

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

IN RE:

CS DIP, LLC (f/k/a Church Street Health Management, LLC),

SSHC DIP, LLC (f/k/a Small Smiles Holding Company, LLC),

FNY DIP, LLC (f/k/a FORBA NY, LLC),

Debtors.¹

Chapter 11

Case No. 12-01573

Case No. 12-01574

Case No. 12-01575

(Jointly Administrated
under Case No. 12-01573)

**MOTION OF THE LIQUIDATING TRUSTEE FOR ORDER (A) APPROVING
SETTLEMENT WITH INSURERS, (B) GRANTING AN INJUNCTION IN FAVOR OF
THE INSURERS, AND (C) APPROVING TRUST DISTRIBUTION PROCEDURES**

Dan B. Lain, solely in his capacity as Liquidating Trustee for the Liquidating Trust² and Small Smiles, submits this motion (the “Motion”), pursuant to Federal Rules of Bankruptcy Procedure, 3020, 6004 and 9019, sections 105(a), 363, and 1142 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”), and the authority granted by interested parties pursuant to the plan of reorganization confirmed in this case, requesting an order (a) approving the Settlement and Release Agreement attached hereto as **Exhibit A** (the “Agreement”) with the Insurers concerning the Policies, (b) authorizing the Liquidating Trust to sell certain insurance policies and policy rights to the Insurers, (c) permanently barring and enjoining all claims against the Insurers under such insurance policies, and channeling any such claims exclusively to the proceeds of the Agreement, which are to be paid to the Liquidating

¹ The original Debtors whose cases were jointly administered under Case No. 12-01573 were CS DIP, LLC (f/k/a Church Street Health Management, LLC) (Case No. 12-01573), SSHC DIP, LLC (f/k/a Small Smiles Holding Company, LLC) (Case No. 12-01574), FNY DIP, LLC (f/k/a FORBA NY, LLC) (Case No. 12-01575), FS DIP, INC. (f/k/a FORBA Services, Inc.) (Case No. 12-01577) and EE DIP, INC. (f/k/a EEHC, Inc.) (Case No. 12-01576).

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Agreement (as defined herein).

Trust, and (d) approving the Trust Distribution Procedures attached hereto as **Exhibit B** (the "Trust Distribution Procedures"). This Motion is subject to the Court's approval of the concurrently filed Motion of the Liquidating Trustee to Approve Additional Notice Procedures Including Publication of Notice of Approval of Settlement Agreement and Related Injunction, Trust Distribution Procedures and Claims Filing Deadline ("Notice Motion"). In support of the Motion the Liquidating Trustee states as follows:

I. PROCEDURAL ISSUES & REQUEST FOR HEARING

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and pursuant to the retention of jurisdiction in the Second Amended Joint Plan of Reorganization in the above captioned case. [Docket Entry No. 578, as modified by Docket Entry Nos. 620 and 647, the "Plan"].

2. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

4. The statutory predicates for relief sought are sections 105, 363, 1141, and 1142 of the Bankruptcy Code, and Fed. R. Bankr. P. 6004 and 9019(a).

5. The Liquidating Trust requests that the Court set a hearing on this Motion on **June 2, 2015**, at 9:00 a.m. C.S.T., Courtroom 2, Customs House, 701 Broadway, Nashville, Tennessee 37203. The Liquidating Trust further requests that all objections to this Motion be filed on or before **May 26, 2015**.

6. The Liquidating Trustee has provided notice of the Motion, the hearing to consider the Motion, the Agreement, and the subject matter thereof, the Trust Distribution Procedures and the attendant deadline to file claims with the Trust: (i) upon all parties who requested notice in the Bankruptcy Case; (ii) to all known Claimants (through their counsel); (iii) to the Dental Clinics at their last known operating address; (iv) to all known insurers with an

interest other than the Insurers; and (v) to counsel for the following individuals: Danny DeRose, Edward DeRose, Michael DeRose, William Mueller, Michael Roumph, Richard Lane, Adolph Padula, Monica Switzer, and Giang Pham.³

7. Concurrently herewith, the Liquidating Trustee is filing the Notice Motion. Upon approval of the Notice Motion, the Liquidating Trust will provide notice to Claimants that did not receive notice through their counsel pursuant to Paragraph 5 above and the Clinic Dentists of: (1) the approval of the Agreement with the Insurers, and the injunction related thereto; (2) the approval of Trust Distribution Procedures; and (3) the attendant deadline to file claims with the Liquidating Trust. The notice contemplated in the Notice Motion will protect any Claimant and the Clinic Dentists that did not actually receive notice through the methods set forth in Paragraph 6 of the instant Motion.

