ALBERT TOGUT, as CHAPTER 7
TRUSTEE FOR REFCO, LLC
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HEARING DATE: TO BE DETERMINED
OBJECTION DEADLINE: TO BE DETERMINED

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 7 Case
	:	No. 05-60134 [RDD]
REFCO, LLC,	:	
	:	
Debtor.	:	
	:	

APPLICATION FOR FINAL ALLOWANCE OF STATUTORY COMMISSION FOR ALBERT TOGUT, AS CHAPTER 7 TRUSTEE[*]

TO THE HON. ROBERT D. DRAIN, BANKRUPTCY JUDGE:

ALBERT TOGUT, the Chapter 7 trustee (the "Applicant" or the "Trustee") of the estate of Refco, LLC ("LLC" or the "Chapter 7 Debtor"), hereby shows this Honorable Court that:

PRELIMINARY STATEMENT

1. The Trustee has managed the bankruptcy estate of one of the biggest futures commission merchants ("FCM") in the world. Immediately prior to LLC's

[*] **The Trustee asked that his work be reviewed by highly respected neutral experts to afford the Court an independent basis for determining the commissions to be awarded to the Trustee. The independent analysis is contained in the 64-page "Report and Recommendation of Jerry Patchan and Si Hopkins on the Trustee's Commission Requested by Albert Togut" dated November 19, 2009 ("Patchan Report") simultaneously filed in this case, which is incorporated by reference herein.**

bankruptcy filing, millions of commodity futures positions, for the accounts of many thousands of customers, supported by billions of dollars in funds and securities, were traded through LLC.

2. The goal in any Chapter 7 case is for the trustee to marshal and distribute to creditors the maximum possible amount of money. Indeed, Section 326 of the Bankruptcy Code[1] provides for payment of a percentage commission, rather than an hourly fee, to give the Trustee an incentive to collect every last possible dollar. Here, the Trustee had to work fast to keep LLC together for its sale as a going concern. And as demonstrated below, the Trustee operated the LLC business after the sale of assets to Man Financial Inc. ("Man") and time and again, brought a businessman's approach and skills to solving the many problems presented in the administration of the LLC estate.[2]

3. By any measure, this case has been a success. The direct creditors of LLC were paid in full more than two years ago and on top of that, the other Refco entities[3] have already been paid more than $800 million, including $120 million on account of the Credit Line Loan owed to Refco Capital LLC ("Refco Capital").

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1 Title 11 of the United States Code.

2 The Trustee is an experienced businessman and was trained as such. He graduated with honors from New York University's School of Business, is a member of the international Beta Gamma Sigma Honor Society, and has for 29 years been the Senior Member and manager of the law firm of Togut, Segal & Segal LLP which he founded. He has also served as a professional advisor to many complex businesses that he has helped to successfully reorganize.

3 The 35 entities are: Refco Capital Markets, Ltd.; Refco Inc.; Refco Capital Holdings, LLC; Refco Capital Management, LLC; Refco Capital, LLC; Refco Financial, LLC; Refco Global Capital Management, LLC; Refco Capital Trading, LLC; Refco Finance, Inc.; Refco Fixed Assets Management LLC; Refco Global Finance, Ltd.; Refco Global Futures, LLC; Refco Group Ltd., LLC; Refco Mortgage Securities, LLC; Summit Management, LLC; Refco Global Holdings, LLC; Refco Information Services, LLC; Refco Regulated Companies, LLC; Refco F/X Associates, LLC; Refco (Singapore) Pte. Limited; Refco Alternative Investments, LLC; Refco Investment Services Pte Limited; Refco Administrative Services, Inc.; Refco Commodity Management, Inc.; Refco Overseas Limited; Refco Easysolutions, LLC; Lind-Waldock Securities LLC; Refco Managed Futures LLC; Refco Securities LLC; Westminster-Refco Management LLC; Bersec International, LLC; Marshall Metals, LLC; Refco Administration, LLC; Kroeck & Associates, LLC; New Refco Group Ltd. LLC.

4. To date, the following distributions have been made through September 30, 2009 (dollar amounts in millions):

	9/30/09
Customer Securities	$2,598.9
Customer Cash	204.8
Customer Name Securities	589.6
Intercompany Claim Payments	655.9
RCC Credit Line Loan Payment	120.6
Executory Contract Cure Payments	39.2
Rogers Claim Settlement	30.0
Sale Proceeds to Other Refco Entities	33.8
Rent	10.5
Other Operating Expenses	10.2
Pre-Petition Vendor Claims[4]	14.2
Professional Fees	24.3
Trustee Bond Premium	4.2
Omni Claims Management	0.7
Total	**$4,336.9**

5. All of this has been done in what is believed to be the largest Chapter 7 case ever and certainly the largest Chapter 7 case filed following the effective date of the BAPCPA amendments (as discussed herein). Given the sheer size and complexity of the case, the result achieved here has been stunning.

6. Delivering these results required an intense effort under far less than ideal circumstances. Much more could have gone wrong than could have gone right; there was substantial risk that this administration could have resulted in a disaster of

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Pre-Petition Vendor Claims Detail	9/30/09
Priority Claims	$0.1
Secured Claims	0.1
Unsecured Excluding Vendors	5.4
Unsecured Vendors	8.6
Total	**$14.2**

monumental proportions, imploding LLC's business, and causing massive harm to its customers, and significantly disrupting the nation's commodity futures markets.

7. The Trustee was acutely aware of the fact that in the month preceding the Filing Date (defined below), a large number of customers took their money out of LLC on a daily basis, dramatically reducing the more than $7 billion of customer accounts that was originally on hand. By the Filing Date, there was a real danger that LLC's customer accounts could come perilously close to the $1.7 billion threshold under the agreement with Man that, once reached, gave Man a $16 million penalty for every $100 million further attrition. If the deterioration was too severe, there was no business to sell.

8. The Trustee's goal was to protect and transfer the customer accounts, and complete a closing before the customer accounts dropped below $1.7 billion. If the sale to Man had not been cleanly executed immediately after the commencement of this case on November 25, 2005[5] (the "Filing Date"), millions of trades would have been trapped. Had that occurred, the Trustee would have been faced with billions of dollars in customer claims, and substantial uncertainty about how and when trades would be cleared.

The "trustee in waiting" leading to the Closing.

9. The Trustee was told that he would be appointed several weeks before the Filing Date. In response, the Trustee insisted that he be allowed to immediately begin his work as a "trustee-in-waiting"[6] because of the Bankruptcy Code's requirement

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5 The LLC petition was filed at 4:31 pm on the Friday after Thanksgiving, immediately after the last North American market in which LLC traded had closed. It was everyone's goal to close the transaction before any markets would reopen.

6 This was the Court's characterization. *See* 11/25/05 transcript at page 41.

for an instantaneous sale that could never have been responsibly satisfied without extensive prepetition due diligence and preparation. The work required to prepare for a closing of the sale could never have been done quickly, even presuming a few days' delay in a transfer could have been tolerated.[7] As a practical matter, the closing had to be completed on day one of the case. Had there been any delay, customers would have pulled their accounts from LLC creating a MAC of epic proportions; that would have ruined any possible closing with Man.

10. The parties to the Chapter 11 cases knew that the Commodity Futures Trading Commission ("CFTC") was ready to close LLC and transfer its customer accounts to another entity consistent with the CFTC's mandate to maintain market stability and customer protection. To this end, the Chicago Mercantile Exchange and CFTC already were considering action to force the transfer of all of LLC's customer accounts to other FCMs for no consideration, but were convinced to hold off while an orderly sale to Man by a Chapter 7 trustee was attempted.

11. The LLC asset sale by a Chapter 7 trustee was the only way that a going concern value for LLC's business could be achieved.[8] For the sale to be palatable to regulators, the buyer had to agree to take substantially all customer accounts; a transfer of only some "good" customer accounts would not satisfy the overall goal of customer

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7 The Trustee believes that had he and the United States Trustee strictly followed the Bankruptcy Code as written (*i.e*, the Trustee does nothing until appointed and is not notified of an appointment until the petition is filed), this case would have been a disaster. If a trustee is to act independently, as he is required to do under the Bankruptcy Code, and not as a puppet, he needs time to perform due diligence and to confirm that a complex sale is in the best interests of the estate. And in this case, he made changes and improvements to the sale structure. The Trustee was afforded that necessary time by the creativity of the United States Trustee. His pre-petition efforts were crucially important to the successful result achieved here.

8 LLC was the first FCM successfully sold in bankruptcy as a going concern; all others that preceded collapsed and were shut down prior to bankruptcy.

account protection and, thus, the sale had to include funding for all customer accounts. Without this aspect of the Sale, there could never have been any sale proceeds; and all of the going concern value would have been destroyed by an abrupt CFTC-mandated shutdown.

12. The Trustee used the several weeks before his formal appointment to be prepared for the closing and the immediate transfer of customer accounts. The Trustee had to work very hard with his professionals to meet the absolute requirement that the closing occur before the commencement of the next trading day after the Filing Date. Without that work, an immediate closing never would have been possible.

13. The Trustee was therefore able to apply to the Bankruptcy Court to approve the Sale, obtain a Chapter 7 sale order, take possession of, and transfer, more than $3.3 billion in customer funds and millions of open trading positions to Man before midnight of the Filing Date, and complete the closing of the Sale. Careful planning allowed this to be done in an orderly fashion. The estate ultimately realized more than $262 million in value that would have been lost if the deal had been mishandled. Even with the accelerated closing, none of the proceeds of the sale were available to the estate until long after the Filing Date.

Reality of the Man transaction.

14. Here is the reality of the Man transaction: by the end of the Filing Date, the Trustee was not able to realize **any** of the $291 million sales price and, in fact, the LLC estate had to go out of pocket $147 million to close the Sale. Under the terms of the Sale mostly negotiated by the Chapter 7 Debtor's parent prior to the Trustee's selection: $320 million had to be left with Man, of which $70 million was for a sale escrow and $250 million was required for Man's use as an "excess capital" cushion to cover LLC's

indemnification obligations for the customers of LLC transferred to Man. So, at that point in time, the LLC estate was **negative $29** million, and not positive anything on the Sale.

15. But that is not all the Trustee had to pay to effectuate the Sale to Man. In addition to the $320 million described in the preceding paragraph, the Trustee had to pay $80 million for exchange deposits and $38 million for Section 365 cure payments to third parties.

16. So, by the end of the Filing Date, the LLC estate was **negative $147 million** on the Sale! Not only were there no sale proceeds to turn over, there was considerable work to be done before any of the sale proceeds could be retained and/or recovered by the estate.

17. Immediately after the Man closing, the Trustee began negotiating with Man for the return of excess regulatory capital and recovered $89 million within the week after the Sale. That still left the LLC estate negative $58 million on the Sale, without receiving the benefit of a dime of the $291 million Man sale purchase price.

The "temporary trustee."

18. When the Trustee was selected, he was told that his tenure would be "temporary". The parties had hoped to avoid an LLC case altogether but that became impossible when it was clear that the sale could not be made outside of Chapter 7. Man, in particular, was in no way willing to acquire the LLC assets other than from a Chapter 7 trustee. Alternatives were suggested to Man but they were all rejected.

19. Certain of the parties envisioned a quick sale and then a prompt conversion of the LLC case to a Chapter 11 case as soon as the closing with Man had occurred. In that context, the Trustee was to apply to the Court for approval of the Sale to Man (that by its terms had to be done in a Chapter 7 case), promptly close that sale,

immediately turn over the sale proceeds, and be done with the case. "Promptly" was explained to the Trustee to mean that his tenure would be terminated no later than ten days after the Filing Date when LLC would be converted to a Chapter 11 proceeding that would be jointly administered with the parent debtor's case. The Trustee was led to believe this would be a ten-day case.

20. When the conversion motion was finally filed on February 28, 2006, **three months** after the Filing Date, it was adjourned and not considered on the merits until **five months** into the case. When the conversion motion was ultimately heard on May 2, it was opposed by the CFTC, the United States Trustee and by Rogers (a major creditor of the LLC estate then asserting claims for more than $330 million). It was denied by the Court by order dated May 12, 2006.

21. With the passage of time, it became clear that for the very same reasons that LLC had to be filed as a Chapter 7 case, it could not be converted to anything else. LLC was never eligible to be a Chapter 11 debtor under the Bankruptcy Code. The idea that the Trustee would be "temporary" was only that, and unworkable.

Obtaining the benefit of the Man Sale.

22. It took two full years to obtain all of the benefit of the Man transaction and hard, old-fashioned trustee administration to get there. It took a year to recover $100 million from Man, $148 million from the exchange memberships and $12 million of the excluded account escrow. It took two years for the Trustee to succeed in resolving the issues surrounding the original $70 million escrow given to Man, recovering nearly $3 million more than creditors urged him to accept.

Four years of administration.

23. For four years, the Trustee has administered the remainder of LLC's assets, made huge distributions and other transfers of property exceeding an additional **$1.0 billion**, and resolved all but a handful of contested claims. To date, all of the Chapter 7 Debtor's direct creditors holding allowed claims have been paid in full, the Refco entities have had 100% of their $565 million "hard claim" paid, and the Trustee has distributed another $91 million on the "soft" intercompany claim[9] held by other Refco entities in addition to paying more than $120 million on account of the customer credit line loan claim. And the Trustee accomplished all of this while keeping the fees of his counsel and other professionals to a small percentage of the costs of the Chapter 11 proceedings.

Experience mattered.

24. In the past fourteen years, the Trustee has had central roles in twenty-one high-profile megacases.[10] He has nearly thirty years of actual hands-on experience as

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9 The "soft" claim was in sharp contrast with the "hard" claim. The factual and legal bases for this claim were subject to *bona fide* dispute, were not readily quantifiable, and generally sounded in fraud or tort. While the "soft" claim had some merit, it also was not supported by the same level of objective historical documentation and data as underlay the "hard" claim. Consequently, it was heavily discounted and subordinated to all other allowed claims.

10 Chrysler LLC, *et al.* (conflicts counsel for the debtor), Charter Communications, Inc. (debtor's counsel for Charter Investment, Inc.); ContiFinancial Corporation, *et al.* (conflicts counsel for the debtor); Loews Cineplex Entertainment Corporation, *et al.* (conflicts counsel for the debtor); Rockefeller Center Properties and RCP Associates (sole counsel for the debtor); Olympia & York Tower B Company and Olympia and York World Financial Center Finance Corp. (sole counsel for the debtor); Enron Corp., *et al.* (co-counsel for the debtors); Delphi Corporation, *et al.* (conflicts counsel for the debtor); NRG Energy, Inc., *et al.* (conflicts counsel for the debtor); Allegiance Telecom, Inc. *et al.* (conflicts counsel for the debtor); Tower Automotive, Inc., *et al.* (conflicts counsel for the debtor); Saint Vincents Catholic Medical Centers of New York d/b/a Saint Vincent Catholic Medical Centers, *et al.* (conflicts counsel for the debtor); Dura Automotive Systems, Inc., *et al.* (conflicts counsel for the debtor); Daewoo International (America) Corp. (sole counsel for the debtors); Collins & Aikman Corporation, *et al.* (special bankruptcy counsel for the debtors and now for the litigation trustee); Ames Dept Stores, Inc., *et al.* (twice: in the first case as counsel to the official employees committee and in the second case as conflicts counsel for the debtor); Kingston Square Associates, *et al.* (Chapter 11 trustee and as counsel to the trustee); Tronox Inc., *et al.* (conflicts counsel for the debtors); Frontier Airline (conflicts counsel for the debtor); Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey (counsel to the

(footnote continued on the following page)

a trustee and he has been an estate-retained professional in some of the most complex Chapter 11 cases ever filed. Faced with truly unique issues and problems never before presented with which *no* trustee could be familiar, the Trustee consistently made the right business and legal judgments. His administration of this estate has been sure-footed.

25. Following the Man transaction, time and again the Trustee benefited from his years of experience as a fiduciary to pick his battles carefully. Whenever possible, he employed business strategies designed to minimize legal and accounting expenses. The Trustee avoided unnecessary litigation that would have drained the estate's resources but when it needed to be done, he litigated and prosecuted claims objections to protect the estate's assets. In the case of the claims of the Rogers Funds (discussed below), for example, the Trustee successfully rebuffed claims exceeding $330 million, ultimately settling the claims for just $30 million despite being told that settling them for $47 million, or $17 million more, was acceptable.

26. Complicating all of the claims resolutions was the truly unique reality that all direct creditors of LLC were able to receive a 100% distribution, almost unheard of in a Chapter 7 case, and certainly extremely rare in any corporate liquidation of any size, let alone the largest Chapter 7 case ever. The prospect of receiving payment in full made the negotiations much harder than in an average case.

Sprinting to make distributions.

27. It is an understatement to say that the administration of this estate was not ordinary. For the first five months, the Trustee's status was uncertain and in limbo (until the conversion motion was denied), and then the Chapter 11 Debtors and

official committee of unsecured creditors and then post-confirmation trustee); and Shea & Gould (counsel to the official committee of unsecured creditors and then post-confirmation trustee).

their principal creditor groups wanted the Trustee to administer his estate (and particularly the claims reconciliation process) on a hurried basis, under exigent circumstances, to facilitate the Chapter 11 Debtors' reorganization and plan confirmation seven months after the Trustee's status was clarified. Responding to their needs, in a matter of just months, the Trustee creatively reduced the aggregate claim pool by more than $5.1 billion, leaving total aggregate claims (excluding intercompany and untimely claims) against the Chapter 7 Debtor's estate of less than $100 million.

28. For the Chapter 11 Debtors to be able to fund their plan, the massive issues surrounding the intercompany claims had to be resolved but the work necessary to do that was not progressing in an orderly fashion. The onus for doing the due diligence fell squarely on the shoulders of the Trustee and his professionals. The Trustee made this project a priority and began laboring on these issues nine months before the plan was confirmed for the Chapter 11 Debtors. The Trustee understood that the success of the Chapter 11 plan depended on having a funding mechanism for getting cash into the hands of creditors quickly. Representatives of the Chapter 11 Debtors did not even seriously address the intercompany claim issues until after plan confirmation, and then at the urging of the Trustee.

29. To be able to pay more than $800 million to the Refco entities for distribution under their plan, the Trustee had to:

- Close the Sale to Man on the Filing Date, preserving the ability to later recover $262 million in value for the estate;
- Recover $70 million in deposits from clearing organizations on top of $87 million paid to them to effectuate the Man sale for a total recovery of $157 million;
- Obtain a temporary restraining order against defecting brokers to avoid Man indemnification claims that could have exceeded $75 million;

- Eliminate hundreds of potential disputes with brokers;
- Recover more than $100 million of excess regulatory capital that Man had not returned;
- Recover $750 million beyond the Man sale proceeds;
- Administer 800 executory contracts and manage 135,000 boxes of documents;
- Avoid losses in "Excluded Accounts" not transferred to Man, including as much as $50 million in potential losses on the Kessler accounts alone;
- Negotiate and recover millions of dollars of payments under transition services agreements;
- Eliminate more than 1,000 claims prior to the bar date including 1,500 "critical vendor claims," highly unusual in a Chapter 7 case but possible here because the Trustee operated the LLC business, also highly unusual in a Chapter 7 case;
- Rapidly eliminate more than $5.1 billion in face amount of non-affiliate claims, including the disallowance or subordination of more than $2 billion in face amount of RCM customer-related claims, and the highly favorable resolution of the Rogers Funds' claims, the West Loop claim, and others;
- Implement an efficient and highly cost-effective process for addressing hundreds of subpoenas and document requests;
- Optimize banking relationships and minimize costs of controlling the estate's massive cash resources;
- Reduce the premiums on the $800 million Trustee's bond through an unprecedented auction process; and
- Aggressively limit professional fees and expenses related to administration of the LLC estate.

No prior compensation.

30. For the past four years, the Trustee has received no compensation whatsoever. The Trustee makes this application (the "Application") under Sections 326, 330(a)(1) and (7) and 331 of the Bankruptcy Code and Rule 2016 of the Federal Rules of

Bankruptcy Procedure (the "Bankruptcy Rules") for the final allowance of statutory commissions. No commissions have previously been paid.

Difference between Chapter 7 and Chapter 11 trustees.

31. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), that became effective before the Filing Date, changed Section 330 significantly. Section 330(a)(1)(3) is no longer applicable to a Chapter 7 trustee.[11] A new Section 330(a)(7) was added that provides:

> In determining the amount of reasonable compensation to be awarded to a [Chapter 7] trustee, the court **shall** treat such compensation as a commission, based on Section 326.

