

Timothy T. Brock
Abigail Snow

Hearing Date: October 25, 2016
Hearing Time: 12:00 noon
Objection Date: October 17, 2016
Objection Time: 4:00 p.m.

SATTERLEE STEPHENS LLP
Counsel for the Recognized Foreign Representatives
230 Park Avenue, Suite 1130
New York, New York 10169
(212) 818-9200

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	:
	:
	: Chapter 15
TRADE AND COMMERCE BANK (IN LIQUIDATION)	:
	:
	: Case No. 05-60279
	:
Debtor,	:
	:
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**MOTION OF THE RECOGNIZED FOREIGN REPRESENTATIVES FOR ORDERS:
(1) PURSUANT TO 11 U.S.C. §§ 105 AND 363 AND FEDERAL RULE OF
BANKRUPTCY PROCEDURE 6004, AUTHORIZING AND APPROVING THE SALE
OF THE KESTEN CLAIM FREE AND CLEAR OF ALL LIENS, CLAIMS,
ENCUMBRANCES AND OTHER INTERESTS; (2) PURSUANT TO 11 U.S.C. §§
1521(b) & 1522 MODIFYING THE FEBRUARY 16, 2006 AMENDED RECOGNITION
ORDER TO ENTRUST THE RECOGNIZED FOREIGN REPRESENTATIVES
WITH THE DISTRIBUTION OF ALL OF THE DEBTOR’S U.S. PROPERTY; AND (3)
PURSUANT TO 11 U.S.C. §§ 1517(d) AND 350, CLOSING THE CHAPTER 15 CASE**

TO THE HONORABLE STUART M. BERNSTEIN
UNITED STATES BANKRUPTCY JUDGE:

Tammy Fu and Eleanor Fisher¹, in their capacity as the duly authorized Joint
Official Liquidators and recognized foreign representatives (together with their predecessors, the
“JOLs”) of Trade & Commerce Bank (in Liquidation) (“TCB” or “Debtor”), a company
registered under the laws of the Cayman Islands that is the subject of insolvency proceedings
(the “Liquidation” or “Foreign Proceeding”) pending before the Grand Court of the Cayman

¹ Eleanor Fisher and Tammy Fu, both of Zolfo Cooper (Cayman) Ltd., replaced the original JOLs and
recognized Foreign Representatives, Richard Fogerty and G. James Cleaver, also both of Zolfo Cooper, through an
Order entered by the Grand Court of the Cayman Islands on May 16, 2012.

Islands (the “**Cayman Court**”), and as recognized by this Bankruptcy Court (the “**Court**”) in the above-captioned Chapter 15 case (the “**Chapter 15 Case**”) as the Foreign Debtor’s foreign representatives pursuant to section 1517 of Title 11 of the United States Code (the “**Bankruptcy Code**”), by their lead United States counsel Satterlee Stephens LLP (“**Satterlee**”), respectfully submit this combined Motion (the “**Motion**”) requesting that the Court: (i) enter an Order substantially in the form attached hereto as **Exhibit A-1 (“Proposed Sale Order”)** authorizing and approving their sale of the “Kesten Claim” (the “**Sale**”) to TCB Asset Recovery, LTD, LLC (the “**Buyer**”) according to the terms set forth in the “Purchase and Sale Agreement” attached hereto as **Exhibit B (“Purchase and Sale Agreement”)** free and clear of liens, claims, encumbrances and other interests pursuant to Sections 105 and 363 of the Bankruptcy Code and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”); (ii) enter an Order substantially in the form attached hereto as **Exhibit A-2 (“Proposed Authorization Order”)** modifying the February 16, 2006 Amended Order of Recognition (the “**Recognition Order**”) to entrust them with the distribution of TCB’s U.S. assets, including the proceeds from the Sale, through the Liquidation pursuant to sections 1521(b) and 1522 of the Bankruptcy Code; and, (iii) following the closing on the Purchase and Sale Agreement, enter an Order substantially in the form attached hereto as **Exhibit A-3 (“Proposed Closing Order”)** and, collectively with the Proposed Sale Order and the Proposed Authorization Order, the “**Proposed Orders**”) closing the Chapter 15 Case pursuant to Local Rule of Bankruptcy Practice and Procedure for the Southern District of New York (“**Local Rule**”) 5009-2, Bankruptcy Rule 5009(c) and Sections 1517(d) and 350 of the Bankruptcy Code. In support of the Motion, the JOLs respectfully state as follows:

PRELIMINARY STATEMENT

This Chapter 15 Case was filed nearly eleven years ago to assist the JOLs in conducting the Liquidation of TCB, a bank organized and regulated under the laws of the Cayman Islands. The Chapter 15 Case was thus primarily intended to assist the JOLs in identifying, investigating, and pursuing TCB's U.S. claims and causes of action through this Court and, pursuant to section 1509, other courts within the United States.

