IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 11**
FISH & FISHER, INC. **CASE NO. 0902747EE**

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FINDINGS OF FACT
AND CONCLUSIONS OF LAW ON
THE *MOTION TO APPROVE COMPROMISE*
AND SETTLEMENT OF TOYOTA LITIGATION

THIS MATTER came before the Court on August 24, 2012, for trial on the *Motion to Approve Compromise and Settlement of Toyota Litigation* (#567) filed by the then Chapter 11 Trustee, James W. O'Mara, and the *Answer and Response to the Motion to Approve Compromise and Settlement of Toyota Litigation* (#578) filed by Renna Fisher and Jacqueline Williams. After considering the pleadings, exhibits and testimony from the trial, and the briefs filed by the parties, the Court finds that the *Motion to Approve Compromise and Settlement of Toyota Litigation* is well taken and should be granted.

FINDINGS OF FACT

I.

This Opinion addresses a settlement between the Bankruptcy Estate of Fish & Fisher, Inc. (Fish & Fisher) and Toyota Motor Engineering & Manufacturing North America, Inc. After a settlement was reached between the parties, the Court entered the *Order Protecting Confidential Settlement Information from Public Disclosure* (#566) pursuant to 11 U.S.C. § 107(b)(1) and Rule 9018 of the Federal Rules of Bankruptcy Procedure[1] on December 14, 2011. Consistent with this order, the dollar amount of the settlement and all other terms of the settlement are confidential, and all documents that refer to the settlement terms were filed under seal and are prohibited from public

[1]Hereinafter, all rules refer to the Federal Rules of Bankruptcy Procedure unless specifically noted otherwise.

disclosure.[2] Therefore, the exact dollar amount of the settlement and the precise terms of the settlement will not be addressed or disclosed in this Opinion.

II.

In 1999, Fish & Fisher was created as a *for profit* corporation organized under the laws of the State of Mississippi. The shareholders and equity security holders of Fish & Fisher are: Renna Fisher and Jacqueline Williams (Equity Security Holders). Each Equity Security Holder is the holder of fifty percent of the outstanding capital stock of Fish & Fisher. In addition, Mr. Fisher is the president and a director of Fish & Fisher, and Ms. Williams is the vice-president, secretary and a director. There are no other officers or directors of Fish & Fisher. The Equity Security Holders have apparently held these same positions throughout the existence of Fish & Fisher.

Since its incorporation in 1999, Fish & Fisher has engaged in the construction business. The primary focus of Fish & Fisher's business has been in clearing, grubbing and other dirt-work construction, either as a prime contractor or as a subcontractor for others.

The Equity Security Holders are African American, and Fish & Fisher is a certified member of the National Minority Supplier Development Council (NMSDC). According to the web site[3] of the Arkansas-Mississippi Minority Supplier Development Council (AMMSDC), which is an affiliate of the NMSDC, the AMMSDC "is responsible for certifying businesses owned by Asian, Black, Hispanic and Native American business owners using guidelines established by the [NMSDC]."

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[2]All filings in this case are electronic filings under the Court's Case Management/Electronic Case Filing System (CM/ECF). All references in this Opinion to a document filed "under seal" means that remote electronic access to that document has been restricted.

[3]The web site of AMMSDC is available at: www.ammsdc.org. *See also* Transcript of Trial, at 32.

The goal of the NMSDC and its regional affiliates is to provide a direct link between corporations, governmental agencies, other purchasing entities, and its certified minority-owned businesses.

In early 2007, Toyota Motor Engineering & Manufacturing North America, Inc. (Toyota) announced plans to construct a large automobile manufacturing plant near Blue Springs, Mississippi (Toyota Project). According to its press release dated May 24, 2007, Toyota stated "Toyota's goal is to spend 15 percent of the construction budget for Toyota Motor Manufacturing, Mississippi (TMMMS) with minority-owned business enterprises."[4]

While the exact dates are not entirely clear, at some point in late April or early May of 2007, Toyota invited five (5) companies to place bids as the general contractor for the sitework of the Toyota Project.[5] Ms. Williams testified that it was a quick bidding process and that the invitation to bid was only given to "five white bidders,"[6] which did not include Fish & Fisher. However, other than Ms. William's statement, no evidence was presented at trial to substantiate her allegation that only "white" companies were invited to bid on the Toyota Project.

Even though Fish & Fisher was not invited to submit a bid, Fish & Fisher recognized an opportunity to obtain significant contracts for construction work on the Toyota Project. Therefore, the Equity Security Holders actively pursued this potential opportunity on behalf of Fish & Fisher. In a proposal letter to Toyota dated May 11, 2007, Fish & Fisher stated that it would team up with N.L. Carson Construction Co., Inc. (N.L. Carson) to create a joint venture in order "to become one

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[4]Exhibit 2, *News From Toyota,* at first unnumbered page, May 24, 2007.

[5]Transcript of Trial, at 169.

[6]*Id.*

of the general contractors and/or Tier 1 Suppliers for the Toyota Mississippi plant."[7] Ms. Williams testified that a joint venture agreement between Fish & Fisher and N.L. Carson was never consummated.[8] Ms. Williams stated that Fish & Fisher did not receive a response from Toyota regarding the joint venture proposal it made to Toyota.[9]

On May 14, 2007,[10] L&T Construction, Inc. and M&H Construction, Inc., in a joint venture, (collectively, L&T) submitted a bid to Toyota to be the sitework general contractor. L&T's bid was for $41,154,771.28.[11] In its bid, L&T listed Fish & Fisher as a subcontractor for clearing/grubbing and earthwork/excavation.[12]

On May 24, 2007, Toyota announced that the contract for the sitework had been awarded to L&T.[13] At some point in time subsequent to May 24, 2007, L&T began work at the site. L&T entered into a subcontract with Fish & Fisher, and Fish & Fisher did work on the Toyota Project.[14]

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[7]Exhibit D-5, *Fish & Fisher Letter to Toyota,* at first unnumbered page, May 11, 2007.