II. BACKGROUND

A. Events Leading to the Debtors' Bankruptcy

8. On February 20, 2012 and February 21, 2012 (the "Petition Date"), Church Street Health Management, LLC n/k/a CS DIP, LLC ("CSHM"), Small Smiles Holding Company, LLC n/k/a SSHC DIP, LLC ("SSHC"), FORBA NY, LLC n/k/a FNY DIP, LLC ("Forba NY"), FORBA Services, Inc. n/k/a FS DIP, Inc. ("FS"), and EEHC, Inc. f/k/a EE DIP, Inc. ("EEHC") (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors' bankruptcy proceedings were jointly administered as Case No. 12-01573.

9. Prior to the Bankruptcy Case, the Debtors provided dental practice management services to 68 dental centers that served low income and underprivileged families in 22 states,

³ Counsel will file certificates of service indicating the notice provided pursuant to Paragraphs 5 within five business days of the date of filing this Motion.

which centers make up the Dental Clinics. The Debtors' operations were headquartered in Nashville, Tennessee.

10. In 2007, the Office of Inspector General of the U.S. Department of Health and Human Services ("OIG") and the United States Department of Justice (the "DOJ") each began an investigation into the Debtors and the Dental Clinics. Soon after, a number of state governmental agencies commenced parallel investigations at the state level.

11. In January 2010, the Debtors entered into certain Settlement Agreements with the DOJ and the 22 states in which they operated (collectively, the "Settlements"). The Debtors further executed certain Corporate Integrity Agreements with the OIG and the New York State Office of Medicaid Inspector General (collectively the "CIAs"). Without admitting any wrongdoing, the Debtors agreed to implement and maintain a compliance program to ensure the quality of care being provided to patients in the Dental Clinics. The Debtors incurred significant costs under both the Settlements and CIAs.

12. As part of the ongoing compliance with the CIAs, the Debtors identified certain deficiencies in their compliance structure. Significant resources were allocated to improving compliance, including a marked increase in the number of employees and independent contractors.

13. Meanwhile, the Debtors and the Dental Clinics faced several lawsuits related to services provided at the Dental Clinics. As of the Petition Date approximately 11 lawsuits had been filed on behalf of over one hundred plaintiffs (collectively, the "Patient Litigation"). In addition to the formally initiated Patient Litigation, additional patients or former patients retained counsel to pursue similar claims against the Debtors and Dental Clinics.

14. The Debtors, the Dental Clinics, and most of their Clinic Dentists, were the

beneficiaries of certain dental professional liability insurance policies. Such policies covered amounts that the Insureds may become legally obligated to pay as damages resulting from dental incidents such as those that gave rise to the Patient Litigation.

15. Specifically, without limitation, National Union Insurance Company of Pittsburgh, PA ("National Union") issued the following SSHC Policies:

a. Dentists Liability Policy No. DNU3375848 for the policy period of September 26, 2009 to September 26, 2010;

b. Dentists Liability Policy No. DNU3375848 for the policy period of September 26, 2008 to September 26, 2009;

c. Dentists Liability Policy No. DNU6360128 for the policy period of December 1, 2009 to December 1, 2010; and

d. Dentists Liability Policy No. DNU6360128 for the policy period of December 1, 2008 to December 1, 2009.

16. Further, the Insurers issued insurance policies affording dental professional liability insurance coverage or similar professional liability coverage, to certain dentists who were scheduled under such policies as an insured, additional insured or named insured who were employed at any time at any of the Dental Clinics. These insurance policies are further described and defined in the Agreement as the Non-SSHC Policies.