Since then, the JOLs have administered the estate generally and, in that connection, pursued certain claims and prosecuted certain litigation, both in the United States and abroad. Despite diligence on the part of the JOLs and their various legal counsel, unfortunately there will not be any recovery to unsecured creditors in the Liquidation. The estate is now administratively insolvent, and has no additional avenues of recovery available outside of the open litigation in the United States that is the subject of this Motion (the "**Kesten Claim**"). However, because the estate is insolvent, even if that litigation were one-hundred percent successful at some unknown future date – predicting when that litigation will conclude is essentially impossible because it remains stayed, as it has been since March 2015 – the unsecured creditors would receive, at most, one cent on the dollar of their claims.

Thus, everything that the JOLs could have done on behalf of the TCB estate has been completed, barring the Sale, and the JOLs have determined that the Liquidation should be closed as cost-effectively and expeditiously as possible.

The Kesten Claim is therefore slated to be sold promptly rather than pursued with no conclusion in sight and with no real upside to the estate (even with a totally successful outcome eventually), and with the near certainty that continuing to finance the costs of litigation would drive the estate further into administrative insolvency. The JOLs wish to remit the

proceeds from this planned sale to the Cayman Islands for disposition through the Liquidation. Therefore, the JOLs respectfully request that this Court: (i) authorize the JOLs to proceed with the Sale to the Buyer and to approve of the terms set forth in their Purchase and Sale Agreement; (ii) modify its Recognition Order granting section 1521 relief in order to entrust the JOLs with the administration and distribution of TCB's U.S. assets, *i.e.*, the proceeds of the Sale of the Kesten Claim, through the Liquidation; and, (iii) close this Chapter 15 Case following the closing on the Sale.

In this manner, as attested to by Joint Official Liquidator Tammy Fu in paragraph 13 of her *Declaration* filed in support of the present Motion and attached hereto as **Exhibit C** (the "**Fu Declaration**"), the JOLs are respectfully following the terms of the Court's July 20, 2016 Order [Docket No. 23], in which the Court denied without prejudice the JOL's *Motion for an Order Pursuant to 11 U.S.C. §§ 1521(b) & 1522 Modifying the February 16, 2006 Amended Recognition Order to Entrust the Recognized Foreign Representatives with the Distribution of All of the Debtor's U.S. Property* (the "**Authorization Motion**") [Docket No. 21], stating that "If the foreign representatives intend to sell their claim, they must comply with 11 U.S.C. § 363. *See* 11 U.S.C. § 1520(a)(2). They can join that motion with a motion to entrust under 11 U.S.C. 1521(b) and a motion to close the foreign proceeding." The JOLs therefore incorporate by reference their prior Authorization Motion into this Motion, as if fully set forth.

The JOLs' requests for these forms of relief are not expected to be controversial and no objections are expected. No objections were interposed to their *Final Report* (the "**Final Report**"), which the JOLs have also incorporated by reference into the Fu Declaration and this Motion, as if fully set forth, or the Authorization Motion, both of which were filed on June 14, 2016 as a combined filing [Docket No. 21]; *see also* paragraph 7 of the Fu Declaration. On July

19, 2016, the presumption that this Chapter 15 Case has been “fully administered,” pursuant to Bankruptcy Rule 5009(c), arose (but the presumption remains subject to this Court’s July 20, 2016 order). Moreover, the facts set forth at length by the JOLs in their Final Report amply demonstrate that their purposes in commencing this Chapter 15 Case have been fulfilled, pursuant to Local Rule 5009-2.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference M-431 dated January 31, 2012 (Preska, C.J., S.D.N.Y.). This matter is a core proceeding pursuant to 28 U.S.C. §157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1409 and 1410.

BACKGROUND

2. For the early background of TCB and the Liquidation through December 21, 2005 (the “**Petition Date**”), please review paragraphs 3 through 26 of the JOLs’ *Verified Petition* [Docket No. 1] as well as the *Affirmation of Alistair J. Walters* supporting same [Docket No. 2]; *see also* paragraph 2 of the Final Report; paragraph 13 of the Fu Declaration.

