litigation and trial of any of the remaining claims against the Bank Defendants likely would be time-consuming and expensive. Each of the Tort Claims, the BHCA Claim, the Margin Loan Claim, and the remaining bankruptcy avoidance claims against BNS and CIBC is complex and turns on a multitude of contested factual and legal issues. Absent this settlement, the Trust faces the risk of loss on the pending summary judgment motions or participation in a lengthy trial that the Parties have estimated could last several months with unknown results as to liability, causation, and the quantum of damages. This litigation would consume substantial assets of the Trust. In addition, both sides could appeal any ruling by the Court, which would result in further attorneys' fees and expenses. As this Court is well aware, this litigation has been hard fought from its inception and costly to the Trust. Notwithstanding the proximity of the settlement to the trial date, there is every reason to believe that it will be extremely expensive for the Trust to continue the litigation and that the litigation will not reach final resolution for a lengthy period of time. Moreover, were the case litigated to judgment, there is no assurance that the Trust would recover an amount equal to or in excess of the Settlement Amount on any of its claims.

58. The settlement thus represents a fair and reasonable settlement to and in the best interests of the Trust and is the product of substantial arm's-length negotiation between the Trust and the Bank Defendants, under the supervision of an experienced mediator, Judge Weinstein. The Trust will benefit from the Settlement Agreement because it will result in an immediate settlement payment in the amount of \$175 million. While the Trust could possibly obtain a

judgment against the Bank Defendants for a greater amount, it also is possible that any damage award in favor of the Trust would be the same, less than the settlement payment, or perhaps nothing at all. Further litigation will take additional time and consume additional assets of the Trust. Accordingly, the Trust submits that, from the standpoint of the Trust, the Settlement Agreement is fair and reasonable, is in the best interests of the Trust and is the result of the exercise by the Trustees – who have been advised by sophisticated counsel well versed in the litigation – of sound business judgment.

The Other Provisions of the Settlement Agreement and the Order Are Appropriate.

59. As noted, the Settlement Agreement calls for the entry by this Court of a Bar Order that would preclude third parties that may be sued by the Trust from seeking contribution or indemnification from the Bank Defendant Releasees, but also provides those third parties with the economic equivalent of what they could receive through such claims for contribution or indemnification in the form of the agreed Judgment Reduction with respect to any judgment the Trust may obtain against them. The entry of such a bar order, accompanied by a corresponding provision for judgment reduction, is common in this Circuit. *See In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1030 (2d Cir. 1992) (approving settlement bars of claims for indemnity and contribution if the non-settling defendant received a judgment credit of at least "the amount paid by settling defendants toward damages for which the nonsettling defendant would be jointly and severally liable"); *see also Gerber v. MTC Elec. Techs. Co.*, 329 F.3d 297, 303 (2d Cir. 2003) ("[T]he cap, which ensures that a judgment credit is at least the amount of the settlement for common damages, complies with this Circuit's 'one satisfaction' rule, which prohibits a plaintiff from recovering more than 'one satisfaction for each injury.'"); *In re WorldCom Inc. ERISA Litig.*, 339 F. Supp. 2d 561, 569 (S.D.N.Y. 2004) (relying on Gerber

and Masters, and denying non-settling defendants' objection to the entry of a bar order contained in partial settlement of action).

60. As also described above, the Settlement Agreement provides for the Settlement Payment to be held in escrow for a period of at least 15 calendar days after entry of this Court's Order granting this Motion, for the Settlement Payment thereafter to be irrevocably released to the Trust unless a stay of the Order is in effect, and – as a result of the Parties' reliance on the effectiveness of the Order and the occurrence of the Approval Date – for any appeal thereafter not to undo any actions, transfers or releases granted under the Settlement Agreement. Such a provision, effectively mooting any appeal unless the would-be appellant obtains a stay before the parties to the agreement consummate the settlement, is also common. Indeed, the Second Circuit held that an appeal from a previous order approving a settlement in these very Chapter 11 Cases was moot, where the appellant failed to obtain a stay and the parties to the agreement acted in reliance on the agreement. *See In re Adelpia Communications Corp.*, 2006 U.S. App. LEXIS 32020 (2d Cir. Dec. 26, 2006).

PROCEDURE

61. Notice of this Motion will be provided to: (a) the Bank Defendants' counsel; (b) all record holders of interest in the Trust; (c) Buchanan Ingersoll & Rooney PC; (d) Deloitte & Touche LLP, Prestige Communications of North Carolina, Inc., FPL Group Inc., and Goldman Sachs & Co.; and (e) all other parties that have served a written request for service of such pleadings.

62. Because the authority for the relief requested is cited herein, and because the Motion does not raise any novel issues of law, the Trust respectfully requests that the Court waive the requirement that a separate memorandum of law be submitted herewith.

63. No previous motion has been made for the relief sought herein.

CONCLUSION

WHEREFORE, the Trust requests the Court to enter an Order in the form attached hereto as Exhibit B, and granting such other and further relief as the Court may deem necessary and proper.

Dated: October 18, 2010

Respectfully submitted,

KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP

JENNER & BLOCK LLP

By:

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¹¹ Counsel for Adelpia Recovery Trust as to all claims except for claims against defendants Deutsche Bank AG and affiliated defendants; HSBC Bank USA; Lehman Brothers Holdings Inc.; Lehman Commercial Paper Inc.; Lehman Syndicated Loan Funding Trust; Nuveen Floating Rate Income Fund; Nuveen Senior Income Fund; Nuveen Floating Rate Income Opportunity Fund; and National City Bank of Pennsylvania.