Thus, BAPCPA removed any requirement that the Court consider the time spent and hourly rate of Chapter 7 trustees when awarding compensation. While the compensation must be reasonable and not exceed the Section 326 cap, there is a statutory presumption that the percentages contained in Section 326 are reasonable compensation. Thus, Section 330(a)(7)'s provision that trustees are now paid by commission is a major change in the law.

32. Black's Law Dictionary defines "commission" as:

> the recompense, compensation or award of an agent, salesman, executor, trustee, receiver, factor, broker or bailee when the same is calculated as a percentage of the amount of his transactions or on the profit to the principal. A fee paid to an agent or employee for transacting a piece of business or performing a service. Compensation to an administrator or other fiduciary for the faithful discharge of his duties.

[11] Section 330(a)(1)(3) continues to apply to a Chapter 11 trustee.

Black's Law Dictionary, 6th Edition, (emphasis added).[12]

33. There can be no doubt that in enacting BAPCPA, Congress intended that Chapter 7 trustees be treated differently than Chapter 11 trustees without the constraint that the court rely mostly on the "time spent on the services provided" and the "rates charged for the services," the standard imposed by the 1994 amendments to Section 330(a)(3).[13] The BAPCPA amendments removed these criteria for Chapter 7 trustees, allowing for far greater compensation based upon a percentage of the funds received and disbursed by the trustee. This is a dramatic change in the law.

34. While Chapter 11 trustees continue to be paid under the old law using the lodestar standards, for Chapter 7 trustees only, the courts are to use an objective method for calculating commissions by applying the percentage formula set forth in Section 326(a). To make this absolutely clear, Congress amended the Bankruptcy Code by adding a new Section 330(a)(7) that makes the Chapter 7 commission approach mandatory.

35. Because Section 330(a)(7) of the Bankruptcy Code uses the mandatory word "shall" to determine a Chapter 7 trustee's compensation, a Chapter 7 trustee's commission must be determined solely under Section 326(a);[14] Section 330(a)(3) is not

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12 Courts apply a "fundamental canon of statutory construction … that … unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *See e.g., Perrin v. United States,* 444 U.S. 37, 42 (1979).

13 The "reasonableness" factors such as hours spent and billing rates continue to apply to "an examiner, trustee under chapter 11 or professional person" but not to a Chapter 7 trustee.

14 *Compare Barbieri v. RAJ Acquisition Corp. (RAJ Acquisition Corp.),* 199 F.3d 616, 619 ("[t]he term 'shall,' as the Supreme Court has reminded us, generally is mandatory and leaves no room for the exercise of discretion by the trial court."); *with In re New Haven Projects Ltd. Liability Co.,* 225 F.3d 283, 287 (2d Cir. 2000) ("the ordinary meaning of the word 'may' applies here because nothing in [section] 505 suggests otherwise and because Congress elsewhere in the Bankruptcy Code has chosen the word 'shall' to denote mandatory requirements.").

even applicable to a Chapter 7 trustee. The United States Trustee has taken exactly this position, arguing that the maximum commission provided in Section 326(a) should be presumed to be reasonable compensation, unless found to be unreasonable using factors other than those enumerated in Section 330(a)(3). *See* Memorandum of United States Trustee In Support of Trustee's Application For Compensation And Expenses at 6-7; *In re Ward*, 06-10389 WWB (Bankr. W.D. Pa. Jan. 9, 2007) ("The interplay between §§ 326(a), 330(a)(1) and 330(a)(7) mandates that the trustee's fee should be determined in the first instance according to the fees specified in § 326(a), unless such a fee would constitute unreasonable compensation under factors *other than* the considerations identified in § 330(a)(3), from which the chapter 7 trustee has been specifically excluded."); *In re Coyote Ranch Contractors, LLC*, Case No. 07-32363-SGL-7 (Bankr. N.D. Tex., Jan. 20, 2009).

Purpose of a commission instead of an hourly rate.

36. The purpose of the commission is to incentivize trustees to have a pecuniary interest in maximizing the estate. The goal is for the trustee to recover every last dollar possible. In this case, the Trustee did precisely that, recovering $1 billion more after the commencement of the case, and creating $67 million that was value-added solely due to the Trustee's administration.

37. While the 3% statutory formula is a maximum, and not a mandated amount, it also represents explicit Congressional recognition that a 3% award would not be excessive. The Second Circuit Court of Appeals has articulated exactly this view in *In re Schautz*, 390 F.2d 797, 798 (2d Cir. 1968) that is discussed later in this Application.

38. In all, the Trustee took possession of more than $4.3 billion, most of which has already been disbursed or turned over to creditors. If the Trustee requested the maximum commission allowed by the statutory formula, the Trustee would be entitled to

claim a commission of more than $130 million. Numerous aspects of this case justify a large award, but none more than the exceptional results and unprecedented cash payments to all types of creditors, including the other Refco debtors.

39. That said, the Trustee is not seeking the maximum commission allowable under the statute or anything near that amount.

40. The Trustee requests $28 million. This amount is within the range of reasonableness recommended in the Patchan Report accompanying this Application. That report took six months to complete, comprehensively reviews the Trustee's administration of the LLC estate, and is extensive.

41. The commission sought herein is significantly less than the Trustee may request under the Bankruptcy Code; indeed, it is the equivalent of a full statutory fee on distributions of $930 million rather than the more than $4.3 billion in funds disbursed as of September 30, 2009.

42. It should be noted that the Trustee has already reduced his commission request by a very substantial amount to be completely fair and to meet in advance reasonable requests for reductions.

43. The Trustee respectfully represents that the commission sought is more than justified given the results in this case and the level of his effort, the Trustee's age, experience and unique qualifications, the complexity of the case, and other factors.

44. It is respectfully submitted that such compensation is reasonable and appropriate under the circumstances, as discussed more fully below.

I. JURISDICTION AND VENUE

45. This Court has jurisdiction over the Application pursuant to 28 U.S.C. § 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core

proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The statutory predicates for the relief sought herein are Sections 326(a), 330(a)(1) and (7) and 331 of the Bankruptcy Code.

II. THE FACTUAL BASIS FOR COMMISSION SOUGHT BY TRUSTEE

A. Background

1. The Chapter 11 Debtors

46. Refco Inc. ("Refco") and its direct and indirect subsidiaries were providers of execution and clearing services for exchange traded derivatives and a major provider of prime brokerage services in the fixed income and foreign exchange markets. Many of the Chapter 11 Debtors (as defined below) are holding companies for either regulated domestic entities such as FCMs or foreign futures brokerages.

47. LLC, the Chapter 7 Debtor, is a registered FCM and was the most significant regulated subsidiary of Refco. LLC maintained business offices at several locations in the United States and abroad, with primary offices located in New York and Chicago. As of the Filing Date, the Chapter 7 Debtor still held more than $3 billion in public customer funds and property.

48. In August 2005, Refco issued equity securities through an initial public offering. On October 10, 2005, Refco announced that it had discovered, through an internal review, a receivable owed to it by an entity controlled by Phillip R. Bennett, Chief Executive Officer and Chairman of the Board of Directors, in the amount of approximately $430 million. On that date, Refco appointed a new President and a new Chief Executive Officer.

49. Even though the Bennett receivable was repaid using the proceeds of a loan Bennett received from BAWAG P.S.K. Bank ("BAWAG"), the public disclosure of this affiliate receivable and news of Bennett's subsequent arrest precipitated a crisis of

confidence among Refco's customers, counterparties and others with whom the Refco entities did business, resulting in an avalanche of customer defections and massive disruptions to the Refco entities' businesses, including the Chapter 7 Debtor's futures commission merchant business. The Trustee estimates that between October 10, 2005 and the Filing Date, the Chapter 7 Debtor lost more than 50% (in value) of its customer accounts.

50. On October 17, 2005, the following Refco entities filed voluntary petitions for Chapter 11 relief in the United States Bankruptcy Court for the Southern District of New York (the "Court"): (i) Refco; (ii) Bersec International LLC; (iii) Kroeck & Associates, LLC; (iv) Marshall Metals LLC; (v) New Refco Group Ltd., LLC; (vi) Refco Administration LLC; (vii) Refco Capital LLC; (viii) Refco Capital Holdings LLC; (ix) Refco Capital Management LLC; (x) Refco Capital Markets, Ltd. ("RCM");[15] (xi) Refco Capital Trading LLC; (xii) Refco Finance Inc.; (xiii) Refco LLC; (xiv) Refco Fixed Assets Management LLC; (xv) Refco F/X Associates LLC; (xvi) Refco Global Capital Management LLC; (xvii) Refco Global Finance Ltd.; (xviii) Refco Global Futures LLC; (xix) Refco Global Holdings LLC; (xx) Refco Group Ltd., LLC; (xxi) Refco Information Services LLC; (xxii) Refco Mortgage Securities, LLC; (xxiii) Refco Regulated Companies LLC; and (xxiv) Summit Management LLC.

51. On June 5, 2006, three additional entities filed voluntary petitions for Chapter 11 relief in this Court: (i) Lind-Waldock Securities LLC; (ii) Refco Managed Futures LLC; and (iii) Westminster-Refco Management LLC (together with the entities

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15 On April 13, 2006, this Court entered an order appointing Marc S. Kirschner as Chapter 11 trustee for RCM (the "RCM Trustee") but not for the estates of the various other Chapter 11 Debtors.

listed in the preceding paragraph, the "Chapter 11 Debtors" and, together with the Chapter 7 Debtor, the "Debtors"). All of the Chapter 11 Debtors' cases are being jointly administered.[16]

52. By Orders dated November 14 and 15, 2005 (Docket Nos. 381 and 426 in the Chapter 11 Cases) (collectively, the "Chapter 11 Sale Order"), this Court authorized the Chapter 11 Debtors to enter into that certain Acquisition Agreement dated as of November 13, 2005 (the "Acquisition Agreement") by and among the Chapter 11 Debtors, their affiliates that are "Sellers" as defined in the Acquisition Agreement ("Sellers"), and Man, for the sale of the Sellers' regulated commodities trading business to Man.

53. Since LLC was a commodity broker, the parties, and particularly Man, had concluded that an asset sale could not be made by the Chapter 11 Debtors. Any sale of the LLC assets had to be made in a Chapter 7 case by a Chapter 7 trustee; LLC was not eligible to be a Chapter 11 debtor.[17] The Chapter 11 Sale Order expressly provided that consummation of the Acquisition Agreement was conditioned upon the commencement of a Chapter 7 case by LLC, the entry of a sale order in the Chapter 7 case approving the transactions contemplated in the Acquisition Agreement, and consummation of the sale by a Chapter 7 trustee.

54. Regulators also insisted that the sale of the Chapter 7 Debtor's FCM business (and in particular the transfer of public customer accounts and property) be made by a Chapter 7 trustee in a Chapter 7 case. That made a sale by a Chapter 7 trustee mandatory.

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16 An Order confirming the Chapter 11 Debtors' amended plan of reorganization was entered by this Court on December 15, 2006.

17 Section 103(d) of the Bankruptcy Code limits a commodity broker case to Subchapter IV of Chapter 7 of the Bankruptcy Code; a commodity broker cannot be a Chapter 11 debtor.

2. The Trustee's Appointment and Immediate Sale of the Chapter 7 Debtor's FCM Business

55. The Trustee's administration of the Chapter 7 Debtor's estate was governed not only by provisions of the Bankruptcy Code, and in particular subchapter IV of Chapter 7 of the Bankruptcy Code ("Subchapter IV"), but also by the applicable requirements of the Commodity Exchange Act ("CEA") and Title 17 of the Code of Federal Regulations, including Part 190 – "Bankruptcy" (the "Part 190 Regulations"). As such, an FCM case is very different than a commercial Chapter 7 bankruptcy case. To complicate matters further, there was little precedent available to guide the Trustee and virtually none for a Subchapter IV going-concern sale. The unique nature of the sale of the business has resulted in significant challenges and matters of first impression in the administration of LLC's estate.

56. At the behest of interested parties and consistent with the Court's guidance (*see e.g.*, Ch. 11 Sale Hrg. Tr. 78, Nov. 10, 2005 ("You'd have to line up this transaction before you can implement it in Chapter 7 and that's the whole purpose of what's going on here.")), the United States Trustee determined whom she would select as "trustee in waiting" for LLC before the Subchapter IV case was filed. Selection of the right person was critical to the sale process. The transfer of customer accounts and funds could not have been achieved without such prior action. As the Court recognized at the hearing on approval of the Sale:

> As is clear from the statute and regulations, the only way to perform such meaningful due diligence was to do it in advance of the filing and by giving Mr. Togut as 'trustee-in-waiting' such an opportunity, the U.S. Trustee was truly fulfilling her obligations to make sure that the bankruptcy system runs properly and particularly in the area where Congress has recognized that if possible and consistent with the desires of the applicable regulatory bodies, customer accounts should be transferred as expeditiously as

> possible. . . . That obviously is what is happening here. The result, I believe, is the best that could be hoped for the customers.

(Ch. 11 Sale Hrg. Tr. 41).

57. The United States Trustee asked Mr. Togut if he would be willing and available to serve as Chapter 7 trustee and, with his agreement, selected him to be so appointed. The Trustee was asked to devote his immediate and complete attention to the matter, including before his formal appointment, and understood that if LLC did not commence a bankruptcy case, he would not be compensated for his work. He had to drop everything else he was working on; especially in the beginning, the issues presented by the LLC estate were all-consuming.

58. The Trustee immediately devoted himself to the assignment. He reviewed all of the pleadings in the Chapter 11 cases, familiarized himself with the Chapter 7 Debtor's unique business, and reviewed extensive research regarding Subchapter IV and the Part 190 Regulations. Advance preparation was complicated because FCM bankruptcies are extremely rare and the sale of a functioning FCM in a Chapter 7 case, before LLC, was unprecedented. As noted, LLC was to be the first FCM ever sold in bankruptcy as a going concern. Every other FCM had been liquidated after being closed by regulators and, in those instances, Chapter 7 cases were used to clean up the loose ends.

59. During the pre-filing period, Mr. Togut researched and carefully selected his special commodities bankruptcy counsel. Counsel had to have particular expertise in the conduct of a large and complex commodities broker case to be able to assist the Trustee in consummating the rapidly-approaching sale of the Chapter 7 Debtor's FCM business, the transfer of customer accounts and related assets, and the administration of a massive FCM estate. The Trustee's due diligence led him to conclude that the best

special counsel for this case was Jenner & Block LLP ("Jenner") because of its extensive experience with FCM bankruptcies, and its expertise in the commodities industry generally.

60. The Trustee selected his own law firm, Togut, Segal & Segal LLP ("TS&S"), to be his general bankruptcy counsel because of the efficiencies of working with the firm that routinely represents him when he is a Chapter 7 trustee, as well as TS&S's extensive experience in large and complex bankruptcy cases representing debtors and other fiduciaries.

61. The Trustee studied the Acquisition Agreement and all other matters required to successfully implement the sale and transfer of the Chapter 7 Debtor's business to Man. In addition to the pleadings leading to the competitive bidding won by Man, the Trustee read the underlying agreements, the transcript from the nearly 24-hour auction conducted at Skadden's offices, the Court transcripts, and all related materials. After familiarizing himself with the sale history, the Trustee asked the United States Trustee for permission to work with two parties connected with the proposed sale: Philip Mindlin of Wachtell, Lipton, Rosen & Katz, Man's counsel; and J. Gregory Milmoe, Jr. of Skadden Arps, counsel to the Refco Chapter 11 Debtors, to insure a smooth sale closing as soon as possible after LLC commenced its Chapter 7 case. The Trustee analogized that what needed to be done was similar to pre-bankruptcy planning for a large publicly traded corporation. The Trustee has had extensive prior dealings with Wachtell and Skadden, and believed they could, and would, respect the confidential nature of all communications.

62. The need to close the proposed sale immediately after filing the Chapter 7 case was paramount. Extensive research was done on the unique issues involved in a commodities broker liquidation in bankruptcy because once an FCM files for

Chapter 7, by law it is *forbidden* from accepting new trades. Had the Man sale not closed immediately, all of the remaining customers would have gone to other FCMs, leaving nothing to sell. Even if there had been only some additional customer defections beyond the 60% of customers who had already left LLC, pursuant to the terms of the Acquisition Agreement, Man would have been entitled to reduce significantly the purchase price by at least $50 million. And that assumes that a transfer of customer accounts even would have been feasible; had the sale failed to close immediately, it is not at all clear how or when customer trades and property eventually would have been transferred to other FCMs.

63. To be ready on the Filing Date, Mr. Togut met with Man and the Chapter 11 Debtors, negotiated depository agreements with financial institutions, conducted due diligence, arranged for an unprecedented $300 million trustee's surety bond, and did all the other things necessary to be prepared for an immediate sale hearing in the Chapter 7 case, including working on the necessary pleadings, proposed sale order, memoranda and notes for the sale presentation in Court. The amount of work required was tremendous.

64. As soon as the North American commodities trading markets closed on November 25, 2005 (the day after Thanksgiving), LLC filed its Chapter 7 petition. The Trustee was then formally appointed and immediately qualified as the interim trustee for the Chapter 7 Debtor's estate by filing the $300 million bond he had already obtained.[18] The Sale to Man closed ten hours thereafter.

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[18] On April 18, 2006, a section 341 meeting of creditors of the Chapter 7 Debtor was held and closed. Pursuant to Section 702(d) of the Bankruptcy Code, Mr. Togut is the permanent Trustee for the Chapter 7 Debtor.

65. Also on the Filing Date, the Court entered an "Order Authorizing Chapter 7 Trustee To Operate Business Of Refco, LLC For A Limited Period And Granting Related Relief" (the "Operating Order") (Docket No. 11). The Operating Order authorized the Trustee to operate LLC's business to effectuate the Sale. That operating authority was extended as the case progressed.

3. The Trustee

66. Mr. Togut is the senior member of TS&S, a well-known and highly specialized "boutique." For more than 29 years, TS&S's practice has been exclusively limited to insolvency and bankruptcy matters, usually as an estate-retained professional. Mr. Togut has wide-ranging experience representing the highest profile, largest and most complex Chapter 11 debtors ever to file for bankruptcy, and has acted in a professional capacity in hundreds of cases representing the interests of debtors, creditors' committees, secured creditors and trustees.

67. Some of the other Chapter 11 debtors that the Trustee and TS&S have represented, or are currently representing, include:

(i) *Chrysler LLC, et al.*, one of the big three domestic automakers and the first to file for bankruptcy (conflicts counsel for the debtors);

(ii) *Charter Communications, Inc., et al.*, the fourth largest cable provider in the United States (Chapter 11 bankruptcy counsel for Charter Investment, Inc., the investment holding company 100% owned by Paul G. Allen);

(iii) *Delphi Corporation, et al.*, the largest automotive parts supplier in the country (conflicts counsel for the debtors);

(iv) *Enron Corp.*, the second largest Chapter 11 case ever when filed (co-counsel for the debtors);

(v) *Collins & Aikman Corporation* and its related debtor entities, one of the largest automotive parts suppliers in the country (special bankruptcy counsel for the debtors and then counsel for the litigation trustee);

(vi) *Tower Automotive, Inc.* and its related debtor entities, one of the largest automotive parts suppliers in the country (conflicts counsel for the debtors);

(vii) *Saint Vincents Catholic Medical Centers* and its related debtor entities, one of the New York Metropolitan area's most comprehensive health care systems (conflicts counsel for the debtors);

(viii) *Allegiance Telecom, Inc.* and its related debtor entities, which was a facilities-based national local exchange carrier that provided integrated telecommunications products and services (co-counsel for the debtors);

(ix) *Ames Department Stores, Inc.*, which at the time of the commencement of its case was the largest regional discount retailer in the United States (co-counsel for the debtors);

(x) the operating subsidiaries of *Loews Cineplex Entertainment Corp.*, which involved the restructuring of the second largest movie theatre exhibitors in the U.S. with over $1.5 billion of debt (co-counsel for the debtors);

(xi) *Daewoo International (America) Corp.*, an international trading company (sole bankruptcy counsel for the debtors);

(xii) *ContiMortgage Corporation* and certain of its affiliates, which were engaged in the consumer finance business and which filed Chapter 11 cases to restructure more than $1 billion of debt (sole bankruptcy counsel for ContiMortgage Corp.);

(xiii) *OnSite Access, Inc.* and certain of its subsidiaries, which provided voice and data communication services to tenants in commercial buildings located throughout the United States and which filed Chapter 11 cases to restructure more than $100 million in debt (sole bankruptcy counsel for the debtors);

(xiv) *Rockefeller Center*, which involved the restructuring of more than $1.3 billion of debt and 12 historic landmarked buildings in the heart of Manhattan (sole bankruptcy counsel to the debtors);

(xv) *the Olympia & York Tower B Company's World Financial Center*, which concerned the restructuring of more than $1 billion of debt (sole bankruptcy counsel to the debtor); and

(xvi) *Guilford Mills, Inc.* and its subsidiaries, one of the largest automotive textile producers in the country, which restructured over $300 million of secured debt and paid all creditors in full under a confirmed plan (sole bankruptcy counsel to the debtor).