3. The JOLs have issued a series of reports to TCB’s creditors (the “**Reports**”) detailing their efforts to investigate TCB’s affairs, verify its assets and liabilities, and to recover funds owed to TCB from third parties. All of these Reports are publicly accessible on the website established by the JOLs and maintained by them on behalf of TCB at <http://www.tcbliquidation.ky> ; *see also* paragraph 3 of the Final Report; paragraph 14 of the Fu Declaration.

4. For the relevant details of the Debtor's main Chapter 15 Case since the Petition Date, *see* paragraphs 4 through 10 of the Final Report; *see also* paragraph 15 of the Fu Declaration.

The Kesten Claim

5. For the relevant details of the JOLs' efforts on behalf of the estate of TCB to pursue the Kesten Claim *see* paragraphs 11 through 21 of the Final Report; *see also* paragraph 16 of the Fu Declaration. These efforts have included the JOLs' attaining a Default Judgment against Kesten through the Kesten Adversary proceeding filed in this Court as well as the subsequent years of litigation in both the District Courts of the Southern District of New York and the District of Columbia (the "**DC Litigation**") with the U.S. Department of Justice ("**DOJ**"), the government of Brazil, as well as another, more recent claimant to the Funds.

6. Earlier in the Chapter 15 Case, this Court acquired some limited familiarity with the Kesten Claim. First, attorneys from both the Satterlee firm and RCT (as defined below), the JOLs' special litigation counsel, reported to the Court – now years ago – about the Kesten Claim and other issues related to TCB during the Court's status conferences in this Chapter 15 Case. *See, e.g.*, paragraph 11 of the Final Report. Second, this Court presided over the Kesten Adversary proceeding that RCT filed and pursued on behalf of the JOLs and ultimately entered a Default Judgment against Kesten in their favor. *See* paragraphs 12 through 15 of the Final Report.

Further Pursuit of the Kesten Claim is Economically Futile

7. Since the Petition Date, the JOLs have, in the United States, pursued discovery from third-parties and initiated litigation over the Kesten Claim. They have also

pursued litigation abroad. The JOLs reasonably believed that the litigation (particularly the litigation pursued abroad) would eventually provide sufficient funds to the TCB estate to provide a material recovery to its unsecured creditors. *See* paragraph 17 of the Fu Declaration.

8. Certain of the litigation pursued by the JOLs, however, has been unsuccessful. Above all, any hope of the TCB estate receiving any meaningful recovery from the large Uruguay Claim has been recently foreclosed through the unfavorable resolution of appellate litigation. *See* paragraphs 22 and 23 of the Final Report; *see also* paragraph 18 of the Fu Declaration.

9. During the period when the Uruguay Claim was viable and actually litigated (through appeals, etc.), it also made sound economic sense for them to pursue the Kesten Claim. Now that any possibility for recovery from the Uruguay Claim has ended, however, continued pursuit of the Kesten Claim has become economically futile and is no longer commercially viable, with unsecured creditors of TCB receiving, at most, one cent on the dollar even if the JOLs were to secure the entirety of the Funds, after payment of accrued fees and expenses. *See* paragraphs 24 and 25 of the Final Report; *see also* paragraph 19 of the Fu Declaration.

The TCB Estate is Administratively Insolvent

10. The TCB estate is now administratively insolvent, with the remaining funds held by the JOLs being insufficient to pay all of the administrative expenses. As a result, the JOLs have suspended many activities on behalf of TCB, including the process of further adjudicating claims in the Liquidation. *See* paragraphs 28 and 29 of the Final Report; *see also* paragraph 20 of the Fu Declaration.

The JOLs Exercise their Business Judgment to Sell the Kesten Claim

11. The JOLs have now reached the point where everything they could have reasonably achieved on behalf of the TCB estate that would affect the estates' creditors favorably, both abroad and in the United States, has essentially been completed. As a result, the JOLs have determined, through exercising their fiduciary duty and business judgment, that the Liquidation should be closed as expeditiously as possible. *See* paragraph 21 of the Fu Declaration.

12. Disposal of the Kesten Claim remains the only piece of relatively unfinished business that has kept the JOLs from closing the Chapter 15 Case. *See* paragraph 27 of the Final Report; *see also* paragraph 22 of the Fu Declaration.

13. The JOLs therefore seek to avoid any continued expense, delay, and uncertainty, and have decided to sell the Kesten Claim. Assuming that this Court grants the present Motion, the closure of the Chapter 15 Case and the Liquidation itself would soon follow. *See* paragraph 23 of the Fu Declaration.