[8]Transcript of Trial, at 178.

[9]*Id.* at 169.

[10]It appears that May 14, 2007, was the deadline to submit a bid as the general contractor for the sitework. However, the testimony regarding this was not clear.

[11]Exhibit 1, *Toyota Motor Manufacturing, Mississippi, Sitework 1 Package Bid Form,* at second and third unnumbered page.

[12]*Id.* at unnumbered page 4.

[13]Exhibit 2, *News From Toyota,* May 24, 2007.

[14]According to the *Trustee's Amended Disclosure Statement* (#497), in May of 2008, disputes arose between Fish & Fisher and L&T, which resulted in L&T terminating Fish & Fisher's subcontract. Fish & Fisher alleged that it was not paid by L&T for work it did on the Toyota Project. Arbitration proceedings between Fish & Fisher and L&T were commenced. In June of 2009, the arbitration panel ruled in Fish & Fisher's favor and awarded Fish & Fisher the total amount of $1,362,967.64.

In November of 2007, L&T left the Toyota job because according to its chief executive officer, Lenard Harris, L&T incurred a substantial loss. Exhibit 15, *Affidavit of Lenard Harris*, ¶ 3, at 1, April 12, 2011. Ms. Williams testified that on December 12, 2007, Fish & Fisher and Toyota entered into a contract for Fish & Fisher to complete the sitework that L&T did not finish on the Toyota Project. Transcript of Trial, at 176.

At some point after Fish & Fisher completed its work on the Toyota Project, the Equity Security Holders contacted an experienced civil rights attorney from Birmingham, Alabama, Mr. Byron Perkins, to file a complaint against Toyota on behalf of Fish & Fisher and themselves individually. The basis for the lawsuit was that Fish & Fisher had not been invited to submit a bid on the Toyota Project in May of 2007,[15] because of the race of the Equity Security Holders. On March 25, 2009, Mr. Perkins filed a complaint[16] on behalf of Fish & Fisher and the individual Equity Security Holders against Toyota and others[17] in the United States District Court for the Southern District of Mississippi (Toyota Litigation).

In its complaint, Fish & Fisher and the Equity Security Holders claimed, among other things, that Toyota violated 42 U.S.C. § 1981[18] (§ 1981 Action) and other federal civil rights statutes by instituting a racially-discriminatory bidding process for the Toyota Project and denying Fish &

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[15]Transcript of Trial, at 20.

[16]Civil Action No. 3:09-cv-00179-DPJ-FKB.

[17]Other defendants were: Haley Barbour, Governor of the State of Mississippi; Gray Swope, Director of the Mississippi Development Authority; Paul H. Johnson, Toyota Project Director, Mississippi Development Authority; State of Mississippi Development Authority; and The State of Mississippi. *See* Exhibit D-7, *Civil Docket for Case #: 3:09-cv-00179-DPJ-FKB.*

[18]Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territority to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a).

Fisher the bidding opportunity to which it was entitled. Fish & Fisher alleged that L&T, the successful bidder, was not qualified and that Fish & Fisher was just as qualified as L&T to be the general contractor for the sitework, but was denied the opportunity to bid because of the race of the Equity Security Holders.[19] In its § 1981 Action, Fish & Fisher and the Equity Security Holders sought, among other things, recovery of lost profits and compensatory and punitive damages.

On August 7, 2009, an involuntary petition under Chapter 7 of the Bankruptcy Code was filed against Fish & Fisher by three petitioning creditors: Merchants and Farmers Bank, Bonds Company, and Busylad Inc. Fish & Fisher failed to file a pleading or defense to the involuntary petition within the time frame[20] then specified in Rule 1011(b). Consequently, an *Order for Relief* (#10) was entered on September 23, 2009, pursuant to Rule 1013(b).

Meanwhile, in the Toyota Litigation, the Honorable Daniel P. Jordan, III, United States District Court Judge, entered an order on October 2, 2009, dismissing all defendants except Toyota from the Toyota Litigation.

Subsequent to the entry of the *Order for Relief*, Fish & Fisher (hereinafter, Debtor) filed a *Motion to Convert Involuntary Chapter 7 Proceeding to a Chapter 11* (#71) on March 2, 2010. Also on March 2, 2010, the Court entered an *Order Converting Involuntary Chapter 7 Proceeding to a Chapter 11* (#74).

Merchants and Farmers Bank (M & F) filed a *Motion to Convert to Chapter 7 Proceeding* on March 9, 2010. At the July 1, 2010, trial on M & F's motion, the parties announced that instead of converting the bankruptcy case to a Chapter 7, they had reached an agreement to appoint a

[19]Transcript of Trial, at 30-32.

[20]The time frame was changed from twenty (20) to twenty-one (21) days on December 1, 2009.

Chapter 11 trustee. On July 8, 2010, the *Order on Motion to Convert to Chapter 7 Proceeding (Dkt #101)* (#296) was entered ordering the appointment of a Chapter 11 trustee. On July 13, 2010, James W. O'Mara (Trustee) was appointed by the United States Trustee to serve as the Chapter 11 Trustee (see letter #305) in Fish & Fisher's bankruptcy case.

In the Toyota Litigation, Judge Jordan entered an order dismissing the Equity Security Holders as plaintiffs on September 23, 2010.[21] In the same order, the Trustee was substituted in the place of Fish & Fisher as plaintiff. The District Court entered an order certifying the dismissal of the Equity Security Holders on January 7, 2011. The Equity Security Holders filed a motion to reconsider, which was denied by Judge Jordan. The Equity Security Holders appealed this ruling to the United States Court of Appeals for the Fifth Circuit (Case No. 11-60593). On May 1, 2012, the Fifth Circuit held that it lacked jurisdiction to hear the appeal of the dismissal order and affirmed the District Court's denial of the motion to reconsider. There was no further appeal, and these rulings became final. Consequently, the Equity Security Holders are no longer parties to the Toyota Litigation.

