

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Case No. 10-50494
)	
FAIR FINANCE COMPANY)	Chapter 7
)	
Debtor.)	Chief Judge Pat E. Morgenstern-Clarren

**TRUSTEE'S MOTION TO APPROVE COMPROMISE
WITH JOHN HEAD AND HEAD CONSULTING GROUP, INC.**

Brian A. Bash (the “**Trustee**”), the duly appointed Chapter 7 Trustee for Fair Finance Company (the “**Debtor**”) in the above-captioned cases, hereby moves for entry of an order, in substantially the form attached hereto as **Exhibit A**, approving the compromise of claims against John Head and Head Consulting Group, Inc. (“**Head Consulting**”) for the reasons more fully set forth in the attached memorandum of law. The proposed settlement agreements in both of the above captioned cases, executed by the parties, are attached to this Motion as **Exhibits B** and **C**.

Date: April 30, 2015

Respectfully submitted,

/s/ David F. Proaño

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Case No. 10-50494
)	
FAIR FINANCE COMPANY)	Chapter 7
)	
Debtor.)	Chief Judge Pat E. Morgenstern-Clarren

**MEMORANDUM IN SUPPORT OF TRUSTEE’S MOTION TO APPROVE
COMPROMISE WITH JOHN HEAD AND HEAD CONSULTING GROUP, INC.**

In support of the Trustee’s Motion to Approve Compromise with John Head and Head Consulting Group, Inc. (the “**Motion**”),¹ the Trustee states as follows:

JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and Rule 9019 of the Federal Rules of Bankruptcy Procedure. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

On February 8, 2010, creditor-investors (the “**Petitioning Creditors**”) filed a petition for involuntary bankruptcy against the Debtor. On March 2, 2010, the Court entered an order granting the relief sought by the Petitioning Creditors *nunc pro tunc* to February 24, 2010. (Dkt. No. 40). Attorney Brian A. Bash is the duly appointed, qualified and acting trustee in the within proceedings.

Mr. Head served as the vice-president, and later president, of the Debtor from 2002 through early 2009. Mr. Head resigned from the Debtor in January 2009 but continued to provide services to the Debtor through his company, Head Consulting. Mr. Head was not

¹ Terms capitalized but not defined herein shall have the meanings ascribed to them in the Motion.

criminally charged in the Fair Finance matter, and did not take related-party loans from the Debtor.

The Litigation Between the Trustee and Mr. Head

The Trustee brought claims against Mr. Head in two adversary proceedings. Prepetition, the Debtor and Mr. Head were co-defendants in a lawsuit filed by certain of the Debtor's creditors (the "**McKibben Matter**"), which the Trustee removed to this Court, where it is currently pending as Case No. 10-5038.² On June 23, 2010, the Trustee filed a cross-claim for conspiracy against Mr. Head. (Dkt. No. 17).³

In the course of the McKibben Matter, a dispute arose between the Trustee and the other defendants over the parties' relative interests in the Debtor's \$1,000,000 Directors and Officers insurance policy. The defendants –other than the Trustee– entered into an "Agreement for the Sharing of Insurance Proceeds" (the "**Insurance Agreement**") purporting to allocate the insurance proceeds among themselves. The insurer ultimately interpled the policy limit with the Court in Case No. 13-5116 (the "**Interpleader Action**"). In the Interpleader Action, this Court entered an agreed order setting John Head's share of the insurance proceeds under the Insurance Agreement at \$76,329.17 (Mr. Head's "**Share**") (Dkt. No. 45).

On February 6, 2012, the Trustee initiated an adversary proceeding against Mr. Head and Head Consulting, Case No. 12-05097 (the "**Fraudulent Transfer Adversary**"). The Trustee alleged that from 2002 to 2009, Mr. Head and Head Consulting received \$2,522,333.06 in constructive or actual fraudulent transfers from Fair Finance, FHI, and DC Investments, LLC (collectively, the "**Transfers**") and demanded their return. Mr. Head and Head Consulting

² The United States District Court for the Northern District of Ohio (the "**District Court**") granted a motion for withdrawal of the reference on September 20, 2013, and the McKibben Matter is also pending before the District Court as Case No. 5:13-cv-02098. (District Ct. Dkt. No. 3).

