

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of the Liquidation of:

Index No.: 42173/1984

NASSAU INSURANCE COMPANY.  
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**SUPPLEMENTAL  
AFFIRMATION**

SCOTT D. FISCHER, an attorney duly admitted to practice before the Courts of the State of New York, affirms as follows:

1. I am the duly appointed agent of Anthony J. Albanese, the Acting Superintendent of Financial Services of the State of New York, in his capacity as Liquidator (“Liquidator”) of Nassau Insurance Company (“Nassau”). I submit this supplemental affirmation in further support of the Liquidator’s application to approve the terms and conditions of the Creditor Trust Agreement (“Trust Agreement”) entered into by and between the Liquidator and Nassau Resolution, LLC, as trustee (the “Trustee”).<sup>1</sup>

2. At the July 15, 2015 hearing on this motion, the Court requested certain clarifications to the Trust Agreement from the Liquidator. Specifically, the Court directed that the Trust Agreement be modified to clarify that Court retains authority to approve or disapprove the Trustee’s final accounting and that the Court retains jurisdiction over all matters pertaining to the Nassau Creditor Trust, not just the “enforcement or interpretation” of the Trust Agreement. The Court directed that the Liquidator provide further explanation of the rationale for the compensation of the Trustee and its counsel as provided for by the Trust Agreement. This Supplemental Affirmation and the Second Amendment to the Trust Agreement, annexed as Exhibit A, are intended to fulfill the Court’s requirements.

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<sup>1</sup> A copy of the Creditor Trust Agreement is annexed to my June 16, 2015 Affirmation as Exhibit “A.”

### **The Trustee's Final Accounting**

3. Section 2.3 of the Trust Agreement has been amended to clarify that this Court retains authority to approve or disapprove the Trustee's final accounting and/or to order such other and further relief as it deems necessary. The amendment also provides that the Trustee's motion for approval of the final accounting shall be served upon the New York Liquidation Bureau ("NYLB") and that the NYLB shall provide its comments on the final accounting to the Court.<sup>2</sup> Specifically, the amended § 2.3 reads as follows:

2.3 **Records and Final Accounting.** The Creditor Trust's professionals shall be required to maintain accurate time records (if and to the extent they are compensated based on time) and expense records. Upon termination of the Creditor Trust, the Creditor Trustee shall file a final accounting and motion for approval of same with the Liquidation Court, after serving a copy of the final accounting and the motion on the New York Liquidation Bureau ("NYLB"). The accounting shall forth the amount the Creditor Trustee has collected and disbursed, including the fees and expenses incurred in administering the Creditor Trust and the fees and expenses incurred by the Creditor Trustee and its professionals. The NYLB shall review such accounting and provide its comments to the Liquidation Court, which may approve or disapprove the accounting and/or order such other and further relief as it may deem just and proper.

### **Retention of Jurisdiction**

4. Section 9.9 of the Trust Agreement has been amended to clarify that the Court retains jurisdiction over all matters pertaining to the Trust Agreement. Specifically, the amended § 9.9 reads as follows:

9.9 **Retention of Jurisdiction.** In addition to the jurisdiction over the Trustee's final accounting described in §2.3, as amended, the Liquidation Court shall retain jurisdiction over disputes concerning the enforcement or interpretation of this Creditor Trust Agreement and over all disputes arising under or related to the Creditor Trust Agreement.

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<sup>2</sup> Accordingly, the Second Amendment encompasses and supersedes the First Amendment, which provided for the NYLB's review and comment.

## **The Trustee's Compensation**

5. Section 6.1 of the Trust Agreement sets the Trustee's compensation at a maximum of 5% of the Net Proceeds of the sale of the Green Lane Property or of other recoveries achieved.<sup>3</sup> This is commensurate with the compensation afforded to Chapter 7 or Chapter 11 Trustees in federal bankruptcy proceedings, which is 25% of the first \$5,000 disbursed to creditors, 10% of the next \$45,000 disbursed, 5% of the next \$950,000 disbursed, and 3% of any additional distributions. 11 U.S.C. §326(a).<sup>4</sup> The Liquidator respectfully submits that it is a reasonable provision for compensation of the Trustee, having regard for the speculative nature of any litigation recoveries beyond those already achieved (*see infra* at ¶7).