Prior to the appointment of the Trustee, orders[22] were entered in the bankruptcy case approving the Debtor's continued retention of Mr. Perkins and Kevin J. White as its attorneys in the Toyota Litigation. Once the Trustee was appointed and then substituted as the plaintiff in the Toyota Litigation, the Trustee had to make a determination whether to retain the attorneys hired pre-petition by Fish & Fisher and then retained by the Debtor or whether to hire his own attorneys. The

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[21]Exhibit 5, *Order* (#54), 3:09-cv-00179-DPJ-FKB, September 23, 2010.

[22]*Order Regarding Application of Fish & Fisher, Inc. To Employ Counsel for Special Purpose (Byron R. Perkins)(Docket No. 84),* (#282), June 22, 2010, and *Order Regarding Application of Fish & Fisher, Inc. To Employ Counsel for Special Purpose (Kevin J. White)(Docket No. 112),* (#283), June 22, 2010.

Trustee testified that he "made some investigation or inquiries relating to Byron Perkins, and got very, very favorable reports concerning . . . his experience and capabilities and respect in litigation matters, particularly civil rights cases." Transcript of Trial, at 132. Consequently, the Trustee decided to remain with Mr. Perkins and Mr. White as his attorneys in the Toyota Litigation.

After they were dismissed as plaintiffs in the Toyota Litigation, the Equity Security Holders hired an attorney to represent them personally. Transcript of Trial, at 36-37.

Discovery was conducted by the Trustee and Toyota in the Toyota Litigation. Then, in November 2010, the parties participated in mediation, but the mediation did not result in a settlement agreement. *Id.* at 43-46.

After the failure of the mediation, further discovery activities were conducted by both Toyota and the Trustee.[23] In July of 2011, the parties participated in a settlement conference with United States Magistrate Judge Keith Ball. The settlement conference with Judge Ball was recessed and then resumed later in the month.[24]

At the resumed settlement conference on July 29, 2011, Judge Ball informed the Trustee of the maximum offer from Toyota.[25] Mr. Perkins testified that the Trustee "pushed and pushed and pushed to get [Toyota] higher,"[26] but Toyota would not budge off of its number.[27]

Judge Ball also informed the Trustee that if the settlement failed, Toyota intended to file a

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[23]*See* Exhibit D-7, *Civil Docket for Case #: 3:09-cv-00179-DPJ-FKB.*

[24]*Id.* at 46-49.

[25]*Id.* at 49.

[26]*Id.*

[27]*Id.*

motion for summary judgment.[28] The Trustee was informed that Toyota had documentation which would be dispositive of the 42 U.S.C. § 1981 qualification issue[29] and would be the basis for its summary judgment motion. Since Mr. Perkins had informed the Trustee that qualification is the first prong a plaintiff must prove in a §1981 Action, the Trustee requested that he be given a copy of Toyota's documentation before he made a decision on Toyota's offer. *Id.* at 52.

Thereafter, Toyota filed its *Notice of Service of Supplemental Disclosure* (#146) (Exhibit 11) in which Toyota certified that it served the opinion of its expert, Johnny Daniel Holliday,[30] (Expert's Report) (Exhibit 12) and the *Affidavit of Charles Sharman* (Sharman Affidavit) (Exhibit 14) on the Trustee. Toyota subsequently delivered to the Trustee the Sharman Affidavit and the Expert's Report. *Id.* at 52-53.

In the Sharman Affidavit, Mr. Charles M. Sharman identified himself as the Branch Manager

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[28]*Id.* at 52.

[29]As noted in more detail later in this Opinion, an action under 42 U.S.C. § 1981 may be established by direct evidence or, more commonly, by circumstantial evidence of intentional discrimination. To prevail in a § 1981 action where there is only circumstantial evidence of race discrimination, the party claiming to have been discriminated against must first establish a *prima facie* case of discrimination. *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996). The elements of a *prima facie* case are that the plaintiff must prove that (1) it is a member of a protected class, (2) it sought to enter into a contractual relationship with the defendant, (3) it met the qualifications to enter into a contract with the defendant, and (4) it was denied the opportunity to enter into a contract that was afforded companies outside the protected class. *See Shepard v. Goodwill Industries of South Texas, Inc.*, 872 F.Supp 2d 569 (S.D. Tex. 2011). The third step is the qualification issue of a § 1981 action. In the Toyota Litigation, in order to satisfy the third step, Fish & Fisher had to prove that it was qualified to bid on the Toyota Project.

[30]Toyota had previously filed in the Toyota Litigation *Defendant Toyota Motor Engineering & Manufacturing North America, Inc.'s Notice of Designation of Expert Witness Order* (#92), 3:09-cv-00179-DPJ-FKB, March 7, 2011. (Exhibit 13). Toyota designated Johnny Daniel Holliday as its expert to testify on whether Fish & Fisher "was qualified to bid on and perform the Tier 1 general site work contract at issue, the usual and customary profit margins in contracts of this type within the industry, the amount of profit or loss Fish & Fisher, Inc. would have incurred had it been the lowest bidder and had been awarded the contract instead of L&T/M & H and Fish & Fisher's recoverable damages, if any." *Id.*

for the Mississippi State Board of Contractors (the Board). According to Mr. Sharman, a contractor who desires to obtain a commercial contractor's license, called a Certificate of Responsibility, must submit the application of a "qualifying party".