17. After the initiation of the Patient Litigation, the Debtors tendered those lawsuits to National Union for defense and indemnity. National Union is defending insureds named as defendants in the Patient Litigation under the SSHC Policies and the Non-SSHC Policies, respectively, subject to a complete reservation of all rights thereunder.

18. On August 5, 2010, National Union commenced a lawsuit in the United States

District Court for the Middle District of Tennessee, styled National Union Fire Insurance Company of Pittsburgh, PA v. Small Smiles Holding Company, LLC, Civil Action No. 3:10-cv-00743 (the "Coverage Case").

19. National Union sought to rescind or reform the SSHC Policies through the Coverage Case. In September 2011, the Coverage Case was administratively closed by agreement of the parties, but was subject to renewal upon 30 days' written notice of either party.

20. The costs of complying with the Settlements and CIAs, the addition of necessary staff and external professionals to improve compliance programs, and defense of the Coverage Case significantly drained the Debtors' resources.

B. The Debtors' Efforts to Reorganize

21. On August 30, 2011, the Debtors' boards authorized the retention of Alvarez & Marsal Healthcare Industry Group, LLC to provide them advice and guidance on how to address the companies' liquidity issues.

22. On September 30, 2011, the Debtors were unable to meet their regular debt service payment to their senior secured lenders. Despite exploring various options for refinancing their indebtedness, by December 2011, it appeared as if the most viable option for addressing the Debtors' liquidity issues would be a section 363 sale of the majority of their assets under the Bankruptcy Code. Accordingly, on the Petition Date, the instant Bankruptcy Case was commenced to advance the pursuit of such a sale.

23. On the Petition Date, the Debtors filed an expedited motion to approve certain post-petition financing to be secured by a superpriority lien against substantially all of the assets of the Debtors. [Docket Entry No. 20]. The post-petition financing was permitted on an interim basis, and the Debtors proposed that it be approved on a final basis pursuant to the terms of that certain order filed as Docket Entry No. 84 (the "Cash Collateral Order").

24. The United States Trustee filed the Notice and Appointment of an Official Unsecured Creditors Committee (the "Committee") on March 1, 2012. [Docket Entry No. 94].

25. Ultimately, a group led by Garrison Investment Group (the "Stalking Horse") became the lead candidate for purchasing the Debtors' assets. The Debtors finalized an Asset Sale Agreement with the Stalking Horse, and, on March 2, 2012, they filed an Expedited Motion to Sell Substantially All Assets of the Debtors (the "Sales Motion"). [Docket Entry No. 106].

26. The Committee objected to entry of the Cash Collateral Order and the Sales Motion. [Docket Entry Nos. 134, 174]. While there were multiple bases for the Committee's objections, a primary concern was ensuring assets be retained for the benefit of unsecured creditors.

27. The objections of the Committee were resolved, and the Court approved the sales process proposed for the Debtors' assets by that certain Order (I) Authorizing Sale of Substantially all of the Debtors' Assets Free and Clear of All Liens, Claims and Encumbrances; (II) Approving the Asset Sale Agreement; and (III) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases filed as Docket Entry No. 404, as amended by Docket Entry No. 418.

28. The sale of the Debtors' assets was opened for competitive bidding, but no other competitive bids were received. On May 31, 2012, CSHM LLC (the "Purchaser"), as the designee of the Stalking Horse, purchased substantially all of the Debtors' assets pursuant to the Asset Sale Agreement. In addition to the assets, the Purchaser assumed certain obligations related to the Settlements and the CIAs.

29. After completion of the sale of substantially all of the Debtors' assets to the Purchaser, the Debtors' bankruptcy estates retained two primary assets of value to be used to

fund a plan of reorganization. The first was the Debtors' insurance policies, including the coverage provided under the SSHC Policies, and the second included causes of action such as avoidance actions under Chapter 5 of the Bankruptcy Code.

30. Subsequent to the sale, but prior to confirmation of a plan of reorganization, National Union sought relief to reopen the Coverage Case in an effort to challenge the validity of the SSHC Policies.

C. Formation and Rights of the Liquidating Trust

31. On January 9, 2013, the Debtors and the Committee filed the Plan for CSHM, SSHC, and Forba NY⁴.

32. On March 7, 2013, the Bankruptcy Court entered an Order (the "Confirmation Order") confirming the Plan. [Docket Entry No. 653].