68. In November 2007, Mr. Togut was asked to represent the valuation expert appointed by former Chief Judge Burton Lifland pursuant to Federal Rule of Evidence 706(a) in the Calpine Corporation cases [No. 05-60200] to help reconcile three widely different valuations made by the Calpine debtors, official committee of unsecured creditors and official equity security holders committee that represented a difference of opinion of more than $10 billion. A successful result was achieved by an overall settlement of the valuation dispute that spared the Court a lengthy, complex, expensive and protracted trial, and that allowed for a confirmation of the cases before the exit financing commitment expired.

69. In January 2008 in the Solutia, Inc. cases [Nos. 03-17949 (PCB)], and after extensive litigation over the allowed amount of a claim held by holders of 11.25% Senior Secured Notes ("2009 Noteholders"), Bankruptcy Judge Prudence Beatty issued her *Memorandum Decision On Joint Motion For Partial Summary Judgment with Respect to Claim No. 6210* dated November 9, 2007 (the "SJ Decision"). The Court's decision determined that the allowed of amount of the 2009 Noteholders claim was approximately $210 million. In their appeal and cross-appeal of the SJ Decision, the parties took positions that could have led to potential allowed amounts for the claim ranging from approximately $198 million to $271 million. Additionally, the creditors' committee sought to claw-back a portion of the interest payments that Solutia paid to the 2009 Noteholders during the pendency of their cases and to reduce the claim by the amount of the claw-back.

70. Unable to come to a resolution of the litigation surrounding the 2009 Noteholders' claim, the parties agreed to mediation of all issues and selected Mr. Togut as mediator. The mediation successfully resulted in a settlement of the claim between the Solutia debtors and the 2009 Noteholders pursuant to which Solutia agreed to pay the 2009 Noteholders $220.5 million in cash through the effective date of the Solutia reorganization plan.

71. Mr. Togut, through his work at TS&S, also has significant experience representing liquidating entities. Among other significant representations, TS&S served as co-counsel for the debtors in the Chapter 11 cases of Enron Corp. and certain of its affiliates; the other co-counsel was Weil, Gotshal & Manges LLP. The Enron debtors, which were primarily engaged in energy trading and operating gas transmission systems, filed what, at the time, was the largest Chapter 11 case in U.S. history. During the course of the Enron Chapter 11 cases, TS&S, led by Mr. Togut, was solely responsible for a number of significant projects, including, without limitation: (i) commencing more than 1,000 adversary proceedings that sought the avoidance and recovery of preferential transfers, fraudulent conveyances, commercial paper and equity transfers, and other avoidable transfers made by the Enron debtors (TS&S recovered more than $250 million in value on behalf of the debtors in those adversary proceedings); (ii) developing and executing a novel, streamlined process that was utilized by the Enron debtors to reject more than 45,000 burdensome contracts; (iii) developing and implementing a Court approved *de minimis* sale procedure that was used to conduct more than 80 sales; (iv) negotiating and implementing an auction procedure, and coordinating with the retained auctioneer, to consummate other sales; (v) negotiating and recovering accounts receivable; (vi) objecting to demands by utility service providers that requested cash deposits (TS&S settled all of those demands so that deposits totaled only $250,000);

(vii) counseling the debtors concerning various employee issues and claims, including acting as liaison among the debtors, the U.S. Trustee, the unsecured creditors' committee and several counsel seeking to form an employees' committee; (viii) successfully litigating to enforce the debtors' rights regarding the prosecution and/or stay of various actions against the debtors that were pending throughout the United States; (ix) litigating and settling an adequate protection motion made by a lender asserting a claim of more than $20 million; (x) negotiating the release of millions of dollars of goods which had been stopped in transit by reclaiming vendors; (xi) negotiating capital recovery in connection with complex energy alliance agreements, resulting in recoveries of more than $10 million; (xii) obtaining Bankruptcy Court approval for the sale of real and personal property including, without limitation, energy assets, intellectual property, telecommunications assets and contract rights; (xiii) recovering assets including, *inter alia*, motion practice to compel the turnover of assets improperly held by third parties; and (xiv) coordinating the preparation of more than 100 individual sets of schedules of assets and liabilities and statements of financial affairs for the debtors. The liquidation experience gained from the Enron cases helped Mr. Togut administer the LLC estate.

72. TS&S was also counsel for the creditors' committee in *In re Finley, Kumble, et al.*, No. 88-10377 (Bankr. S.D.N.Y. closed May 4, 2007), which concerned the liquidation of the then fourth largest law firm in the United States (having assets of more than $75 million). A Chapter 11 plan was confirmed and Mr. Togut served as the trustee of the liquidating trust established under the *Finely Kumble* plan. TS&S similarly served as counsel to the creditors' committee in the law firm liquidation case of *In re Bower & Gardner*, No. 94-44743 (Bankr. S.D.N.Y. closed Mar. 31, 2006) and Mr. Togut, as the Chapter 11 plan administrator in that case, who recently made final distributions.

Mr. Togut also served as the Chapter 11 plan administrator in *In re Shea & Gould*, No. 95-45978 (Bankr. S.D.N.Y. closed July 19, 2001).

73. Mr. Togut is a Fellow of the American College of Bankruptcy (and a member of its Second Circuit Council) and a member of the International Insolvency Institute. He is also a Director of the American Bankruptcy Institute and serves on its Finance Committee. In 2008, he received the Lawrence P. King Award from the Bankruptcy and Reorganization Group of UJA-Federation of New York, and was named one of the top 100 SuperLawyers of New York in 2008 and 2009.

74. Mr. Togut also has written and lectured on many topics under the former Bankruptcy Act and Bankruptcy Code. In June 2009, for example, he lectured at Columbia University School of Law and will be chairing a panel this December at the ABI Winter Leadership Conference dealing with liquidating Chapter 11 cases. For several years, Mr. Togut chaired the Plan Process Task Force of the Chapter 11 Business Bankruptcy Committee of the American Bar Association Section of Business Law, and twice served on the Bankruptcy Committee of the Association of the Bar of the City of New York.

4. <u>Refco, LLC Chapter 7 Case</u>

75. On the Filing Date, the Trustee immediately filed the motion for an order authorizing him to assume and perform the Acquisition Agreement, sell the regulated futures commission merchant business, and assign certain related executory contracts (the "Chapter 7 Sale Motion"). After a hearing on the Chapter 7 Sale Motion held later that day, the Court entered the order granting the sale motion (the "Chapter 7 Sale Order"). As contemplated in the Chapter 11 Sale Order, the Chapter 7 Sale Order and the Acquisition Agreement, the sale to Man closed on November 25, 2005 (the "Sale"), and the transfer of customer accounts and property to Man occurred flawlessly.

76. On the Filing Date, the Court also entered an Order authorizing the Trustee to operate LLC's business (as supplemented by Order dated March 27, 2006 and as clarified by Order dated August 10, 2006, the "Operating Order"). The Operating Order authorized the Trustee to, among other things, continue to operate LLC's business to effectuate the sale to Man pursuant to the terms of the Chapter 7 Sale Order, as well as to wind down the LLC's remaining business operations. Operating orders for Chapter 7 trustees are highly unusual.

B. Administration Of The Chapter 7 Debtor's Estate By The Trustee

77. Section 704 of the Bankruptcy Code sets forth the duties that a Trustee is required to perform. Specifically, Section 704 provides in pertinent part:

> § 704. Duties of trustee.
>
> (a) The Trustee shall –
>
> 1. collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
>
> 2. be accountable for all property received;
>
> 3. ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;
>
> 4. investigate the affairs of the debtor;
>
> 5. if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
>
> 6. if advisable, oppose the discharge of the debtor;
>
> 7. unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

> 8. if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;
>
> 9. make a final report and file a final account of the administration of the estate with the court and with the United States trustee. . . .

11 U.S.C. § 704. Sections 704(a)(3) and (6) are inapplicable here, and Section 704(a)(9) is not yet relevant; the Trustee's fulfillment of his other duties are addressed below.

78. The Trustee also was required to perform the additional obligations imposed upon him by Subchapter IV of the Bankruptcy Code and the Part 190 Regulations.

79. The Trustee has fulfilled his statutory duties by marshalling, preserving and liquidating assets of the LLC estate, whether it involved the consummation of the Sale to Man, marshalling funds belonging to the LLC estate contained in bank accounts throughout the world, or identifying and disposing of hundreds of unexpired executory contracts and leases of nonresidential real property. By working with his professionals and coordinating their efforts, the Trustee diligently expended substantial effort to maximize the value of LLC's estate while minimizing its liabilities.

80. The Trustee does not wish to burden the Court with an overly detailed and lengthy recitation of each and every matter he addressed. Accordingly, the following is intended to serve only as a summary description of the more significant activities engaged in by the Trustee, and to highlight some of the significant benefits conferred upon the Chapter 7 Debtor's estate and its creditors as a result of those efforts.

1. Subchapter IV and Part 190 Regulations

81. As an FCM, the administration of LLC's estate is governed by regulations promulgated by the CFTC, authorized by Congress in connection with the 1978 enactment of the Bankruptcy Code to establish regulations pertaining to Subchapter IV commodity broker cases. *See* 7 U.S.C. § 24.

82. The Trustee ensured that all of the relevant provisions of Subchapter IV and the Part 190 Regulations were followed. Before the Sale, the Trustee and his counsel made certain that proper approvals had been obtained from the CFTC to permit the transfer to Man of customer accounts with no open trades or deficit balances, the transfer of which otherwise would have been prohibited under 17 C.F.R. § 190.06(e)(1)(iv) and (v). Following the Sale, the Trustee carefully coordinated with the CFTC the form and type of notice given to customers at the time of their account transfers, and ensured that Man would provide the initial account transfer notice required under the Part 190 Regulations.[19] The Trustee also extensively negotiated with the CFTC a special "plain English" form of customer proof of claim and notice[20] that varied from the form prescribed in the Part 190 Regulations, which notice and proof of claim were required to be provided under 17 C.F.R. § 190.02(b)(4) and (d); as a result of the special form of notice and proof of claim negotiated by the Trustee, the specter for thousands of needless

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19 The Part 190 Regulations require the Trustee to provide certain notices to LLC's customers. As authorized and directed in the Chapter 7 Sale Order, an initial notice to customers of the transfer of their accounts was provided by Man immediately following the Sale. In addition to this notice, 17 C.F.R. §§ 190.02(b)(4) and (d) require that the Trustee provide all customers with a notice and proof of claim form which contains a bar date and requests that customers provide, to the extent reasonably possible, information sufficient to determine a customer's claim in accordance with the Part 190 Regulations.

20 Mr. Togut also fashioned a "plain English" proof of claim form for all of the employees in the first Ames Department Store case when his firm was counsel to the Official Employees Committee.

customer proofs of claim was avoided.[21] The Trustee carefully scrutinized all claims filed by customers, and obtained Court permission to pay any valid customer "net equity" claims.

83. In addition, the CFTC takes the position that bankruptcy trustees generally are required to comply with all of the CFTC's regulations concerning retention of records (*see* 17 C.F.R. § 1.31 ("Books and Records; keeping and inspection")), promulgated pursuant to section 4g of the CEA. *See* 7 U.S.C. § 6g. In general, those regulations require the retention of most customer trading and related records for five years, and in a readily accessible format for the first two of those five years. To comply with these requirements, the Trustee and his professionals utilized a team of paralegals and temporary workers to index and pack literally thousands of boxes of the Chapter 7 Debtor's documents located at various offices and storage facilities throughout the country, and oversaw development of a searchable database of the more than 135,000 boxes of documents in storage. That database has been used to identify 65,000 boxes of documents that no longer need be retained, and that the Trustee has destroyed with Court approval, which has resulted in significant savings in storage costs for the LLC estate.

84. In short, the Trustee has taken every step to ensure that the letter and spirit of Subchapter IV and the Part 190 Regulations have been observed.

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21 Although 17 C.F.R. § 90.02(d) lists specific information that *may* be included in the claim notice, it explicitly defers to the "discretion of the trustee" for the precise form and content of the notice. Given the unique nature of the Sale transaction, the Trustee consulted with the CFTC and Man for the Trustee's compliance with the applicable CFTC requirements and the form of customer proof of claim and bar date notice, and obtained Court approval of a "plain English" bar date notice and claim form for customers to comply with the Part 190 Regulations and the applicable provisions of the Bankruptcy Code.

2. Collection of estate property, and closing the estate as expeditiously as is compatible with the best interests of parties in interest (Section 704(a)(1))

a. Collection of Estate Property

(i) Recovery of Excess Regulatory Capital

85. Under the Acquisition Agreement, Man did not purchase, and the Chapter 7 Debtor's estate was to retain, all "excess regulatory capital" as determined by reference to a modified CFTC Form 1-FR-FCM to be delivered to Man at closing. Because of issues relating to the reconciliation of certain customer account records to the Chapter 7 Debtor's general records, at closing a "cushion" in an amount of $250 million over an estimated amount required to be segregated for the benefit of customers was transferred to Man. Any excess cushion funds were to be returned to LLC's estate upon delivery of the modified CFTC Form 1-FR-FCM detailing the amount of excess regulatory capital (essentially cash and readily marketable securities over and above the amount the Chapter 7 Debtor was required to segregate for customers).

86. The Trustee negotiated with Man for the return of excess amounts delivered at the time of closing. The recovery of excess regulatory capital was difficult because Man initially only returned $85 million to the Chapter 7 Debtor's estate. The Trustee recovered more than $186 million in cash from Man.

(ii) Recovery of Clearing and Membership Deposits

87. Prior to closing the Sale, the Chapter 7 Debtor maintained $70 million in deposits at clearing organizations for all major domestic commodity exchanges. After the Filing Date, the Trustee worked with the various clearing organizations to facilitate the prompt return of those deposits after payment of claims permitted to be asserted against the deposits under applicable exchange or clearing corporation rules and regulations.

88. In addition to clearing deposits (as noted above), after the closing of the Sale, the Trustee delivered $87,138,712 in cash deposits to commodity exchanges to secure the transfer of the LLC commodity exchange memberships at the Chicago Mercantile Exchange, the Chicago Board of Trade, the New York Board of Trade, the New York Mercantile Exchange, the Kansas City Board of Trade, and the Minneapolis Grain Exchange to Man, free and clear of liens and claims.

89. The Trustee addressed and resolved the various claims lodged against the Chapter 7 Debtor at various exchanges and clearing entities and, where necessary, filed formal responses contesting various claims asserted against the Chapter 7 Debtor and engaged in negotiations with claimants to resolve the disputes. Not one claim was required to go to arbitration or hearing.

90. As a result of these efforts, the Trustee has recovered more than $148 million in clearing and membership deposits after paying exchange fees and valid member claims.

b. Expeditious administration of estate

91. In only four years, the Trustee has almost fully administered the largest Chapter 7 case in history. He sold the Chapter 7 Debtor's business and transferred more than $3.3 billion in customer segregated funds and securities in connection therewith, marshaled and disbursed more than $1 billion more, and then resolved all but a handful of claims filed against the Chapter 7 Debtor's estate. It is hard to imagine how the Chapter 7 Debtor's case could have been administered any more efficiently or expeditiously.

3. Accountability for all property received (section 704(a)(2))

a. Asset Management and Negotiation of Favorable Banking Terms

92. Upon his appointment, the Trustee tracked down and took possession of significant assets of the Chapter 7 Debtor's estate, and that has continued to date. Rather than simply depositing the estate's substantial funds in an interest-bearing bank account, the Trustee invested the estate's funds safely and at minimal cost while earning a higher rate of interest. The Trustee negotiated with Citibank, N.A., the depository holding the estate's funds, to obtain highly favorable treatment of the estate's cash, and obtained the following unique concessions: (i) no transaction fees (*e.g.*, wire transfer fees, *etc.*) were to be imposed for estate transactions; (ii) direct investment in T-bills without any fund manager fees; (iii) no charges assessed for escrow agent and account maintenance services; (iv) the elimination of any indemnification rights; and (v) no obligation to reimburse Citibank's legal fees and expenses. Citibank also agreed to advance, interest-free, any funds needed by the Trustee prior to T-bill maturities. The Trustee estimates that his actions saved the Chapter 7 Debtor's estate more than $1 million.

b. Reducing Bond Premiums

93. Given the size, nature and complexity of the LLC estate, the Trustee was required to maintain a substantial fiduciary bond. While a "trustee in waiting," the Trustee was told he would need a $300 million bond on the Filing Date. The company that routinely obtains bonds for the Trustee had never gotten one that large, and it took time and a lot of effort to get the original bond.

94. Moreover, the bond broker had to work discreetly because the Filing Date had to be kept a closely guarded secret so that customers would not be alarmed; had they been concerned about LLC's ability to serve them, customers would have moved

their accounts, destroying LLC's business and the ability to consummate the sale with Man. The $300 million bond was obtained without spooking the markets and the Trustee had it in hand on the Filing Date so that he could immediately qualify and close the sale with Man.

95. The Trustee continued to serve under the original bond until five months into the case when the conversion motion was denied. With the Trustee's status certain, the United States Trustee insisted that the Trustee needed to obtain an additional $500 million of coverage, for a total of $800 million.

96. This time, the Trustee could go into the marketplace, and despite a more than twenty-year relationship with the original source, went to another broker asking for quotes. Utilizing two brokers and having located multiple underwriters interested in the business, the Trustee conducted what was essentially an auction for his bond business. The Trustee pressed for a significantly better rate, not only for the new $500 million of coverage, but also the original $300 million bond, now five months old.[22] The Trustee's approach worked for the new and old coverage alike, and has saved the estate 40% to 50% on certain coverage and on renewal rates, representing a savings of more than $1.85 million.

4. Investigate the Affairs of the Debtor (Section 704(a)(4))

97. By the time the Chapter 7 Debtor commenced its Subchapter IV case, federal criminal and civil investigations into Refco's affairs were well underway, and criminal indictments already had been issued. In addition, numerous representatives of other estates already were conducting investigations into the affairs of the Chapter 7

[22] The premium on the $300 million bond was fully earned when the bond was issued. The Trustee could not have gotten a refund, but he got one anyway.

Debtor's affiliates, and substantial litigation was pending before this and other courts arising out of alleged wrongdoing by certain of the Refco entities' officers.

98. The Trustee chose not to duplicate those criminal and civil investigations, or to run up unnecessary expenses, and instead deferred to the investigations of regulatory authorities and others. The Trustee investigated the Chapter 7 Debtor's affairs only to the extent necessary to administer fully the LLC estate.

99. The Trustee consulted extensively with professionals retained by the Chapter 11 Debtors to ascertain whether any of the alleged wrongdoing extended to LLC, and has filed all reports required to be filed with appropriate governmental entities. He also extensively analyzed claims that were asserted against LLC by other Refco entities, and investigated allegations that the Chapter 7 Debtor had been involved in the wrongdoing that eventually led to Refco's collapse. Without in any way duplicating the work done in the Chapter 11 cases (principally by the unsecured creditors committee and its professionals) or by the Examiner, the Trustee and his professionals engaged in a review and analysis of the Chapter 7 Debtor's books and records, and conducted interviews of current and former Refco personnel to understand the claims by and against LLC.

100. Among other things, the Trustee examined claims for misrepresentation, fraud, constructive trust, diversion of funds, indemnification, contribution, rescission, breach of contract, specific performance, reimbursement, conversion, unjust enrichment, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and subordination and/or subrogation, related to or arising from transactions or wrongful acts allegedly involving LLC; claims against LLC for causes of action that may be possessed by the estates of the Chapter 11 Debtors under Chapter 5 of the Bankruptcy Code; and more specific claims arising from matters such as improper acquisition accounting, failure to allocate senior management employee and tradename

use charges, improper recording of income at LLC, and improper payment and assumption of LLC liabilities by other Refco entities. The Trustee's investigation paved the way for enabling the Trustee to settle the intercompany claims against the Chapter 7 Debtor, as more particularly described below.

5. Examination of proofs of claims and objection to the allowance of any claim that is improper (Section 704(a)(5))

101. The Trustee implemented a comprehensive strategy for addressing claims against LLC. That strategy resolved the vast majority of claims even prior to the bar date. Specifically, before the bar date, the Trustee eliminated more than 1,000 claims against LLC's estate through payments made under the transition services agreements, the December 2005 stipulation permitting payment of certain pre-petition claims, the commodity exchange claims process, and the innovative broker cure payment process negotiated by the Trustee with Man. As a result of these efforts, the majority, as measured by number, of claims against LLC were resolved and paid before the bar date even passed, thereby avoiding the need to address such claims through the proof of claim objection process. But for these creative actions, the claims resolution process would have taken years, as it often does in Chapter 7 cases.