## **Compensation of the Trustee's Counsel**

6. The Trustee has not yet retained counsel, however, at the July 15, 2015 hearing the Court was advised that the Liquidator understands that William Costigan who has been litigating matters in this proceeding, on behalf of the Liquidator, since 1989 and who possesses valuable knowledge of the case gained over the past nearly 20 years, the various litigations and collections efforts that have been made, is likely to be retained by the Trustee. Section 3.1 of the original Trust Agreement limits the compensation of the Trustee's Counsel to a contingency fee of: (i) 2% of the first \$1,420,000 of Net Proceeds from the sale of the Green Lane Property; (ii) 25% of Net Proceeds above \$1,420,000; and (iii) 45% of Net Proceeds from litigation recoveries. At the July 15 hearing, the Court directed the Liquidator to provide further support for the latter provision.<sup>5</sup>

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<sup>3</sup> For the first \$1,420,000 of Net Proceeds of the sale of the Green Lane Property, the Trustee's compensation is 3%.

<sup>4</sup> Domestic insurance companies, such as Nassau, are prohibited from filing for liquidation or reorganization under the Federal Bankruptcy Code. 11 U.S.C. §§ 109(b)(2), (d). Insurance Law Article 74 is the statutory vehicle by which New York Domestic Insurance companies, such as Nassau, are liquidated. Article 74 does not have a mechanism detailing payments to be made to Trustees. As such, the Liquidator and Trustee looked to the provisions of 11 U.S.C. § 326 as guidance for reasonable fees to be paid to a trustee in liquidating an estate.

<sup>5</sup> As to the former two provisions, the Liquidator understands the compensation is similar to that of a receiver.

7. The 45% fee is meant to reflect several of the realities surrounding the litigation against the DiLoretos and their various entities. First, they have resisted their obligations to Nassau since the company was put into litigation in 1984, engaging over a dozen law firms in multiple jurisdictions and spending significant sums on counsel fees, as well as filing for personal bankruptcy only to be denied a discharge of debt under 11 U.S.C. § 727 on account of, among other things, their engagement in fraudulent transactions. Second, any further recoveries will likely require recovery efforts outside the United States, which will increase costs and the risk to counsel who undertakes the task of collections on a contingent basis. The DiLoretos have created numerous offshore entities. Ardra Insurance Company, Ltd. – the primary vehicle by which they looted Nassau – was organized in Bermuda; other entities employed in the scheme were organized in the Bahamas, the Turks & Caicos Islands, and the Netherlands Antilles. In the recently concluded Pennsylvania litigation, the Liquidator established through discovery that the DiLoretos funded their re-acquisition of the Green Lane Property (through an *alter ego* entity) and the pay-off of mortgages on that property by drawing upon bank accounts domiciled in Switzerland and the Caribbean. Third, as part of any contingency fee arrangement, the Trustee’s Counsel will be obligated to fund all litigation disbursements, including out-of-state and international counsel fees, in the first instance with no guarantee that counsel will ever be reimbursed for such expenses.<sup>6</sup> Finally, significant amounts have already been recovered from the DiLoretos or spent by them on counsel fees; it is unclear what assets are left that might be recoverable.

8. The Liquidator respectfully submits that the 45% contingency fee on further litigation recoveries is fair and reasonable in view of the speculative character of the enterprise, and the potential that counsel will incur significant expenses and not be reimbursed. However, after the July 15, 2015 hearing, the Trustee gave the matter further consideration and has agreed to reduce the

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<sup>6</sup> Counsel will recoup those disbursements from recoveries, if any. The contingency fee would then be deducted from the Net Recovery.

maximum contingency fee to its counsel for any litigation recoveries to 40%. The Second Amendment makes that single change at § 3.1, which is otherwise unchanged.

WHEREFORE, the Liquidator respectfully requests that this Court grant the application, issue an order approving the Trust Agreement, as amended by the Second Amendment, and granting the Liquidator authority to enter into the Trust Agreement.

Dated: New York, N.Y.  
July 22, 2015

  
SCOTT D. FISCHER, ESQ.

# **EXHIBIT A**

## **SECOND AMENDMENT TO THE CREDITOR TRUST AGREEMENT**

This Second Amendment: (i) amends the June 16, 2015 Creditor Trust Agreement between Nassau Resolution, LLC as Trustee ("Creditor Trustee") and Nassau Insurance Company, in Liquidation ("Nassau") (the "Creditor Trust Agreement") pursuant to Article VII, Section 7.1 of the Creditor Trust Agreement; and (ii) supersedes the prior Amendment to the Creditor Trust Agreement dated June 29, 2015.

### **SECOND AMENDMENT**

Effective as of the date of this Amendment, the Creditor Trust Agreement is amended as follows:

Clause 2.3 **Final Accounting** of Article II shall now read:

2.3 **Records and Final Accounting.** The Creditor Trust's professionals shall be required to maintain accurate time records (if and to the extent they are compensated based on time) and expense records. Upon termination of the Creditor Trust, the Creditor Trustee shall file a final accounting and motion for approval of same with the Liquidation Court, after serving a copy of the final accounting and the motion on the New York Liquidation Bureau ("NYLB"). The accounting shall forth the amount the Creditor Trustee has collected and disbursed, including the fees and expenses incurred in administering the Creditor Trust and the fees and expenses incurred by the Creditor Trustee and its professionals. The NYLB shall review such accounting and provide its comments to the Liquidation Court, which may approve or disapprove the accounting and/or order such other and further relief as it may deem just and proper.