33. Pursuant to the terms of the Confirmation Order, the Effective Date of the Plan was established as April 13, 2013. On that date, the Liquidating Trust was formed by the execution of that certain Liquidating Trust Agreement and that certain Qualified Settlement Fund Trust Agreement. Dan B. Lain was appointed to serve as Liquidating Trustee for the Liquidating Trust. Additionally, the equity interests of the Debtors were transferred as provided for in the Plan, and the Liquidating Trust became the sole member of each of the Debtors.

34. The Plan further provided that the automatic stay barring further pursuit of the Coverage Case was to terminate on May 15, 2013.

35. The Coverage Case was reopened on June 12, 2013, upon the unopposed motion filed by the Liquidating Trust on May 17, 2013.

36. Subsequent to the Effective Date, the Liquidating Trust pursued multiple

⁴ The bankruptcy cases for FS and EEHC were converted to proceedings under Chapter 7 of the Bankruptcy Code on May 16, 2013. [Docket Entry No. 691].

avoidance actions for the benefit of unsecured creditors. The final avoidance action was compromised and settled in June 2014.

37. Simultaneously, the Liquidating Trust attempted to monetize the Insurance Rights under the Policies for the benefit of the Claimants.

38. To further benefit the Claimants, the Plan authorizes the Liquidating Trust, in connection with any resolution of Insurance Rights (as defined in the Plan), including as to the Policies, to compromise, settle and release any claims or potential claims by the Claimants, the Insureds and the Clinic Dentists against any insurer relating to the Small Smiles Claims, subject to approval by the Trust Advisory Committee and approval by the Bankruptcy Court after notice and hearing. [Plan, Sections 4.17(d) and (e), 4.18(c), and 4.19(c).]

39. Under the Confirmation Order, the Court retained jurisdiction to approve these anticipated settlements with respect to the Insurance Rights and all issues related thereto. [Confirmation Order, Paragraph 37; Plan, Article XI, subparagraph (q)]. Similarly, the Court retained jurisdiction to approve Trust Distribution Procedures proposed by the Liquidating Trustee. [Plan, Article XI, subparagraph (r)]. Furthermore, the Court retained jurisdiction:

- a. over any dispute as to Insurance Rights [Plan, Article XI]⁵;
- b. [t]o issue injunctions . . . and take such other actions as may be necessary or appropriate to prevent interference by any person with the consummation, implementation, or enforcement of the Plan, the Confirmation Order, or any other order of the Bankruptcy Court [Plan, Article XI, subparagraph (f)]; and
- c. [t]o take any action and issue such orders as may be necessary to . . . implement, . . . and consummate the Plan [Plan, Article XI, subparagraph (k)].

⁵ The Plan noted that the Bankruptcy Court's jurisdiction over any dispute as to Insurance Rights would be non-exclusive.

40. The Liquidating Trustee and the Insurers have engaged in extensive, good faith settlement discussions in an attempt to resolve their issues related to the Insurance Rights.

III. ARGUMENT

41. As a result of extensive negotiations, the Liquidating Trust and the Insurers have agreed to settle their differences in accordance with the terms of the Agreement. The Liquidating Trust seeks entry of an order approving the Agreement.

42. The Agreement provides that Insurers will pay the Liquidating Trust Thirty Nine Million Dollars (\$39,000,000.00). In exchange, the Liquidating Trust will release the Insurers and Affinity of and from the Settled Claims (the "Release"), and will sell the SSHC Policies and coverage rights under the Non-SSHC Policies related to Small Smiles Claims to the Insurers (the "Sale of Policy Rights").

43. To effectuate the Release and the Sale of Policy Rights, the parties request the entry of an order approving the terms of the Agreement, and imposing a channeling injunction.

A. The Agreement Satisfies All Factors Favoring Approval of a Compromise Under Bankruptcy Rule 9019

44. Bankruptcy Rule 9019(a) authorizes a court, after notice and a hearing, to approve a compromise or settlement of a controversy. *See* Fed. R. Bankr. P. 9019(a).