³ Ultimately, the original plaintiffs in the McKibben Matter were dismissed at their request, and the parties were realigned so that the Trustee became the named plaintiff.

moved to withdraw the reference from this Court, which was granted on April 20, 2012. The Fraudulent Transfer Adversary is currently pending before Judge Gaughan in the District Court as case number 5:12-cv-981. The Fraudulent Transfer Adversary was referred to this Court for pretrial management.

Mediation and Settlement Agreements

Between February 2, 2015, and April 10, 2015, the Trustee, Mr. Head, and Head Consulting entered into proposed settlement agreements, subject to court approval, that would settle the Fraudulent Transfer Adversary and Mr. Head's role in the McKibben Matter.

At mediation held on February 2, 2015, the parties entered into a proposed settlement of the Trustee's claims against Mr. Head in the McKibben Matter (the "**Head McKibben Settlement Agreement**"), in exchange for a payment by Mr. Head of the \$50,000 allocated to him under the Insurance Agreement, as more fully described in the Head McKibben Settlement Agreement, attached to the Motion as **Exhibit B**. The Trustee also agreed to consent to, and cooperate with, the distribution of any insurance proceeds allocable to Mr. Head under the Insurance Agreement in excess of \$50,000 to Mr. Head's counsel.

The proposed settlement in the McKibben Matter was contingent upon the participation of Mr. Head in a second mediation session scheduled for April 10, 2015 in an attempt to settle the Fraudulent Transfer Adversary. The second mediation session went forward on April 10, 2015, and the parties ultimately agreed to settle the Fraudulent Transfer Adversary. The parties executed a settlement agreement (the "**Fraudulent Transfer Settlement Agreement**," attached to the Motion as **Exhibit C**, and together with the Head McKibben Settlement Agreement, the "**Settlement Agreements**").

Before entering into the Fraudulent Transfer Settlement, the Trustee engaged in extensive discovery regarding Mr. Head's assets, his transfers of assets, and the assets held by the John J.

Head Revocable Trust (the “**Head Trust**”). Discovery included review of trust documents, bank and brokerage account statements, Mr. and Mrs. Head’s tax returns, and a personal financial statement prepared by Mr. Head. The Trustee was provided with a complete disclosure of Mr. Head’s assets. Essentially all of Mr. Head’s assets, other than his retirement account, were held by the Head Trust’s Morgan Stanley brokerage account (the “**Morgan Stanley Account**”).

As is more fully set forth in the Fraudulent Transfer Settlement, the Trustee proposes to settle all outstanding matters with Mr. Head and Head Consulting in exchange for the full balance of the Head Trust’s Morgan Stanley Account (approximately \$637,000⁴ as of April 10, 2015), less certain expenses. Those expenses are (i) Mr. Head’s legal fees in the Fraudulent Transfer Adversary, up to \$10,000, (ii) his share of the mediator’s fees in the Fraudulent Transfer Adversary, and (iii) the capital gains taxes Mr. Head will owe as a result of liquidating the Morgan Stanley Account, up to \$30,000. Mr. Head will cause all securities in the Morgan Stanley account to be liquidated in the open market as soon as possible after the Settlement Agreements are approved by the Court.

For the reasons set forth below, the Trustee submits that this proposed compromise is fair, reasonable, and in the best interests of the estate.

LAW AND ARGUMENT

I. The Applicable Standard Under Rule 9019.

Rule 9019(a) of the Federal Rules of Bankruptcy Procedure provides that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”

Compromises are favored in bankruptcy cases. *In re Leeway Holding Co.*, 120 B.R. 881, 891 (Bankr. S.D. Ohio 1990); *Magill v. Springfield Marine Bank*, 67 B.R. 378, 383 (C.D. Ill. 1986). The decision to approve a settlement or compromise lies within the discretion of the

⁴ This number is subject to market fluctuations.

