STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the matter of the application of

NEW YORK STATE WORKERS' COMPENSATION BOARD, in its capacity as the governmental entity charged with the administration of the Workers' Compensation Law and attendant regulations, and in its capacity as successor in interest to the HEALTHCARE INDUSTRY TRUST OF NEW YORK, WHOLESALE AND RETAIL WORKERS' COMPENSATION TRUST OF NEW YORK, TRANSPORTATION INDUSTRY WORKERS' COMPENSATION TRUST, TRADE INDUSTRY WORKERS' COMPENSATION TRUST FOR MANUFACTURERS, REAL ESTATE MANAGEMENT TRUST OF NEW YORK, THE PUBLIC ENTITY TRUST OF NEW YORK, THE NEW YORK STATE CEMETERIES TRUST, and ELITE CONTRACTORS TRUST OF NEW YORK,

Petitioner,

for an order, pursuant to CPLR §7701, seeking approval of proposed settlements and judicial apportionment of settlement proceeds.

Index No.:

MEMORANDUM OF LAW IN
SUPPORT OF ARTICLE 77 PETITION

RUPP BAASE PFALZGRAF CUNNINGHAM LLC
Attorneys for the Petitioner
Daniel E. Sarzynski, Esq.
Matthew C. Lenahan, Esq.
1600 Liberty Building
Buffalo, New York 14202
(716) 854-3400

PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of the Petitioner, New York State Workers' Compensation Board (the "WCB" or the "Board"), in support of its Verified Petition, brought pursuant to Article 77 of the CPLR, in its capacity as the governmental entity charged with the administration of the Workers' Compensation Law and as successor in interest to eight (8) former group self-insured trusts that operated in New York State: The Healthcare Industry Trust of New York (hereinafter "HITNY"), The Wholesale and Retail Workers' Compensation Trust of New York (formerly known as the Grocery Industry Trust of New York) (hereinafter "WRWCT"), the Transportation Industry Workers' Compensation Trust (formerly known as The Transportation Trust of New York) (hereinafter "TIWCT"), the Trade Industry Workers' Compensation Trust for Manufacturers (formerly known as the Manufacturing Industry Workers Compensation Trust of New York) (hereinafter "TRADE"), the Real Estate Management Trust of New York ("REMTNY"), the Public Entity Trust of New York (hereinafter "PETNY"), The New York State Cemeteries Trust (formerly known as The New York Association of Cemeteries Trust Workers) (hereinafter "NYSCT"), and the Elite Contractors Trust of New York (hereinafter "ECTNY") (these trusts will hereinafter be collectively referred to as "the Trusts").

In its Petition, the Board respectfully requests that the Court grant the following relief:

(i) declaring that each and every one of the Trusts is an express trust within the meaning of CPLR § 7701;

(ii) approving a settlement agreement reached by Petitioner with SGRisk LLC (hereinafter "SGRisk") relative to SGRisk's involvement with the Trusts;

(iii) approving a settlement agreement reached by Petitioner with Daniel G. Hickey Jr., Martin D. Rakoff, Daniel G. Hickey Sr., Chester J. Walczyk, Mark Bottini, Joseph F.

Taylor, James J. Scardino, Robert Polanksy, Salvator A. Patafio, David Birsner, Keith S. Byrnes, Philip J. Magnarella, and Louis J. Viglotti (hereinafter referred to collectively as the "CRM Individual Defendants") relative to the CRM Individual Defendants' involvement with the Trusts;

(iv) declaring that the settlement agreements reached by Petitioner with SGRisk and the CRM Individual Defendants are final and binding on all persons and entities, their successors and assigns, and all individuals and entities who and that are provided notice of this proceeding (hereinafter "Notice Parties") as set forth below;

(v) declaring that the causes of action that Petitioner has asserted against the CRM Individual Defendants and SGRisk are withdrawn;

(vi) declaring that all claims that have been asserted by the Notice Parties against SGRisk and/or the CRM Individual Defendants relative to their respective involvement in the Trusts, shall be dismissed with prejudice and be deemed fully and finally extinguished and satisfied;

(vii) permanently enjoining and forever prohibiting the Notice Parties from asserting any future lawsuits, claims, legal proceedings, and/or causes of action against SGRisk and/or SGRisk's current and former shareholders, members, officers, directors, employees, agents, attorneys, accountants, consultants, and advisors relative to their respective involvement in the Trusts;

(viii) permanently enjoining and forever prohibiting the Notice Parties from asserting any future lawsuits, claims, legal proceedings, and/or causes of action against the CRM Individual Defendants relative to their involvement in the Trusts;

(ix) declaring that the provisions of General Obligations Law § 15-108 apply to any and all tort claims advanced by non-settling defendants in the Professional Actions (as defined infra) against the CRM Individual Defendants and SGRisk and declaring that claims for contribution advanced by non-settling defendants in the Professional Actions against the CRM Individual Defendants and SGRisk are barred by the provisions of CPLR Article 14 and/or General Obligations Law § 15-108;

(x) declaring that the WCB's proposed pro rata allocation of the settlement proceeds realized from the settlement agreements entered into by the WCB with SGRisk and the CRM Individual Defendants, as well as the settlement proceeds received in the bankruptcy case *In Re Majestic Capital Ltd.*, et al, Case No. 11-36225 [Bankr. SDNY] (hereinafter defined as "Majestic Bankruptcy"), is fair, reasonable, and equitable; and

(xi) declaring that the outstanding obligations of each of the Trusts exceeds the apportioned settlement proceeds realized from the settlement agreements entered into by the Petitioner with SGRisk and the CRM Individual Defendants, as well as the settlement proceeds received in the Majestic Bankruptcy settlements and, therefore, no surplus monies exist for distribution to the former employer-members of the Trusts.

STATEMENT OF FACTS

Petitioner is the governmental agency charged with administration of the New York State Workers' Compensation Law ("WCL") and attendant regulations (the "Regulations"). (Petition, ¶¶ 1, 11). The mission of the Board is to equitably and fairly administer the provisions of the WCL and attendant regulations, including workers' compensation benefits, disability benefits, volunteer firefighter benefits, volunteer ambulance workers' benefits and volunteer civil defense workers' benefits on behalf of New York's injured workers and their employers. (*Id.*, ¶ 11).