45. When reviewing a proposed settlement under Rule 9019(a), the Court should analyze four factors:

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

In re Bard, 49 Fed. Appx. 528, 530 (6th Cir. 2002) (quoting *LaSalle Nat'l Bank v. Holland (In re Am. Reserve Corp.)*, 841 F.2d 159, 162-63 (7th Cir. 1987)) (citing *Drexel v. Loomis*, 35 F.2d

800, 806 (8th Cir. 1929)); *see also In re Greektown Holdings, LLC*, 728 F.3d 567, 575-76 (6th Cir. 2013) (“*Bard* sets out four factors that a bankruptcy court should consider when evaluating fairness of a settlement.”); *In re Tech. for Energy Corp.*, 56 B.R. 307, 312 (Bankr. E.D. Tenn. 1985).

46. In reviewing these factors, the Sixth Circuit has adopted the Seventh Circuit’s reasoning that “[a] bankruptcy judge need not hold a mini-trial or write an extensive opinion every time he approves or disapproves a settlement,” and instead, “[t]he judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision, and set out the reasons for his decision. The Court may make either written or oral findings; form is not important, so long as the findings show the reviewing court that the judge properly exercised his discretion.” *Fishell v. Soltrow (In re Fishell)*, 47 F.3d 1168 (Table) at *3 (6th Cir. Feb. 16, 1995) (quoting *In re Am. Corp.*, 841 F.2d at 163); *see also Cook v. Terlecky (In re Cook)*, 336 B.R. 600 (Table) at *3 (6th Cir. B.A.P. Jan. 4, 2006).

47. “In assessing a settlement agreement the court is not obliged to determine and rule upon disputed facts and questions of law. Instead the court’s duty is to ‘canvass the issues’ and decide whether the settlement falls below the nadir in the range of reasonableness.” *In re Tech. for Energy Corp.*, 56 B.R. 307 at 311-12. Thus, “[t]he trustee’s judgment concerning the proposed compromise and settlement is entitled to some deference.” *In re Media Cent., Inc.*, 190 B.R. 316, 321 (Bankr. E.D. Tenn. 1994).

48. Further, the decision to “authoriz[e] the trustee in bankruptcy to enter into a compromise of the creditors’ claims rests in the sound discretion of the bankruptcy judge.” *Porter Drywall Co. Inc. v. Haven, Inc. (In re Haven, Inc.)*, 326 B.R. 901, at *1 (6th Cir. BAP 2005) (quoting *Mach. Terminals, Inc. v. Woodward (In re Albert-Harris, Inc.)*, 313 F.2d 447,

449 (6th Cir. 1963)). Accordingly, the court must not “disturb or set aside such a compromise unless it obviously achieves an unjust result as to amount to an abuse of discretion.” *Id.*

49. "The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims The law favors compromise and not litigation for its own sake, . . . and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court’s decision must be affirmed.” *Fishell* at *2 (quoting *In re A & C Properties*, 784 F.2d 1377, 1380-81 (9th Cir. 1986), *cert. denied*, 479 U.S. 854 (1986)).

50. Here, the settlement should be approved because (1) the probability of success by the Liquidating Trust in the Coverage Case is uncertain, (2) the Coverage Case presents complicated issues of law and will require the Liquidating Trust to incur significant expense to litigate to resolution, and (3) the settlement represents a reasonable resolution of the Coverage Case and provides a significant return to the Liquidating Trust.

51. Both the Liquidating Trust and National Union have taken extensive discovery in the Coverage Case, and both parties contend that such discovery supports their respective positions in the litigation. This competing factual record makes it uncertain whether the Liquidating Trust will prevail in the Coverage Case.

52. While the Liquidating Trust believes that it has strong arguments in the Coverage Case, the risk of success by National Union has significant consequences. If National Union were to succeed on its rescission claims, coverage under the SSHC Policies (perhaps the most significant potential source of recovery as to the Claimants) would be completely eliminated and the Claimants would receive nothing.