The JOLs Marketed the Kesten Claim

14. During 2015, the JOLs marketed the Kesten Claim. *See* paragraph 26 of the Final Report; *see also* paragraph 24 of the Fu Declaration.

15. The JOLs believed, and continue to believe, that, because the acquisition of the Kesten Claim would be of interest only to a very narrow and specific market, nothing of further benefit realistically could be expected from embarking on a wholesale bidding process in relation to it; indeed, such a process very likely could be detrimental to the value of the Kesten Claim (as it might dim prospects of making a recovery from the DC Litigation). *See* paragraph 25 of the Fu Declaration.

16. The JOLs accordingly undertook a deliberate, six-month-long marketing process to establish the best price reasonably available for the Kesten Claim having regard to all the circumstances. Given the very specific nature of the Kesten Claim as an asset, the JOLs took steps to approach a number of sophisticated investors known by the JOLs to be in the market to purchase such claims. *See* paragraph 26 of the Fu Declaration.

17. As a result of that marketing process, three expressions of interest were received from certain interested parties (the “**Interested Parties**”). *See* paragraph 27 of the Fu Declaration.

18. After signing non-disclosure terms with each of the Interested Parties and providing further due diligence, the JOLs received notification that one of them was not in a position to acquire the Kesten Claim and, further, that it had tried but failed to generate any interest in it from other potential investors. *See* paragraph 28 of the Fu Declaration.

19. The JOLs did, however, receive offers of \$120,000 and \$100,000 from the two other Interested Parties. *See* paragraph 29 of the Fu Declaration.

The JOLs Choose to Sell the Kesten Claim to Buyer, an Insider

20. At the same time they received the offers from the two Interested Parties, the JOLs received an offer from the Buyer to pay \$120,000 for the Kesten Claim. *See* paragraph 30 of the Fu Declaration.

21. The Buyer is an insider as it is an entity affiliated with Reid, Collins Tsai LLP (“**RCT**”), the JOLs’ special U.S. counsel who have pursued the Kesten Claim on their behalf under a contingency fee arrangement. *See* paragraph 31 of the Fu Declaration; *see also* Exhibit B at ¶ 4(d) (noting that the JOLs’ arrangement with RCT is one of four such contingency

fee arrangements that the JOLs have entered into with various legal professionals).

22. The JOLs, in further exercise of their business judgment, believe that the offer from the Buyer should be accepted as it is equal to the best offer otherwise received from the marketing process and has the advantages that it is both unconditional and does not require any assignment of, or continuing entanglements with, the JOLs' contingency fee contracts related to the Kesten Claim, which is expected to result in a cleaner, more-efficient and cost-effective assignment of the Kesten Claim. *See* paragraph 32 of the Fu Declaration.

The Sale has been Approved by the Cayman Court in the Liquidation

23. TCB has a Liquidation Committee (the "**Committee**") comprised of five of its creditors, namely: (i) Carlos Folle Martinez (represented by Dr. Juan J. Fraschini); (ii) Fondos Mutuos Banaleman (in liquidation) (represented by Elisabetta de Riveros); (iii) Mariano Alarcon (represented by Alberto Forti); (iv) Antonio Luquin (represented by Alberto Forti); and, (v) Victor Testoni (represented by Alberto Forti). *See* paragraph 33 of the Fu Declaration

24. On May 4, 2015, a written communication was transmitted to the Committee describing the JOLs' marketing of the Kesten Claim and their ultimate acceptance of the Buyer's bid. *See* paragraph 34 of the Fu Declaration.

25. The Committee did not respond to this communication and therefore no objection was raised in the Liquidation to the proposed sale of the Kesten Claim to the Buyer. *See* paragraph 35 of the Fu Declaration.

26. The Cayman Court, via an order dated 22 April 2016, a copy of which is attached hereto as **Exhibit D**, has recently given its approval of the JOLs' sale of the Kesten

Claim to the Buyer under the terms of the Purchase and Sale Agreement. *See* paragraph 36 of the Fu Declaration.

THE SECTION 363 SALE MOTION: RELIEF REQUESTED

27. The JOLs respectfully request that this Court authorize and approve the Sale of the Kesten Claim to the Buyer according to the terms of the Purchase and Sale Agreement free and clear of liens, claims, encumbrances and other interests pursuant to sections 105 and 363 of the Bankruptcy Code and Rule 6004 of the Bankruptcy Rules.

THE SECTION 363 SALE MOTION: BASIS FOR RELIEF REQUESTED

28. The JOLs respectfully submit that the Purchase and Sale Agreement is in the best interest of TCB, its estate and creditors, and should be approved pursuant to sections 363 and 1520 of the Bankruptcy Code.