102. Timely filed proofs of claim seeking in the aggregate more than $5.96 billion, plus proofs of claim filed after the bar date seeking in the aggregate more than $534 million, were filed against the Chapter 7 Debtor's estate. The Trustee, through his professionals, rapidly prepared and successfully prosecuted numerous objections to claims, including multiple omnibus objections, resulting in the disallowance (or estimation at zero) of hundreds of claims seeking billions of dollars in the aggregate, as well as many claims filed in unliquidated amounts. As of the date hereof, approximately $3 million in proofs of claim remain to be resolved.

103. The following are some of the more significant claims resolved by the Trustee:

a. The Rogers Claims

104. Rogers Raw Materials Fund, L.P. and Rogers International Raw Materials Fund, L.P. (together, the "Rogers Funds") filed claims first against the Chapter 11 Debtors, and then against LLC, seeking more than $330 million. In the RCM case, the RCM Trustee reached a settlement with the Rogers Funds. The fundamental problem with the settlement was that it allowed the Rogers Funds to tell two, contradictory stories at the same time: the Rogers Funds should "be treated as" RCM securities customers for purposes of distributions under the RCM settlement and any plan of reorganization, while, at the same time, the Rogers Funds should be treated as an LLC creditor for purposes of pursuing claims against the Chapter 7 Debtor's estate.

105. This was much more than mere semantics. Under the Bankruptcy Code, the Rogers Funds were only entitled to such favorable treatment in the RCM Chapter 11 case if indeed they were "securities customers" of RCM, a defined term. But they were obtaining this favorable treatment from the RCM Trustee without any admission allowing for a judicial finding that their claims were for securities entrusted to RCM. If that judicial finding had been made (as the Trustee strenuously urged), the Rogers Funds would have been precluded from asserting claims against the Chapter 7 Debtor's estate and the Trustee would not have had to litigate with the Roger Funds.

106. However, the settlement reached with the RCM Trustee left the Rogers Funds free to pursue their claims against the LLC's estate, without restriction. Thus, the Rogers Funds had every incentive to pursue their $330 million claims against LLC, especially because the LLC estate would pay the claims in full, at 100 cents on the dollar.

107. At this point, the RCM Trustee, through his counsel, asked if the Trustee would be willing to settle with the Rogers Funds for $47 million. The Trustee refused because, in his analysis, the Rogers Funds claims were simply not worth that much. The Trustee decided to litigate with the Rogers Funds in the belief that a lot of money could be saved by doing so. As it turned out, the Trustee was right.

108. Given its prejudicial impact on the Chapter 7 Debtor's estate and the Trustee's conclusion that the Rogers Funds were indeed securities customers of RCM, the Trustee objected to the settlement proposed by the RCM Trustee, but to no avail. Emboldened, the Rogers Funds proved impossible to deal with and despite his best efforts, no settlement with them for anywhere near what the Trustee believed their claim was worth could be reached without litigation.

109. The Trustee then filed an objection to the Rogers Funds' claims and prepared thoroughly for trial on an expedited basis. The trial was conducted in September 2006. On the eve of this Court's ruling on his objection to the Rogers Funds' claims, when it was clear that the Trustee had the upper hand, the Trustee entered into a settlement with the Rogers Funds, settling the $330 million claim for $30 million that was approved by the Court, a savings of $17 million over what he had been told was acceptable to the RCM Trustee and his constituents.

110. Resolution of this litigation paved the way for the so-called "Assets in Place Litigation" to be resolved without a trial, resolved potential appeals and collateral litigation, and materially contributed to the confirmation of the Chapter 11 Debtors' plan.

b. Goodman Litigation

111. Before LLC commenced its Chapter 7 case, Richard M. Goodman had filed an action against LLC and Refco Group, Ltd., LLC in the United States District Court for the Eastern District of Michigan (the "Michigan Action"). The complaint in the

Michigan Action purported to allege claims for negligence, fraud, conspiracy, aiding and abetting fraud, aiding and abetting under the Commodity Exchange Act ("CEA"), violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), liability on accounts stated, and vicarious liability. Goodman's alleged claims against LLC arose out of Goodman's dealings with Charles G. Mady, who was a former customer of Lind-Waldock & Company ("Lind-Waldock"), an FCM that was acquired by Refco Group Ltd. in or about 2000, and which merged into LLC in or about September 2001. Goodman alleged that, beginning in or about 1999 and continuing into 2002, he provided more than $6 million to Mady to trade commodity futures and options on Goodman's behalf, and that Mady transferred the bulk of that money into an account at Lind-Waldock. Goodman alleged that, in fact, Mady was operating a "Ponzi" scheme, that Mady concealed the existence of that scheme by, among other things, creating and sending to Goodman "grossly overstated and false account reports," and that Mady "misappropriated and wasted" the funds that Goodman provided to Mady. According to Goodman, LLC was responsible for his losses because Lind-Waldock and LLC allegedly negligently, recklessly, and/or knowingly assisted Mady in perpetrating his wrongful acts.

112. On June 21, 2006, Goodman filed proof of claim number 160 in the LLC case (the "Original Goodman Claim"). The Original Goodman Claim was based on the Michigan Action, and in it, Goodman alleged that he was entitled to recover from LLC's estate $5.1 million in compensatory damages (which Goodman asserted should be trebled), unquantified amounts of attorneys' fees and interest, and $35 million in punitive damages. Goodman also sought to withdraw the reference and transfer the litigation to the United States District Court for the Eastern District of Michigan. After briefing and oral argument, the United States District Court for the Southern District of New York denied Goodman's motion to withdraw the reference and transfer the litigation.

113. Thereafter, the Trustee and Goodman engaged in extensive fact discovery. In addition to serving and responding to written interrogatories and document requests, the parties each took a number of depositions of fact witnesses. Goodman's counsel deposed nine former Lind-Waldock and LLC employees, and the Trustee's counsel deposed Goodman, two of his accountants, his personal banker, and a former Lind-Waldock and LLC employee.

114. On April 24, 2007, during a hearing before the Court on the Trustee's motion to settle certain intercompany claims, and Goodman's objection to that motion, the Trustee resolved Goodman's objection by agreeing to participate in a mediation proceeding to attempt to resolve the Original Goodman Claim. Goodman withdrew the portion of his original claim seeking $35 million in punitive damages in connection with this agreement.[23] That agreement allowed the intercompany claim settlement to be approved and an initial distribution of $475 million to be made on account of the intercompany claims.

115. In June 2007, the Trustee, Goodman, and their respective counsel participated in a mediation conference with Magistrate Judge Ronald Ellis of the United States District Court for the Southern District of New York. The mediation lasted several hours but the parties were unable to come to an agreement.

116. In November 2007, Goodman filed proof of claim number 583 (the "Amended Goodman Claim") in the LLC case, which superseded and replaced the Original Goodman Claim in its entirety. In the Amended Goodman Claim, Goodman

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[23] By operation of Section 726(a)(4) and given the structure of the Trustee's intercompany claims settlement, the Trustee was able to persuade Goodman that the punitive damage portion of his claim could never be paid.

alleged that he was entitled to recover from LLC $29.432 million, of which $5.8 million was for compensatory damages (which Goodman asserted should be trebled), $2.93 million was for interest, $600,000 was for commissions that Goodman asserted should be disgorged, $8.372 million was alleged to be for attorneys' fees, and $130,000 was for expenses.

117. Trial on the Amended Goodman Claim and the Trustee's objection thereto was scheduled for June 11-13, 2008. During the months leading up to trial, the Trustee and his counsel prepared extensively for trial. That preparation included drafting and filing motions *in limine* and responses to motions in limine, deposition designations and counter-designations to deposition designations, witness and exhibit lists, pre-filed direct testimony for fact witnesses, pre-filed direct testimony for expert witnesses, and a trial brief. The Trustee and his counsel also were required to spend time responding to a motion for sanctions filed by Goodman, which this Court denied. The Trustee provided substantial input regarding trial preparation and strategy.

118. The day before the trial was to begin, Goodman's counsel advised the Trustee's counsel that Goodman was ill and unable to proceed. At Goodman's request, and with no objection from the Trustee, this Court adjourned the trial.

119. Following the adjournment of the trial, the Trustee and Goodman continued to discuss settlement. The Trustee initiated two face-to-face settlement meetings, one in August of 2008, and again in December of 2008, in which the Trustee, Goodman, and their respective counsel participated. These meetings, and the Trustee's presentations to Goodman and his counsel, laid the groundwork for the settlement that was to come.

120. At the end of the December 2008 settlement meeting, the Trustee made a $750,000 "take-it-or-leave-it" settlement offer. Between December 2008 and

February 2009, the Trustee and Goodman, through their counsel, continued to discuss the possibility of settlement, and the offer of settlement made by the Trustee.

121. In February 2009, Goodman accepted the Trustee's $750,000 offer. On March 12, 2009, the Court approved the settlement.

122. Given the factual issues in dispute and the risk and uncertainty with any trial, a resolution of a nearly $30 million claim for $750,000 was an exceptional result.

c. Customer Claims

123. As part of his duties, the Chapter 7 Trustee investigated customer claims that had been asserted against the Chapter 7 Debtor's estate, and examined the appropriate treatment of claims asserted by Refco Capital on accounts of funds that had been withdrawn from public customer accounts for delivery (but had not been delivered) to Refco Capital, that had been "trapped" as a result of LLC's bankruptcy. That investigation included extensive consultation with the CFTC, the Chapter 11 Debtors and others. The Trustee eventually sought and obtained Court approval to transfer more than $120 million in customer funds to Refco Capital following the Trustee's determination that there was a substantial likelihood of the assertion of customer "net equity" claims in the event these funds were not delivered to Refco Capital. These payments eliminated the potential that the customers would file claims against the Chapter 7 Debtor and/or that Man would assert indemnification claims for any disruption to its business.[24]

124. The Trustee also prepared numerous objections to customer or customer-related claims that were overstated or without merit. Virtually all of these customer claims have now been disallowed.

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[24] The timing of the payment was crucially important to the Chapter 11 Debtors, which used the money to pay off its secured lenders in full, eliminating future interest and payments, legal fees, etc.

d. RCM Derivative Claims

125. The Trustee made numerous objections to claims that were filed against the Chapter 7 Debtor's estate by customers or creditors of RCM. In general, these claims asserted injuries that were derivative and duplicative of the claims that were asserted or could have been asserted by the RCM Trustee. Pursuant to a global settlement in the Chapter 11 cases, many similarly situated claimants executed a "Claim Subordination and Waiver" provided by the Trustee, subordinating and/or waiving their claims against the Chapter 7 Debtor. The RCM customers whose claims were the subject of the Trustee's objections were only RCM creditors and customers who failed or refused to execute a Claim Subordination and Waiver. At the direction of the Trustee, his counsel contacted these remaining RCM customers subject to the objection and negotiated additional subordination and waiver agreements with most of the claimants; all other remaining RCM-related Claims have been disallowed and expunged.

e. Intercompany Claims

126. Proofs of claim were filed against LLC by: (i) the Chapter 11 Debtors (other than RCM), on behalf of themselves and their affiliates; (ii) Refco Trading Services ("RTS"); and (iii) RCM. On behalf of LLC and RTS, the Trustee also filed timely filed proofs of claim against each of the Chapter 11 Debtors (including RCM).

127. The claim filed by the RCM Trustee initially asserted a liquidated intercompany claim in the amount of $11,450,384 based on "money borrowed or converted," and "unknown, contingent and unliquidated claims" against LLC in an amount up to $2,278,164,695. This contingent and unliquidated claim was based on the RCM Trustee's assertion that RCM improperly transferred more than $2.2 billion to Refco Global and/or Refco Capital and that such funds were transferred for the purpose of directly benefiting Refco Global, Refco Capital and one or more other debtors, including

LLC. The RCM Trustee refined his claim and made more specific allegations, including (a) that LLC was the beneficiary of more than $200 million in RCM cash used to fund acquisitions where the acquired assets were transferred for no consideration to LLC and (b) that LLC was a willing participant in a fraudulent scheme to hide significant losses and/or inflate income at LLC and other regulated entities, and that cash stripped from RCM was used to make acquisitions for the benefit of LLC and the Contributing Debtors.

128. The Chapter 11 Debtors also asserted contingent and/or unliquidated claims against LLC, including: (i) claims, rights and/or remedies relating to guarantee agreements; (ii) claims, rights and/or remedies under applicable law or equity, including, but not limited to, claims for tortious misrepresentation, fraud, constructive trust, diversion of funds, indemnification, contribution, rescission, breach of contract, specific performance, reimbursement, conversion, unjust enrichment, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and subordination and/or subrogation, related to or arising from transactions or wrongful acts possibly involving LLC; and (iii) claims for causes of action that may be possessed by the estates of the Chapter 11 Debtors under Chapter 5 of the Bankruptcy Code.

129. Subsequent to filing the proof of claim, the Chapter 11 Debtors alleged damages (separate and distinct from the more than $2 billion in damages asserted by the RCM Trustee in the RCM claim) exceeding $750 million based on various grounds of liability seeking sums for, among other things, improper acquisition accounting, allocations of senior management employee and trade name use charges, improper recording of income at LLC referred to as "corporate yield enhancement," and the assumption and payment by one or more of the Chapter 11 Debtors of liabilities that arose at LLC.

130. Early on in the administration of the LLC estate and before the RCM Trustee's appointment, the Trustee concluded that the issues surrounding the intercompany claims were of paramount importance. The LLC administration could have been entangled for years in complex, costly, convoluted litigation because the issues surrounding all the potential claims were many and difficult to resolve, particularly in a case where there had been fraudulent, criminal prepetition conduct.

131. But more than taking a pedestrian, myopic view of LLC's administration alone, the Trustee took an aerial view of all the Refco estates. At the time, there was a fierce battle underway between the creditors of RCM and the other Chapter 11 Debtors; the resolution of that fight led to the appointment of the RCM Trustee. And once that trustee was appointed, he had his hands full, for nearly all of the eight months of his service, getting parties to agree to a Chapter 11 plan. There was a great deal of disagreement before a plan was confirmed and its confirmation represented a great achievement.

132. People were not focused on the intercompany claims. Yet without their resolution, how would the money in the LLC estate get paid over to the Chapter 11 Debtors? How could they fund their plan? For the Chapter 11 plan to work, the money not required to pay direct LLC creditors had to be paid to the Chapter 11 Debtors rather than remain in the Trustee's possession.

133. It is important to appreciate how frozen were those funds. There was a desire to pay out the secured lenders to the Chapter 11 Debtors but there was no money in those estates with which to make payment.[25] For example, the CFTC had blocked the

[25] Because of this, the Trustee paid the Chapter 11 Debtors $32 million on May 31, 2006 to reimburse them for expenses attributable to LLC.

attempt by the parent to gain control over $120.5 million attributable to funds withdrawn from customer accounts representing the repayment of loans Refco Capital made to LLC customers, customer money that was in effect trapped by the bankruptcy filing.

134. To enable the payout of the banks, the Trustee and his professionals negotiated with the CFTC and obtained its permission for the Trustee to repay the $120.5 million, and the Court approved the transfer. On October 10, 2006, the Trustee paid the funds to the Chapter 11 Debtors and that permitted them to pay off the banks, terminating expensive interest, charges and other expenses. The banks' attorneys' fees alone were $15 million.

135. The payout of the banks was a small hurdle compared to funding the Chapter 11 plan. It is one thing to repay a loan for customer monies caught up in the LLC filing but quite another to determine the extent and validity of intercompany claims. Looking at those issues was a monumental challenge.

136. The Trustee had to determine if the result of netting LLC and Chapter 11 Debtor claims resulted in money due to the Chapter 11 Debtors. If that were the case and if those monies could be paid quickly, the Trustee concluded that there would be an immediate funding mechanism for the Chapter 11 plan.

137. The Trustee's original idea was to have the Chapter 11 Debtors work with him in determining valid claims, and beginning in March, 2006, the Trustee tried to do exactly that. But at that time, the focus was elsewhere and intercompany claims were not a priority for any of the parties-in-interest, other than the Trustee. So, the Trustee decided to go it alone and retained Bridge Associates to do a full investigation into the intercompany claims. The Trustee was ready to engage the Chapter 11 Debtors on the issues involved and made sure that his work was done before the Chapter 11 plan was confirmed.

138. Once the Plan Administrators were in place, the Trustee asked them to focus on the intercompany claims. When they were ready, the Trustee negotiated extensively with representatives of the Chapter 11 Debtors. Some of the claims asserted were solid, and could be well substantiated. The Trustee had understood their validity even before engaging the Plan Administrators in negotiations. But the rest of the claims, the vast majority of them, were much harder to substantiate.

139. The Trustee was of the view that allowing any of the Chapter 11 Debtor claims against the LLC estate, *pari passu* with the claims of third-party creditors who had extended credit directly to LLC, would have severely diluted the claims of direct LLC creditors. The Trustee's willingness to engage in settlement discussions had a precondition that timely third-party LLC creditor claims be paid in full before any other Refco entity be paid on intercompany claims.

140. The Plan Administrators agreed to the Trustee's precondition and, with that, entered into negotiations. The negotiations were professional, without any acrimony, and productive.

141. The Trustee and Plan Administrators eventually reached the following compromise that has been approved by the Court, which (i) allowed a senior subordinated unsecured claim against LLC in the amount of $565 million, subordinate to (a) all allowed customer claims under Section 766(h) of the Bankruptcy Code, and (b) all allowed claims, other than the Allowed Other Claim (as defined below), entitled to distributions under Sections 726(a)(1) and 726(a)(2) of the Bankruptcy Code; (ii) allowed a junior subordinated unsecured claim against LLC in the amount of $575 million, junior and subordinate to (a) all allowed customer claims under Section 766(h) of the Bankruptcy Code, (b) all allowed claims entitled to distributions under Sections 726(a)(1) and 726(a)(2) of the Bankruptcy Code, and (c) the $565 million senior subordinated claim; and

(iii) provided for the mutual releases of all other pre-petition claims by and among Refco entities.

142. This compromise resolved approximately $3 billion in claims against LLC for almost two-thirds less than their asserted amount and paved the way for 100% distributions to all holders of timely filed non-affiliate claims against LLC.

143. The most unique feature of the settlement, from the Trustee's point of view, was the subordination of the intercompany claims. This aspect of the settlement, obtained at the Trustee's insistence, protected the core claims of LLC's direct creditors from the risk that intercompany claims would dilute them to a fraction of their amount.

f. Sphinx Funds

144. Early in the Chapter 11 Debtors' cases, the Court authorized the Creditors' Committee to commence an adversary proceeding[26] on behalf of RCM, one of the Chapter 11 Debtors, to recover a transfer in the amount of $312,046,266.23 made shortly before the Chapter 11 Debtors' petition date by RCM to Sphinx Managed Futures Fund SPC and its affiliated segregated portfolios (collectively, "Sphinx"). After several weeks of motion practice and negotiations, including involvement by the Trustee, on April 21, 2006, the Creditors' Committee and Sphinx settled the lawsuit. Thereafter, the Trustee sought court approval for the settlement under Bankruptcy Rule 9019 as it pertained to the LLC's estate and obtained authority to implement the settlement.

145. Despite the settlement, before the bar date seven proofs of claims were filed relating to the Sphinx claims. Specifically, (i) Sphinx Managed Futures Fund SPC and certain of segregated portfolios filed two proofs of claim asserting unliquidated amounts,

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26 The Adversary Proceeding is titled, *The Official Committee of Unsecured Creditors of Refco Inc. et al., on behalf of Refco Capital Markets, Ltd. v SPhinX Managed Futures Fund SPC, et al.*, Adv. No. 05-3331 (RDD).

(ii) shareholders of the funds filed three proofs of claim seeking more than $77 million in the aggregate plus unliquidated amounts, and (iii) foreign exchange and swap customers of RCM filed two proofs of claim in unliquidated amounts. The Trustee attempted to resolve the Sphinx-related proofs of claim without the necessity of protracted litigation. This approach was successful for the FX Sphinx Claims, which were withdrawn before the initial hearing on the objection, but the remaining claims could not be consensually resolved. Following briefing and argument, the Court disallowed all but one of the Sphinx-related claims, and the remaining Sphinx-related claim was then voluntarily withdrawn.

g. West Loop Associates, LLC Claims

146. The Chapter 7 Debtor's headquarters were located at 550 West Jackson, Chicago, Illinois, where LLC was a permitted occupant. Prior to the Filing Date, the Chapter 7 Debtor had entered into contracts for construction at the property. Postpetition, contractors asserted mechanics liens and filed proofs of claim against the Chapter 7 Debtor and RGL.