All employers in New York State, as defined by WCL § 2(3), are required to provide workers' compensation coverage for the benefit of their employees. (WCL §§ 10 and 50). Workers' compensation benefits provide weekly cash payments and the cost of full medical treatment, including rehabilitation, for employees who become disabled as a result of employment-related disease or injury. (Petition, ¶ 12). Employers can secure the payment of workers' compensation in one of three ways: (i) by insuring and keeping insured the payment of such compensation from the State Insurance Fund (WCL § 50(1)); (ii) by insuring and keeping insured the payment of such compensation with an insurance carrier authorized to transact such business in New York State (WCL § 50(2)); or (iii) by self-insuring (WCL §§ 50 (3) and 50 (3-a)).

Employers that choose to satisfy their workers' compensation obligations by self-insuring can do so in one of two ways. First, if an employer can demonstrate that it has the financial wherewithal to pay its workers' compensation obligations on its own, the employer may apply for permission to the Board to administer and pay its own claims independent of any policy of insurance. (Petition, ¶ 14). Second, if an employer is unable to independently self-insure, an employer may join a group self-insured trust ("GSIT") to satisfy its workers' compensation

obligations. WCL § 50(3-a). Eight of these GSITs are at issue in this Petition, namely HITNY, WRWCT, TIWCT, TRADE, REMTNY, PETNY, NYSCT and ECTNY.

Group Self-Insured Trusts

A GSIT, in general terms, is a trust in which the member-employers pay contributions into the trust that are used to satisfy the workers' compensation obligations of the members' employees. (Petition, ¶ 15; 12 NYCRR § 317.2(i)). All employers that wish to join a GSIT must apply, and be approved for, membership, based on information provided by the GSIT and the individuals and entities that manage and operate the GSIT.

The affairs of a GSIT are administered by a board of trustees (the "Trustees"), with the assistance of various service providers and professionals that GSITs are required by law to retain. (Petition, ¶¶ 16; 12 NYCRR §§ 317.2(b), 317.12). The Trustees are fiduciaries of the GSIT, charged with honestly, diligently and carefully administering the GSIT and taking all actions necessary to ensure that the GSIT is operated and administered competently and in compliance with the WCL and Regulations. (12 NYCRR § 317.2(b) and (g)).

All GSITs are required to retain the services of a group administrator who is responsible to assist the GSIT to remain in compliance with the controlling provisions of the WCL and to coordinate required trust services to in order to help ensure that the GSIT remains financially solvent. (12 NYCRR § 317.2(g)). Pursuant to the Regulations, GSITs are also required to submit annual audited financial statements to the WCB, prepared in accordance with generally accepted accounting principles ("GAAP") and certified by an independent certified public accountant. (12 NYCRR § 317.19). Finally, pursuant to 12 NYCRR § 317.19, GSITs are required to submit annual actuarial reports to the WCB, which have been certified by an independent qualified

actuary, verifying the claims and the method of calculating such claims, based on accepted actuarial standards of practice.

By virtue of the WCL and Regulations and the governing documents of a GSIT, members of a GSIT are jointly and severally liable for the liabilities of the GSIT which are attributable to the fiscal year(s), or portions thereof, during which the member participated in the GSIT. (Petition, ¶ 19; 12 NYCRR § 317.2(i)). Employers participating in a GSIT are not relieved from their liability except through the payment of all obligations by the GSIT or by the employer. (WCL § 50(3-a)(3)).

The Board's Oversight of GSITs

When accurately submitted, the audited financial statements and actuarial reports, which are required to be filed by every GSIT on an annual basis, allow the Board to evaluate the financial strength of a GSIT, thereby minimizing the risk of an interruption in the flow of benefits to injured workers. (Petition, ¶ 21; 12 NYCRR § 317.19). If a GSIT's annual audited financial statements and/or actuarial reports indicate that the GSIT's liabilities are greater than its assets, then the GSIT is deemed to be "underfunded" and the GSIT becomes subject to the remediation procedures set forth in 12 NYCRR § 317.9. Depending upon the severity of the underfunding, the Board may take one or more of the actions designated in 12 NYCRR § 317.9 (b), which are designed to restore the GSIT to a funded status in a timely manner. (Petition, ¶ 22).

If a GSIT's underfunded status is so severe that it cannot be restored to a financially stable position in a timely manner, the GSIT will be terminated by order of the Board. (12 NYCRR § 317.20). When this occurs, the GSIT no longer provides coverage to its members. A

terminated GSIT is, however, still required to meet all of the GSIT's workers' compensation obligations, including the payment of benefits to the injured employees of its member employers. (*Id.*). In the event the Board determines that a GSIT cannot properly administer its liabilities due to its inability to pay its outstanding lawful obligations, the Board may deem the GSIT insolvent and assume the administration and final distribution of the GSIT's assets and liabilities pursuant to 12 NYCRR § 317.20(c).

After assuming the administration of an insolvent GSIT, the WCB becomes the successor-in-interest to the GSIT. (Petition, ¶ 22) (12 NYCRR 317.20; *State of N.Y. Workers' Compensation Bd. v Madden*, 119 AD3d 1022 [3d Dept 2014]; *State of New York Workers' Comp. Bd. v Hamilton, Warton Group, Inc.*, 40 Misc. 3d 1238 (A) [Sup. Ct., Albany County 2013]). Thereafter, the Board takes the necessary actions designed to ensure that the statutorily mandated benefits to injured workers are not interrupted. Accordingly, the WCB will use the security deposit and other assets of the GSIT to pay and administer the GSIT's liabilities. If the GSIT's remaining assets and security are insufficient to fully satisfy the GSIT's remaining obligations, including the claims payments to the GSIT's injured employees, then the WCB is statutorily required to satisfy those obligations from the Board's own administrative funds pursuant to WCL § 50(5)(g).[1]

The Board will also commission the completion of a forensic accounting review of the GSIT to calculate the GSIT's true liabilities (*i.e.*, the GSIT's overall cumulative deficit), allocate those liabilities to the GSIT's employer-members on a pro rata basis based upon the period(s) of time that the employer-members belonged to the GSIT, and identify, detail and explain the reasons why the GSIT became insolvent. (Petition, ¶ 21). Thereafter, each former member of

[1] In addition to the WCB's own funds, funds are borrowed from other self-insured employers, pursuant to WCL § 50(5)(g), in order to ensure the continuity of benefits to injured workers of former self-insured employers.

the insolvent GSIT will be invoiced for their respective pro rata share of the GSIT deficit as determined by the forensic accountant.

Finally, to the extent that the forensic analysis reveals that the GSIT's insolvency was due to the actions or inactions of the third-parties that managed and operated the GSIT, the Board will initiate lawsuits against those third parties, and seek to recoup, among other things, the total deficit of the GSIT.