29. The Recognition Order specifically made section 1520 applicable to the Chapter 15 Case (see Docket No. 10 at ¶ 10) and “Section 1520(a)(2) applies Section 363 to transfers of the debtor’s interests in property that is within the territorial jurisdiction of the United States as would be applied to property of the estate under Section 541.” In re Grand Prix Assocs., Inc., 2009 WL 1850966, at *3 (Bankr. D.N.J. June 26, 2009); *see also* In re Fairfield Sentry Ltd., 768 F.3d 239, 246 (2d Cir. 2014).

30. As intangible property of a foreign debtor with its center of main interests in the Cayman Islands, the Kesten Claim as such might not be “property in the United States.” The Kesten Claim has, however, been domesticated through the Default Judgment attained by the JOLs through the Kesten Adversary proceeding in this Court. Out of an abundance of

caution and in deference to the terms of the Court's July 20, 2016 Order, the JOLs are assuming that section 363 applies to the Sale while the Chapter 15 Case remains open.

31. The JOLs therefore also assume that Local Rule 6004-1(j) applies to the Chapter 15 Case and that the Motion is to comply with the Court's *Guidelines for the Conduct of Asset Sales* (the "**Sales Guidelines**") at (<http://www.nysb.uscourts.gov/sites/default/files/6004-1-j-Guidelines.pdf>).

32. Bankruptcy Code section 363(b)(1) provides: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." To approve a transaction other than in the ordinary course of business, the Court must find some articulated business justification. Courts interpreting section 363(b)(1) have held that such transactions should be approved when they are supported by evidence of sound business judgment. *See, e.g., In re Chateaugay Corp.*, 973 F.2d 141 (2d Cir. 1992); *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983).

33. A sale of a debtor's assets should be authorized pursuant to Bankruptcy Code section 363(b) if a good business reason exists for the sale. *See Lionel*, 722 F.2d at 1071; *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991).

34. Furthermore, a sale under section 363 must also satisfy the following requirements:

- (1) adequate and reasonable notice of the sale was provided to interested parties;
- (2) the sale has been proposed in good faith; and
- (3) the purchase price is fair and reasonable.

See Del. & Hudson Ry. Co., 124 B.R. at 176.

A. Approval of the Sale and the Purchase and Sale Agreement is Appropriate

35. The Sale to the Buyer reflects the exercise of the JOLs' sound business judgment and is a proper exercise of their fiduciary duties. A sound business purpose exists for consummating the Sale as set forth in the Purchase and Sale Agreement; namely, that the proceeds of the transaction represents the monetization of the value of the Kesten Claim for the benefit of the administratively insolvent TCB estate where further pursuit of the Kesten Claim by the JOLs would be economically futile. *See* paragraphs 17-20 of the Fu Declaration.

36. Given that the Kesten Claim is the only remaining asset and issue in the Chapter 15 Case and the Liquidation, consummating the Sale will also allow the JOLs to wind-down and close both the Chapter 15 Case and the Liquidation with a minimum of further delay and expense. *See* paragraphs 21-23 of the Fu Declaration.

37. The JOLs further submit that proper notice of the Sale was given because the proposed notice described in this Motion constitutes adequate, reasonable and proper notice of the Sale and the Purchase and Sale Agreements.

38. Moreover, the key terms of the Sale were negotiated at arm's length and in good faith. The marketing process undertaken by the JOLs was more than adequate, as it, despite the arcane nature of the asset and a limited market, resulted in two bids by non-insiders, the greater of which equals the offer made by the Buyer. *See* paragraphs 24-29 of the Fu Declaration.

39. The JOLs believe that, given both the limited interest in the type of asset comprised by the Kesten Claim, the bids received by them after undertaking their marketing of the Kesten Claim, and the known and unknown further costs and delay that would be incurred by their further prosecution of the Kesten Claim, the consideration that the TCB estate will receive

through the Sale is fair and reasonable. *See, e.g.*, paragraphs 30-32 of the Fu Declaration.

40. The Sale will both bring in some cash to an administratively insolvent estate and will allow the JOLs to close the Chapter 15 Case and the Liquidation at a minimum of further cost and delay. *See, e.g.*, paragraphs 21-23 of the Fu Declaration.

B. *Sales Guidelines'* Extraordinary Provisions Are Met: Private Sale to an Insider

41. As required by the *Sales Guidelines*, the JOLs believe that there exist substantial justifications for the Sale of the Kesten Claim to the Buyer, an insider, and that the measures taken by them have ensured the fairness of the sale process and the Sale itself.