Court and is warranted where the settlement is found to be reasonable and fair in light of the particular circumstances of the case. *Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson (In re TMT Trailer Ferry, Inc.)*, 390 U.S. 414, 424-25 (1968); *International Distrib. Ctrs., Inc. v. Talcott, Inc.*, 103 B.R. 420, 422 (S.D.N.Y. 1989); *In re Texaco*, 84 B.R. 893, 901 (Bankr. S.D.N.Y. 1988); *In re Albert-Harris, Inc.*, 313 F.2d 447, 449 (6th Cir. 1963); *In re Parkview Hospital-Osteopathic Med. Ctr.*, 211 B.R. 603 (Bankr. N.D. Ohio 1996); *In re Victoria Alloys, Inc.*, 261 B.R. 918, 920 (Bankr. N.D. Ohio 2001); *In re SIS Corp.*, 108 B.R. 608, 612 (Bankr. N.D. Ohio 1989).

In determining whether a settlement is reasonable, a court should consider the following factors:

- a. The probability of success in litigation;
- b. The difficulty of collecting any judgment which may be obtained;
- c. The complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attendant to it; and
- d. The interests of creditors and equity holders and a proper deference to their reasonable views of the settlement.

See *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *TMT Trailer*, 390 U.S. at 424-25; *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Swallen's, Inc.*, 210 B.R. 128 (Bankr. S.D. Ohio 1997); *In re McLean Indus., Inc.*, 84 B.R. 340, 344 (Bankr. S.D.N.Y. 1988); *In re Carla Leather, Inc.*, 44 B.R. 457, 466 (Bankr. S.D.N.Y. 1985).

Bankruptcy courts should approve a proposed settlement, after an independent review and evaluation of the applicable principles of bankruptcy law, unless it “fall[s] below the lowest

point in the range of reasonableness.” *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied*, 464 U.S. 822 (1983) (citations omitted) (*quoting Newman v. Stein*, 464 F.2d. 689, 693 (2d Cir. 1972)); *see also In re Tennol Energy Co.*, 127 B.R. 820 (Bankr. E.D. Tenn. 1991); *In the Matter of Energy Cooperative, Inc.*, 886 F.2d 921 (7th Cir. 1989); *In re Dow Corning Corp.*, 198 B.R. 214 (Bankr. E.D. Mich. 1996). Under *TMT Trailer*, courts should seek to balance the probable benefit and potential cost of pursuing a claim or defense against the costs of the proposed settlement. The Court is not required to conduct a “mini-trial” on the merits of the underlying causes of action being settled. *In re Blair*, 538 F.2d 849 (9th Cir. 1976); *see also In re Walsh Constr., Inc.*, 669 F.2d 1325 (9th Cir. 1982).

Accordingly, courts generally give considerable deference to a trustee’s recommendation of a proposed compromise and settlement. *See Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 604 (5th Cir. 1980) (affirming district court’s reliance on trustee’s evaluation of merits of claim); *In re Blair*, 538 F.2d at 851, n.1 (affirming district court’s reliance on trustee’s conclusory statements in recommending settlement). Indeed, the Court should give weight to a trustee’s informed judgment that a compromise is fair and equitable to the estate. *See Int’l Distrib. Ctrs., Inc.*, 103 B.R. at 423; *In re Carla Leather, Inc.*, 44 B.R. at 465.

II. The Proposed Compromise Satisfies the Rule 9019 Standard.

The Trustee respectfully submits that the compromise to be achieved by the proposed Settlement Agreement satisfies the standards for approval and, therefore, should be approved under Rule 9019.

The Trustee, in his business judgment, has determined that settlement will benefit the estate more than continued litigation. In summary, settlement now will likely give the estate all the assets the Trustee could collect after litigation, without the litigation expenses. Specifically,

the Trustee considered the following *In re Martin* factors in proposing to compromise his claims against Mr. Head and Head Consulting:

(1) **The Difficulty of Collecting a Larger Judgment.** The Trustee has determined that the estate would have difficulty collecting more from Mr. Head than it receives under the Settlement Agreements. The Settlement Agreements turn over to the Trustee virtually all of the assets held by Mr. Head and the Head Trust, except for Mr. Head's retirement account. Retirement accounts are generally exempt from collections activity, and so it would be difficult, expensive, and time consuming for the Trustee to litigate that matter. R.C. § 2329.66. Moreover, it is likely that Mr. Head would use the Morgan Stanley Account to fund his legal defense, so that the longer the Trustee litigates, the less money would be available to pay any judgment. Thus, pursuing the case further would provide little benefit.