The Subject Trusts

As mentioned above, the eight (8) trusts made the subject of this Article 77 proceeding were all GSITs that operated in New York State at various times. More specifically:

(i) HITNY was formed by the preparation and execution of a Trust Agreement and Declaration, dated September 12, 1999. During the course of its active life, a total of approximately 448 member-employers participated in HITNY. HITNY's employer-members were principally in the business of providing healthcare-related services and included hospitals, nursing homes, and other healthcare-related facilities. Due to its poor financial condition, HITNY ceased active operations on or about December 31, 2007, and the WCB assumed the administration of HITNY on or about February 12, 2008. After assuming the administration of HITNY, the WCB obtained a forensic accounting review of HITNY which determined that HITNY had a cumulative deficit of $220,921,073 as of November, 2009;

(ii) WRWCT, formerly known as the "Grocery Industry Trust of New York," was formed by the preparation and execution of a Trust Agreement and Declaration, dated September 27, 1999. During the course of its active life, a total of approximately 874 employers participated in WRWCT. WRWCT's employer-members were principally in the business of

retail grocery. Due to its poor financial condition, WRWCT ceased active operations on approximately April 15, 2008, and the WCB assumed the administration of WRWCT on or about August 11, 2008. After assuming the administration of WRWCT, the WCB obtained a forensic review of WRWCT which determined that WRWCT had a cumulative deficit of $65,896,908 as of September 2009;

(iii) TIWCT, formerly known as "The Transportation Trust of New York," was formed by the preparation and execution of a Trust Agreement and Declaration, dated December 27, 2000. During the course of its active life, a total of approximately 812 employers participated in TIWCT. TIWCT's employer-members were principally in the business of providing trucking and shipping services. Due to its poor financial condition, TIWCT ceased active operations on approximately December 31, 2007, and the WCB assumed the administration of TIWCT on or about September 8, 2008. After assuming the administration of TIWCT, the WCB obtained a forensic review of TIWCT which determined that TIWCT had a cumulative deficit of $140,207,558 as of December 2009;

(iv) TRADE, formerly known as "The Manufacturing Industry Workers' Compensation Trust of New York," was formed by the preparation and execution of a Trust Agreement and Declaration, dated December 27, 2001. During the course of its active life, a total of approximately 138 employers participated in TRADE. TRADE's employer-members were principally in the transportation industry. Due to its poor financial condition, TRADE ceased active operations on approximately January 1, 2008, and the WCB assumed the administration of TRADE on or about May 12, 2008. After assuming the administration of TRADE, the WCB obtained a forensic review of TRADE which determined that TRADE had a cumulative deficit of $24,959,664 as of December 2009;

(v) REMTNY was formed by the preparation and execution of a Trust Agreement and Declaration, dated January 1, 2001. During the course of its active life, a total of approximately 100 employers participated in REMTNY. REMTNY's employer-members were principally in the business of real estate management. Due to its poor financial condition, REMTNY ceased active operations on approximately January 21, 2008, and the WCB assumed the administration of REMTNY on or about July 7, 2008. After assuming the administration of REMTNY, the WCB obtained a forensic review of which determined that REMTNY had a cumulative deficit of $6,242,347 as of December 2009;

(vi) PETNY was formed by the preparation and execution of a Trust Agreement and Declaration, dated January 1, 2001. During the course of its active life, a total of approximately 14 employers participated in PETNY. PETNY's employer-members were all municipal or municipal-related entities in the State of New York. Due to its poor financial condition, PETNY ceased active operations on approximately August 2, 2007, and the WCB assumed the administration of PETNY on or about January 8, 2008. After assuming the administration of PETNY, the WCB obtained a forensic review of which determined that PETNY had a cumulative deficit of $7,557,515 as of December 2008;

(vii) NYSCT, formerly known as "The New York Association of Cemeteries Trust Workers," was formed by the preparation and execution of a Trust Agreement and Declaration, dated January 27, 2002. During the course of its active life, a total of approximately 85 employers participated in NYSCT. NYSCT's employer-members were principally in the business of providing cemetery-related services. Due to its poor financial condition, NYSCT ceased active operations effective February 1, 2008, and the WCB assumed the administration of NYSCT on or about February 1, 2008. After assuming the administration of NYSCT, the WCB

obtained a forensic review of NYSCT which determined that NYSCT had a cumulative deficit of $3,500,790 as of January 2010;

(viii) ECTNY was formed by the preparation and execution of a Trust Agreement and Declaration, dated August 27, 1999. During the course of its active life, a total of approximately 2,654 employers participated in ECTNY. ECTNY's employer-members were principally in the business of providing contracting and construction services. Due to its poor financial condition, ECTNY ceased active operations on approximately March 31, 2008, and the WCB assumed the administration of ECTNY on or about April 1, 2010. After assuming the administration of ECTNY, the WCB obtained a forensic review of ECTNY which determined that ECTNY had a cumulative deficit of $82,242,027 as of September 2010.

LITIGATION INVOLVING THE TRUSTS

The Professional Actions

A. *The CRM Action*

The WCB initiated *New York Workers' Compensation Board v Compensation Risk Managers, LLC, et al.* [Albany County Index No. 10288-09] (hereinafter the "CRM Action") on December 9, 2009. Therein, the WCB named Compensation Risk Managers LLC; CRM Holdings Ltd.; Compensation Risk Managers Agency, Captive, LLC; CRM USA Holdings Inc.; Twin Bridges (Bermuda) LTD.; Majestic Insurance Company; EIMAR, LLC; and Village Holdings, LLC (hereinafter collectively referred to as the "CRM Organized Defendants"), as well as the CRM Individual Defendants, as party defendants. The WCB subsequently amended the Summons twice and the Complaint three times. In the Third Amended Complaint, the WCB also named the trustees of HITNY as party-defendants. (Petition, ¶ 105).

As is more fully set forth in the accompanying Petition, Compensation Risk Managers LLC (hereinafter "CRM LLC") served as the group administrator for the Trusts during the following time periods:

(i) for HITNY: from approximately September 12, 1999 through approximately February 14, 2008;

(ii) for WRWCT: from approximately September 27, 1999 through approximately August 11, 2008;

(iii) for TIWCT: from approximately December 27, 2001 through approximately May 16, 2008;

(iv) for TRADE: from approximately December 27, 2000 through approximately July 3, 2008;

(v) for REMTNY: from approximately January 1, 2001 through approximately July 7, 2008;

(vi) for PETNY: from approximately January 1, 2002 through approximately January 8, 2008;

(vii) for NYSCT: from approximately January 27, 2002 through approximately July 7, 2008; and

(viii) for ECTNY: from approximately August 27, 1999 through approximately September 1, 2008.