42. Moreover, the JOLs believe, to the extent that the Sale is considered by the Court to be a private sale, because there is to be no auction conducted pursuant to this Motion through this Court, that there are substantial justifications for their doing so and that they have undertaken efforts that have maximized the consideration the estate will receive through the Sale.

43. The JOLs have undertaken a thorough marketing process in which they shopped the Kesten Claim to a number of sophisticated potential non-insider interested parties comprising the (limited) market for such litigation claims. They did so discreetly, so as to not compromise the ability of any potential buyer and assignee of the Kesten Claim from further prosecuting it, thereby preserving the asset's value. Once they had entered negotiations with the non-insider Interested Parties, the JOLs and these entities entered into non-disclosure agreements to further preserve the potential value of the Kesten Claim. *See, e.g.*, paragraphs 24-29 of the Fu Declaration.

44. Given the above-described nature of their marketing campaign, the JOLs believe that no purpose would be served by presiding over an auction through the present

Motion. If anything, the costs of presiding over such an auction in the United States, with the necessity of following the two-step motion process (first for the Court's approval of bidding procedures and then of the sale itself), would only add further costs to what is an administratively insolvent estate. The JOLs therefore believe that, to the extent that this Court considers the Sale a private sale that triggers the relevant Extraordinary Provision in the *Sales Guidelines*, they have shown the required substantial justification for it.

45. Moreover, given the targeted nature of that marketing campaign to non-insiders, as demonstrated by their receipt of two bids from the non-insider Interested Parties, the JOLs have shown that their eventual sale to the insider Buyer—who made a bid equal to that of the highest bid received by the JOLs from a non-insider Interested Party—demonstrates the good faith of all concerned as well as the conscientious efforts by the JOLs to ensure the fairness of their process of marketing and selling the Kesten Claim. The JOLs therefore believe that they have shown the required substantial justification for the Sale to an insider and have met the requirements of the relevant Extraordinary Provision in the *Sales Guidelines*.

46. Finally, the efforts undertaken by the JOLs and the fruit of those efforts, *i.e.*, the Sale and Purchase and Sale Agreement with the Buyer, has maximized the potential consideration to the estate from the sale of the Kesten Claim. The JOLs believe that the consideration from the Buyer, in their business judgment, is the highest or otherwise best offer available given that it is not only equal to the best offer they had received from a non-insider Interested Party in the marketing process, but has the advantage that it is both unconditional and does not require any assignment of the JOLs' contingency fee contract, which is expected to result in a more efficient and cost-effective assignment of the Kesten Claim. *See, e.g.*, paragraph 32 of the Fu Declaration.

C. The Sale Satisfies the Requirements of Section 363(f)

47. Upon information and belief, the JOLs submit that the Kesten Claim is not subject to any liens, claims, encumbrances or other interests. Moreover, under the terms of the Purchase and Sale Agreement, the Buyer would be taking the Kesten Claim “where is” and “as is”, outside of the specific warranties being made by the JOLs. *See* Exhibit B at ¶ 2.

48. Out of an abundance of caution, however, the JOLs seek to sell the Kesten Claim free and clear pursuant to section 363(f).

49. Under section 363(f), property of the estate (or, pursuant to section 1520(a)(2), property of a Chapter 15 debtor within the territorial jurisdiction of the United States) may be sold free and clear of any lien, claim or interest in such property if, among other things:

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

11 U.S.C. § 363(f). Because section 363(f) is drafted in the disjunctive, satisfaction of any one of its five requirements will suffice to approve the sale of the assets free and clear. *See, e.g.*, 11 U.S.C. § 363(f); *see also* In re Elliot, 94 B.R. 343, 345 (E.D. Pa. 1988); In re Dewey & LeBoeuf LLP, Civ. No. 12–12321, 2012 WL 5386276, at *5 (Bankr. S.D.N.Y. Nov. 1, 2012).

50. To reiterate, the JOLs do not believe any liens, security interests, claims, charges, options and interests thereon and there against (collectively, the “**Interests**”) exist in the

Kesten Claim. They submit that a sale of the Kesten Claim free and clear of all Interests is appropriate under the circumstances because, with regard to the holders of any unknown, and as-of-yet, unasserted Interests in the Kesten Claim which object to the Motion, the JOLs submit that one or more of the other subparagraphs of section 363(f) would apply and allow the JOLs to execute the Purchase and Sale Agreement and to consummate the Sale free and clear of such Interests. Any holder of an Interest in the Kesten Claim will be protected, as any such Interest will transfer and attach to the proceeds of the sale.

