

FOX ROTHSCHILD LLP
Yann Geron
Kathleen M. Aiello
100 Park Avenue, 15th Floor
New York, New York 10017
(212) 878-7900

Attorneys for Yann Geron, Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re :
: Chapter 7
THELEN LLP, :
: Case No. 09-15631 (ALG)
: Debtor. :
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**TRUSTEE’S APPLICATION, PURSUANT TO FED. R. BANKR. P. 9019,
FOR APPROVAL OF A STIPULATION RESOLVING CLAIMS ARISING BETWEEN
DEBTOR AND STATE STREET BANK AND TRUST COMPANY PURSUANT TO A
SETTLEMENT AGREEMENT DATED MAY 7, 2010**

TO THE HONORABLE ALLAN L. GROPPER,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

Yann Geron, Chapter 7 Trustee (the “Trustee”) of the estate of Thelen LLP, the above-captioned debtor (the “Debtor” or “Thelen”), as and for his application (the “Application”) for an order, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), approving a certain stipulation of settlement, stipulation of discontinuance with prejudice and mutual release, dated May 7, 2010, respectively, in full and final satisfaction of all claims by and between the Trustee and State Street Bank and Trust Company (“State Street”) (parties to the Stipulation are collectively referred to herein as the “Parties”), and additional claims asserted by other third and fourth party defendants against Thelen, upon information and belief, respectfully sets forth and represents:

JURISDICTION

1. This Court has jurisdiction over this Application and the above-captioned adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. Venue of the Adversary Proceeding and this Application is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicate for the relief sought herein is Rule 9019 of the Bankruptcy Rules.

SUMMARY OF RELIEF REQUESTED

4. By this Application, as further detailed below, the Trustee seeks approval of a Stipulation of Settlement, Stipulation of Discontinuance with Prejudice and Mutual Release (collectively, the “Stipulation”), (copies of which are annexed hereto as Exhibit A)¹ under which the Debtor’s insurance carrier, MPC Insurance (“MPC”), will pay to State Street the sum of \$900,000² in full and final satisfaction of State Street’s claims against Thelen as third-party defendant. The Stipulation further details that the Trustee, in his capacity as representative of the Debtor’s estate, on the one hand, and State Street, on the other hand, shall mutually release and discharge each other from certain limited claims specifically related to the underlying New York State Supreme Court litigation.

5. In conjunction with the Stipulation, the Trustee seeks approval of a settlement and release among State Street, Thelen and the additional third-party and fourth-party defendants in this action, each of whom filed claims against Thelen in 2008 in the underlying

¹ The Mutual Release and Stipulation of Discontinuance are being held in escrow and, thus, are not effective at this time per the terms of the Settlement Agreement.

litigation: Salomon Smith Barney Inc. (“SSB”), UBS Warburg LLC (“UBS”), and Skadden, Arps, Slate, Meagher & Flom LLP (“Skadden”) (the “Global Settlement”). Upon approval of the Global Settlement, whose terms are specifically limited to the transactions underlying the subject State Court litigation, all pending claims in that litigation by each of these parties will be discharged against Thelen.

6. As further detailed below, approval of the Stipulation is warranted as falling well within the range of reasonableness. The Stipulation provides for payment from the Debtor’s insurance funds, which are non-estate assets. This is a reasonable resolution of almost ten years of ongoing litigation between the Parties and releases the Debtor from any pending claims.

7. The Trustee has received extensive information relating to the underlying litigation and proposed settlement from Allen & Overy, Thelen’s pre-petition counsel in the underlying state court action. Based on such information, the Trustee has concluded that despite Thelen’s viable defenses against the claims raised by State Street and the third and fourth parties, the proposed settlements take into account the future costs of litigation and limit the potential exposure to damages arising from multiple pending claims, and the fact that MPC will be paying the settlement amount.

BACKGROUND

8. On September 18, 2009 (the “Petition Date”), the Debtor filed with the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”), a voluntary petition for relief under chapter 7 of Title 11 of the United States Code (the “Bankruptcy Code”).

² State Street will also be receiving settlement monies from the other third-party defendants in the Third-Party Action (together with the Settlement Funds, the “Global Settlement Funds”).

9. Yann Geron was subsequently appointed as interim chapter 7 trustee of the Debtor's estate. Mr. Geron has since qualified and is currently serving as permanent Trustee herein.

10. Prior to the Petition Date, the Debtor was a limited liability partnership, operating as an international law firm with approximately 600 attorneys. In October 2008, the Debtor formally voted to dissolve the partnership. Thereafter the Debtor began its wind-down process. Upon information and belief, while in the wind-down stage, the Debtor's largest lender ceased wind-down financing, and the Debtor filed the instant bankruptcy proceeding.