(Petition, ¶ 106).

In addition, the various organized affiliates of CRM LLC also had a connection with the Trusts as more thoroughly set forth in the accompanying Petition at paragraphs 107 through 112. Also, the CRM Individual Defendants were all closely associated with the CRM Organized

Defendants, in both a formal and informal manner. For example, Daniel G. Hickey Jr., was the Chief Executive Officer of CRM LLC and was an owner and director of CRM Holdings; while Martin D. Rakoff formed CRM LLC, and was an owner and director of CRM Holdings. (Petition, ¶ 113).

Relative to the CRM Action, the CRM Individual Defendants are covered by a directors and officers policy of insurance issued by Indian Harbor Insurance Company with limits of $5,000,000 per occurrence and $5,000,000 in the aggregate (hereinafter the "CRM ID Policy"). Upon information and belief, the CRM ID Policy is an eroding policy, meaning that any money spent defending an action in which the CRM ID Policy is triggered, such as the CRM Action, reduces the coverage that is available on the policy to indemnify the insureds. As of December 2016, approximately $600,000 in fees and costs have been eroded from the CRM ID Policy, leaving approximately $4,400,000 available to indemnify the CRM Individual Defendants. Upon further information and belief, these funds have continued to erode, and will continue to erode through the completion of this proceeding.

As is more fully set forth in the accompanying Petition, the WCB, as plaintiff in the CRM action, alleged, in sum and substance, that the CRM Organized Defendants, as well as the CRM Individual Defendants, exercised dominion and/or control over all aspects of the operation of the Trusts for significant periods of time, and that the actions and inactions of the CRM Individual Defendants and the CRM Organized Defendants caused the Trusts to become underfunded and/or insolvent.

B. The SGRisk Action

In addition to the CRM Action, the WCB also initiated an action against SGRisk, which served as the actuary for the Trusts, and UHY LLP, which served as the accountant and auditor for the Trusts at various times. The WCB commenced the action via a summons with notice on July 8, 2011, followed by an Amended Summons with Notice on November 28, 2011, a Verified Complaint filed on December 20, 2011, and an Amended Verified Complaint on September 9, 2016 (hereinafter the "SGRisk Action").

As is more fully set forth in the accompanying Petition, the allegations against SGRisk were, in sum, that SGRisk contracted with CRM LLC to provide actuarial services to the Trusts and that SGRisk committed various actionable wrongs including that SGRisk manipulated the actuarial estimates of the Trusts, that SGRisk failed to accurately portray the financial condition of the Trusts, and that SGRisk's actions perpetuated CRM LLC's improper administration of the Trusts, among other things. Accordingly, the WCB asserted that SGRisk's actions and inactions caused and/or contributed to the cumulative deficits of the Trusts.

Relative to the SGRisk Action, SGRisk is covered by a policy of insurance issued by Indian Harbor Insurance Company with limits of $2,000,000 per occurrence and $2,000,000 in the aggregate (hereinafter the "SGRisk Policy"). Upon information and belief, the SGRisk Policy is an eroding policy, meaning that any money spent defending an action in which the SGRisk Policy is triggered, such as the SGRisk Action, reduces the coverage that is available on the policy to indemnify the insureds. As of December 2016, approximately $550,000 in fees and costs have been eroded from the SGRisk Policy in the SGRisk Action, leaving approximately $1,450,000 available to indemnify SGRisk. These funds have continued to erode, and will continue to erode through the completion of this proceeding.

C. *The HITNY Action*

On or around July 10, 2009, certain former employer-members of HITNY (hereinafter "HITNY Plaintiffs") initiated the case, *Healthcare Industry Trust of New York, et al., v Compensation Risk Managers Agency, Captive, LLC, et al.*, [Albany County Index No. 5966-09] (hereinafter the "HITNY Action"). Therein, the HITNY Plaintiffs named the CRM Organized Defendants, the CRM Individual Defendants, UHY, the HITNY Trustees and SGRisk as defendants. As is more fully alleged in the Fourth Amended Summons and Complaint in the HITNY Action, the plaintiffs asserted causes of action against the named defendants for, inter alia, breach of fiduciary duty, breach of contract, and negligence, all related to the alleged mismanagement of HITNY.

Because of the common defendants and common causes of action in the HITNY Action, the CRM Action, and the SGRisk Action, on or around August 28, 2013, the HITNY Plaintiffs and the WCB entered into a joint stipulation wherein the HITNY Plaintiffs assigned their rights to the WCB. This joint stipulation provided the WCB with the sole legal standing to pursue all claims on behalf of the HITNY Plaintiffs. (Petition, ¶ 127). Upon information and belief, the SGRisk Policy and the CRM ID Policy that have been triggered in the CRM Action and the SGRisk Action were also triggered in the HITNY Action. As such, the respective insurance limits of the policies—$2,000,000 and $5,000,000—also apply to, and have been eroded in, the HITNY Action. (*Id.* at 130).

D. *The Erie County Actions*

Finally, and as more thoroughly set forth in the accompanying Petition, certain former employer-members of the Trusts (hereinafter "Erie County Plaintiffs") initiated several lawsuits in Erie County, New York, in 2013 which named UHY and SGRisk as defendants (hereinafter "Erie County Actions"). (*Id.* at 131). Once again, because of the common defendants and common causes of action in the Erie County Actions, the CRM Action, and the SGRisk Action, the Erie County Plaintiffs and the WCB entered into a series of joint stipulations wherein the Erie County Plaintiffs assigned their rights to the WCB. These joint stipulations provided the WCB with the sole legal standing to pursue all claims on behalf of the Erie County Plaintiffs. (*Id.* at 133). Thereafter, on February 28, 2014, the WCB, as assignee of the claims of the Erie County Plaintiffs, discontinued without prejudice the Erie County Actions. (*Id.* at 134). Also, once again, and upon information and belief, the SGRisk Policy that was triggered in the HITNY Action and the SGRisk Action is the same insurance policy triggered in the Erie County Actions. As such, the $2,000,000 insurance limit of the SGRisk Policy also applies to, and has been eroded in, the Erie County Actions.

E. *The Majestic Bankruptcy*

Following the initiation of the CRM Action, various CRM-related entities filed for bankruptcy protection in U.S. Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") on or about April 29, 2011. (Petition, at ¶136). Accordingly, the WCB was precluded from prosecuting the CRM Action against the CRM Organized Defendants. (*Id.*).