(2) **The Complexity of the Litigation . . . and the Expense . . . and Delay Necessarily Attendant to It.** The Settlement Agreements with Mr. Head will also relieve the estate from the expense and delay of complex litigation. Under the Settlement Agreements, the estate will receive more than \$600,000 almost immediately. Proceeding to trial would involve significant legal and expert witness fees for a payoff that would likely be several years in the future, after any appeals.

If the McKibben Matter were to be litigated, the Trustee would need to prove that Mr. Head engaged in a malicious combination with Mr. Durham, Mr. Cochran, and Mr. Snow, who are in prison and hostile to the Trustee. Thus, the proof would need to be made circumstantially or through painstaking use of hundreds of records. Similarly, in the Fraudulent Transfer Adversary, the Trustee would likely need to litigate dozens of individual transfers, the date that the Debtor became insolvent, the date that the Debtor became a Ponzi scheme, the date that Mr. Head knew

or should have known of Mr. Durham's fraud scheme, and what value Mr. Head's services provided to the Debtor. Litigating either of these matters through trial would be very expensive.

In sum, the Settlement Agreements provide the Trustee with virtually all the assets he could obtain cost-effectively if he were to obtain a judgment, while reducing the Trustee's litigation costs. Since further litigation would be an expense to the estate and reduce the assets Mr. Head has available to pay the estate, the proposed compromise is reasonable and in the best interests of the estate and creditors. Accordingly, the Trustee requests the approval of the compromises on the terms set forth in the Settlement Agreements.

Having provided notice of the Motion to (a) the Office of the United States Trustee, (b) counsel to the Petitioning Creditors, (c) Defendants Mr. Head and Head Consulting, and (d) all parties who have requested notice, the Trustee requests and submits that, under the circumstances, no other or further notice need be given.

WHEREFORE, the Trustee respectfully requests that this Court enter an Order, in substantially the form attached hereto as Exhibit A, (i) granting the Motion, (ii) approving the compromise on the terms set forth in the Settlement Agreements, and (iii) authorizing and directing the parties to take all actions necessary or incidental to performance under the Settlement Agreements.

Date: April 30, 2015

Respectfully submitted,

/s/ David F. Proaño

Joseph F. Hutchinson, Jr. (0018210)

Kelly S. Burgan (0073649)

David F. Proaño (0078838)

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Counsel for the Trustee

EXHIBIT A
PROPOSED ORDER

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:)	Case No. 10-50494
)	
FAIR FINANCE COMPANY)	Chapter 7
)	
Debtor.)	Chief Judge Pat E. Morgenstern-Clarren
)	

**ORDER APPROVING COMPROMISE OF CLAIMS BY THE TRUSTEE
AGAINST JOHN HEAD AND HEAD CONSULTING GROUP, INC.**

This matter having been presented to the Court upon the Motion of Trustee to Approve Compromise with John Head (the “**Motion**”)¹ and the Memorandum of Law In Support of the Motion, and the Court having considered the Motion, and it appearing that the compromise is in the best interest of the Debtor’s estate and creditors, and after due deliberation and consideration of the facts and circumstances therein:

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The Motion is **GRANTED** in its entirety.
2. The notice of the Motion was adequate and sufficient under the circumstances.

¹ Terms capitalized but not defined herein shall have the meanings ascribed to them in the Motion and the memorandum of law in support of the Motion.

3. The compromise is hereby approved in accordance with the terms and conditions set forth in the Settlement Agreements attached to the Motion.