A "qualifying party" is a term of art–the "qualifying party" is the person who takes the exam for the specific classification the Certificate holder is seeking, and he/she must be "regularly employed by the Certificate holder and actively engaged in the classification of the work for which the person qualifies on behalf of the Certificate holder."[31]

Further, according to Rule 1(1) of the *Rules and Regulations of the State Board of Contractors*, the "qualifying party shall be the owner, or a responsible managing employee, or a responsible managing officer, or a member of the executive staff who appears for and takes examination on behalf of the . . . corporation seeking a license as referred to in Miss. Code Ann. § 31-3-13(a)."[32]

In his affidavit, Mr. Sharman states that the type of classification needed to do the sitework on the Toyota Project would be a certificate for Highway, Street and Bridge Construction. While Fish & Fisher did have a Certificate of Responsibility for Highway, Street and Bridge Construction, Mr. Sharman stated that this classification was revoked:

> 4. [O]n April 11, 2007, the Board revoked F&F's Highway, Street and Bridge Construction classification because of failure to properly replace its qualifying party. Between April 11, 2007 and June 2, 2007, F&F had no classification for Highway, Street and Bridge Construction. On June 2, 2007, Harvey Keith served as F&F's qualifying party and took the exam for F&F to obtain the classification for Highway, Street and Bridge Construction.
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> 5. On May 10, 2007, Harvey Keith served as F&F's qualifying party and took the exam for F&F to obtain classification for Heavy Construction. This classification

[31]Exhibit 14, *Affidavit of Charles Sharman*, ¶ 6, p. 2.

[32]*Id.*

was approved by the Board in July 2007. Prior to July 2007, F&F did not have the classification for Heavy Construction.

Exhibit 14, *Affidavit of Charles Sharman*, ¶ 4 & 5, p. 2.

The Expert's Report covered several topics: (1) Lack of Qualifications Based on Lack of a Proper Contractor License; (2) Lack of Size and Financial Capacity to Qualify as Tier 1 Contractor on the Project; (3) Lack of Personnel and Equipment Capacity; and (4) Potential Damages for Lost Profit. In summary, Mr. Holliday's Expert's Report stated:

1. During May of 2007 when the bids for the sitework were accepted by Toyota, Fish & Fisher did not have on its payroll a Qualifying Party, as defined in Miss. Code § 31-3-13(a), for heavy construction and highway, street and bridge construction. Therefore, Fish & Fisher "was not properly licensed to perform or bid on the sitework contract at issue."[33]

2. Based on Fish & Fisher's historical financial information, Fish & Fisher did not have the financial capacity to support a $40 million plus project. Therefore, Fish & Fisher was unqualified to bid on or to be awarded the Tier 1 sitework contract.[34]

3. After reviewing the payroll and personnel information of Fish & Fisher, Mr. Holliday concluded that Fish & Fisher did not have the necessary personnel or equipment to be awarded the sitework contract for a project the size of the Toyota Project.[35]

4. Mr. Holliday considered that since L&T lost money on the Toyota Project and based on testimony of Mr. Fisher that Fish & Fisher would have bid less than what

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[33]Exhibit 12, *Expert's Report*, at 3.

[34]*Id.*

[35]*Id*. at 4.

> L&T bid, Mr. Holliday concluded that Fish & Fisher would also have lost money. However, he found that in the best case scenario, and giving Fish & Fisher every benefit of the doubt, the amount of any lost profit of Fish & Fisher would range between $0 and $51,429.

Exhibit 12, *Expert's Report*, at 4-5.

After reviewing the information in the Sharman Affidavit and the Expert's Report, which both showed that Fish & Fisher was not qualified to bid on the Toyota Project, Mr. Perkins advised the Trustee to accept Toyota's offer. Transcript of Trial, at 55-69. Mr. Perkins testified that in a § 1981 action, "the first issue is always whether or not you're qualified. If you can't prove qualification, I just don't see how you'd prove you had a right to bid on the contract." Transcript of Trial, at 67. Thereafter, the Trustee accepted Toyota's settlement offer, and in December of 2011, the parties entered into a *Settlement, General Release and Confidentiality Agreement* (Exhibit 16 under seal) (Settlement Agreement).

The Trustee filed a *Motion to Approve Compromise and Settlement of Toyota Litigation* (#567) (Motion to Settle). On December 15, 2011, the Trustee filed a *Notice of Motion to Approve Compromise and Settlement of Toyota Litigation* (#570) in which all creditors and parties in interest were given twenty-one (21) days to file an objection to the settlement.

On January 4, 2012, the Equity Security Holders timely filed their *Answer and Response to the Motion to Approve Compromise and Settlement of Toyota Litigation.* (#578) (Response). The Response of the Equity Security Holders was the only objection/response filed to the Motion to Settle.

On January 6, 2012, H. Kenneth Lefoldt, Jr., was appointed the Liquidating Trustee of the F&F Liquidating Trust (Liquidating Trustee). Mr. Lefoldt is the successor trustee to James W.

O'Mara.[36] While he was not the Liquidating Trustee at the time the settlement was negotiated and entered into, the Liquidating Trustee testified that he supports the settlement agreement. He further testified that the settlement needed to be approved by the Court because "it's a very integral part of any potential dividend to unsecured creditors." Transcript of Trial, at 124.

The Court set the Motion to Settle and the Response for hearing. After several pre-trial conferences, the Court set the matters for trial on April 27, 2012. The parties appeared at the April 27, 2012, trial, however, the Equity Security Holders raised the issue of whether it would be an ethical violation for Mr. Perkins to testify at the trial. Before any evidence or testimony was submitted, the Court continued the trial to allow Mr. Perkins to obtain an opinion from the Alabama State Bar on whether his testifying in this matter would be an ethical violation.

After attempts by the parties to resolve their differences failed, the Motion to Settle and Response were once again set for trial.[37] At the conclusion of the trial on August 24, 2012, the Court stated that once the transcript was filed, the parties were to agree on the amount of time they needed to file their briefs. The Court instructed the parties to "submit basically simultaneously briefs on this matter."[38]

The transcript was filed under seal on October 2, 2012 (#827 under seal). Thereafter, the parties submitted an *Agreed Order* (#838) regarding the submission of briefs. The *Agreed Order*

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[36]Pursuant to the plan of liquidation filed with the Court, a liquidating trust would be created and a liquidating trustee appointed. The *Order Confirming Trustee's Amended Plan of Liquidation* (#547) was entered on November 21, 2011. Mr. O'Mara was retained as one of the Liquidating Trustee's attorneys. Even though the Liquidating Trustee did not file all of the pleadings currently before the Court, from hereon in, Liquidating Trustee will be used instead of Trustee.