Similarly, on or about April 19, 2011, the Insurance Commissioner of the State of California placed Majestic Insurance Company into a conservation proceeding and, ultimately, liquidation proceedings, in a matter initiated in the Superior Court of the State of California,

County of San Francisco, and captioned *Insurance Commissioner of the State of California v Majestic Insurance Company*, Case No.: CPF-11-511261 ("Conservation Proceeding"). The filing of the Conservation Proceeding also stayed all proceedings, including the CRM Action and the HITNY Action, against Majestic Insurance Company pursuant to the applicable provisions of the California Insurance Code.

The Member Actions

In addition to the actions discussed above, following the completion of the respective forensic accounting reviews for each of the Trusts and the calculation of their respective cumulative deficits, the WCB issued assessments to the employer-members of the Trusts pursuant to the relevant provisions of the WCL, including WCL § 50(3-a)(b)(7), and offered the members an opportunity to enter into interim repayment agreements, known as a memorandum of understanding ("MOU") with the WCB. (Petition, ¶¶ 115-116). The interim repayment agreements were intended to help ensure that the ongoing workers' compensation claims obligations of the respective Trusts would be met.

After a period of time, the WCB, through its forensic accountants, updated the cumulative deficit of the Trusts, and recalculated each employer-member's liability based upon those updated deficits, both on a pro rata and a joint-and-several basis. In addition to the monies received from those assessments and interim repayment agreements, a number of other developments occurred which impacted the cumulative deficits of the Trusts. These developments included changes in the WCL, which eliminated certain statutory assessments that the Trusts were previously required to pay, and the maturation, settlement and closing of some of the Trusts' workers' compensation claims, on both a claim-by-claim basis by the WCB's third-

party administrators and through the execution of Assumption of Workers' Compensation Liability Policies ("ALPs") executed on behalf of the Trusts by the WCB. (Petition, ¶ 82).

The WCB then calculated each member's settlement amount, known as "Final Pro Rata Amount" or "FPRA", and offered each employer-member the opportunity to execute a settlement agreement with the WCB (hereinafter referred to, generally, as "Member Settlement Agreement(s)") and pay their FPRA in exchange for a full and final release absolving the employer-member of any liability relative to the Trust to which the employer-member belonged. Alternatively, the WCB advised that it would sue any non-settling members and seek to recoup the deficit of each Trust on a joint-and-several basis. Some employer-members settled with the WCB and paid, or agreed to pay, their FPRA, while others did not. As such, the WCB initiated suit against the majority of non-settling members. (Petition, ¶¶ 81-103).

Resolution of the WCB's Member Actions

As mentioned above, the WCB entered into Member Settlement Agreements with a number of the former employer-members of the Trusts (hereinafter the "Settling Members"). (*Id.*) In agreeing to terms with the Settling Members, the WCB, in exchange for the payments contemplated in the Member Settlement Agreements, agreed to release each Settling Member from joint and several liability for the obligations of the Trust in which the Settling Member belonged. As stated above, each Trust employer-member is jointly and severally liable for all of the Trust's obligations for the fiscal year(s), or portions thereof, that each employer-member was a member of a Trust.

The Member Settlement Agreements memorialized the terms of the parties' settlement and set forth each party's obligations relative to the payment of each Settling Member's

settlement amount and the manner in which the WCB would distribute surplus monies to the Settling Members should it recover from the defendants in the CRM Action and/or the SGRisk Action. Accordingly, the substantive provisions of the Member Settlement Agreements for each Trust contains language which provides, in sum and substance, that any damages recovered by the WCB from third-parties (including SGRisk and the CRM Individual Defendants) that result in a surplus of funds after all of the Trust's obligations have been satisfied, including but not limited to (i) repayment of prior statutory assessments relative to the Trust levied upon other self-insured employers in New York, and (ii) other administrative costs relative to the Trust, will be distributed to former members of the Trusts who executed a Member Settlement Agreement with the WCB. Any such distribution is to be made on a pro rata basis, in the same proportion to the settling employer-member's settlement amount, exclusive of interest. (Petition, ¶¶ 206-207).

As such, and pursuant to the Member Settlement Agreements, the proceeds of any settlement are to be used first to satisfy any outstanding obligations of the Trusts. Accordingly, the Settling Members are only entitled to a pro rata distribution of the settlement proceeds if there is a surplus after such outstanding obligations are satisfied, and only if the settling members paid their respective Final Pro Rata Allocation amount ("FPRA") set forth in their Member Settlement Agreement. All of the settlement agreements for each respective trust contained identical language, save for certain identifying and payment information which is unique to each Settling Member.

Resolution of the Professional Actions

A. The Settlement with the CRM Individual Defendants and SGRisk

The WCB entered into a settlement agreement with SGRisk in December 2014 and with the CRM Individual Defendants in March 2016. The WCB executed a settlement agreement memorializing the settlement with the CRM Individual Defendants (hereinafter the "CRM ID

Settlement Agreement") and SGRisk (hereinafter the "SGRisk Settlement Agreement"). The WCB agreed to accept the amount of $4,000,000 from the CRM Individual Defendants and the total sum of $1,333,875 from SGRisk. In exchange, the WCB agreed to release the CRM Individual Defendants and SGRisk from liability for the deficits of the Trusts. (Petition ¶ 159). Also, the payment of the settlement monies by the CRM Individual Defendants and SGRisk is expressly conditioned on the successful completion of the instant proceeding. (*Id.* at ¶ 158).

In addition to the proceeds to be realized from the CRM ID Settlement Agreement and the SGRisk Settlement Agreement, and as set forth in greater detail in the accompanying Petition at paragraphs 161 through 165, the Board prosecuted its rights as a creditor in both the CRM Bankruptcy and in the Conservation Proceeding in order to secure an optimal recovery from those estates on behalf of the Trusts. As such, the WCB was able to recover the sum of $7,719,376.16.

As discussed above, proceeds resulting from a settlement with a defendant in any WCB-related litigation (including the Settlement Agreements that are the subject of this Article 77 proceeding) are to be used first to satisfy any outstanding obligations of the respective Trusts. Any surplus will be distributed to members according to the FPRA set forth in their settlement agreements.