53. Even if the Liquidating Trust were to fully prevail in the Coverage Case, the

amount recoverable under the SSHC Policies is dependent upon the successful establishment of liability and damages in the underlying tort actions against the Insureds. To date, the underlying claims tried against the Insureds (and certain Clinic Dentists) have not resulted in any significant successes for the Claimants. Accordingly, even absent consideration of any validity issues, the amount of potential recovery under the SSHC Policies (and the Non-SSHC Policies) is speculative.

54. The Liquidating Trust anticipates that further litigation will result in significant, additional expenses. Even if the Liquidating Trust were to prevail at the trial level, it anticipates that National Union would exhaust any appeals, in which case the Liquidating Trust would incur significant litigation expenses for years to come.

55. Finally, the Agreement yields a significant recovery for the Liquidating Trust and, thus, for the Claimants. Despite National Union's arguments under the SSHC Policies, which could potentially obviate coverage, the Insurers (inclusive of National Union) have agreed to pay \$39,000,000.00 to the Liquidating Trust. Further, the Agreement benefits the Claimants by allowing the Liquidating Trust to adopt a claims resolution procedure that allows for an equitable and efficient distribution of the proceeds of the Agreement and prompt distribution to Claimants.

B. A Sale of the SSHC Policies and Non-SSHC Policies to the Insurers Should be Approved Under the Authority Granted the Liquidating Trust under the Plan and/or Under Section 363 of the Bankruptcy Code

56. Section III.C of the Agreement requires that, upon payment by the Insurers, the SSHC Policies and claims for coverage under the Non-SSHC Policies relating to Small Smiles Claims will be sold free and clear to the Insurers.

57. The Plan specifically grants to the Liquidating Trust the power, with Court approval, to release all claims of the debtors, the Claimants, the Dental Clinics, and the Clinic Dentists. Such a release of an insurance policy by all of the policy owners and potential insureds

is in effect a sale back to the insurer of the policy, completely terminating the insurer's obligations under the policy. Thus, the Plan effectively grants the Liquidating Trust the power to sell the SSHC Policies and claims for coverage under the Non-SSHC Policies relating to Small Smiles Claims to the Insurers. *See also Robinson v. Mich. Consol. Gas Co., Inc.* 918 F.2d 579, 583 (6th Cir. 1990) (adopting the reasoning set forth in *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) that the test for "determining whether a civil proceeding is related to bankruptcy [under 28 U.S.C. § 1334(b) is whether the *outcome of a proceeding could conceivably have any effect on the estate being administered in bankruptcy.*" (emphasis in original)).

58. Similarly, section 363(b)(1) of the Bankruptcy Code authorizes a trustee, after notice and a hearing, to use, sell, or lease, other than in the ordinary course of business, property of the estate. *See* 11 U.S.C. § 363(b)(1). As the Court has retained jurisdiction over the insurance policies and rights that might respond to the Claimant's claims against the Debtors and the Clinics and the Dentists, section 363 grants authority and provides useful guidance as to how the Court may evaluate a sale and broad release of such insurance rights.

59. In determining whether a proposed sale under section 363(b)(1) of the Bankruptcy Code is appropriate, Courts examine whether a trustee has exercised sound business judgment in proposing the sale in question. *See Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 388-390 (6th Cir. 1986); *In re Delaware & Hudson Railway Co.*, 124 B.R. 169 (D. Del. 1991); *In re Industry Valley Refrig. & Air Cond. Supplies*, 77 B.R. 15 (Bankr. E.D. Pa. 1987).

60. In the exercise of his business judgment, the Liquidating Trustee finds that the proposed sale of the SSHC Policies and the Small Smiles Claims under the Non-SSHC Policies provides maximum recovery for the benefit of the Liquidating Trust. The sales price is the product of extensive negotiations involving parties who have substantial expertise in this area of

the law. Accordingly, the proposed sales price is fair.

61. Further, section 363(f) of the Bankruptcy Code authorizes a trustee to sell property of the estate free and clear of any interest in such property, if one or more of the following requirements are met:

- (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f). *See also In re Wolverine Radio Co.*, 930 F.2d 1132, 1147 at n.24 (6th Cir. 1991) (“the language of Section 363(f) is in the disjunctive and the sale free and clear of the interest concerned can occur if any one of the conditions of Section 363(f) have been met . . .”). The sale of the SSHC Policies and the Small Smiles Claims under the Non-SSHC Policies meets at least one of these requirements and, therefore, satisfies Section 363(f).