11. The Debtor is a third-party defendant in a New York State Supreme Court action commenced by AG Capital Funding Partners, L.P. ("A.G. Capital") against State Street. The claims in the underlying litigation derive from claims by holders of debt issued by Loewen Group International, Inc. and Loewen Group Inc. ("Loewen") against State Street. Pursuant to indenture agreements entered into between Loewen and State Street, State Street served as the indenture trustee with respect to the following securities at issue: (i) the Pass-Through Asset Trust Certificates issued on September 25, 1997, with a closing date of September 30, 1997, in the original principal amount of \$300 million (collectively, the "PATS"); and (ii) the Series 6 and Series 7 Senior Notes issued on May 21, 1998, with a closing date of May 28, 1998, in the original principal amount of \$450 million (collectively, the "Series 6 and 7 Notes").

12. Thelen served as counsel to Loewen with respect to both the PATS and the Series 6 and 7 Notes transactions. Skadden served as counsel to UBS, the underwriter for the PATS transaction, and hosted and ran the closing of the PATS transaction. Davis Polk & Wardwell served as counsel to SSB, the underwriter for the Series 6 and 7 Notes transaction, and hosted and ran the closing of the Series 6 and 7 Notes transaction. On each of the closing dates,

Thelen furnished opinion letters addressed to the respective underwriters in connection with the closing of these transactions.

13. On June 1, 1999, Loewen filed for bankruptcy protection. Thereafter, in May 2002, the holders of the Loewen debt securities (“Plaintiffs”), filed an Amended Complaint naming State Street as defendant (the “Main Action”). Plaintiffs in the Main Action alleged that State Street, as indenture trustee, failed to deliver certain statements called Additional Secured Indebtedness Registration Statements (“ASIRS”) to Bankers Trust Company, the collateral trustee for the debt (the “Collateral Trustee”). According to Plaintiffs, delivery of the ASIRS to the Collateral Trustee was necessary to protect their security interests in the Loewen bonds, and because the ASIRS were not delivered, the “uncertain” status of Plaintiffs’ security interests resulted in “tens of millions of dollars of damage.” Plaintiffs, who were not in contractual privity with Thelen, have never asserted a claim against Thelen.

a. **Procedural History of the Third-Party Action**

14. In response to Plaintiff’s claims against State Street, State Street commenced a third-party action against Thelen, SSB, and UBS claiming that the duty to deliver the ASIRS was assumed by UBS and SSB, or by Thelen. State Street’s Amended Third-Party Complaint, dated January 10, 2003, sets forth causes of action against Thelen for negligence, unjust enrichment, negligent misrepresentation, attorney malpractice, indemnity and contribution.³

15. Thelen moved to dismiss State Street’s claims. On September 16, 2003, the New York Supreme Court granted in part and denied in part Thelen’s motion, allowing the negligence and contribution claims to proceed and dismissing State Street’s claims of unjust enrichment, negligent misrepresentation, attorney malpractice and indemnity. On appeal, the

First Department affirmed the Supreme Court's decision and further dismissed State Street's remaining claims against Thelen for negligence and contribution. On November 17, 2005, the Court of Appeals reinstated the negligence and contribution claims, and affirmed the dismissal of all other claims against Thelen.

16. After the 2005 decision by the Court of Appeals, the Main Action proceeded. On May 17, 2007, the First Department dismissed all of Plaintiffs' claims against State Street. On June 15, 2008, however, the Court of Appeals reinstated Plaintiffs' cause of action for negligence against State Street.

17. On October 29, 2008, Skadden filed a complaint against Thelen, later converted to a cross-claim, asserting claims for negligence, common law indemnification and contribution. On November 26, 2008, UBS and SSB each asserted cross-claims against Thelen for common law indemnity and contribution. In total, four parties asserted claims against Thelen related to the PATS and the Series 6 and 7 Notes transactions.

18. The June 2008 decision revived State Street's Amended Third-Party Complaint against Thelen, SSB and UBS. On November 26, 2008, Thelen filed a motion for summary judgment seeking dismissal of State Street's remaining negligence and contribution claims against Thelen. By Order dated June 2, 2009, State Supreme Court Justice Barbara Kapnick denied Thelen's motion for summary judgment keeping alive not only State Street's claims, but also those of Skadden, SSB and UBS. Justice Kapnick also severed and stayed the third-party and fourth-party actions pending resolution of the Main Action.

³ UBS subsequently brought a fourth-party action against Skadden.

THE CURRENT APPLICATION

a. Applicable Legal Standard

17. Bankruptcy Rule 9019 provides that “[o]n a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). In ruling on a motion pursuant to Bankruptcy Rule 9019(a), the court must find that the proposed settlement is fair and equitable and is in the best interests of the estate. Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968). Fischer v. Pereira (In re 47-49 Charles Street, Inc.), 209 B.R. 618, 620 (S.D.N.Y. 1997); In re Ionosphere Clubs, Inc., 156 B.R. 414 (S.D.N.Y. 1993), *aff’d* 17 F.3d 600 (2d Cir. 1994); In re Fugazy, 150 B.R. 103 (Bankr. S.D.N.Y. 1993).

18. In order to reach such a decision, the Court must be apprised “of all facts necessary for an intelligent and objective opinion” of whether the claim will be successful, the likely expense, length and the degree of complexity of the litigation, the potential difficulties of collecting on a judgment “and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.” TMT Trailer Ferry, 390 U.S. at 424-425.