ARGUMENT

CPLR Article 77 Overview

Article 77 of the CPLR authorizes a special proceeding for the determination of matters relating to "any express trust." (CPLR § 7701). The scope of Article 77 "should be broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust." (*In re Greene*, 88 AD2d 547, 548 [1st Dept 1982]; *see also In re Edwards' Trust*, 142 NYS2d 169 [Sup. Ct., Monroe County 1955] (referring to former Article 79 of the Civil Practice Act, which is virtually identical to Article 77, as "very broad in its application to express trusts" and intended "to simplify the practice in relation to express trusts and eliminate cumbersome and expensive procedures."); 8 Weinstein, Korn & Miller, *N.Y. Civil Practice,* § 7701.05).

Proceedings under Article 77 are an appropriate method for trustees to obtain a judicial instruction of whether a future course of conduct is proper, and is also the proper method for trustees or beneficiaries to obtain legal interpretations of trust documents. (*See Gilbert v Gilbert*, 39 NY2d 663, 666 [1976] (interpreting addendum to trust); *First Nat'l City Bank v Palmer*, 25 NY2d 553, 559-60 [1969] (approving sale of trust assets to trustee after adversarial hearing to determine fairness); *Andrews v Trustco Bank, Nat'l Ass'n*, 289 AD2d 910 [3d Dept 2001] (interpreting income provision of trust)).

The U.S. Court of Appeals for the Second Circuit recently provided insight into the scope and applicability of Article 77 in its decision in *BlackRock Fin. Mgmt. Inc. v Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169, 174 [2d Cir. 2012]. In *BlackRock*, a trustee sought construction of the trustee's rights under a pooling and servicing agreement. The trustee sought a judgment declaring that it had the authority under the agreement to assert and settle claims on

behalf of the trusts, and sought a judgment that the trustee acted in good faith, within its discretion, and within the bounds of reasonableness in determining that the settlement was in the best interest of the trusts. (*Id.*) The Second Circuit determined that the subject matter of the relief the trustee was seeking was within the scope of CPLR Article 77. (*Id.* at 177 (citing *Gilbert*, 39 NY2d 663; *First Nat'l City Bank*, 25 NY2d 553)).

For the reasons stated in the accompanying Petition, and based on the relevant legal authority discussed herein, the relief the Board is seeking is within the scope of CPLR Article 77, is reasonable and in the best interest of the Trusts, and should be granted.

POINT I

THE TRUSTS ARE EXPRESS TRUSTS WITHIN THE MEANING OF CPLR § 7701

The Board commenced this proceeding relating to eight subject Trusts. Each of the Trusts are express trusts as set forth in Article 77 of the CPLR. The statutory language and the decisional law make clear that the scope of Article 77 extends to the present proceeding as a "matter relating to a trust." The statute is construed broadly to cover any matter of interest to the trustees, beneficiaries or adverse claimants concerning the trust. Because the eight Trusts identified in this proceeding are express trusts, Article 77 of the CPLR was specifically enacted to address issues such as those raised in this proceeding. Thus, the present proceeding is properly before the Court, and the Court is within its jurisdiction to determine the issues raised by the Verified Petition.

POINT II

THE COURT SHOULD ISSUE AN ORDER APPROVING THE SETTLEMENT AGREEMENTS EXECUTED BETWEEN THE BOARD AND THE CRM INDIVIDUAL DEFENDANTS AND SGRISK AND DECLARE THOSE SETTLEMENT AGREEMENTS FINAL AND BINDING ON ALL FORMER MEMBERS OF THE SUBJECT TRUSTS

The Board brought this petition seeking Court approval of the CRM ID Settlement Agreement and the SGRisk Settlement Agreement as a reasonable exercise of the Board's discretion in administering the subject Trusts, and for a declaration that the CRM ID Settlement Agreement and the SGRisk Settlement Agreement are binding on the Notice Parties, which includes all former members of the subject Trusts: HITNY, WRWCT, TIWCT, TRADE, REMTNY, PETNY, NYSCT and ECTNY. For the reasons discussed herein, the relief requested in the Petition should be granted.

A. The Subject Settlement Agreements constitute a reasonable exercise of discretion by the Board, and should be approved.

From the time the Board became the successor in interest to the Trusts, the Board has devoted considerable resources to the forensic review and administration of the Trusts' liabilities and ensuring that statutorily mandated benefits are not interrupted. In addition, the Board has been involved in significant litigation and related negotiations concerning the assumption of eight insolvent GSITs with thousands of former members. The Board used its best efforts to identify and pursue claims against those believed to be responsible for the Trust deficits and mismanagement.

The subject Settlement Agreements are a product of substantial coordinated efforts and represent a fair and reasonable resolution of the issues addressed within the subject settlement agreements. The proposed agreements also take into account that the available policies of insurance have limits as set forth in the accompanying Petition, and that they are eroding

policies, whereby costs and legal fees deplete the available coverage. The Board asserts that a timely settlement is the best way to maximize recovery for the Trusts and its members. Based on all the circumstances, the Board respectfully requests an Order granting the relief requested in the accompanying Petition, and specifically declaring that the proposed Settlement Agreements are fair and binding and that all challenges are precluded.

Indeed, this Court recently granted identical relief in two proceedings brought by the WCB to approve settlements relating to two other insolvent GSITs. One such case, *In re New York State Workers' Compensation Board*, Index No. 4372-15 (Sup. Ct., Albany County, August 30, 2016), involved the Manufacturing Self Insurance Trust ("MSIT"). In that case, the Board commenced an Article 77 proceeding by Order to Show Cause seeking judicial approval of three settlement agreements it had entered into as successor-in-interest to the MSIT, including approval of the proposed allocation of settlement proceeds. (*Id.*) In addition, the Board requested an order declaring that the agreements are binding on all former MSIT members and precluding all former MSIT members and settling parties from bringing any future legal proceedings relative to MSIT. The Petition was opposed and, after briefing, oral argument, and due deliberation, the court (Hon. Richard J. McNally, Jr., JSC) determined that the proposed settlement agreements were fair. (*Id.*) In addition, the court determined that the settlements are binding on all former members of the MSIT trust and specifically disallowed a challenge by a former member of the trust. (*Id.*)

The other case, *In re New York State Workers' Compensation Board*, Index No. 1491-16 [Supreme Court, Albany County, March 10, 2017], involved the Health Care Providers Self-Insurance Trust ("HCPSIT"). The Board commenced an Article 77 proceeding seeking judicial approval of a settlement agreement it entered into as successor-in-interest to the HCPSIT,

including approval of the proposed allocation of settlement proceeds. (*Id.*) In addition, the Board requested an order declaring that the agreements are binding on all former HCPSIT members and precluding all former HCPSIT members and settling parties from bringing any future legal proceedings relative to HCPSIT.