[37]Mr. Perkins had consulted with the Alabama State Bar, and he testified at the August 24, 2012, trial.

[38]Transcript of Trial, at 180, *Motion to Approve Compromise and Settlement of Toyota Litigation* (#567), August 24, 2012.

states that: "IT IS, THEREFORE, ORDERED that simultaneous briefs shall be filed by the parties on or before October 31, 2012." *Agreed Order* (#838), (Case No. 09-02747EE), October 10, 2012.

The Liquidating Trustee filed his *Post-Trial Memorandum in Support of Motion to Approve Compromise and Settlement of Toyota Litigation* (#846 under seal) on October 31, 2012. Also on October 31, 2012, the Equity Security Holders filed their *Memorandum of Authorities of Creditors Jacqueline Williams and Renna Fisher in Opposition to to (sic) Motion to Approve Compromise and Settlement of Toyota Litigation* (#847 under seal).

The Court will note that the Equity Security Holders also filed a *Memorandum of Authorities of Creditors Jacqueline Williams and Renna Fisher in Response to Trustee's Memorandum* (#855 under seal) (Rebuttal Brief) on November 13, 2012. However, for the reasons expressed in the Court's *Order on Motion to Strike Memorandum of Authorities of Creditors Jacqueline Williams and Renna Fisher in Response to Trustee's Memorandum* which was entered contemporaneously with this Opinion, the Equity Security Holders' Rebuttal Brief was stricken and not considered by the Court.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(O).

II.

A. Standards for Approval of a Settlement

"One of the goals of Congress in fashioning the Bankruptcy Code was to encourage parties in a distress situation to work out a deal among themselves." *In re Mirant Corp.*, 334 B.R. 800, 811

(Bankr. N.D. Tex. 2005)(citations omitted). In order to achieve this Congressional goal, Rule 9019(a) provides that "[o]n motion of the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bank. P. 9010(a).

"Compromises are favored in bankruptcy. Many cases involve litigation between the representative of the estate and an adverse party. Much of that litigation is settled. In such situations, the settlement must be approved by the court."[39]

In *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968), the United States Supreme Court established grounds a bankruptcy court should consider when deciding whether to approve a settlement. The Supreme Court held:

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation. It is here that we must start in the present case.

TMT Trailer, 390 U.S. at 424-25.

Using the Supreme Court's ruling in *TMT Trailer* as guidance, the Fifth Circuit has established the standards a court should use when considering whether to approve a settlement. A court should only approve a settlement when the settlement is "fair and equitable and in the best interest of the estate." *Connecticut General Life Insurance Co. v. United Companies Financial Corp. (In re Foster Mortgage Corp.),* 68 F.3d 914, 917 (5th Cir. 1995) (citations omitted).

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[39]10 *Collier on Bankruptcy* ¶ 9019.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)(footnotes omitted).

When determining whether a settlement is fair and equitable, a bankruptcy judge "must make a well-informed decision, 'compar[ing] the terms of the compromise with the likely rewards of litigation.'" *Official Committee of Unsecured Creditors v. Cajun Electric Power Cooperative, Inc. (In re Cajun Electric Power Cooperative, Inc.),* 119 F.3d 349, 356 (5th Cir. 1997) (quoting *Rivercity v. Herpel (In re Jackson Brewing Co.),* 624 F.2d 599, 602 (5th Cir. 1980)).

In the case of *In re Jackson Brewing Company,* the Fifth Circuit established a three-part test for determining whether a settlement is fair, equitable and in the best interest of the estate. The Fifth Circuit held that a court should consider:

> (1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law,
>
> (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
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> (3) All other factors bearing on the wisdom of the compromise.

In re Jackson Brewing, 624 F.2d at 607 (citations omitted).

Under the third, and so called catch-all provision, the Fifth Circuit added two additional factors that a court should consider when determining whether to approve a settlement:

> First, the court should consider the best interests of the creditors, "with proper deference to their reasonable views." *Foster Mortgage Corp.,* 68 F.3d at 917. Second, the court should consider "the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *Id.* at 918 (internal citations omitted).

In re Cajun Electric, 119 F.3d at 356; *see also In re Myers,* 425 B.R. 296 (Bankr. S.D. Miss. 2010); *In re Condere Corp.,* 228 B.R. 615 (Bankr. S.D. Miss. 1998).

In summary, under the factors established by the Fifth Circuit in *Foster Mortgage* and *Cajun Electric*, when considering a motion to settle, a court should consider:

(1) The probability of success in the litigation;

(2) The complexity and likely duration of the litigation;

(3) The best interests and wishes of the creditors; and

(4) Whether the settlement was the product of an arms-length negotiation.

The Court will apply these factors to the Motion to Settle currently pending before the Court.

B. Fair and Equitable

In the Motion to Settle, the Liquidating Trustee "asserts and believes that the Settlement and the terms thereof set forth in the Settlement Agreement are fair, reasonable, and in the best interest of the Debtor's estate."[40] In their Response, the Equity Security Holders request that the Court not approve the settlement because they allege it is not fair and equitable and not in the best interest of the Debtor's estate.

1. *Probability of Success in the Litigation*

"With respect to the first factor, it is unnecessary to conduct a mini-trial to determine the probable outcome of any claims waived in the settlement. 'The judge need only appraise himself of the relevant facts and law so that he can make an informed and intelligent decision. . . .'" *Cajun Electric*, 119 F.3d at 356 (citation omitted). "The Court can give weight to the Trustee's informed judgment that a compromise is fair and equitable." *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991) (citations omitted). In addition, "[t]he Court can also give weight to the competency and experience of counsel who support the settlement." *Id.* (citation omitted).