D. The Buyer is a Good Faith Purchaser

51. The JOLs, given the facts set forth in the Fu Declaration and for the reasons set forth above, believe that the Sale of the Kesten Claim pursuant to the Purchase and Sale Agreement to the Buyer will be to a buyer in good faith under section 363(m) of the Bankruptcy Code and, as such, should be entitled to the protections afforded thereby.

52. Although the Bankruptcy Code does not define the term “good faith purchaser,” the traditional equitable definition of “one who purchases the assets for value, in good faith, and without notice of adverse claims” has been adopted by various courts. Licensing by Paolo, Inc. v. Sinatra (In re Gucci), 126 F.3d 380, 390 (2d Cir. 1997) (quoting In re Willemain, 764 F.2d 1019, 1023 (4th Cir. 1985)); *see also* In re Abbotts Dairies of Pa., Inc., 788 F.2d 143, 147 (3d Cir. 1986).

53. The Sale will allow the JOLs to monetize an otherwise illiquid asset that has become uneconomic to pursue, and at what they believe to be the maximum price given the narrow and limited market for litigation claims of this nature. To the JOLs’ knowledge, no adverse claims exist with respect to the Kesten Claim itself. Further, given the JOLs’ diligent

efforts to market the Kesten Claim and to obtain a fair price for it and the arm's length negotiations that have taken place, the JOLs submit the Buyer has not engaged in any of "the misconduct that would destroy a purchaser's good faith status at a judicial sale [such as] fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." Willemain, 764 F.2d at 1023.

THE AUTHORIZATION MOTION: RELIEF REQUESTED

54. The JOLs respectfully request that this Court modify the February 16, 2006 Amended Order of Recognition to entrust them with the distribution of TCB's U.S. assets, including the proceeds from the Sale, through the Liquidation pursuant to sections 1521(b) and 1522 of the Bankruptcy Code.

THE AUTHORIZATION MOTION: BASIS FOR RELIEF REQUESTED

55. As noted *supra*, on June 14, 2016, the JOLs filed and served the Authorization Motion with their Final Report. *See* paragraphs 7-9 of the Fu Declaration.

56. On July 20, 2016, the Court denied the Authorization Motion without prejudice, stating the necessity for the JOLs to file a section 363 sale motion. *See* Docket No. 23; *see also* paragraph 11 of the Fu Declaration.

57. Given that the JOLs have incorporated by reference, as if fully set forth herein, the Final Report and Authorization Motion into the Fu Declaration, *see, e.g.*, paragraph 7 of the Fu Declaration, they respectfully renew their request that the Court enter an order granting them the relief sought, and for the reasons set forth, in the Authorization Motion.

THE CLOSING MOTION: RELIEF REQUESTED

58. The JOLs respectfully request that this Court close this Chapter 15 Case pursuant to Local Rule 5009-2, Bankruptcy Rule 5009(c) and Sections 1517(d) and 350 of the Bankruptcy Code without prejudice to the right to reopen this Chapter 15 Case in the future should the need to do so arise.

THE CLOSING MOTION: BASIS FOR RELIEF REQUESTED

59. Section 1517(d) of the Bankruptcy Code provides that “[a] case under this chapter [15] may be closed in the manner prescribed under section 350.” 11 U.S.C. § 1517(d).

60. Pursuant to section 350 of the Bankruptcy Code, a bankruptcy case may be closed “[a]fter an estate is fully administered.” 11 U.S.C. § 350(a).

61. Bankruptcy Rule 5009(c) provides that a foreign representative shall:

file a final report when the purpose of the representative's appearance in the court is completed. The report shall describe the nature and results of the representative's activities in the court. The foreign representative shall transmit the report to the United States trustee, and give notice of its filing to the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all parties to litigation pending in the United States in which the debtor was a party at the time of the filing of the petition, and such other entities as the court may direct. The foreign representative shall file a certificate with the court that notice has been given. If no objection has been filed by the United States trustee or a party in interest within 30 days after the certificate is filed, there shall be a presumption that the case has been fully administered.

Fed. R. Bank. P. 5009(c).

62. Moreover, Local Bankruptcy Rule 5009-2(a) states:

Closing the Case. In a case under chapter 15 of the Bankruptcy Code, the Court shall close the case when there is a presumption under Bankruptcy Rule 5009(c) that the case has been fully administered or the Court, after notice and a hearing, determines that the purpose of the foreign representative's appearance in the chapter 15 case has been completed, whichever is earlier.