147. On April 27, 2006, West Loop Associates, LLC ("West Loop"), the owner of the 550 West Jackson property, filed a motion to compel RGL, based upon West Loop's contention that such relief was available under Section 365(d)(3) of the Bankruptcy Code, to discharge or bond the Mechanics Liens pursuant to the Lease. The Trustee investigated the legitimacy of the mechanic's liens and the contractors' claims, and eventually reached a global settlement that resolved West Loop's motion and paid the mechanics liens in a reduced amount.

148. West Loop then filed a proof of claim against LLC asserting a general unsecured claim in the approximate amount of $67.5 million. The claim was based on a lease to which the Chapter 7 Debtor was not a signatory and asserted a fraud claim against

LLC in connection with West Loop's purchase of the building. West Loop asserted similar claims against each of the Chapter 11 Debtors, with the exception of RCM. The Trustee vigorously disputed the validity of West Loop's unsecured claim.

149. After the Trustee filed a claim objection, he decided that if West Loop's damage claim could be limited under Section 502(b)(6) of the Bankruptcy Code, it was more likely that a settlement could be reached that would limit the cost of discovery, and would limit the potential that West Loop would be entitled to a significant claim that would dilute the recovery of other creditors. Toward that end, the Trustee filed a motion for partial summary judgment that West Loop's claim be limited to approximately $10.6 million. Following additional briefing and a hearing, a settlement was reached whereby the Chapter 7 Debtor's estate would pay $3.75 million to West Loop, and West Loop would not be entitled to assert any additional claims. West Loop further agreed to waive its objections to confirmation of the Chapter 11 Debtors' plan as part of the settlement.

h. Trading Technologies International, Inc.

150. On July 12, 2006, Trading Technologies International, Inc. filed proofs of claim against certain of the Chapter 11 Debtors and against the Chapter 7 Debtor asserting claims in excess of $38 million based upon patent infringement claims asserted in a lawsuit then pending in the United States District Court for the Northern District of Illinois. The Trustee stood steadfast in his negotiations with Trading Technology, and resolved the claim with a payment of less than $125,000.

6. Furnishing Information concerning the estate and the estate's administration (Section 704(a)(7))

151. The Chapter 7 Debtor's estate has been subject to hundreds of subpoenas and requests for documents, including ordinary course requests for customer

account information. The Trustee succeeded in establishing a unique streamlined process to respond to regulatory requests and subpoenas. The Trustee was able to negotiate an arrangement under which he was able to use Man's resources to respond to the subpoenas in a way that was closely coordinated with the CFTC. The Trustee also entered into a facilities management agreement with Man to deal with future document requests. The Trustee estimates that these actions saved the Chapter 7 Debtor's estate more than $2 million that it otherwise would have spent responding to subpoenas and requests from regulators for documents.

152. In addition, the Trustee and his professionals supervised a team of workers who indexed and packed literally thousands of boxes of the Chapter 7 Debtor's documents for storage. These documents were located at various offices and storage facilities throughout the country. The Trustee also oversaw efforts to develop an inclusive, searchable database of all the boxes of documents in storage. After consulting with the CFTC and the United States Trustee and obtaining their concurrence, the Trustee sought and obtained Court authority to dispose of more than 67,000 boxes of documents in storage that are no longer required to be maintained under regulations and rules promulgated by the CFTC and other applicable law. Another 62,000 boxes have been identified that the Trustee will ask to be allowed to destroy soon. The destruction of those records will result in substantial administrative cost savings to the Chapter 7 Debtor's estate.

153. After the destruction of these 129,000 boxes, approximately 25,000 boxes will remain that (i) contain LLC trading records less than 5 years old that cannot be destroyed under CFTC regulations or (ii) do not appear, based on box descriptions, to relate to LLC's businesses (a number of the Refco entities used shared storage).

7. Operation of Business (Sections 704(a)(8) and 721)

a. Operation of business to effectuate Sale to Man

154. LLC's case is the first FCM bankruptcy case ever to result in the successful sale of an FCM business as a going concern. From the outset, it became clear to the Trustee that he would have to obtain authority to operate the business. Such authority is so rare that under the prior law, trustees were paid double commissions in such cases because of the increased difficulty of the case and the risk to the trustee. It makes the administration at least twice as difficult. An order authorizing the Trustee to operate LLC's business was entered on November 25, 2005, as supplemented on March 27, 2006 and clarified on August 10, 2006.

b. The Excluded Accounts

155. Certain customer accounts transferred by the Trustee to Man contained undermargined or deficit account positions, and under the Acquisition Agreement designated "Excluded Accounts" for which the Chapter 7 Debtor's estate generally remained liable where the customers did not satisfy the liabilities associated with such Excluded Accounts. It was the Trustee's obligation to deal with those accounts.

156. Although following the Sale most margin calls relating to Excluded Accounts were quickly answered and/or any open trade positions in Excluded Accounts either were liquidated or voluntarily assumed by Man, some Excluded Accounts continued to contain large open futures and options positions after the Sale. LLC's estate was exposed to market fluctuations for such Excluded Accounts in the event that the customers could not satisfy the liabilities associated with the accounts. To limit the exposure to the estate, the Trustee and his counsel had to actively monitor Excluded Accounts with the assistance of a futures industry consultant and other professionals. The Trustee sought to collect negative balances in deficit accounts from former customers and

brokers and, when necessary, commenced adversary proceedings to collect on the accounts.

c. Kessler

157. The winddown proceeded successfully so that two months after the Sale, and as of January 31, 2006, only one set of material Excluded Accounts remained for which the estate bore market risk (the "Kessler Accounts"). As of that date, the Kessler Accounts contained more than 100,000 complicated, illiquid trading positions in natural gas options, had incurred a deficit balance exceeding $12 million (based upon imputed settlement prices for inactively traded options), and were subject to initial margin calls exceeding $18 million. The account holder was indebted to Refco Capital for an additional $10 million borrowed to meet pre-petition margin calls at LLC.

158. More significantly, the risk associated with the hundreds of thousands of remaining open positions in the Kessler Accounts fluctuated greatly from day to day, and if there was an adverse market movement, the Trustee believed that losses easily could have exceeded $50 million or more beyond the existing losses associated with the Kessler Accounts. Complicating the problem was that significant expertise and continued cooperation from the account holder were required to properly manage the risk and maintain an orderly market in natural gas. But Kessler was obstinately defiant of the Trustee's fiduciary obligations and he became unmanageable.

159. During the course of negotiations with the Trustee in January 2006, Kessler threatened to "walk out" on the Kessler Accounts and ignore them unless he received significant monetary concessions. He knew that if there were a forced liquidation of his accounts, the estate faced up to a minimum of $50 million of losses, and he tried to leverage those potential massive losses to his advantage at the expense of the LLC estate.

160. After consulting with industry experts and others, and exploring all available options to manage the risk associated with the Kessler Accounts, the Trustee concluded that a "midnight coup" to oust Kessler and transfer all open account positions in the Kessler Accounts to a third party would best protect and minimize LLC's continued and substantial losses. The worst option was to keep Kessler in place but a close second disaster was a forced liquidation of the Kessler Accounts, given their size and the illiquidity of the open positions. The Trustee believed that if Kessler were allowed to continue trading, based upon his rate of losses, total losses could have reached $100 million.

161. The easiest solution would have been for the Trustee to direct Man to liquidate the account positions; it was estimated that in a forced liquidation, the Kessler Accounts could have suffered aggregate losses in the $50 million range, or greater. Significant execution risk would have been associated with such a liquidation because there are only a handful of traders with the expertise required to liquidate such large and complicated options positions.

162. On February 1, 2006, the Trustee identified a third party who was willing to acquire all existing Kessler Accounts positions and all risk associated therewith for a modest payment of $1.5 million over the existing deficit amount, plus payment of certain associated transaction costs. The Trustee requested and obtained clearance from the exchanges and CFTC for Kessler's ouster and replacement.

163. After notifying counsel and financial advisors to the Chapter 11 Debtors, Man, the United States Trustee and certain other parties, on February 1, 2006, the Trustee used the regulatory clearance he had obtained from NYMEX to stage the coup by transfering the Kessler Account positions to the third party. Upon receipt of that approval,

Kessler's trading privileges were immediately terminated, and all positions in the Kessler Accounts were immediately transferred to that third party.

164. The swift implementation of the foregoing transaction eliminated all further risk associated with the Kessler Accounts, including but not limited to market fluctuations (market fluctuation risk was estimated to exceed $30 million), the possibility that the account holder would "walk out" and leave the account unmanaged, and the possibility of improper execution of trades in connection with the liquidation of the account. As a result, the Chapter 7 Debtor's estate was isolated from additional market exposure on the Excluded Accounts. The Trustee estimates that the Chapter 7 Debtor's estimated losses would have been at least $35 million to $50 million absent the Trustee's proactive involvement.

165. After Kessler was ousted, he filed a petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Connecticut, leaving LLC's estate with a substantial claim. According to Kessler's bankruptcy schedules, Kessler owed LLC approximately $19 million, and owed Refco Capital in excess of $11 million. These two debts comprised over 80% of Kessler's scheduled debt.

166. The Trustee believed that there could be a significant recovery from Kessler either by denying him his discharge and pursuing him for the rest of his life or through his estate, and the Trustee committed significant time and resources to pursue his claims against Kessler. Substantial discovery was undertaken, including a three-day deposition of Kessler and Bankruptcy Rule 2004 examinations of former business associates of Kessler. Interviews of former Refco Capital and LLC managers and employees were also taken, as well as a review of documents produced by Kessler, his wife Karin, and others.

167. The Trustee filed a proof of claim in the Kessler Chapter 7 case and, jointly with the Chapter 11 estate of Refco Capital, objected to Kessler's claimed exemptions. A complaint was also filed objecting to the dischargeability of Kessler's debt to the LLC estate.

168. Complicating the Trustee's ability to pursue assets from Kessler and his estate was the claim asserted against Kessler by his wife during a divorce proceeding. Connecticut is an equitable distribution state, and his wife asserted a claim in excess of $17 million against Kessler.

169. Ultimately, the Trustee was able to reach a global settlement with Kessler, his bankruptcy trustee, and Refco Capital, and executed a settlement agreement that resulted in the transfer of Kessler's interest in his membership seat on the New York Mercantile Exchange and NYMEX Holdings, Inc. shares to the LLC estate and Refco Capital. The Trustee also resolved the allocation of any recovery between the LLC estate and Refco Capital and did so with the result that the majority of the recovery went to the LLC estate. As a result, the Trustee recovered approximately $6 million from Kessler. The net loss to the estate was reduced to one-tenth of what it could have been had the Trustee not acted in the way he did.

d. Transition Services Agreement

170. Under the Acquisition Agreement, the Chapter 7 Sale Order and a Transition Services Agreement ("TSA") entered into in connection therewith, the Trustee and the other sellers were required to provide transition services to Man for up to 270 days (the "Transition Period") following consummation of the Sale (through on or about August 22, 2006). Those transition services included, *inter alia*, access to leased real property, employee access, and the uninterrupted provision of information and technology services during the Transition Period.

171. In addition to facilitating and complying with the obligations under the TSA, the Trustee was required to reconcile amounts owed to Man under the TSA. In reconciling the amounts owed, the Trustee came to believe that the Chapter 7 Debtor's estate was being improperly charged for certain items. The Trustee recovered from Man and/or successfully challenged TSA expenses sought by Man totaling more than $5 million.

e. Resolution of Broker Disputes

172. Man asserted that under the Acquisition Agreement, LLC was required to assign or enforce its non-compete agreements. Man claimed that it would be entitled to more than $75 million in indemnification claims if the Trustee failed to enforce the non-compete agreements. Following the commencement of the Chapter 7 Debtor's case, certain of LLC's former brokers began to poach LLC's customers in contravention of non-compete agreements. The actions of these brokers threatened significant loss to the LLC estate, and required immediate action from the Trustee or the estate would risk significant indemnification claims by Man.

173. The Trustee rushed to commence an adversary proceeding to restrain the LLC's former brokers and employees from misappropriating and using confidential and trade secret information. A temporary restraining order was granted quickly, sending a powerful message to brokers who refused to work with Man that non-compete agreements would be aggressively enforced. The Trustee settled the adversary proceeding, and an order approving the settlement was entered by this Court on April 19, 2006. Through the Trustee's actions, the Chapter 7 Debtor's estate realized an estimated benefit of up to $75 million by avoiding potential indemnification claims by Man.

f. Cargill Dispute

174. In connection with the closing of the Man Sale, disputes arose between, among others, (a) Cargill Industries, together with certain of its affiliates (collectively, "Cargill") and the Chapter 11 Debtors regarding the designation of an exclusivity agreement and the release of escrowed funds, and (b) between Cargill and Man regarding the transfer of certain accounts. As a result of, *inter alia*, disputes between (i) Cargill and various Refco entities and (ii) Man and Cargill, Man indicated that it could potentially assert significant indemnification claims against the Chapter 7 Debtor's estate relating to Cargill. Pending resolution of those (and certain non-Cargill-related) disputes and claims with Man, the escrow agent under the Man Sale could not release escrow funds for the benefit of LLC or the Refco entities.

175. Following negotiations among the parties, a settlement agreement was reached resolving and compromising all of the disputes with (a) the Cargill entities, and (b) Man relating to the exclusivity agreement, the transfer of the accounts, and matters pending before the Court of Appeals for the Second Circuit in connection with litigation concerning the Chapter 11 Debtors, and regarding Man's withholding of cash collateral. As part of a global settlement, the Trustee provided and obtained mutual releases relating to the disputed matters.

g. Broker Cure Claims

176. In addition to disputes with brokers who sought to breach non-compete agreements, the Trustee reached an agreement with Man to avoid disputes with hundreds of brokers relating to the calculation of cure amounts owed to brokers and other contract counterparties. Partly because LLC had no employees to help him calculate such cure amounts, the Trustee and his counsel negotiated favorable arrangements with Man whereby Man agreed to bear most risks associated with overpayment or miscalculation of

cure amounts. In addition, Man agreed to pay cure amounts to brokers in advance of final resolution of the cure amounts, with the Trustee reimbursing Man only after cure amounts were verified. The Trustee estimates that the agreement with Man regarding the resolution of cure amounts operated to create an estimated benefit of $4 million to the Chapter 7 Debtor's estate.

177. As part of the Sale, the Trustee also negotiated with Man to expedite the assumption or rejection of broker contracts and real property leases used in LLC's FCM business, and to minimize contract rejection damages. Under the Acquisition Agreement, Man was entitled to designate executory contracts and real property leases for assumption and assignment. Man designated in excess of 750 such agreements (primarily agreements with brokers) and the Trustee paid, in the aggregate, approximately $39 million in cure amounts to satisfy the statutory and sales contract requirements for the executory contracts assumed and assigned to Man.

h. Asset Dispositions

(i) Taiwan Branch of Refco, LLC

178. Approximately $3 million remained in Refco Taiwan bank accounts that were not novated to Man; those funds belonged to LLC's estate. When the Trustee attempted to move those monies to the United States, he was advised that the monies constituted capital under the laws of Taiwan that could not be delivered to United States bank accounts without the approval of Taiwanese governmental authorities.

179. The Trustee designated LLC's local branch manager in Taiwan to act as liquidator and he supervised the winding down of the Refco Taiwan branch in accordance with Taiwanese law. The Trustee took the requisite steps to complete the wind-down, including directing his professionals and Refco Taiwan employees to publish notice advising potential claimants of their time to submit claims to Refco Taiwan,

produce accounting reports, get their final tax returns and prepare an accounting of Refco Taiwan's assets and liabilities, and obtaining a court order concerning the payment of claims and return of any excess capital. The Trustee ultimately recovered approximately $3 million of remaining funds.

(ii) RTS

180. RTS is a limited liability company organized in 2003 under the laws of Delaware. RTS was formed when Refco acquired an entity known as MacFutures in the United Kingdom, a day-trading business that specialized in commodity futures and options. RTS followed a similar model to MacFutures and became the proprietary trading subsidiary of LLC. LLC is the sole member of RTS and its only equity holder.

181. Because RTS was mainly a proprietary business, most RTS trades used accounts funded by LLC; there were hardly any trades for customer accounts. To the extent there were any third-party customer accounts, like the RTS proprietary accounts, they were settled on a daily basis so that the business day would rarely end with RTS having any open trade positions.

182. RTS had over 100 employees and business operations in Montréal, Chicago and Miami. RTS trained its employees to use its proprietary trading system, and then funded an account for them to trade. Most of the personnel were paid a flat salary but the RTS traders also received percentages of the profits of successful trades.

183. After the closing under the Acquisition Agreement, Man hired most of the RTS employees and RTS ceased all trading operations. There was then approximately $1.4 million in cash on hand at RTS and uncertain liabilities.

184. The Trustee obtained an Order dated August 10, 2006 that authorized him to wind-down and dissolve RTS. At that time, there were only three former employees available to assist the Trustee in the winddown and there was no reliable way

to know if any of the RTS money could be distributed to LLC creditors because there were potential liabilities related to RTS's Canadian operations for taxes resulting from RTS's participation in an intercompany cash management system that paid RTS obligations to outside sources and repaid the obligations with intercompany receivables, and because of a labor issue concerning what may have been the termination of Canadian employees in violation of Canadian law.

185. Within twelve months after the entry of the winddown order, the Trustee had come to believe that a non-judicial winddown was impossible, in large part because if the funds on hand in RTS were left exposed in RTS where it maintained a presence in Canada, Canadian creditors would find ways to get it all by commencing proceedings in Canada that would be difficult for the Trustee to defend and because of other possible claims in addition to those assertable by Canadian creditors.

186. The Trustee decided that the best way to address and dispose of those potential claims was through a judicial proceeding and, by far, the least expensive of the options available was a Chapter 7 case for RTS in the Southern District of New York despite that RTS had no presence in New York. Such a proceeding was possible because RTS could be filed as a related case to LLC. An added benefit of having the RTS case in New York was that Canadian creditors would be less likely to litigate or even pursue their claims.

187. On March 13, 2007 (the "RTS Filing Date"), the Trustee directed that a voluntary petition for relief under Chapter 7 of the Bankruptcy Code be filed on behalf of RTS. The United States Trustee appointed Mr. Togut to act as the trustee for RTS's Chapter 7 estate (the "RTS Trustee").

188. After the RTS Filing Date, and in connection with the global settlement of intercompany claims, the Court entered an order in RTS's Chapter 7 case that

authorized RTS to exchange mutual releases with the Chapter 11 Debtors, the RCM Trustee and LLC's estate, resolving any intercompany claims without the necessity or cost of expensive litigation.

189. The RTS Trustee determined that the proofs of claim filed by the New York State Department of Taxation and Finance and the New York City Department of Finance, aggregating more than $790,000, were not properly asserted against RTS's Chapter 7 estate and, following discussions with these taxing authorities, was successful in having the claims withdrawn, again without the necessity of litigation. The RTS Trustee also determined that the proof of claim filed by AT&T Global Services, in an amount exceeding $136,000 (the "AT&T Claim"), was not a valid claim against RTS Chapter 7 estate. The RTS Trustee directed his professionals to prepare and file a motion to disallow the AT&T Claim. On December 18, 2008, an order was entered expunging the AT&T Claim.

190. No proofs of claim were filed against the RTS Chapter 7 estate by any of the parties in Canada. Thus, the Trustee's expectation in commencing the RTS bankruptcy in New York proved correct.

191. As of September 30, 2009, and despite certain expenses that had to be paid, the amount on hand in RTS is now more than $1.7 million. After paying the rather modest costs of administration, substantially all of these funds will be available to LLC's creditors.

(iii) **The Clearing Corporation Shares**

192. LLC owned 39,500 Class A Shares in the closely held The Clearing Corporation ("CCorp"), representing approximately 6.5% of the issued and outstanding Class A shares of CCorp (the "CCorp Shares"); CCorp is a private non-publicly traded entity. There was no market for its stock.

193. The Trustee, with his financial advisors, spent months actively identifying and soliciting prospective purchasers and for a long time, no buyer could be found. Some of the Trustee's advisors urged the Trustee to offer the CCorp stock at auction, without a stalking horse bidder, but the Trustee refused. Over the years, the Trustee has learned that offering an asset without a bidder in place can be disastrous. So, he refused to follow the advice he was being given. He also refused an offer by CCorp for $1.5 million that had contingencies such as Board approval. Instead, he held out until a bidder could be found.