62. Here, it is not clear that there are any interests asserted in the Policies other than those that the Liquidating Trust is specifically authorized to release. If any such rights are asserted, they would be subject to bona fide dispute and would also likely be subject to at least one of the conditions of section 363(f)(1), (3), or (5).

C. The Court Should Impose an Injunction Under Section 105(a) of the Bankruptcy Code

63. The Agreement seeks to permanently bar and enjoin all claims against the Insurers under the SSHC Policies and in connection with Small Smiles Claims under the Non-SSHC Policies, and channel any such claims exclusively to the proceeds of the Agreement, which are to be paid to the Liquidating Trustee, all as more fully set forth in the Agreement.

64. Section 105(a) of the Bankruptcy Code provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Section 105(a) essentially codifies the bankruptcy court’s inherent equitable powers. *See In re Middleton Arms, Ltd. Partnership*, 934 F.2d 723, 724 (6th Cir. 1991). *See also Macarthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988) (approving the imposition of a channeling injunction in favor of certain insurance carriers under both sections 363 and 105).

65. Both the Sixth Circuit and courts in various other jurisdictions have enjoined pursuit of released claims and liabilities in situations similar to the one at hand. *See, e.g., In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re The Flintkote Co.*, 04-11300 (JFK) (Bankr. D. Del. Mar. 18, 2008) (approving buyback of insurance and enjoining claims under section 363); *In re Federal-Mogul Global, Inc.*, 01-10578 (JFK) (Bankr. D. Del. Nov. 8, 2007) (approving buyback of insurance enjoining claims under section 363); *In re Quigley Co.*, 04-15739 (SMB) (Bankr. S.D.N.Y. Jun. 9, 2009) (approving buyback of insurance and enjoining claims under section 105); *National Union Ins. Co. v. Porter Hayden Co.*, 1:03-cv-03408 (CCB) (D. Md. Dec. 18, 2014) (approving buyback of AIG-related insurance policies and issuing an injunction under sections 363 and 105(a) of the Bankruptcy Code).

66. Specifically, in *Dow Corning*, the Sixth Circuit held that a bankruptcy court may

enjoin claims when the following seven factors are present:

- (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
- (2) The non-debtor has contributed substantial assets to the reorganization;
- (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
- (4) The impacted class, or classes, has overwhelmingly voted to accept the plan;
- (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
- (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full; and
- (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Corp., 280 F.3d 648, 658 (6th Cir. 2002). Here, the Plan Injunction contemplated by the Agreement satisfies the relevant factors set forth in *Dow Corning*.⁶

67. First, there is an identity of interest between the Liquidating Trust and the Insurers. Both the Liquidating Trust and the Insurers, as issuers of the Policies, are potentially obligated to respond to and satisfy the claims asserted by the Claimants. Accordingly, through the payment of the Settlement Amount under the Agreement, both parties are resolving the same set of Claimant demands. If the Plan Injunction is not issued, the Insurers would have to reserve some portion of the Settlement Amount to protect against and respond to future claims, thus depleting assets of the Liquidating Trust that would otherwise be available for the Claimants.

⁶ The Sixth Circuit set forth the *Dow Corning* factors in connection with an appeal to confirmation of a plan of reorganization. Here, the Court previously confirmed the Plan. Thus, not all of the factors set forth in *Dow Corning* are directly applicable given the post-confirmation context. Nonetheless, this Motion attempts to adapt these factors and explain how the same considerations are met in the present context.

68. Second, the Settlement Amount paid by the Insurers represents a significant asset of the Liquidating Trust. As set forth in the Agreement, the Settlement Amount will provide the Claimants a means of recovery.

69. Third, the Plan Injunction is essential to the Liquidating Trust fulfilling its purpose. The Plan authorizes the Liquidating Trust to compromise, settle and release any claims or potential claims by the Claimants, the Insureds, and the Clinic Dentists against any insurer relating to the Small Smiles Claims. The Release is a material part of the Agreement, and the Injunction ensures that the Insurers will in fact receive the full benefit of the Release.