63. In addition, section 1522(c) provides that the Court may, at the request of the foreign representative, modify or terminate relief granted under sections 1519 and 1521.

64. As noted *supra*, on June 14, 2016, the JOLs filed and served their Final Report. *See* paragraph 7 of the Fu Declaration. In compliance with Bankruptcy Rule 5009(c), the Final Report describes the nature and results of their activities before this Court and other courts in the United States.

65. Also on June 14, 2016, the JOLs filed their *Certificate of Service of the Recognized Foreign Representatives' Final Report and Motion to Authorize* (the “**Certificate**”) [Docket No. 22] as required by Bankruptcy Rule 5009(c). *See* paragraph 8 of the Fu Declaration.

66. Appropriate and proper notice of the JOLs’ filing of their Final Report was given to the Final Report Notice Parties. *See* paragraph 9 of the Fu Declaration. The requisite parties were served and notified that they had until July 18, 2016 to object to the Final Report (the “**Final Report Objection Deadline**”).

67. In accordance with Bankruptcy Rule 5009 and Local Rules 5009-2 and 9075-2, the JOLs filed a certification indicating that no objections were received in response to the Final Report (the “**Final Report CNO**”) [docket no. 24] by the Final Report Objection Deadline; *see also* paragraph 10 of the Fu Declaration.

68. With the filing of the Final Report CNO, this Chapter 15 Case is to be presumed as “fully administered” pursuant to Bankruptcy Rule 5009(c), subject to the terms of this Court’s July 20, 2016 order.

69. Aside from the Bankruptcy Rule 5009(c) presumption, the facts set forth by the JOLs in their Final Report demonstrate that, except for the Sale of the Kesten Claim, all of

the issues raised within the Chapter 15 Case by the JOLs have been resolved. TCB's Chapter 15 "estate", *i.e.*, its claims and assets within the United States, has thus been essentially "fully administered" for purposes of Section 350 and Bankruptcy Rule 5009(c).

70. As of the date hereof, the facts set forth by the JOLs in their Final Report further demonstrate that, barring the Sale of the Kesten Claim, they have fulfilled their purposes in appearing before this Court, as set forth under Local Rule 5009-2.

71. Consistent with the foregoing, and assuming this Court approves of the Sale according to the terms set forth in the Purchase and Sale Agreement and enters orders in the form of the Proposed Sale Order and the Proposed Authorization Order, the JOLs would propose to submit to Chambers, after the closing of the Sale, a Proposed Closing Order for entry thereafter.

CONTINGENT HEARING DATE

72. To contain the costs associated with continuing to administer this administratively insolvent estate, the JOLs are hopeful that the various relief sought by this Motion will be granted without the need for any hearing(s). In the event that any objections to the present Motion are filed, the Court has given the JOLs a hearing date of October 25, 2016 at 10:00 a.m. (the "**Hearing**").

73. Pursuant to Local Rule 9006-1(b), the requisite parties (the "**Motion Notice Parties**") are being served with a copy of the present Motion and are being notified that they will have until Monday, October 17, 2016 at 4 p.m. to object to the Motion (the "**Objection Deadline**").

74. In accordance with Local Rule 9075-2, the JOLs intend to file a

certification indicating that no objections were received in response to the Motion, or that any such objections were resolved by the JOLs and the applicable objecting party (the “**Motion CNO**”). If no objections are filed by the Objection Deadline, the Motion CNO will be filed, pursuant to Local Rule 9075-2, at least forty-eight hours thereafter. Pursuant to Local Rule 9075-2, the JOLs will therein respectfully request that the Court cancel the Hearing and enter each of the three Proposed Orders as hereinabove requested.

NOTICE

75. Notice of this Motion has been given by United States mail, first class postage prepaid, to: (i) the Office of the United States Trustee; (ii) the Final Report Notice Parties, *i.e.*, the holders of claims against TCB in the Liquidation both as to whose own addresses of record are in the United States or whose designated agent has an address of record in the United States; and, (iii) the Interested Parties, *i.e.*, those entities who have previously expressed an interest to the JOLs in acquiring the Kesten Claim.

76. Moreover, further notice of this Motion will be given by the JOLs posting it on the official website for the Liquidation: <http://www.tcbliquidation.ky/>.

77. The JOLs respectfully submit that no further notice is necessary.

One Previous Request for Relief

78. As to the relief sought in the Section 363 Sale Motion and the Motion to Close, no previous motion for the relief requested herein has been made to this or any other court.

79. The JOLs have, as detailed above, previously requested the relief sought