As noted above, Mr. Perkins, the Liquidating Trustee's attorney, and Mr. O'Mara, in his capacity as the Trustee at the time the settlement agreement was entered into, both testified in

[40] *Motion to Approve Compromise and Settlement of Toyota Litigation* (#567), ¶ 16, at 4 (December 14, 2011).

support of the Toyota Settlement. Mr. Perkins is an experienced trial attorney. He testified that he had been practicing law for approximately 23 years and that "[t]he majority of my practice has always been representing plaintiffs in civil rights and employment litigation, being race discrimination, sexual harassment [and] gender discrimination." Transcript of Trial, at 15. He further testified that he had handled a substantial number of "Section 1981 cases for minority vendors or contractors who can't get contracts with majority companies." *Id.*

Mr. Perkins testified that in order to prove a claim for discrimination under 42 U.S.C. § 1981,[41] Fish & Fisher had to overcome the first hurdle of proving that it was qualified to bid on the Toyota Project.[42] At the time he filed the § 1981 Action in District Court, Mr. Perkins believed that Fish & Fisher was fully qualified to bid on the Toyota Project, but that the only reason they were not permitted to bid was because of the race of the principals of the corporation.[43]

The Toyota Litigation moved forward[44] with the parties conducting discovery, attempting mediation (which was unsuccessful), and a settlement conference scheduled by Judge Ball. Trustee O'Mara[45] testified that during the settlement conference with Judge Ball, he asked Judge Ball to try to get Toyota to offer a higher amount, "but [Judge Ball] came back and said, no, they refuse to even

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[41]In a § 1981 action, courts evaluate circumstantial evidence of discrimination using the same evidentiary framework established by the U. S. Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). To establish a prima facie case, a plaintiff must show that "(1) she is a member of a protected class, (2) she was qualified to do the job, (3) she suffered an adverse employment action, and (4) others outside the protected group (non-Blacks) were treated more favorably than she was." *Shepard,* 872 F.Supp 2d at 574-75.

[42]Transcript of Trial, at 67.

[43]*Id.* at 19-20.

[44]Exhibit D-7, *Civil Docket for Case #: 3:09-cv-00179- DPJ-FKB.*

[45]At the trial, Mr. O'Mara testified as the Trustee who negotiated the settlement. To avoid any confusion with the Liquidating Trustee, his testimony as the Trustee will be designated as Trustee O'Mara.

consider anything higher than [the amount offered]."[46] Judge Ball then informed Trustee O'Mara that Toyota had stated that if Trustee O'Mara did not accept the amount that it had offered, it would be filing a motion for summary judgment which would be dispositive of the prima facie issue of qualification.[47]

As noted above, the exhibits given to Trustee O'Mara and Mr. Perkins were the Sharman Affidavit and the Expert's Report. The dates of the bid process for Toyota Project were between May 14th and May 24th, 2007.[48] After reviewing the Sharman Affidavit which showed that Fish & Fisher did not have a heavy equipment license or a certification for highway, street and bridge construction during the bid period, Mr. Perkins testified that if Fish & Fisher "didn't have the license to do heavy construction during the bid period, I felt fairly strongly that the judge would grant summary judgment based on that."[49]

Further, Mr. Perkins testified that he was unaware of any affidavit that he could obtain from any party to counter the Sharman Affidavit nor was he aware of any expert that would be available to Fish & Fisher which could counter Mr. Holliday's Expert's Report.[50]

Indeed when Ms. Williams testified on behalf of the Equity Security Holders, she did not offer any proof or testimony to refute the allegation in the Sharman Affidavit and the Expert's Report that during the bid period in early May of 2007, Fish & Fisher was not qualified to bid. Ms. Williams offered no proof or testimony to show that Fish & Fisher did hold a heavy construction

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[46]Transcript of Trial, at 137.

[47]*Id.* at 138.

[48]*Id.* at 64.

[49]*Id.* at 65.

[50]*Id.* at 65-66.

and/or a highway, street and bridge construction certification during that time frame, and therefore, Fish & Fisher was qualified to bid. Transcript of Trial, at 165-179.

In response to questions from one of her attorneys about the Sharman Affidavit, Ms. Williams inferred that N.L. Carson was properly licensed in 2007, but offered no proof beyond her own statements:

> **Q.** All right. Do you see anything in here about the license of NL Carson Construction Company, and I'm talking about Exhibit 14 [Sharman Affidavit].
>
> **A.** Okay. No, I don't see anything about Mr. Carson's license in here.
>
> **Q.** Okay. So there's no affidavit that says that your joint venture, NL Carson was not properly licensed in 2007?
>
> **A.** None.

Transcript of Trial, at 168.

Ms. Williams later testified that a joint venture agreement between Fish & Fisher and N.L. Carson was never consummated.[51]

Mr. Perkins also testified about some of the issues raised in the Expert's Report which stated that Fish & Fisher did not have sufficient equipment, employees, and financial strength to handle the Toyota Project. He stated that these issues were hurdles that would have to be overcome, but he thought he "could probably massage [these a] little better, but [he] just didn't see how [he] could get across the [bridge of] not having the proper certificates."[52]

Mr. Perkins was asked if he were able to "win" on summary judgment, or if it was not filed, and if he were able to prove liability by Toyota, what damages would he be able to prove Fish &

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[51]Transcript of Trial, at 178.

[52]*Id.* at 68.

Fisher had suffered. Mr. Perkins responded:

> Well, we still had the same problem, is that had they bid. . .would they have bid lower or higher [than L&T], and ultimately would they have gotten the contract, so that caused a certain amount of speculation. . . .But then we know that L&T lost money on the 41 million, so we would've had to have worked through several different issues on the damages thing.

Transcript at Trial, at 68.

As for punitive damages, Mr. Perkins stated that "[t]here did not appear to be any evidence that, in my mind, revealed any maliciousness on the part of Toyota that would get us to that high a level of damages or punitive damages." *Id.* at 69.