194. The Trustee's patience paid off when he secured an offer for the CCorp Shares, subject to an auction process, and higher and better offers. The Trustee entered into a purchase agreement with American Milling, L.P. and filed a motion seeking authorization for bidding procedures and the sale of the CCorp Shares (Docket No. 502). The proposed bidding procedures for the sale were approved by Order of the Court on December 6, 2006 (the "December 6 Order"). Thereafter, the Trustee effected the service of notice of the auction in accordance with the December 6 Order and responded to numerous inquiries from several prospective bidders concerning the sale, auction and bidding procedures. Three bidders, in addition to American Milling, ultimately qualified to participate in the Auction.

195. On January 5, 2007, an auction was personally conducted by the Trustee, but the stalking horse bidder refused to bid any further. Instead, there was spirited bidding between Goldman Sachs and Morgan Stanley & Co. The higher bid was finally obtained from Morgan Stanley for $4,450,000, a $3 million improvement over the initial CCorp offer.

196. A new purchase agreement was drafted and the Sale Order was prepared to reflect the new purchase price and terms. On January 9, 2007, the Court

approved the sale of the CCorp Shares to Morgan Stanley, and on January 10, 2007, the Trustee closed the sale of the CCorp Shares.

i. Executory Contracts and Real Property Leases

197. More than 800 executory contracts (the "Executory Contracts") to which LLC was a party were reviewed and analyzed, including more than 750 broker agreements. The Executory Contracts consisted of agreements with brokers, service and license agreements with third parties, and miscellaneous agreements with third party vendors and suppliers. More than 700 agreements were assumed and assigned to Man. The Trustee served hundreds of notices of assumption and cure amounts on the affected parties in compliance with the Chapter 7 Sale Order.

198. The Trustee also identified numerous real property leases to which LLC was a party. Although Man could have required the Trustee to assume and assign the Executory Contracts and Leases under the Acquisition Agreement, and did in fact take the assignment of hundreds of executory contracts and real property leases, Man determined it did not want to take assignments of every lease. As a result, the Trustee negotiated the terms of the assignments of certain of those real property leases to third parties, and obtained Court approval of the proposed assumption and assignment of leases to third parties.

199. In other instances, Man told the Trustee that it did not want an assignment of a portion of the premises or did not need the premises beyond the TSA period. After negotiations with the landlords for the properties, the Trustee was able to enter into stipulations with certain landlords that provided for an extension of the Trustee's time to assume or reject the lease, set a termination date for each lease, and a waiver of the right to file a rejection damages claim against the LLC estate. All of LLC's

real property leases were consensually rejected, or assumed and assigned prior to the August 22, 2006 expiration date under the Acquisition Agreement.

j. Coordination and Negotiation with the Chapter 11 Debtors

200. An important aspect of administering this case has been the Trustee's efforts to coordinate activities with representatives of the Chapter 11 Debtors, where appropriate. The Trustee, along with his professionals, worked with counsel for the Chapter 11 Debtors and the Creditor's Committee in the Chapter 11 cases to file concurrent motions in the LLC case and the Chapter 11 Debtors' cases, to obtain, for example, approval of the complex settlement agreements with SPhinX and BAWAG, which involved hundreds of millions of dollars. Without the Trustee's involvement, there could not be settlements because the settling parties insisted on approvals and releases from all the Refco entities, including LLC.

201. As described above, the Trustee also helped to facilitate the resolution of a multi-estate dispute involving, among other things, a motion to compel the payment of administrative expenses made by West Loop and took a lead role in objecting to West Loop's more than $67 million in claims asserted against LLC and many of the Chapter 11 Debtors. Through the Trustee's efforts, West Loop's pre-petition claim settled for $3.75 million, a mere fraction of the total claim asserted. Moreover, West Loop had objected to the confirmation of the Chapter 11 Debtors' reorganization plan, and the Trustee's settlement of West Loop's claim removed the obstacle of West Loop's confirmation objections.

202. Further, the Trustee coordinated the submission of a motion by one of the Chapter 11 Debtors, Refco Global, to sell the stock that LLC and Refco Global each owned in a non-debtor entity, Refco Hong Kong Limited.

203. The coordination of these activities enabled all of the Debtors to work together to facilitate the administration of their respective cases, avoid duplication of effort, and minimize each estate's respective administrative expenses.

204. The Trustee resolved, without the necessity of protracted litigation, multi-estate disputes relating to claims filed by, among others, Interactive Data Corporation, AboveNet, Steffan Van Keppel and Timothy Tod Mitchell. These settlements resulted in the reduction of claims and/or disallowance of claims against the Chapter 7 Debtor's estate in situations where such claims were also asserted against one or more of the Chapter 11 Debtors.

205. The Trustee participated in, and helped to facilitate, settlements by the Chapter 11 Debtors with, among others, (a) Nuevo Banco Industrial De Azul S.A., (b) MBA Uruguay Sociedad De Bolsa S.A., and (c) Multi-Bank Securities, Inc., that resulted in the mutual releases of claims and avoided the potential that the Chapter 7 Debtor's estate would incur expenses associated with litigation among multiple parties in connection with disputes in the Chapter 11 cases.

206. The Trustee also was able to negotiate a global settlement, with among others, the reorganized Chapter 11 Debtors and reorganized RCM, the litigation trustee in the Chapter 11 Cases, European Sicav Alliance Galaxy, European SICAV Alliance Makalu and SICAV Alliance Odin Fund, which resulted in a payment of almost $5 million to the Chapter 7 Debtor's estate.

207. The coordination of these activities enabled all of the Debtors to work together to facilitate the administration of their respective cases, avoid duplication of effort, and minimize each estate's respective administrative expenses.

k. Filing of Operating Reports and Tax Returns (Section 704(a)(8))

208. The Trustee's reports to the Court have been detailed, comprehensive, and time-consuming to prepare. The Trustee prepared a First Interim Report, which was filed on March 19, 2006, detailing the status of the Trustee's administration of the LLC estate and his activities through the period ending February 28, 2006. As the case progressed, the Trustee has filed monthly operating reports to provide a more detailed picture of the Chapter 7 Debtor's estate. The Trustee worked closely with his advisors to prepare a template of a monthly operating report that would provide the Court, the United States Trustee and other parties in interest with comprehensive information regarding the liquidation of the LLC estate including the receipts and disbursements of the estate, a reconciliation of the numerous bank accounts that were open as of the petition date, and that reports on the closing of certain of those accounts.

209. To supplement the purely financial reports, the Trustee also filed several reports unique to this case, including: a report detailing all executory contracts that were assumed and assigned to Man (and cure amounts paid); a report of all pre-petition claims paid pursuant to the Court's December 2005 order permitting payments of certain claims critical to the continued operations of the business sold to Man; a report of all claims paid and satisfied through the commodity exchange claim process; and a report of all customer funds and securities transferred to Man in connection with the Sale.

210. The Trustee has filed (or will file) all tax returns required to be filed under applicable law. Although LLC is a disregarded entity for many tax purposes, it is required to pay certain state and federal taxes. The Trustee directed that his attorneys prepare an extensive report of LLC's potential federal, state and local tax liabilities that identified all returns that needed to be filed and all taxes that needed to be paid. Several

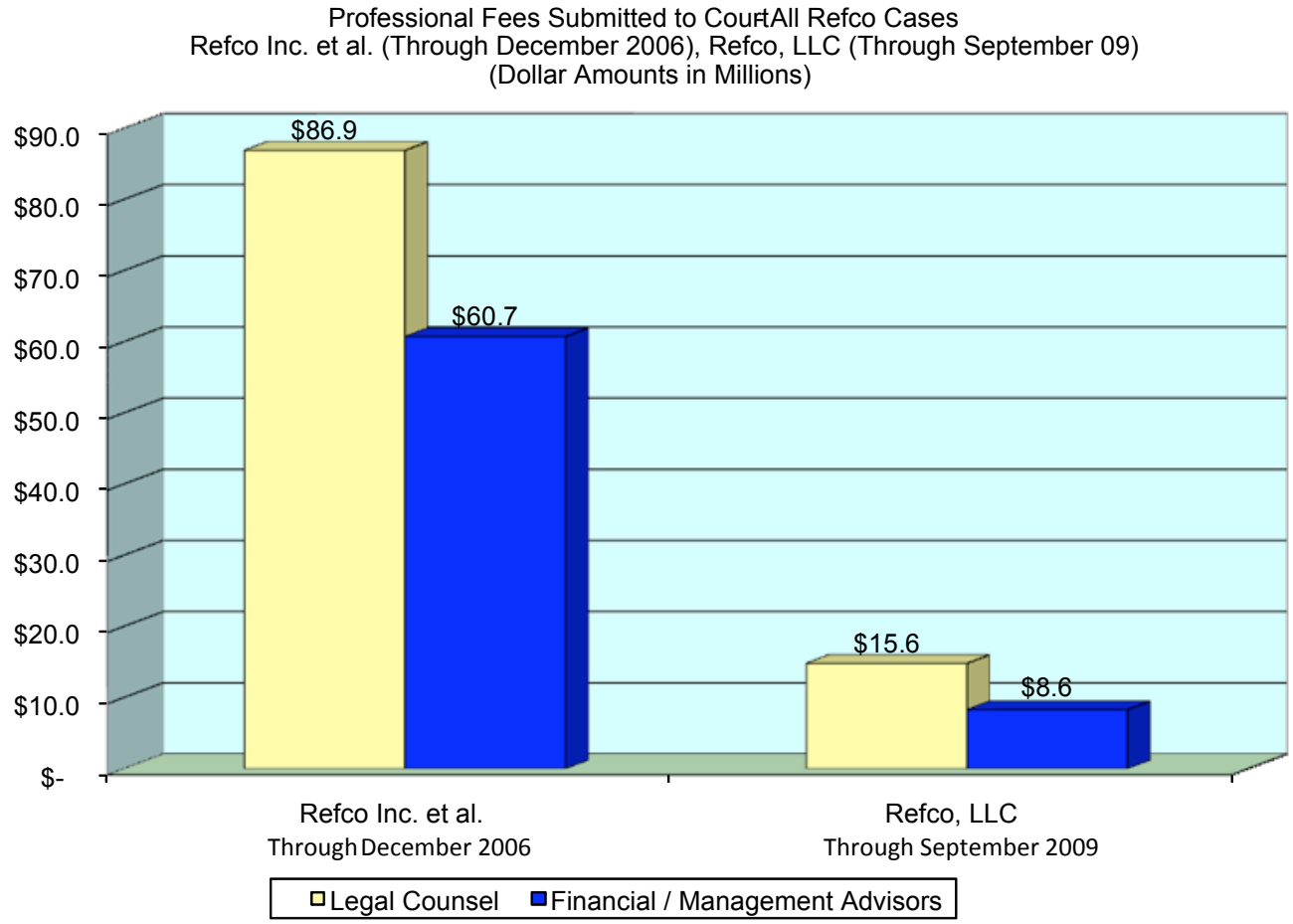
final returns already have been filed, and the remaining returns will be prepared and filed during the ordinary course of the Trustee's administration of LLC's estate.

8. Management of Legal and Professional Fees

211. The Trustee has been ably assisted by expert counsel and professionals who helped make the extraordinary outcome in this case possible. Consistent with his philosophy, it has been a team effort and everyone involved has made important contributions. The Trustee has been the head of the estate administration, directing what needed to be done.

212. The Trustee was able to carefully marshal and deploy his professionals, saving the estate many millions of dollars in fees. In that respect, the estate benefited greatly by having the Trustee also be a sophisticated, experienced bankruptcy attorney.

213. As depicted in the following chart, the Trustee succeeded in keeping overall legal and professional fees to a fraction of the expenses incurred by the Chapter 11 Debtors' estates. This was not just happenstance but was the product of the Trustee's careful management and judgment informed by nearly 30 years of experience as a fiduciary. It is important to recognize that the following chart compares four years of LLC estate fees with only 13 months of the other Refco estate professional fees:



The Patchan Report notes: "The fees in this [LLC] case were only 15% of those in the Refco Inc. Chapter 11 cases for a period that was more than twice as long." Patchan Report at p. 38.

III. LEGAL BASIS FOR COMMISSION SOUGHT BY TRUSTEE

214. Section 326(a) provides the statutory framework that governs a Chapter 7 trustee's compensation. It provides that a Chapter 7 trustee is entitled to a commission, calculated on a sliding scale up to 3%, based upon the "moneys disbursed or turned over." Section 326(a) states that:

> In a case under Chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable

> after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

11 U.S.C. § 326(a).

215. Before the BAPCPA amendments, courts were split on the proper methodology for determining a Chapter 7 trustee's compensation under Section 326(a). On one end of the spectrum were decisions like *In re Guyana Development Corp.*, 201 B.R. 462 (Bankr. D. Tex. 1996), which strictly applied the statutory commission formula and awarded the Chapter 7 trustee compensation in the approximate amount of $2.4 million, representing the full 3% commission based on total disbursements of $79,938,954.41 and the formula set forth in Section 326(a). In contrast, cases like *Connolly v. Harris Trust Co. of America (In re Miniscribe Corp.)*, 309 F.3d 1234 (10th Cir. 2002), applied a "lodestar" analysis that emphasized hours, hourly rates, tasks performed and results achieved to determine the reasonable compensation of a trustee and, only then, determined whether it exceeded the Section 326(a) limitations.

216. In 2005, Congress changed the standard for compensating a Chapter 7 trustee. As one of the key amendments under BAPCPA, Congress modified section 330(a)(3) and added a new provision—Section 330(a)(7)—to change the proper method for determining a trustee's compensation.

217. Prior to BAPCPA, Chapter 7 and Chapter 11 trustee commissions were treated alike, and courts considered factors such as time spent and rates charged to

determine the amount of reasonable compensation for a Chapter 7 trustee. Those courts relied on, among other things, language in Section 330(a)(3):

> In determining the amount of reasonable compensation to be awarded the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including:
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
>
> (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3).

218. In enacting BAPCPA, Congress expressly modified Section 330(a)(3) to declare that the factors listed there apply to "an examiner, trustee under Chapter 11, or professional person"—**but not to a Chapter 7 trustee.** 11 U.S.C. § 330(a)(3). Congress made the distinction that Chapter 7 trustees are to be treated differently. Chapter 7 trustees are not to be treated like any other professional in the case nor, indeed, like a Chapter 11 trustee.

219. For Chapter 7 trustees only, Congress mandated that courts use an objective method for calculating commissions by applying the formula set forth in section 326(a). Congress amended the Bankruptcy Code by adding a new Section 330(a)(7):

> In determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326.

11 U.S.C. § 330(a)(7).

220. Indeed, as has been noted by Bankruptcy Judge Wedoff of the Northern District of Illinois, "Section 330(a)(3) is amended to exclude chapter 7 trustees from the professionals whose compensation is to be based, among other things, on the time spent in providing their services. Rather, new § 330(a)(7) is added, providing that the reasonable compensation of 'a trustee' shall be treated 'as a commission, based on § 326'." Eugene R. Wedoff, Major Consumer Bankruptcy Effects Of BAPCPA**,** 2007 U. Ill. L. Rev. 31, 58.[27]

221. Because Section 330(a)(7) of the Bankruptcy Code uses the mandatory word "shall" to determine a Chapter 7 trustee's compensation, Section 330(a)(7), and not 330(a)(3), is applicable to a Chapter 7 trustee; thus, a Chapter 7 trustee's commission must be determined solely under Section 326(a).[28] The United States Trustee has adopted exactly this position, arguing that the maximum commission contained in Section 326(a) should be presumed to be reasonable compensation, unless found to be unreasonable using factors other than those enumerated in Section 330(a)(3). *See* Memorandum of

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[27] Since Section 330(a)(3) was amended in 1994 to provide that the Court take into account the "time spent on the services provided," and "the rates charged for the services" along with other factors, the result of the removal of the applicability of Section 330(a)(3) to Chapter 7 trustees is that the Court may now evaluate a Chapter 7 trustee's commission application without considering the time spent or the rates charged. Indeed, the Court should not penalize the Trustee for the number of hours spent and instead should reward diligence, experience, skill and results.

[28] *Compare Barbieri*, 199 F.3d at 619 ("The term 'shall,' as the Supreme Court has reminded us, generally is mandatory and leaves no room for the exercise of discretion by the trial court."); *with New Haven Projects Ltd. Liab. Co.*, 225 F.3d at 287 ("the ordinary meaning of the word 'may' applies here because nothing in [section] 505 suggests otherwise and because Congress elsewhere in the Bankruptcy Code has chosen the word 'shall' to denote mandatory requirements.").

United States Trustee In Support of Trustee's Application For Compensation And Expenses at 6-7, *In re Ward*, No. 06-10389 (Bankr. W.D. Pa. Jan. 9, 2007) ("The interplay between §§ 326(a), 330(a)(1) and 330(a)(7) mandates that the trustee's fee should be determined in the first instance according to the fees specified in § 326(a), unless such a fee would constitute unreasonable compensation under factors *other than* the considerations identified in § 330(a)(3), from which the chapter 7 trustee has been specifically excluded.") (emphasis original).[29]

222. Where, as here, a statute is clear and unambiguous, it is to be applied literally—unless a literal application would lead to absurd results. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (in construing a section of the Bankruptcy Code, "[t]he starting point in discerning congressional intent is the existing statutory text"); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a section of the Bankruptcy Code] begins where all such inquiries must begin: with the language of the statute itself."). Where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485, (1917)); *see also United States v. Venturella*, 391 F.3d 120, 125 (2d Cir. 2004). *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a

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29 Thus having eliminated Chapter 7 trustees from the determination of reasonable compensation pursuant to Section 330(a)(3), Congress substituted a new standard of compensation of Chapter 7 trustees by enacting Section 330(a)(7). The plain language of Section 330(a)(7) requires that the reasonable compensation of a trustee shall be treated as a commission, based on Section 326. Section 330(a)(7) does not expressly limit its application to the determination of a chapter 7 trustee's compensation but instead references the compensation of a trustee. Nonetheless, the compensation of Chapter 11 trustees is specifically provided for in Section 330(a)(3) while standing trustees in Chapter 12 and 13 are compensated pursuant to 28 U.S.C. Section 586(e). In considering the overall context of the amendments to Section 330, it is evident that Congress intended Section 330(a)(7) to apply only to Chapter 7 trustees. *See Davis v. Mich. Dept of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

statute…. [Because] this rule [is] a cardinal principle of statutory construction … a statute ought … to be so construed that … no clause, sentence, or word shall be superfluous, void, or insignificant[.]") (internal quotations and citations omitted). *See also, Beguy v. U.S.*, 128 S. Ct. 1581, 1585 (2008) (describing the need to interpret a statute in a way that gives meaning to each word) (citations omitted); *2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION* § 46:7 (6th ed. 2003) ("The legislature is presumed to have intended to avoid surplusage in the words and sentences and therefore it is permissible to interpret the statute to avoid such a pitfall."). Consequently, it is contrary to the clear intent of Congress to interpret the statute at issue here in any other way. If the text does not reveal a plain meaning, courts may consider other interpretative aids such as the statute's purpose and canons of construction. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 642 (1990); *Gottlieb v. Carnival Corp.*, 436 F. 3d 335, 337 (2d Cir. 2006); *United States v. Ford*, 435 F.3d 204, 210 (2d Cir. 2006); *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001).

223. Literal application of the objective statutory formula under Section 326(a) requires a court to award a Chapter 7 trustee the 3% commission on all disbursements in excess of $1 million. The clarification concerning a Chapter 7 trustee's compensation made in the amended Section 330(a)(3) and new Section 330(a)(7) is consistent with pre-Bankruptcy Code law and policy.

224. Under the Bankruptcy Act, a trustee who did not conduct the business of the debtor was entitled to a sliding scale commission, including a 1% commission on all disbursements in excess of $25,000, and a trustee who operated a business received twice

that amount.[30] (Here, the Court authorized the Trustee to operate LLC's business to wind down LLC's residual business.) The Court of Appeals for the Second Circuit viewed Congress' codification of a commission under Section 48c of the Bankruptcy Act as support for the conclusion that the maximum commission allowable was in and of itself reasonable. *In re Schautz*, 390 F.2d at 798.