4. The clerk of courts is hereby ordered and directed to make the following disbursements forthwith from the balance of the funds paid to this Court by National Union in Adversary Proceeding number 13-5116, as follows:

- a. \$50,000 from the Share of John Head to Brian A. Bash, Chapter 7 Trustee for Fair Finance Company, which funds shall be released to the Trustee's counsel, David F. Proaño, by check payable to Brian A. Bash, Trustee of the Bankruptcy Estate of Fair Finance Company.
- b. \$26,329.17, being the balance of the Share of John Head, plus all interest accrued in the registry account allocable to the Share of John Head on a pro rata basis to the date of disbursement to counsel for Mr. John Head, payable to the order of Taft, Stettinius & Hollister LLP, One Indiana Square, Ste. 3500, Indianapolis, Indiana 46204, or as Mr. Paganelli shall otherwise direct in writing.

5. The parties are hereby authorized and directed, without further order of this Court, to take all actions necessary or incidental to performance under the Settlement Agreements and to implement and effectuate this Order.

6. The Court shall retain jurisdiction with respect to all matters arising from or related to the Settlement Agreements and the implementation of this Order.

IT IS SO ORDERED.

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Submitted by,

/s/ David F. Proaño

Joseph F. Hutchinson, Jr. (0018210)

Kelly S. Burgan (0073649)

David F. Proaño (0078838)

Joseph M. Esmont (0084322)

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Counsel for the Trustee

EXHIBIT B
HEAD MCKIBBEN SETTLEMENT AGREEMENT

Mediated Settlement Agreement

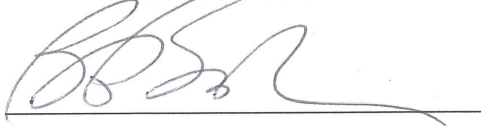
Brian Bash, as Chapter 7 Trustee for Fair Finance Co., and John J. Head, agree to fully compromise and settle all of their claims in the case of *Bash vs. Fair Finance Co., et al*, (commonly known as the "McKibben Case"), pending before the U.S. District Court for the Northern District of Ohio pursuant to a withdrawal of reference, in exchange for the payment of \$50,000.00.

The parties anticipate that the source of this payment will be a portion of Directors & Officers insurance proceeds allocable to Mr. Head. Upon Bankruptcy Court approval of the settlement, Mr. Bash agrees to take all necessary steps, in concert with Mr. Head's counsel, to effectuate the release and distribution of all such sums. Mr. Bash further agrees to consent to and cooperate in the distribution of any and all portions of insurance proceeds allocable to Mr. Head in excess of the \$50,000 settlement amount, to F. Anthony Paganelli as counsel for Mr. Head, as payment for previously incurred attorney's fees and costs. If the parties are unable to effectuate the release and distribution of sufficient proceeds from the Directors and Officers insurance, Mr. Head shall pay the \$50,000 settlement payment to the Trustee within 14 days of the date on which the parties are notified that sufficient Directors and Officers policy proceeds will not be released to pay the settlement sum.

This agreement is contingent upon court approval, upon Mr. Head participating in an additional mediation session in an effort to resolve the parties' remaining disputes, and upon Mr. Head making good faith efforts to obtain and provide to Mr. Bash, in confidence, documents contained on a list that has been provided to Mr. Head by the mediator in this matter.

Within 14 days after Mr. Head produces documents as a result of his good faith effort described above and participation by Mr. Head in an additional mediation session, Mr. Bash will present a motion to the Court seeking approval of this agreement and, upon approval thereof, the parties will take all steps necessary to obtain approval for the distribution of the aforementioned insurance proceeds. Within 7 days after distribution, Mr. Bash will dismiss with prejudice all claims against Mr. Head in the "McKibben Case"

Dated and effective as of February 2, 2015:



Brian Bash, as Chapter 7 Trustee



John J. Head

EXHIBIT C
FRAUDULENT TRANSFER ADVERSARY PROCEEDING SETTLEMENT AGREEMENT

MEMORANDUM OF MEDIATED SETTLEMENT

This Memorandum of Mediated Settlement memorializes the terms by which Brian Bash, as Trustee for Fair Finance Company in its chapter 7 bankruptcy case, John J. Head, and Head Consulting Group, Inc. ("HCG") have agreed to settle their disputes:

1. The Trustee has filed an adversary proceeding against Mr. Head and HCG, which is now pending before the U.S. District Court for the Northern District of Ohio (the "Proceeding").