The HCPSIT Court stated that the "ultimate issue for determination" in the Board's Article 77 proceeding "is whether the trustee's discretionary power was exercised reasonably and in good faith. It is not the task of the court to decide whether [it agrees] with the trustee's judgment. The task is limited to 'ensuring that the trustee has not acted in bad faith such that [its] conduct constituted an abuse of discretion." (*Id.* (citing *Matter of Bank of NY Mellon*, 127 AD3d 120, 125 [1st Dept 2015]). The court recognized that the settlement agreement was negotiated by sophisticated parties and its terms take into consideration the seriousness of the claims raised in the litigation. The court referred to the eroding nature of the insurance policy at issue, and considered the estimated costs and time involved in further litigation.

The allocation of the proceeds was challenged and, after briefing, oral argument, and due deliberation, the court (Hon. Gerald W. Connolly, AJSC) determined that the proposed settlement "is fair and reasonable and final and binding on all HCPSIT members, and that all requested relief in the petition should be granted," with one exception. The court granted leave for the submission of two applications for fees and costs. The court's decision provides that after determining those submissions, the court will declare that the Board may allocate the remaining proceeds in the manner requested, as "such allocation is fair, reasonable and equitable for all former members." In addition, the court held that "HCPSIT's liabilities exceed the settlement proceeds," and thus, no one is entitled to any further distribution or allocation.

The MSIT proceeding and the HCPSIT proceeding arose from similar facts and circumstances as the present proceeding. As such, the relief requested in the accompanying Petition should be granted.

Another case presenting similar legal issues is the *Matter of IBJ Schroder Bank & Trust Co.,* 271 AD2d 322 [1st Dept 2000]. In *Matter of IBJ*, a successor trustee sought judicial construction of an investor trust agreement and approval of a proposed settlement of a pending action that involved the assets of the investor trust. (*Id.*) Specifically, the successor trustee sought a determination (1) that it had the authority to file the pending litigation, (2) that it had the authority to enter into the settlement agreement, and (3) that each of the beneficiaries were barred from asserting any of the causes of action alleged in that action. The court approved the settlement and determined that IBJ's decision to enter into the Proposed Settlement was within its powers and was reasonable and prudent. (*See* Order and Judgment dated September 19, 2000 at Petition, Ex. L).[2]

Similarly, in 2011, the Trustee of Bank of New York Mellon commenced an Article 77 proceeding seeking summary judicial approval of a settlement and a determination that a settlement with the issuer of underlying mortgages and its successor was binding on all trust beneficiaries. (*Matter of Bank of New York Mellon*, Index No. 651786/2011 [Sup. Ct., New York County 2014]). After conducting a hearing on the merits, the Court determined that, with the exception of one minor portion of the settlement agreement at issue, the trustee did not act in bad faith or outside of the bounds of reasonable judgment in entering into the settlement agreement.

---

[2] Initially, the Supreme Court denied that portion of the petition that sought a declaration that the trustee had authority to enter into the settlement agreement, based on language in the Trust Agreement that limited the trustee's authority. The First Department reversed, holding that the same provision of the Trust Agreement that gave the trustee the power to commence the action gave the trustee the power to take all other necessary action, including the ability to settle, and remanded to the Supreme Court to determine whether to approve the settlement. *In re Matter of IBJ Schroder Bank & Trust Co., supra.*

(*Id.* at *20). On appeal, the First Department articulated the standard adopted by this Court in the MSIT proceeding referenced above for reviewing a trustee's decision to enter into a settlement agreement:

> The ultimate issue for determination here is whether the trustee's discretionary power was exercised reasonably and in good faith. It is not the task of the court to decide whether we agree with the trustee's judgment; rather, our task is limited to ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of discretion.

In re Bank of New York Mellon, 127 AD3d 120, 125 [1st Dept 2015].

As such, "judicial intervention is warranted only when there is an abuse of discretionary authority." (*Id.*; *see also Haynes,* 72 AD3d 535). "What constitutes an abuse of discretion depends on the terms and purposes of the trust, and particularly on the terms and purposes of the power and any standards or guidance provided for its exercise, as well as on applicable principles of fiduciary duty." (*In re Bank of New York Mellon*, 43 Misc.3d at *9, *quoting* Restatement (Third) of Trusts: Judicial Control of Discretionary Powers § 87, cmt. b [2007]). The First Department articulated the following as examples of an abuse of discretion:

> when a trustee (1) acts in bad faith and receives an improper inducement for exercising the power in question, (2) acts in good faith but for a reason other than to further the purpose of the trust or the purpose for which the power was granted, *i.e.* using trust funds to make well-intentioned, reasonable distributions when those distributions are not related to the stated purpose of the trust and (3) in exercising a power, acts unreasonably or beyond the bounds of reasonable judgment. *Id.*

In *Bank of New York Mellon*, the First Department agreed with the lower court's conclusion that the trustee had acted reasonably, holding that "[t]he Trustee acted within its authority throughout the process, and there is no indication that it was acting in self-interest or in the interests of [the bank] rather than those of the certificate holders." (*Id.* at 126). Indeed, the First Department noted that a trustee's reliance on outside counsel's expert judgment is

sufficient, even where the Court may have disagreed with the advice provided. (*Id.*) Notably, the First Department reversed that portion of the Supreme Court's decision that held that the trustee had not acted reasonably in settling the loan modification repurchase claims without investigating their potential worth or strength, and approved the settlement in its entirety. The First Department explained that with respect to this portion of the decision, the lower court had "disregarded the standard of deference due to a trustee's exercise of discretionary judgment . . . [and], in effect, improperly imposed a stricter and far less deferential standard . . .." (*Id.* at 127-28).

As more fully discussed in the Verified Petition, in the present case, the CRM ID Settlement Agreement and the SGRisk Settlement Agreement were the result of lengthy negotiations and careful consideration of the merits of the case against those defendants. This included a comprehensive assessment of the risks and costs associated with litigating the claims against those defendants, the nature and extent of insurance coverage available to those defendants, the available assets of the defendants (which bears on the likelihood that any resulting judgment would actually be collected), and the diminishing nature of the insurance policies which covered those defendants. Likewise, by entering into the CRM ID Settlement Agreement and the SGRisk Settlement Agreement on behalf of the subject Trusts (and their former members), the Board has made an independent, good faith judgment that the CRM ID Settlement Agreement and the SGRisk Settlement Agreement are advantageous to the subject Trusts, and in the best interest of their employer-members.