For all of these reasons, Mr. Perkins recommended to Trustee O'Mara that he accept the settlement offer from Toyota. *Id.*

During the settlement conference with Judge Ball, Trustee O'Mara was not willing to accept the settlement offer from Toyota until he knew what the summary judgment would be based on. *Id.* at 138. However after reviewing the Sharman Affidavit and the Expert's Report, Trustee O'Mara stated that his evaluation of the significance of these two documents was the same as Mr. Perkins:

> [These] two documents raised significant likelihood in his mind and my mind that if we did not accept the settlement amount we were facing a high likelihood of getting zero for the litigation. . . .[M]y analysis also indicated to me that even if we could get over a summary judgment motion, and get the case submitted to a jury, that both of those documents would create significant likelihood that either we would not be able to prove liability sufficient to recover a judgment, and even if we were able to recover a liability ruling, we wouldn't be able to recover damage amounts sufficient to get up to the settlement amount.

Id. at 139-40.

Trustee O'Mara also testified that independent of Mr. Perkins' analysis, he looked into what damages the Debtor could possibly prove in its § 1981 Action. After reviewing Lenard Harris' affidavit (CEO of L&T) wherein he states that L&T did not complete the sitework for the Toyota

Project because L&T sustained substantial losses,[53] Trustee O'Mara analyzed the work Fish & Fisher actually completed for the Toyota Project. In reviewing the proofs of claim filed in the Debtor's bankruptcy case, he identified sixteen (16) separate proofs of claim from unpaid employees, unpaid subcontractors and other unpaid entities that arose out of the work Fish & Fisher did on the Toyota Project. These proof of claim totaled $1,607,000. Based on these unpaid claims, Trustee O'Mara concluded that Fish & Fisher lost money on the actual contract it had for work on the Toyota Project.[54]

Finally, before accepting the settlement offer from Toyota, Trustee O'Mara requested that Mr. Perkins and Mr. White reduce the amount of their attorney fees.[55] Trustee O'Mara testified that he did not ask for the reduction because of any lack of work or effort on their part. Rather, he asked if they would reduce their fees for the sole "purpose of trying to increase the dollar amount that would come–the net dollar amount that would come to the estate. And they were willing to agree to that." Transcript of Trial, at 145.

As noted previously, even though he had not been appointed at the time the Toyota Settlement was accepted by Trustee O'Mara, the Liquidating Trustee testified that he believed the Toyota Settlement should be approved by the Court as the Toyota Settlement was an "integral part of any potential dividend to unsecured creditors." *Id.* at 124.

The Equity Security Holders did not offer any proof or testimony to show that there was a likelihood that the Debtor would succeed in the Toyota Litigation and recover more than Toyota had offered in settlement. Instead, Ms. Williams' testimony regarding the Expert's Report centered

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[53]Exhibit 15, *Affidavit of Lenard Harris*, ¶ 3, at 1, April 12, 2011.

[54]Transcript of Trial, at 141-44.

[55]*Id.* at 145.

around her attempts to discredit the expert, Mr. Holliday. She testified that Mr. Holliday was hired by L&T to testify against Fish & Fisher in the arbitration proceedings Fish & Fisher had with L&T. According to Ms. Williams, Mr. Holliday's opinion was that Fish & Fisher's claims against L&T were worth zero, however, the arbitration panel awarded Fish & Fisher over a million dollars. Transcript of Trial, at 167.

As for whether Fish & Fisher was qualified to bid on the Toyota Project in May of 2007, the Equity Security Holders did not offer any proof or testimony that Fish & Fisher held the proper licenses to bid on the Toyota Project. As noted above, Ms. Williams inferred that N.L. Carson was properly licensed in May of 2007. However, no proof was submitted of what licenses N.L. Carson may have held in May of 2007. The Court finds that regardless of the status of N.L. Carson's licenses in May of 2007, Ms. Williams testified that Fish & Fisher never consummated a joint venture with N.L. Carson, so whether N.L. Carson was properly licensed is immaterial.

Ms. Williams acknowledged in her testimony that in order to bid on the Toyota Project, Toyota required a contractor to have prior experience with a large automotive plant. In addition, the contractor had to have annual revenue that was four times the estimate of $70 million for the Toyota Project.[56] There was testimony from Ms. Williams that Fish & Fisher had been hired as a subcontractor to do work on the Nissan Plant in Canton, Mississippi,[57] and therefore, had some experience of working on a large automotive plant. However, the Equity Security Holders' own exhibit shows that Fish & Fisher was not qualified to bid because it did not meet Toyota's annual revenue requirement of four times the estimate of the cost of the Toyota Project. Even if the lower amount of L&T's bid is used ($41 million), Fish & Fisher did not have annual revenue in excess of

[56] *Id.* at 171.

[57] *Id.* at 172.

$164 million. The Equity Security Holders' own exhibit states: "Revenue for any given year is as much as $10,000,000 to $20,000,000."[58] These figures fall far short of the $164 million requirement.

Having been appraised of the relevant facts and law, the Court finds that Trustee O'Mara made a reasonable and justified conclusion that his likelihood of success in the Toyota Litigation was very unlikely. Trustee O'Mara not only did his own analysis of the likelihood of success of the Toyota Litigation, but he also relied upon the opinion of his experienced attorney that he should accept the settlement on behalf of the Bankruptcy Estate.

Based on Mr. Perkins' experience and competency in race discrimination cases, the Court gives great weight to Mr. Perkins' opinions. In light of the un-controverted evidence that Fish & Fisher was not qualified to bid on the Toyota Project at the time the bids were being accepted in May of 2007, the Court found Mr. Perkins' judgment that the chances were very slim of Fish & Fisher succeeding on its §1981 Action to be very persuasive. Consequently, for all of the reasons listed above, the Court finds that the lack of probability of success weighs in favor of the Court approving the settlement.