2. The parties have agreed to fully and completely settle the disputes in the Proceeding under the following terms and conditions, all of which are subject to the approval by the U.S. Bankruptcy Court for the Northern District of Ohio:

a. Mr. Head and HCG agree to pay to the Trustee a settlement amount consisting of virtually all of the assets held by Mr. Head personally, and/or by the John J. Head Revocable Trust (the "Trust"), by tendering the full balance in the Trust's Morgan Stanley brokerage account, which has an approximate balance of \$637,000 as of the date of this agreement but which may vary based on market fluctuations, net after the following allowances and/or deductions:

i. Mr. Head will use funds in the Morgan Stanley account to pay his share of the fees for the mediator's services in the Proceedings;

ii. Mr. Head will use funds in the Morgan Stanley account to pay his legal fees for services rendered in the proceeding, in an amount not to exceed \$10,000.00; and

iii. Mr. Head and HCG may deduct from the amount paid to the Trustee the amount estimated by Mr. Head's accountant as necessary to pay capital gains taxes that he will owe based on the liquidation of the account, in an amount not to exceed \$30,000.00.

3. Mr. Head and the Trust will not engage in any account activity in the Morgan Stanley account other than the transactions set forth in Section 2 above.

4. Within seven (7) calendar days of the delivery of the statements required by paragraph 8 of this agreement, the Trustee shall file a motion to compromise his claims against Mr. Head and HCG. As soon as possible after approval by the Bankruptcy Court of the parties' agreement, Mr. Head will cause all securities in the Morgan Stanley account to be liquidated on the open market. Thereafter, he will promptly instruct his accountant to calculate his capital gains tax liability. Within 10 days after learning of his capital gains tax liability, which calculation shall be shared with the Trustee, Mr. Head will tender the balance in the Morgan Stanley account to the Trustee in full and final settlement of the disputes in the Proceeding by causing a check to be delivered to the Trustee.

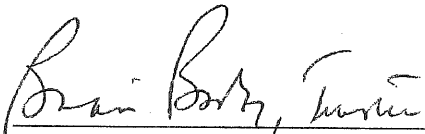
5. Effective upon Mr. Head's payment of the settlement amount to the Trustee, Mr. Head, HCG, and the Trustee unconditionally release each other, together with all members of Mr. Head's family, his heirs, assigns, and/or agents, and together with the Trustee's agents, representatives and counsel, from and against any liability for any alleged acts and/or omissions that precede the date of this agreement.

6. Within seven days after Mr. Head's payment to the Trustee, the Trustee and Mr. Head will file a joint stipulation dismissing the Proceeding with prejudice.


7. Neither party shall make any statements to the media relating to the Proceeding or to this settlement apart from a "no comment."

8. Mr. Head will provide the Trustee with his and the Trust's most recent two months' statements showing all activity from February 1, 2015 through the date of this agreement, for his or the Trust's brokerage accounts and bank accounts, and any joint accounts held with Mr. Head's wife, within 14 days after the date of this agreement. In the event that the account balances are significantly different than those represented at the mediation, the parties shall in good faith negotiate an appropriate accommodation with respect to the settlement payment required by this agreement.

Dated and effective as of April 10, 2015:



Brian Bash
In his capacity as Trustee for
Fair Finance Company



John J. Head



Head Consulting Group, Inc.
By: John J. Head
Its: 

CERTIFICATE OF SERVICE

A copy of the foregoing has been served via ECF or regular, U.S. Mail, on April 30, 2015, on the attached service list.

/s/ David Proaño

David Proaño

Counsel for the Trustee

SERVICE LIST

Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive e-mail notice/service for this case.

- David F Adler dfadler@jonesday.com, nmadamczyk@jonesday.com
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