Clause 3.1 **Payment of Expenses and Liabilities** of Article 3 shall now read:

3.1 **Payment of Expenses and Liabilities.** The Creditor Trustee shall pay the Creditor Trustee's compensation, legal fees and disbursements due and owing to the Trustee's Counsel, and certain other expenses, namely: (i) expenses associated with the management and sale of the Green Lane Property ("**Green Lane Disbursements**"), (ii) the costs of forming and winding up the Creditor Trust, (iii) professional fees and expenses for preparing tax filings and accountings, (iv) the costs of obtaining errors and omissions insurance coverage, and (v) like administrative obligations.

Litigation expenses, including local counsel fees, related to: (i) the enforcement of Nassau's rights under the September 23, 2014 Stipulation of Settlement of its claims against

Abetech in the action captioned *Lawsky v. Abetech Group, Inc.*, 12-CV-1564 (U.S. District Court for the Eastern District of Pennsylvania) (Document 98), (ii) the enforcement of the Judgments, and (iii) the prosecution of the Causes of Action shall be advanced by the Trustee's Counsel ("**Firm Disbursements**").

The Creditor Trustee shall not receive any compensation for its services except from the Net Proceeds, if any, of recoveries in respect of Trust Assets. "**Net Proceeds**" means: (i) in relation to the Green Lane Property, the gross proceeds realized by the Creditor Trust less any Green Lane Disbursements and Firm Disbursements; and (ii) in relation to recoveries accomplished by enforcing the Judgments or prosecuting the Causes of Action, the gross proceeds realized by the Creditor Trust less any Firm Disbursements paid or incurred by the Trustee's Counsel as of the date of receipt of such recovery and not previously reimbursed.

The contingency fees chargeable by the Trustee's Counsel shall not exceed: (i) in the event of the sale or other disposition of the **Green Lane Property**, Two (2%) Percent of the first \$1,420,000 of **Net Proceeds**, defined as Gross Proceeds reduced by the Green Lane Disbursements and further reduced by Firm Disbursements and Twenty-Five (25%) of any **Net Proceeds** over and above \$1,420,000; and (ii) in the event of a recovery achieved by enforcing the **Judgments** or prosecuting the **Causes of Action**, Forty Percent (40%) of the **Net Proceeds**.

In the event of any dispute pertaining to the terms and conditions of this Creditor Trust Agreement arises by and between the signatories to this Creditor Trust Agreement, then the Trustee's Counsel may not represent either party in any such dispute.

Clause 9.9 **Retention of Jurisdiction** of Article 9 shall now read:

9.9 **Retention of Jurisdiction**. In addition to the jurisdiction over the Trustee's final accounting described in §2.3, as amended, the Liquidation Court shall retain jurisdiction over disputes concerning the enforcement or interpretation of this Creditor Trust Agreement and over all disputes arising under or related to the Creditor Trust Agreement.




ANTHONY J. ALBANESE  
Acting Superintendent of Financial Services of  
The State of New York in his capacity as  
Liquidator of Nassau Insurance Company

BY  DATE: July 22, 2015

*Scott Fischer  
Acting Special Deputy Superintendent as Agent*

NASSAU RESOLUTION, LLC  
As Creditor Trustee

By:  DATE: July 13, 2015

Name: Garrison Resnick

Title: Member

Index No. 42173 Year 1984

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

In the Matter of

the Liquidation of

NASSAU INSURANCE COMPANY.

SUPPLEMENTAL AFFIRMATION

JOHN PEARSON KELLY

Attorney for the Acting Superintendent of Financial Services of the State of New York as Liquidator

Office and Post Office Address, Telephone

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110 William Street - 15th Floor
New York, NY 10038
(212) 341-6523
Fax (212) 233-0461

ATTORNEY CERTIFICATION

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information, belief and reasonable inquiry, the contentions in the above referenced document(s) are not frivolous.

Dated: July 24, 2015
New York, New York

Handwritten signature of Lauren M. Reber over a horizontal line.

Lauren M. Reber

[ ] NOTICE OF ENTRY

that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on the day of 20

[ ] NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for
settlement to the HON. one of the judges of the within named court, at

, on 20 at
Dated:

Yours, etc.

JOHN PEARSON KELLY

Attorney for the Acting Superintendent of
Financial Services of the State of New York as
Liquidator

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