70. Fourth, the Plan that granted the Liquidating Trust the authority to release the Insurers was overwhelmingly approved by the classes of creditors comprised of Claimants, Clinic Dentists, and Dental Clinics. Further, the Trust Advisory Committee, who was designated under the Plan to represent the interests of the Claimants, has voted to approve the Agreement.

71. Fifth, the Agreement contemplates the approval of Trust Distribution Procedures that will establish a method to pay, using the Settlement Amount, the Claimants that will be enjoined under the Plan Injunction. Further, the Agreement relieves the Dental Clinics and Clinic Dentists from substantial risks related to Claimants' claims. Accordingly, each of these groups of interested parties is receiving the exact type of consideration contemplated by the Plan.

72. Sixth, pursuant to the Plan, the Claimants, the Dental Clinics, and the Clinic Dentists committed themselves to a group-wide resolution of insurance rights in recognition of the practical reality that absent such a group resolution, the value of any individual resolutions would be substantially reduced, if possible at all.

73. The power of the Liquidating Trustee to affect such an outcome was previously approved by this Court. Given the group-wide resolution authorized by and encompassed within

the Plan, the individual claimant's rights to the policies are subordinated by the Plan to the rights and powers of the Liquidating Trustee. Thus once the Trustee resolves such rights, with the approval of this Court, individualized rights to receive insurance proceeds are replaced by the rights and powers of the Trust.

74. This limitation on the individual rights of claimants is entirely opposite from the circumstances in *Dow Corning*, where the claimants were asked to give up claims against the Debtor's solvent parent companies, Dow Chemical Company and Corning Corporation, whose potential liability was not limited in any way.

75. Finally, in addition to the record established in conjunction with approval of the Plan, the Liquidating Trust submits the Declaration of Dan B. Lain in Support of this Motion as **Exhibit C**. The Liquidating Trust is further prepared to provide additional information the Court may require at the hearing on this Motion.

76. Because the *Dow Corning* factors are satisfied as they are relevant here, the Liquidating Trust requests that the Court issue the Plan Injunction under sections 105(a) and 1142 of the Bankruptcy Code permanently barring and enjoining all claims against the Insurers under the SSHC Policies and in connection with Small Smiles Claims under the Non-SSHC Policies, and channeling such claims exclusively to the proceeds to be paid to the Liquidating Trust pursuant to the Agreement.

D. The Court Should Approve the Trust Distribution Procedures

77. Any proceeds from the Insurance Rights were expected to be integral to any recovery by the Claimants. Accordingly, the Plan anticipated the need for a procedure to ensure that any recovery reached the Claimants once the Liquidating Trust recovered payments for the Insurance Rights. Under section 1142 of the Bankruptcy Code and Federal of Bankruptcy Procedure 3020, the Court possesses the authority to implement the provisions of the Plan by

issuing appropriate orders to administer the estate.

78. Specifically, the Plan allows the Liquidating Trust to “implement a structure for the submission, review and allowance of Class 5(a) Claims, and/or for the procedures for distribution from the Liquidating Trust to holders of Allowed Class 5(a) Claims Any such Claim Approval Structure and/or Claim Distribution Procedures shall require approval by the Trustee Advisory Committee, and by the Bankruptcy Court (after notice and hearing) and be subject to such other approvals as provided for in the Liquidating Trust Agreement.” [Docket Entry No. 647, Section 4.17(g)].

79. The Trust Distribution Procedures allow for the efficient and fair evaluation of Small Smiles Claims and a prompt allocation of the Settlement Amount among Claimants.

80. Pursuant to its powers under sections 105(a) and 1142 of the Bankruptcy Code, the Court should approve the Trust Distribution Procedures as a fair and reasonable method for ensuring that the Claimants receive the benefit of the Settlement Amount.

IV. CONCLUSION

WHEREFORE, the Liquidating Trust respectfully requests that the Court enter an order, substantially in the form of the Order annexed hereto as **Exhibit D**, approving all of the relief sought herein and granting such other and further relief as is just and proper.

Dated: May 6, 2015

Respectfully submitted,

/s/ John H. Rowland

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of May, 2015, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system:

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