19. To constitute a fair and equitable compromise or settlement, the Court must find that the settlement does not “fall below the lowest point in the range of reasonableness.” Cosoff v. Rodman (In re W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir. 1983)(quoting Newman v. Stein, 464 F.2d 689, 693 (2d Cir.) *cert. denied*, 409 U.S. 1039, 93 S. Ct. 521 (1972)), *cert. denied*, 464 U.S. 822, 104 S. Ct. 89 (1983); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 758-59 (Bankr. S.D.N.Y. 1992); In re International Distribution Centers, Inc., 103 B.R. 420, 423 (Bankr. S.D.N.Y. 1989).

20. The Court should also consider the fair and reasonable course of action for the Debtor's estate, with the limited available assets, giving consideration to the interests of creditors and the avoidance of burdening the estate with undue waste or needless or fruitless litigation. In re Del Grosso, 106 B.R. 165, 167-168 (Bankr. N.D. Ill. 1989) (citation omitted). See also In re Culmtech, Ltd., 118 B.R. 237, 238 (Bankr. M.D. Pa. 1990); In re Lawrence & Erausquin, Inc., 124 B.R. 37, 38 (Bankr. N.D. Ohio 1990); In re Bell & Beckwith, 93 B.R. 569, 574-75 (Bankr. N.D. Ohio 1988).

21. The Court is not required to conclusively determine the merits of a claim subject to compromise or to find that a proposed settlement constitutes the best results obtainable to ensure that the settlement reaches the threshold of reasonableness. Instead, the Court should "canvass the issues" to determine whether the proposed settlement is fair and equitable, is in the best interests of the estate and otherwise does not fall outside the range of reasonableness. In re Apex Oil Co., 92 B.R. 847, 866-67 (Bankr. E.D. Mo. 1988).

b. Salient Terms of the Stipulation

22. Under the proposed Stipulation, the Debtor's insurer, MPC will pay to State Street the sum of \$900,000 (the "Settlement Amount") in full and final resolution of all claims between State Street and Thelen, subject to this Court's approval and to the Global Settlement of all third-party and fourth-party claims.⁴ This amount is currently being held in escrow by Allen & Overy.

23. Upon payment of \$900,000 to State Street and execution of the Global Settlement and release, all pending claims asserted against Thelen by State Street, UBS, SSB and Skadden, as related to the Loewen Securities at issue, would be fully and finally discharged.

⁴ The Global Settlement and release contemplates that each party – State Street, Thelen, UBS, SSB and Skadden – would release all pending claims in the third-party and fourth-party actions.

c. Approval of the Stipulation is Warranted

24. The Trustee submits that the Stipulation is reasonable based on all the facts and circumstances of the case, and minimizes the risks of further prosecution of State Street and other third-party and fourth-party claims against the Debtor's estate.

25. The Stipulation calls for payment of the Settlement Amount by the Debtor's insurance provider, which would ensure that estate assets are preserved for the benefit of its creditors.

26. The Trustee's signature onto the settlement on behalf of Thelen is required. Such approval will prevent further protracted litigation, which has already cost a significant amount of attorneys' fees to the Debtor and many other parties.

27. The proposed settlement also obviates the need for a motion to lift the stay to pursue the action against the Debtor's estate, and properly resolves the role of Allen & Overy as Thelen's pre-petition counsel in this matter.

28. For all the foregoing reasons, the Trustee believes the Stipulation and the amount proposed under the Stipulation to be paid by the Debtor's insurer to State Street in exchange for full release and settlement of its claims, is fair, equitable, in the best interests of the Debtors' estates and its creditors and well within the range of reasonableness. Accordingly, the Trustee hereby seeks approval of the Stipulation, the Stipulation of Discontinuance with Prejudice and the Mutual Release.

NOTICE AND PROCEDURE

29. Contemporaneously with the filing of the Application, Trustee filed with the Court and served by first class mail a notice of the relief requested in this Application upon counsel to State Street, SSB, UBS and Skadden and all creditors and parties in interest who are

entitled to notice pursuant to Bankruptcy Rule 2002, and all other parties as approved by the this Court's Order, dated February 24, 2010, [DE #88], authorizing the Trustee to limit notice in this case. The Trustee respectfully submits that notice of this Application has complied with Bankruptcy Rule 2002 and is otherwise reasonable and appropriate, and that no other or further notice of the relief requested herein is warranted or required.

NO PRIOR RELIEF

30. No previous application for the relief sought herein has been made to this or any other court.

WHEREFORE, the Trustee respectfully requests that this Court enter an order: (i) approving the Stipulation substantially in conformity with the proposed form of Order annexed hereto as Exhibit B; and (ii) granting the Trustee such other and further relief as is just.

Dated: New York, New York
May 11, 2010

FOX ROTHSCHILD LLP
Counsel to the Chapter 7 Trustee

By: s/ Yann Geron

Yann Geron
Kathleen Aiello
100 Park Avenue, Suite 1500
New York, New York 10017
T: (212) 878-7900
F: (212) 692-0940