2. *Complexity and Expense of Litigation*

The Toyota Litigation has been pending since 2009, and the bankruptcy case of Fish & Fisher has also been pending since 2009. While there was not much testimony submitted regarding the complexity and expense of proceeding with the Toyota Litigation, as noted above, Mr. Perkins testified extensively regarding the hurdles and/or obstacles Trustee O'Mara would have to overcome in order to recover against Toyota. One of these major obstacles is the issue of damages. Proving damages would be very complex. The Debtor would have to hire an expert to prove what it claimed

[58]Exhibit D-5, *Fish & Fisher Letter to Toyota,* at last unnumbered page, May 11, 2007.

were the damages it had suffered as a result of not being awarded the bid on the Toyota Project. Historical books and records of the Debtor and other contractors would have to be examined in order to project what profits, if any, the Debtor would have made from the Toyota Project. Not only would this be a very complex undertaking, the cost of experts would not be inexpensive.

Trustee O'Mara testified that if a settlement was not reached, Judge Ball would reopen the discovery time period. Transcript of Trial, at 146. In addition, Mr. Perkins testified that if the Toyota Litigation had not been settled, he would have taken depositions and conducted more discovery. *Id.* at 80. Consequently, the Court finds that the complexity and continued expense of the Toyota Litigation weighs in favor of a settlement.

3. *Best Interests/Wishes of the Creditors*

The Fifth Circuit held in *Foster Mortgage* that "a bankruptcy court should consider the amount of creditor support for a compromise settlement as a 'factor bearing on the wisdom of the compromise,' as a way to show deference to the reasonable views of the creditors." *In re Foster Mortgage*, 68 F.3d at 918. The Fifth Circuit refined this holding in *Cajun Electric* in which it held that when considering whether a settlement is fair and equitable, a court should consider the views of a majority of the creditors–whether for or against the settlement, but that the "test is not the desires of the majority as such, but the best interests of the creditors, taking into account their reasonable views." *In re Cajun Electric*, 119 F.3d at 358.

In the case at bar, the only objection to the Motion to Settle was filed by the Equity Security Holders. According to the claims register in this case, thirty-six (36) creditors have filed proofs of claims, including one by the Equity Security Holders.[59] However, no other creditor or party in

[59]The Liquidating Trustee objected to the Equity Security Holders' motion for administrative expense claims. In addition, the Liquidating Trustee has filed several adversary proceedings against the Equity Security Holders. The objection and motion and the adversary proceedings are still pending.

interest objected to the settlement.

The Liquidating Trustee prepared as an exhibit a "rough schedule" of what the effect of the Toyota Settlement would have on the potential distributions to creditors.[60] According to his analysis, the Liquidating Trustee testified that "the bottom line is without the Toyota Settlement, it appears to be that unsecureds would not get any dividend distribution in this case. With the Toyota Settlement, there's a possibility that unsecureds could get a dividend distribution." Transcript of Trial, at 120-21.

The Court finds that based on the lack of an objection by any creditor other than the Equity Security Holders, the view of the majority of the creditors is that they are in favor of the settlement as being in their best interests. The Court agrees and finds that the view of the Equity Security Holders to reject the Toyota Settlement is not in the best interest of the Debtor's creditors.

4. *Arms Length Transaction*

The Equity Security Holders have not alleged that the settlement reached by Trustee O'Mara and Toyota resulted from anything other than arms-length negotiations and bargaining. There have been no allegations of fraud or collusion. Indeed, during the settlement conference with Judge Ball, the Equity Security Holders were present and participated in the negotiations with Toyota.[61] Therefore, the Court finds that the Toyota Settlement was the result of an arms-length negotiation between Trustee O'Mara and Toyota.

Having considered the four factors established by the Fifth Circuit, the Court finds that the Toyota Settlement is a fair and equitable settlement and in the best interests of the creditors and the Bankruptcy Estate. Based on the fact that no evidence was submitted to refute the claim in the

[60]Exhibit 17 (under seal) *F & F Liquidating Trust*.

[61]Transcript of Trial, at 136.

Sharman Affidavit that Fish & Fisher was not qualified to bid on the Toyota Project, the Court believes that the Liquidating Trustee's prospects of succeeding in the Toyota Litigation are dubious. Consequently there is no benefit to the Bankruptcy Estate to continue with the Toyota Litigation, and therefore, the Motion to Settle should be approved as being fair and equitable and in the best interests of the creditors.

CONCLUSION

The uncontroverted evidence shows that in May of 2007, Fish & Fisher did not hold the proper certificates to bid on the Toyota Project. In addition, Fish & Fisher did not have annual revenue in excess of $164 million, and therefore, Fish & Fisher did not meet the criteria established by Toyota to bid on the Toyota Project. Consequently, the Debtor probably could not succeed in its § 1981 Action because it could not overcome the hurdle of proving, as an element of a *prima facie* case of race discrimination, that it was qualified to bid on the Toyota Project.

The Court finds that the Liquidating Trustee has proven that the Toyota Settlement is "fair and equitable and in the best interest of the estate." *In re Foster Mortgage,* 68 F.3d at 917 (citations omitted). Further, after "'compar[ing] the terms of the compromise with the likely rewards of litigation,'" *In re Cajun Electric,* 119 F.3d at 356, the Court finds that the rewards of the Toyota Settlement greatly outweigh any potential rewards of proceeding with the Toyota Litigation. Therefore, the Motion to Settle should be approved.

A separate judgment consistent with this opinion will be entered in accordance with Rules 9014 and 9021 of the Federal Rules of Bankruptcy Procedure.

Edward Ellington
United States Bankruptcy Judge
Dated: April 4, 2013

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 11**
FISH & FISHER, INC. **CASE NO. 0902747EE**

FINAL JUDGMENT ON THE
MOTION TO APPROVE COMPROMISE
AND SETTLEMENT OF TOYOTA LITIGATION

Consistent with the Court's *Findings of Fact and Conclusions of Law* dated contemporaneously herewith:

IT IS THEREFORE ORDERED that the *Motion to Approve Compromise and Settlement of Toyota Litigation* (#567) filed by the then Chapter 11 Trustee, James W. O'Mara, is well taken and is hereby granted.

SO ORDERED.

Edward Ellington
United States Bankruptcy Judge
Dated: April 4, 2013