225. In *Schautz*, the Court of Appeals for the Second Circuit rejected any notion that hours or the difficulty in administering the estate should be considered as factors in allowing maximum compensation and determined that "the number of hours required of the trustee or the difficulty of the job in the referee's opinion, could have been selected to establish the maximum allowance, but Congress has chosen this objective criterion"—referring to the statutory commissions. *See Schautz*, 390 F.2d at 798-99. Indeed, the Second Circuit held that so long as money came into the hands of a trustee lawfully, he was entitled to the commission, regardless of whether or not the estate was benefited. *See id.* at 799. The Second Circuit did note that there was flexibility in strictly and

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30 Section 48c of the Bankruptcy Act provided:

> The compensation of trustees for their services, payable after they are rendered, shall be a fee of $10 for each estate, deposited with the clerk at the time the petition is filed in each case, except where installment payments may be authorized pursuant to section 40 of this Act, and such further sum as the court may allow, as follows:
>
> > Normal Administration. When the trustee does not conduct the business of the bankrupt, such sum as the court may allow, but in no event to exceed 10 per centum on the first $500 or less, 6 per centum on moneys in excess of $500 and not more than $1,500, 3 per centum on moneys in excess of $1,500 and not more than $10,000, 2 per centum on moneys in excess of $10,000 and not more than $25,000, and 1 per centum on moneys in excess of $25,000, upon all moneys disbursed or turned over by them to any persons, including lienholders: Provided, however, That if in any case, after the trustee has paid all expenses of administration and has realized upon all available assets, the maximum compensation allowable to him hereunder does not exceed $150, the court may of its own motion allow the trustee a fee which with the commissions, if any, paid or to be paid him, shall not exceed $150.
> >
> > Conducting Business. Trustees who conduct the business of the bankrupt as provided in clause (5) of section 2 of this Act shall receive such amount as may be allowed by the court, but in no event to exceed twice the maximum allowance permitted by paragraph (1) of this subdivision c.

objectively applying the statutory formula in instances when a trustee acted inappropriately, such as when a "trustee has merely inflated the moneys which he has disbursed to increase his compensation, rather than to benefit the estate. . . ." *Id*. at 800-01. But none of that occurred here.

226. Applying a 3% commission is consistent with the policies and legislative history of the Bankruptcy Code described in the 1996 *Guyana* decision. As noted, the Chapter 7 trustee in *Guyana* requested and received the maximum commission of $2,398,348.63 based on the formula set forth in Section 326(a). The trustee's request faced stiff opposition from the IRS, which contended that the trustee was not required to administer a difficult case, as he inherited an estate with millions of dollars of assets on hand, there was no creditors committee, no reorganization of the business, and only one active creditor in the case. Notwithstanding this opposition, the Bankruptcy Court for the Southern District of Texas awarded the full 3% commission and rejected attempts to analogize the role of a Chapter 7 trustee to that of attorneys. Specifically, the court in *Guyana* recognized that the "legislative history to the enactment of the Bankruptcy Code states that trustees are compensated out of money of the estate '*to provide an incentive to trustees* to collect assets for the estate. . . .'" *Guyana*, 201 B.R. at 475 (citing H.R. Rep. No. 95-595 (1977) (emphasis added). The court in *Guyana* further distinguished between trustees and attorneys based on the fact that a trustee can never delegate his authority of administering the estate, "including most significantly the safeguarding and responsible disposition of estate assets and their distribution to creditors." *Id.* at 476-77 (internal citations omitted). The Court further recognized that *a bankruptcy trustee "must always be held accountable and [therefore] should justifiably be compensated*, even if all actual work is performed by others." *Id*. (emphasis added).

Applying the law to this case.

227. The Trustee recognizes that strictly applying the statutory formula to the more than $4 billion he received and disbursed could exceed $130 million based on the commissions formula under Sections 330(a)(7) and 326(a) of the Bankruptcy Code. Using the statutory formula, the maximum commission would be:

DISBURSEMENTS:[31]	$ 4,334,900,000
25% of the first $5,000	1,250
10% of the next $45,000	4,500
5% of the next $950,000	47,500
3% of the balance	130,077,000
Maximum Commission Allowable	$ 130,130,250

228. The Trustee will not seek the maximum commission and is not going there in making this application. Instead, the Trustee has severely tempered his commission request to what he genuinely believes to be fair and appropriate, in keeping with precedent for such large cases, in conformity with what the law permits, and within the range recommended to the Court in the Patchan Report. As will be seen below, the commission sought in this application is fully in line with existing case law, even under the less generous pre-BAPCPA standard for compensating a Chapter 7 trustee.

229. The Trustee was able to wind down LLC's business, preserve the value of the Man sale, and administer the LLC estate on an expedited basis by moving quickly to resolve and eliminate more than $5 billion dollars in claims. His success allowed the banks in the Chapter 11 cases to be paid and for the plan to be funded. As a result of the Trustee's efforts, all of the claims of LLC's direct creditors have been or will be

31 Assumes all cash collected has been or will shortly be disbursed. This does not take into account any future funds that may be recovered and distributed by the Trustee.

paid in full, and have not been diluted by the claims of other Refco entities that could have overwhelmed the direct creditor claims.

Not A "Done Deal"

230. Despite the advance billing and a misconception by certain major creditors, the Trustee did not walk into a "done deal" with nothing left for him to do. This has not been a case where all of the estate's assets had already been recovered and reduced to cash. This was an unprecedented case in which the Trustee had to work hard with no guidance from precedents, since there were none. The Trustee was able to handle this case because his nearly three decades of experience prepared him well in the sense that his "trustee instincts" were well honed.

231. As the largest FCM case (and indeed the largest Chapter 7 case) ever, administration of the LLC estate was extremely complex and required creative thinking by the Trustee. To administer this estate, the Trustee relied upon business and legal skills acquired over a long, distinguished career.

232. The Trustee took on significant personal risk when he agreed to act as "trustee-in-waiting" and later as interim trustee. If the sale to Man had not closed flawlessly—before the commencement of the next trading day after the Chapter 7 filing—there could have been a monumental disaster. Millions of trades could have been trapped, and the nation's futures markets would have been disrupted.

233. The Trustee could have been a personal target for millions of dollars in claims. However small the likelihood of risk appears in hindsight, the magnitude of the potential risk was overwhelming when the Trustee agreed to take on this unprecedented matter.

234. A powerful message should be sent by this Court that such exceptional performance and acceptance of risk will be recognized. Given the size and

complexity of the Chapter 7 Debtor's case, the significant distributions made to creditors, customers and others, and the intelligent work on the part of the Trustee, an allowance of the commissions in the amount sought is appropriate. As large as the amount sought is in absolute terms, relative to the estate administered, it is tiny, especially when compared with the 3% that could be awarded on $4.3 billion of "all moneys disbursed or turned over in the case by the trustee to parties in interest …." 11 U.S.C. § 326(a).

235. Even under the pre-BAPCPA statutory framework, awards of multi-million dollar trustee commissions were not unusual in complex cases, and all of those cases were less than a billion dollars—cases much smaller than the Chapter 7 Debtor's case. For example, in *In re Bennett Funding Group*, Inc., No. 96-61376 (Bankr. N.D.N.Y. Feb. 20, 2003), the Chapter 11 trustee received compensation of $13,850,000, a commission of almost 2%, based on anticipated distributions of $740 million to creditors. Similarly, in *In re Merry-Go-Round Enterprises, Inc.*, No. 94-50161 (Bankr. D. Md. Feb. 9, 2006), the Chapter 7 trustee was awarded final compensation of $7.74 million on distributions of $294,395,000, representing a commission of more than 2.6% (in a case where general unsecured creditors received only a 30% distribution on their claims, not the 100% which was paid here to direct LLC creditors). *See also In re Brennan*, No. 95-35502 (Bankr. D.N.J. Apr. 5, 2006) (Chapter 11 trustee awarded compensation of $3,140,422, or 2.87%, on disbursements of $61,124,628, resulting in creditor recoveries of approximately 46%); *In re Molten Metal Technology*, No. 97-21385 (Bankr. D. Mass. July 7, 2006) (Chapter 11 trustee awarded compensation of $1,970,569, the maximum 3% compensation permissible, based on distributions of approximately $64,910,000).

236. In *In re Autotech Leasing Services, LLC*, No. 00-12084 (Bankr. S.D.N.Y. Sept. 29, 2006), Chief Judge Bernstein of this Court awarded a Chapter 7 trustee final commissions and compensation of $2,904,555.51 on distributions of approximately

$97,246,000. This represented the maximum 3% commission permissible under Section 326(a) of the Bankruptcy Code.

237. Although Section 330(a)(3) is no longer applicable to Chapter 7 trustees, under prior law, many courts used the lodestar method approach in calculating "reasonable compensation" for Chapter 7 trustees and other professionals. In applying Section 330(a)(3) to determine "reasonable compensation," courts following the lodestar method approach engaged in a two-step analysis. *See generally* 3 *Collier on Bankruptcy* ¶ 330.04[3][c] (15th rev. ed. 2007) (discussing the application of the lodestar method under section 330). First, the court multiplied the reasonable hourly rate by the number of hours expended on the case. *See Miniscribe*, 309 F.3d at 1243-44; *In re Molten Metal Tech., Inc.*, 345 B.R. 26, 28 (Bankr. D. Mass. 2006) (applying lodestar approach to bankruptcy trustee's fees); *In re Moss*, 320 B.R. 143, 156 (Bankr. E.D. Mich. 2005) (same); *In re Southeast Banking Corp.*, 314 B.R. 250, 269 (Bankr. S.D. Fla. 2004) (same); *see also Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) (explaining generally that under the lodestar approach, the court "scrutinizes the fee petition to ascertain the number of hours reasonably billed . . . and then multiplies that figure by an appropriate hourly rate"). In determining the reasonable hourly rate, the court compares the rate proposed by the applicant with "the prevailing market rates in the relevant community." *In re Computer Learning Ctrs., Inc.*, 285 B.R. 191, 227 (Bankr. E.D. Va. 2002) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984)).

238. Once the lodestar figure is established, the court may consider additional factors, to the extent that they have not been taken into account in computing the hourly rate, and adjust the award upward or downward to achieve a reasonable result in light of the circumstances of the case. *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). Typically, in this regard, bankruptcy

courts have looked to the following twelve factors first articulated by the Court of Appeals for the Fifth Circuit to assist in determining the reasonableness of attorneys' fees, many of which have been incorporated into Section 330(a)(3):

(a) the time and labor required by the case;

(b) the novelty and difficulty of the issues presented;

(c) the skill requisite to perform the legal services properly;

(d) the preclusion of other employment by the attorney due to acceptance of the case;

(e) the customary fee;

(f) whether the fee is fixed or contingent;

(g) time limitations imposed by the client or the circumstances;

(h) the amount involved and the results obtained;

(i) the experience, reputation, and ability of the attorney;

(j) the "undesirability" of the case;

(k) the nature and length of the professional relationship with the client; and

(l) awards in similar cases.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Applying these factors to a bankruptcy trustee's fee application pre-BAPCA, in certain cases courts found it appropriate to enhance the lodestar figure by a multiplier that took into account exceptional results obtained by the trustee. *See Miniscribe*, 309 F.3d at 1245; *In re Buckridge*, 367 B.R. 191, 207 (Bankr. C.D. Cal. 2007); *Southeast Banking*, 314 B.R. at 269; *see also In re Merry-Go-Round Enters., Inc.*, No. 94-50161 (Bankr. D. Md. Feb. 10, 2006) (oral opinion, transcript available); *In re Bennett Funding Group, Inc.*, No. 96-61376, slip op. (Bankr. N.D.N.Y. Feb. 20, 2003) (unpublished memorandum and order, available from electronic docket).

IV. IF THE LODESTAR APPROACH WERE FOLLOWED

239. Because this is a post-BAPCPA case, awarding a straight commission to the Chapter 7 Trustee is specified by the statute and the analysis should stop there. Even applying the old lodestar standard, the amount sought by the Trustee is reasonable.[32] Each of the 12 *Johnson* standards will now be discussed.

- **Time and labor required by the case.** This case has taken four years and consumed a huge portion of the Trustee's time. The Trustee will spend approximately 4,700 hours[33] in the administration of this estate and often worked extremely long days. He was asked to administer the case on a very fast track, at breakneck speed, to coincide with the other Refco debtors' Chapter 11 cases, and he did so. He was ready when he was needed to be and getting there on time took a prodigious effort. There is no doubt that this was a time-intensive, laborious case.
- **Novelty and difficulty of the issues presented.** In the Chapter 7 world, there is no more novel case than this one involving the sale of a commodities broker as a going concern, and the post-sale operation of LLC's business to winddown its remaining affairs. Never in the history of bankruptcy had this been done. Because of its sheer size and complexity – and novelty – the issues presented were necessarily difficult. Indeed, despite more than 29 years of on-the-job training as a trustee, LLC's case presented business and legal issues the Trustee has never seen before for which creative and unique solutions had to be found for difficult problems.

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[32] If only the lodestar approach were followed, the Patchan Report supports a commission of $16,275,000 based upon 4,650 hours with an adjustment of 3.5 times the amount produced by multiplying the time reasonably required by the appropriate hourly rate. *See* Patchan Report, p. 56.

[33] Approximately 4,450 hours have already been spent and it is estimated that 250 hours more will be required before the work is completed.

- **Skill required to perform the services properly.** The Bankruptcy Code does not require that a trustee be a lawyer but more often than not, that is who is selected. Here, an experienced lawyer was crucially important because the problems facing the LLC estate were complex legal ones. More than simply having a law degree was required, though. This administration required the highest level of sophistication, business acumen and megacase experience. All of that experience mattered, not only in knowing how to run a business and function in a megacase, but in having had extensive prior dealings with most of the key professionals with whom the Trustee had to interact in this case.
- **Preclusion of other employment due to acceptance of the case.** Administering the LLC estate was all-consuming and not only prevented the Trustee from accepting other employment but kept him from working on cases already in his firm. In 2006, the Trustee only spent 384 hours on Delphi, the largest case in his office, versus 2,048 hours on Refco. Especially in 2006, substantially all of his time was occupied working on the LLC case and virtually nothing else, including new business development.
- **Customary fee.** There is already established, by the *Johnson* factors, a baseline trustee fee in the Refco cases. More than two years ago, the Chapter 11 Trustee was allowed $6 million based upon $850 an hour times a multiplier of 2.88 per hour. Applying that same rate to the Trustee's efforts would result in a fee of more than $11.5 million and that is based on billing rates that are two years old.[34]

[34] It should be noted that the experts who reviewed the Trustee's work in this case believe that the starting hourly rate should be $1,000, not $850. *See* Patchan Report, p. 49. Mr. Togut's current billing rate is also higher than $850 per hour.

- **Whether the fee is fixed or contingent.** The commission here was truly contingent. First, had the Trustee not cleanly executed the Sale, there could have been a disaster, not measured by the loss of the Man purchase price, but measured by the damage claims that would have been asserted against the estate by customers, parties to executory contracts, etc. Had the sale not been handled properly, there would have been extreme damage done to the estate. But beyond that, the Trustee's efforts resulted in greatly enhancing the size of the estate and the reason for percentage compensation is to give the Trustee a pecuniary interest in maximizing the estate.
- **Time limitations imposed by the circumstances.** The time limitations were severe. The Trustee understood, from the very beginning, that his administration had to coincide with the Refco parent's case. Unlike the LLC case, the other cases were dominated by plan negotiations and not asset liquidations or recoveries. It is faster to negotiate a plan than to do old-fashioned Chapter 7 estate administration. Yet, the Trustee had to keep pace with what was going on in the other cases……and succeeded. This required sprinting, not jogging.
- **Amount involved and result obtained.** The amount involved is staggering: more than $4.3 billion. As for the result obtained, one hundred percent to the direct creditors of LLC and then on top of that, a more than $800 million distribution to the parent's creditors is an excellent result. But the proper measure is not simply the monies collected and disbursed, it is also the monies saved by an efficient administration of the estate. Every action that could be settled was settled rather than litigated. Relatively little court time was spent because the experience of the Trustee was put to maximum use; this Trustee knows how to achieve an economic settlement. This Trustee also severely limited what he would permit his

professionals to do and watched their fees closely, keeping them down. The fees of administering the LLC estate are a small fraction of what it cost to get to a plan in the other cases. Those savings matter too.

- **Experience, reputation, and ability of the Trustee.** Starting with his firm's representation of Rockefeller Center in 1995, there has hardly been any year, in the past fourteen, when the Trustee has not been in the epicenter of one megacase or another. Some of the cases are described in this application. The Trustee is a member of the American College of Bankruptcy, International Insolvency Institute, and is on the Board of the American Bankruptcy Institute. He lectures frequently. He has written often. He is expert in Chapter 7 administrations. He has a national reputation for excellence.
- **The "undesirability" of the case.** For the head of a law firm with a busy practice, it was not desirable to have one case, not even this one, co-opt substantially all of his time.
- **Nature and length of the professional relationship.** This measure usually looks at the relationship with the client but here, the better measure is the professional relationship between the Trustee and other key professionals with whom agreements had to be made. By that measure, the nature of the professional relationship is hard to match and all trustees are not fungible. The Trustee has preexisting relationships with key lawyers. The Trustee has known many of these people more than 10 years and in some cases, more than 30. If length of the case is the standard of measure, the breakneck pace at which the LLC administration had to be done was exhausting. No matter how measured, the *Johnson* factors support a very large commission.

- **Awards in similar cases.** There are no "similar" cases, only smaller ones, much smaller ones. Purely as a historical reference, a description of what occurred in such smaller cases follows. It should also be noted that the commissions described were calculated under the prior law, and not the compensation standard that applies to this case.

240. In *Miniscribe*, the debtor's chapter 11 reorganization case was converted to a chapter 7 liquidation after a little over a year and a half. By the time the trustee sought final allowance of his fees, and as a result of the trustee's efforts according to the court, a $17 million bank claim had been reduced to $1 million, other claims against the estate had been reduced from $900 million to $168 million, and $67.4 million had been made available to pay claims against the estate through avoidance actions and other causes of action. *See Miniscribe*, 309 F.3d at 1237-39. The bankruptcy court's fee award was twice appealed to the district court and twice remanded to the bankruptcy court on various grounds. On review of the second district court opinion allowing the trustee's fees, the Court of Appeals for the Tenth Circuit affirmed the use of lodestar method approach with an enhancement for the trustee's exceptional work based on the *Johnson* factors. *Id.* at 1243. Applying this method, the Court of Appeals affirmed a lodestar figure calculated using a blended hourly rate with a 2.57 multiplier based on the application of the *Johnson* factors to the results achieved by the trustee in the case, for an award of $1,828,812. *Id.* at 1244-45.

241. In *Southeast Banking*, the court reviewing the application of the third trustee for final allowance of compensation totaling $7,632,904 noted that, during his six-year tenure, the trustee had amassed approximately $350 million in cash for distribution to creditors, through the pursuit of estate causes of action and the liquidation of assets, and reduced claims against the estate from $1.3 billion to $370 million. *See Southeast Banking*,

314 B.R. at 257-58. Applying the lodestar method approach to the fees sought by the trustee, the court determined that the proposed blended hourly rate was within the range of reasonable fees within district. *Id.* at 268-69. Additionally, reviewing the *Johnson* factors, the court found that the exceptional results achieved by the trustee merited a 2.0 multiplier to the base lodestar figure. *Id.* at 271.

242. In *Merry-Go-Round,* the debtor's unsuccessful two-year chapter 11 case was converted to a chapter 7 liquidation. The chapter 7 trustee ultimately recovered $294 million for the debtors' estate. *See* Transcript of Feb. 6, 2006 Hearing at 21-22, *Merry-Go-Round*, No. 94-50161 (calling the trustee's accomplishment "a magnificent effort showing that the trustee was both tenacious and perceptive and had an outstanding legal mind and outstanding ability to grasp and persistence to develop the necessary facts"). Under these circumstances, and based on the bankruptcy court's analysis of the *Johnson* factors, the court found that a multiplier of 3.05 was an appropriate enhancement to a lodestar figure based on a blended hourly rate of $356.32, resulting in a total award of $7.74 million in fees. *Id.* at 18.

243. Finally, in *Bennett Funding*, a chapter 11 trustee sought $14 million in compensation for recovering $740 million for creditors in what had been described as the "largest Ponzi scheme in U.S. history." *Bennett Funding*, Case No. 96-61376, slip op. at 1-2. Although the court, in its unpublished "Memorandum-Decision, Findings of Fact, Conclusions of Law and Order" did not specifically describe its approach as an application of the lodestar method, it did note that, based on the 15,750 hours which the trustee devoted to the case, the proposed fee award resulted in an effective hourly rate of $880, "vastly higher than the slightly more than $400 per hour that he has to date received." *Id.* at 4. The court's opinion described in some detail the trustee's activities to recover assets for the debtor's estate over the course of seven years, including stabilizing the

collection of some $297 million in accounts receivable from equipment leases, aggressively pursuing estate causes of action arising from or related to the debtors' fraudulent prepetition activities, and conducting numerous asset sales. *Id.* at 5-6. Observing that "the Trustee has crafted a result over these past seven years that few if any could ever have anticipated," the court refused to find that "an enhanced rate of $880 per hour, given the magnitude, uncertainty and length of this case coupled with the very significant rate of return for creditors" was unreasonable and approved the award. *Id.* at 7.

244. It is helpful to see a chart summarizing such larger awards, that includes an analysis, not found in the reported decisions, of what percentage of the trustees' disbursements was allowed as their compensation, remembering that the courts there were not able to rely solely on a percentage commission as the compensation standard as they are obligated to do now under the current law.

Multi-Million Dollar Trustee Commissions Chart

Case	Court	Amount Distributed by Trustee	Fee Awarded Trustee by Court	Trustee Fee as %of Estate
In re Bennett Funding Group, Inc.	Bankr. N.D.N.Y., Chapter 11 Case No. 96-61376 (SDG)	$740 million	$13,850,000	1.87%
In Merry-Go-Round Enterprises, Inc.	Bankr. D. Md., Chapter 7 Case No. 94-5-0161 (SD)	$294,395,000	$7,740,000	2.6%
In re Southeast Banking Corp.	Bankr. S.D. Fla., Chapter 7 Case No. 91-14561-BKC-PGH	Over $500 million	$7,632,904	Unclear because opinion does not specify disbursements

Case	Court	Amount Distributed by Trustee	Fee Awarded Trustee by Court	Trustee Fee as %of Estate
In re Foxmeyer Corp.	Bankr. D. Del., Chapter 7 Case Nos. 96-1329 (MBM) through 96-1334 (MBM)	$348 million	$6,940,000	1.99%
In re Robert Brennan	Bankr. D.N.J., Chapter 11 Case No. 95-35502 (KCF)	$109,482,947.58	$3,140,421.50	2.87%
In re Cardinal Industries, Inc.	Bankr. S.D. Ohio, Chapter 11 Case No. 2-89-02779 (BJS)	Stock in reorganized debtor with book value of $30 million	$2.1 million plus 50,000 shares of restricted stock in reorganized debtor	Unclear
In re Molten Metal Tech-nology	Bankr. D. Mass., Chapter 11 Case Nos. 97-21385 (RS) to 97-21389 (RS)	$64,910,000	$1,970,569	3%
In re TSR Wireless LLC (*interim* compensation)	Bankr. D.N.J., Chapter 7 Case Nos. 00-41857 (RG) and 00-41585 (RG)	$32 million	$991,206	3%
In re Autotech Leasing Services, LLC	Bankr. S.D.N.Y., Chapter 7 Case Nos. 00-12084 (SMB), 00-12138 (SMB), 00-12133 (SMB), and 00-41872 (SMB)	$97,246,000	$2,940,623.38	3%

245. The average of the fees awarded, using the commission approach prior to the BAPCPA amendments, is more than 2%. The Trustee requests a commission of only $28 million, much less than has been awarded on a percentage basis in other large cases. His request is only one-fifth of the maximum commission allowable under Section 326 of the Bankruptcy Code.

246. This is significantly less than the Trustee may request under the Bankruptcy Code; indeed, it is the equivalent of a full statutory fee on distributions of $933 million rather than the $4.3 billion. Looking at it another way, it is only six-tenths of 1% of the $4.3 billion he has disbursed.

247. Thus, there is ample authority for allowing the LLC Trustee the commissions sought herein. The amount sought by the Trustee, on a percentage basis, is significantly less than the commissions sought and received by trustees in other large and complex Chapter 7 and 11 cases that pre-date BAPCPA. It is a lot of money but not in the context of this case.

V. THE VALUE-ADDED BY THE TRUSTEE'S ADMINISTRATION MORE THAN PAYS FOR THE COMMISSION REQUESTED

248. This Trustee has worked hard to maximize the size of the estate and has done many things that were extraordinary to achieve his goal. There were many times that he could have taken the path of least resistance. Indeed, there were several times when creditors urged him to settle sooner than he did; had he done what was suggested, those creditors would have been happy with the results but those results would have been less than what the Trustee actually achieved.

249. Some of the examples are relatively small and others large but it is the aggregate of them that matters. The Trustee could have settled with Man over the escrow

much earlier than he did but by holding out and looking for every last dollar, $3 million more was recovered by the estate.

250. He could have simply purchased his additional $500 million bond at the same rate and no one would have complained. Instead, he forced competitive bidding and a repricing of his original $300 million bond with a savings to the estate of nearly $2 million. He saved the estate another $1 million of banking charges and still another $7 million on the records management and costs of responding to subpoenas that instead he got Man to answer.

251. He could have sold the CCorp stock back to CCorp for $1.5 million when no other buyer could be found but instead held out for $3 million more, which was found money.

252. He could have agreed to pay the Rogers Funds $47 million but instead settled for $17 million less. Having to pay Rogers anything was particularly disturbing because of the way the settlement with the RCM estate had been structured; that left the Trustee no choice but to litigate.

253. He could have been less proactive with Kessler but instead saved the estate as much as $34 million and collected $6 million more for distribution to creditors.

254. Tally it all up and the Trustee estimates that there is value-added of at least $67 million due to the Trustee's administration, without even considering the sale to Man. And given the size of the estate and its complexity, it was done extremely fast while keeping fees to professionals down, another value-added when measuring funds available for distribution to creditors.

255. For the Trustee to request $28 million still leaves at least $39 million of value-added to the estate. It is six-tenths of 1% of what he has disbursed when the statute

allows up to 3% as a commission. It is 2.8% of the $1 billion recovered after the Man closing. It is far less than what is allowable under the Bankruptcy Code, not more.

256. No matter how measured, it is fair and reasonable.

VI. COMPENSATING THE TRUSTEE AS A BUSINESSMAN

257. This Court has previously recognized that a bankruptcy trustee, although a practicing attorney, "can also act as a businessman, essentially acting as a president or chairman of the board …." *In re East 44th Realty, LLC*, Chapter 11 Case No. 05-16167 (RDD), Transcript Opinion , pp. 23-24 (Bankr. S.D.N.Y. April 21, 2009). Accordingly, in determining the appropriate compensation to be awarded to a bankruptcy trustee, a court may also consider "amounts charged by … those who might be wearing – or serving – comparable roles, such as chief restructuring officers or crisis managers or the like." *Id*. at p. 25. This is particularly true of the Trustee who graduated with honors from New York University's School of Business, is a member of the international *Beta Gamma Sigma* Honor Society, and who has for 29 years been the Senior Member and manager of the law firm of Togut, Segal & Segal LLP, which he founded. He has also served as a professional advisor to many complex businesses that he has helped to successfully reorganize. And more often than not, he took a businessman's approach to administering the LLC estate.

258. Consistent with the Court's discussion of trustee compensation in the *East 44th Realty* case, the Trustee made a survey and analysis of the fees earned by financial advisory professionals (*e.g*., crisis managers, financial advisors, management consultants, restructuring advisors *etc*.) in Chapter 11 cases comparable in asset size and complexity to the LLC Chapter 7 case. **First**, the survey consists of sixteen Chapter 11 cases involving assets, valued on a liquidation basis, ranging from a high of approximately $5.6 billion to a

low of approximately $182 million. As LLC involves a Chapter 7 liquidation, the Trustee believed it was most appropriate to consider the comparable cases using the liquidation value of the Chapter 11 debtors' assets. **Second**, in each of the Chapter 11 cases, the Trustee determined the regular fees earned by the financial advisor for its services (*i.e.*, fees earned on a fixed hourly or monthly basis), as well as the success fee or bonus awarded by the court in addition to the financial advisor's regular fees. **Third,** the Trustee then calculated for each case (i) the ratio of the total fees awarded by the court to the regular fees earned by the financial advisor, which calculation resulted in a ***multiplier*** and (ii) the percentage relationship that the total fees awarded to each financial advisor bear to the liquidation value of the Chapter 11 debtor's assets, which calculation resulted in a ***percentage***.

259. As illustrated in the charts below, the survey determined that the average multiplier of total fees in relation to the award of regular fees to financial advisors was approximately 5.14, and the average percentage ratio that the total fees earned by the financial advisor bore to the liquidation value of the Chapter 11 debtor's assets was approximately 2.19%.

Comparable Chapter 11 Bankruptcies:
($ in millions and rounded to nearest hundred thousand unless otherwise specified)

Company Name	Financial Advisor	Liquidation Value of Assets[1]	Success Fee Awarded	Total Regular Fees (not including Success Fee)	Total Fees	Total Fees as Multiple of Regular Fees	Total Fees as % of Liquidation Value
Enron*	Kroll Zolfo Cooper	$5,616.35	$12.50	$107.00	$119.50	1.12	2.13
Comdisco	Rothschild	3,424.54	4.20	2.30	6.50	2.83	0.19
Dana Corporation	AP Services	3,315.90	4.00	43.50	47.50	1.09	1.43
US Airways	Seabury Group	2,728.29	6.50	8.57	15.07	1.76	0.55
AMERCO	Alvarez & Marsal	1,537.10	5.13	4.70	9.83	2.09	0.64

Williams Communication *	Blackstone	960.00	10.00	1.10	11.10	10.09	1.16
Global Crossing[2]*	Blackstone	850.00	20.50	4.45	24.95	5.61	2.94
XO Communications	Houlihan	846.65	18.00	1.22	19.22	15.75	2.27
Saint Vincent's	Alvarez & Marsal	714.15	2.00	12.42	14.42	1.16	2.02
Allegiance Telecom *	Impala Partners	648.40	2.50	1.32	3.82	2.89	0.59
Fleming Companies[3]	AP Services	583.47	1.80	26.40	28.20	1.07	4.83
Fleming Companies	Blackstone	583.47	3.40	3.13	6.53	2.09	1.12
Dura Corporation	Alix Partners, LLP	572.46	2.10	27.65	29.75	1.08	5.20
Flag Telecom Holdings	Blackstone	474.95	9.00	1.33	10.33	7.77	2.17
AMF Bowling *	Blackstone	433.84	7.00	1.49	8.49	5.70	1.96
Covad Communications *	Houlihan	294.40	11.81	0.73	12.54	17.18	4.26
NII Holdings *	Houlihan	182.23	6.00	0.85	6.85	8.06	3.76

Summary of Comparable Chapter 11 Bankruptcies:

High		$5,616.35	$20.50	$107.00	$119.50	17.18	5.20
Low		182.23	1.80	0.73	3.82	1.07	0.19
Average		2,062.91	7.44	14.60	22.04	**5.14**	**2.19**

Footnotes:

1) The liquidation value of assets is exclusive of payments to secured creditors and administrative expenses. Additionally, whenever possible, (a) the midpoint value has been used where both a "low" and "high" liquidation value are provided and (b) non-debtor affiliate assets are not included in the liquidation value of assets.

2) In Global Crossing, Blackstone agreed to cap its total compensation at $25 million.

3) The success fees awarded in the bankruptcy of the Fleming Companies represent the compensation earned by the interim management and the financial advisors hired for the bankruptcy process. AP Services was hired as Crisis Managers, while Blackstone Group was hired as financial advisors.

*** The liquidation analysis relied upon only included one valuation, not a "low" and a "high" valuation.**

Application of the Average "Total Fees as Multiple of Regular Fees" to the Refco Trustee's Commission Application

Trustee's Hours Billed	4689.60
Hourly Rate	$1,000.00

Application of the Average of "Total Fees as Percentage of Liquidation Value" to the Refco Trustee's Commission Application

Total Distributions by the Refco Trustee	$943,600,000.00
Average	**2.19**%

Trustee's Regular Fees	$4,689,600.00
Multiplier	**5.14**
Trustee's Total Commission After Application of Multiplier	**$24,104,544.00**

Trustee's Total Commission After Application of Average	**$20,664,840.00**

260. Applying (i) the average multiplier derived from total fees awarded to financial advisors (5.14) to (ii) the recommended hourly rate for the Trustee in the Patchan Report ($1,000) and (iii) the number of hours actually recorded by the Trustee in rendering services to the Chapter 7 Debtor and estimated to be devoted to case closing (4,439.6 hours, actual, and 250 hours estimated, aggregating 4,689.6 hours, exclusive of additional time prosecuting and defending this compensation application),[35] the Trustee believes that he would be entitled to reasonable compensation in the amount of $24,104,544 in the event a multiplier derived from the financial advisory context was utilized.

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35 The Trustee has recorded 4,440.8 hours of time in connection with the Chapter 7 Debtor's case through September, 2009. The Trustee also estimates that he will expend approximately 250 hours in closing the case, and 350 hours prosecuting and defending this commission application. That brings the Trustee's total hours devoted to the Chapter 7 Debtor's case to 5,040.8 (both already recorded and projected). With the exception of the duplicative entry of 1.2 hours on October 31, 2008 noted by the Experts in the Patchan Report (Exhibit D, p. 2), the Trustee does not believe that the adjustments to his time entries noted in the Patchan Report are warranted. Including the duplicative entry of 1.2 hours, the entries identified by the Experts aggregate 143.3 hours and include: (a) 87.4 hours of time spent working with the Experts themselves to provide background information about the Chapter 7 Debtor's case; (b) 36.2 hours devoted by the Trustee in preparing a special powerpoint presentation about his administration of the Chapter 7 Debtor's case utilized in discussions about an appropriate statutory commission with various third parties, including the United States Trustee; and (c) 19.7 hours in either working meals or local travel time (e.g., from the Trustee's office in New York City to the Bankruptcy Court to attend a hearing). With regard to these latter three categories of time identified by the Experts, the Trustee submits that he is entitled to be compensated for same as he was at all times expending time directly related to the Chapter 7 Debtor's case and his performance as Trustee. In sum, it is the Trustee's contention that this Court should consider an aggregate of 5,039.6 hours that the Trustee either has devoted (4,439.6 hours) or anticipates devoting (600 hours) in connection with the Chapter 7 Debtor's case. Applying the 5.14 multiplier to 5,039.6 hours, instead of 4,689.6 hours, would produce a total fee of $25,903,544.

261. Alternatively, if the Court were to use the average percentage that the total fees earned by financial advisors bear to the liquidation value of the assets of the Chapter 11 debtors in the survey (2.19%), then the Trustee would be entitled to reasonable compensation in the amount of $20,664,840 – based on actual cash disbursements in the amount of approximately $943.6 million made by the Trustee on account of allowed claims against the Chapter 7 Debtor and expenses incurred and paid to third parties in connection with the administration of the estate, exclusive of customer and related property transferred to Man on the first day of the case.

262. Thus, in reaching the amount to be sought in this Application, the Trustee went at the analysis in several ways. If he were limited to the lodestar approach under the prior, pre-BABCPA amendments, the Experts' rates and 3.5 multiplier applied to all of the Trustee's recorded time, including the estimate of the time to be spent concluding the administration of the LLC estate, supports an allowance of $16,411,500. Here, the Trustee was more of a businessman than an attorney. If a finance rather than law lodestar approach were followed, $24,104,544 is appropriate under the facts presented here based upon a multiplier of 5.14.

263. If the Court looks to what financial consultants received on a percentage basis, in line with what the current law requires under the BAPCPA amendments, an intermediate result is obtained. Based upon the average percentage compensation (2.19%) paid to financial consultants, an award of $20,664,840 would be allowed under the facts presented here.

264. The Trustee respectfully suggests, however, that the Court need go no further than applying the percentage amount allowed under Section 326 of the Bankruptcy Code and the computation on that basis, on only the $943.6 million disbursed by the Trustee after the closing of the Sale to Man, results in a commission amount more than the

$28 million sought in this Application. A $28 million commission is also supported by the conclusion reached in the Patchan Report, pages 38, 53, 60, 64.

VII. EXPERTS' REPORT AND RECOMMENDATION (PATCHAN REPORT)

265. There was an abundance of precedent to guide trustees and courts in how to calculate a trustee's compensation under the pre-BAPCPA prior law but there is precious little precedent beyond the clear meaning of the statute under the current law, especially for cases of this size, complexity and importance.

266. Just as novel approaches were taken to so many challenges in this case, the Trustee has done something unprecedented to help the parties evaluate this Application. The Trustee has, at his own expense, retained the most qualified, independent experts possible. This is in stark contrast to what the trustees of two of the larger cases under the prior law did; they had law professors review their compensation applications. [36]

267. The Trustee requested that Jerry Patchan, a former Bankruptcy Judge and national Director of the United States Trustee Program who served as the Chairman of the Fee Committee in the Enron cases, review the Trustee's work to determine an appropriate compensation allowance. He has not only supervised United States Trustees and panel trustees nationwide but is truly expert in trustee compensation and in compensation of bankruptcy professionals generally. He is an individual of the highest integrity, professionalism, competence, and independence.

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36 Professor Kevin Clermont of Cornell University in *Bennett Funding*; Professor Geoffrey Hazard of University of Pennsylvania in *Merry-Go-Round.*

268. His right-hand man in the Enron case was John Silas Hopkins, III, a bankruptcy litigation and business lawyer and *Magna Cum Laude* graduate from Harvard Law School. Mr. Hopkins served as the Chief Applications Analyst for the Enron Fee Committee that was appointed at the Court's behest. Messrs. Patchan and Hopkins are hereafter jointly referred to as the "Experts."

269. It is important to note the basis upon which the Experts insisted they work: "We accepted the assignment only on the understanding that the conclusions in the [Patchan] Report would[:]

- represent our independent opinions, whether favorable or unfavorable to the Trustee;
- that the Report would be entirely our work product;
- that, to assure our independence, our compensation would be on a strict hourly basis in no way contingent on whether our opinions were favorable or unfavorable or on the outcome of the Trustee's request for compensation;
- and that our compensation would be paid by the Trustee, not by the estate."

Patchan Report, pp. 2-3.

270. The Trustee confirms that <u>all</u> of the Experts' conditions were strictly obeyed and that after an initial presentation to them before they began their investigation, the Trustee had no input to the Patchan Report except to correct certain factual information after the draft of the report had been completed. The Trustee did not speak to either Expert while they were forming their opinion of the appropriate level of compensation to recommend, nor did the Trustee do anything to influence, their conclusion. The Trustee did not advocate any result. The conclusion reached is the Experts' alone.

271. Their work took six months and has been thoughtful and thorough. Their report is separately filed and is incorporated by reference herein. The Experts make the finding that compensation of up to $28 million would be reasonable in this case.

272. The Experts reviewed the Trustee's time records and they are available upon request; they have not been filed due to their voluminous nature. But it is respectfully submitted that time records are an inadequate measure of appropriate compensation in this case and are merely illustrative. The best way to compute the Trustee's real value is not based on the time spent but on the results achieved.

273. The Patchan Report speaks for itself but one part is worth repeating:

> … in this case the Trustee had a multitude of notable achievements, any one of which would warrant a performance enhancement. Together they illustrate the ingenuity and versatility of a highly skilled trustee operating in a challenging case in which the rewards for the creditors were great and the risks to the Trustee were substantial.

Patchan Report at p. 52.

274. The Trustee is seeking an amount the Experts recommend be allowed. The amount sought herein is below the maximum compensation allowable. The amount sought is fair and appropriate. In the context of this estate, it is a modest amount. On a percentage basis, it is in line with what has been awarded in other large cases.

CONCLUSION

275. The Trustee alone bears heavy responsibilities and mind-numbing risks not adequately measured by time spent or hard and fast hourly rates. For that reason, in the BAPCPA amendments, Congress made clear that trustees are to be paid on a commission basis without regard to hours spent; it is indeed a contingency fee. In passing the amendment to Section 330, Congress was undoubtedly aware that several courts were

applying the lodestar test (still valid for those who bill solely by the hour and without risk) to assess trustee commission applications, and that applying the lodestar test was not consistent with Congressional intent. With the new statutory language, Congress has made it indisputable that Chapter 7 trustees are to be paid commissions based on disbursements calculated in accordance with the formula set forth in Section 326.

276. A trustee is an estate's board of directors and its chairman. He is the leader of a team of professionals. He is also the estate's CEO. No hourly rate can measure what a trustee has to do, as Congress has now made clear. An hourly rate cannot take into account the constant pressures on a trustee from myriad sources.

277. Moreover, a trustee takes on substantial risk. If a trustee errs in judgment, not only does the trustee get little, if any, monetary award, but he or she is subjected to serious and severe criticism and reprobation from creditors, courts and the United States Trustee. The trustee may even face significant personal liability, especially in cases such as that involving LLC.

278. In this Chapter 7 case, the Trustee confronted complex and unprecedented issues, engaged in significant legal actions, defenses, settlement initiatives and related activities, and paid direct creditors of LLC in full. This performance amply justifies the commission sought.

279. No agreement or understanding exists between me and any other person for the sharing of compensation to be received for services rendered in connection with this case.

WHEREFORE, the Trustee respectfully requests that this Court grant (i) the relief requested by this Application by awarding him a statutory commission in the amount of $28 million for services rendered and to be rendered as the Chapter 7 trustee for the estate of LLC, and (ii) such other and further relief as is just and proper.

DATED: New York, New York
November 20, 2009

Respectfully submitted,

/s/ Albert Togut
ALBERT TOGUT, as
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