B. The Court should issue an order declaring that the CRM ID Settlement Agreement and the SGRisk Settlement Agreement are final and binding on all former members of the Trusts.

Under well-established principles of *res judicata*, a judgment in a special proceeding is binding on all persons who are provided with notice and an opportunity to be heard, and over whom jurisdiction is obtained. (*See Estate of Holland*, 84 Misc.2d 922 [Sup. Ct., Bronx County 1974] (holding that decree settling executor's account was *res judicata* as to infant who was virtually represented pursuant to SCPA § 315); *In re Hunter*, 6 AD3d 117 [2d Dept 2004], *aff'd* 4 NY3d 260 [2005] ("The general rule is that every decree of the Surrogate's Court is conclusive as to all matters embraced therein against every person over whom jurisdiction was obtained."); *see also Schwartz v Public Adm'r of Bronx County*, 24 NY2d 65 [1969] ("New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.").

Regarding the doctrine of *res judicata*, the Court of Appeals has held that where a fiduciary voluntarily seeks a formal judicial settlement of an account under the Surrogate's Court Procedure Act, and provides the beneficiaries of the trust account with notice of that proceeding, the beneficiaries are barred by principals of *res judicata* from later challenging the fiduciary's actions. (*In re Hunter*, 4 NY3d 260 [2005] ("As a general rule, an accounting decree is conclusive and binding with respect to all issues raised and as against all persons over whom Surrogate's Court obtained jurisdiction.")).

Under the same rationale, the former members of the subject Trusts who receive notice of the Verified Petition and an opportunity to be heard should be bound by the CRM ID Settlement

Agreement and the SGRisk Settlement Agreement, to the extent they are approved by the Court as a final resolution of any claims arising out of the settling parties' involvement with the Trusts. In *Matter of Bank of New York Mellon*, the court determined that the Article 77 proceeding provided potentially interested persons who were provided with notice of the proceeding a "full and fair opportunity . . . to make their views known to the Court, to object to the Settlement and to the approval of the actions of the Trustee in entering into the Settlement Agreement, and to participate in the hearing thereon." (*In re Bank of New York Mellon,* 42 Misc.3d at *8).

By the Notice Program contained in the Order to Show Cause, all former members of the subject Trusts will have been afforded notice of this proceeding and a full and fair opportunity to be heard on the relief sought in the Verified Petition. As such, the proposed Settlement Agreements are a valid exercise of the Board's discretion and, subject to Court approval, provide an appropriate mechanism to facilitate a final and binding resolution of the settling parties' actions with respect to the Trusts, including any claims that the former members have or may have had against the settling parties in connection with their participation in the Trusts.

POINT III

THE PROVISIONS OF GENERAL OBLIGATIONS LAW § 15-108 APPLY TO ANY AND ALL TORT CLAIMS ADVANCED BY NON-SETTLING PARTIES AGAINST THE CRM INDIVIDUAL DEFENDANTS AND SGRISK

Under General Obligations Law § 15-108, "[a] release given in good faith by the injured person to one tortfeasor . . . relieves him of liability to any other person for contribution as provided in article 14 of the civil practice law and rules." (*See, e.g.*, *Hytko v Hennessey*, 62 AD3d 1081, 1082 [3d Dept 2009]). GOL § 15-108 was enacted to encourage settlement where there are multiple tortfeasors and to prevent one tortfeasor from effectively preventing another's

settlement because of the potential liability for contribution. (*Williams by Williams v Niske by Niske*, 81 NY2d 437, 442 [1993]). Specifically, "[s]ubdivison (b) permits a defendant to settle with plaintiff without fear of being brought back into the action by another defendant seeking contribution." (*Rock v Reed-Prentice Div. of Package Mach. Co.*, 39 NY2d 34, 41 [1976]).

Here, WCB and the SGRisk and CRM ID Defendants executed a settlement in good faith releasing said Defendants from future liability. Accordingly, WCB respectfully requests that the protections of GOL § 15-108 apply to any and all tort claims advanced by non-settling parties against the CRM ID Defendants and SGRisk.

POINT IV

THE BOARD'S PRO RATA ALLOCATION OF THE SETTLEMENT PROCEEDS IS FAIR AND REASONABLE

The Board's efforts in the litigation involving the Trusts, as detailed in Point III of the accompanying Verified Petition, were undertaken in an effort to reduce or eliminate the significant Trust deficits that existed when the Board took over the subject Trusts, in which all former employer-members are jointly and severally liable. The Settling Members, in turn, have agreed to pay their pro-rata share of the respective trust deficit, as determined by the WCB, with the understanding that the WCB would be commencing actions against those alleged to be responsible for the cumulative deficits of the respective Trusts, and to reduce the Trust deficits for which the members would otherwise be liable. As set forth in the settlement agreements for the respective Trusts, the Settling Members clearly understood that any proceeds recovered by the WCB in those actions would first be used to satisfy the outstanding obligations of the respective trusts, and that any remaining surplus would only be distributed to the Settling Members on a pro-rata basis if and only if all of the liabilities of each respective trust was fully

satisfied. Unfortunately, as detailed below, at this juncture, there is no resulting surplus which can be distributed to the Settling Members. As such, and consistent with this understanding and the agreements with the Settling Members, the settlement proceeds from the CRM ID Settlement Agreement and the SGRisk Settlement Agreement, as well as the proceeds realized by the WCB in the CRM Bankruptcy, should be used to satisfy the outstanding liabilities of the Trusts.

Through its Petition, the Board requests an order declaring that the Board's proposed use of the settlement proceeds to satisfy the outstanding obligations of the Trusts, is fair, reasonable and equitable. This approach was agreed to by all former members at the time that the settlement agreements were executed, in exchange for capping their liability at their pro-rata share. As stated above, the Member Settlement Agreements effectively contemplated that the Board would waive its right to pursue the former members under a theory of joint and several liability, and limit their obligation to their then calculated pro rata share, in exchange for the Board's right to use any settlement proceeds to eliminate or reduce the remaining deficit (for which the former members could have otherwise been held liable).

POINT V

THE COURT SHOULD ISSUE AN ORDER CONFIRMING THAT NO SURPLUS EXISTS

Pursuant to the Member Settlement Agreements with the former employer-members of the respective Trusts, any proceeds recovered by the WCB in the CRM Action, the SGRisk Action or in the CRM Bankruptcy are to be applied first to the outstanding obligations of the Trust. (Petition, Ex. D). Only if a surplus exists after all of the Trusts' liabilities have been satisfied is a distribution to the former members on a pro rata basis authorized. As set forth

below and in the accompanying Petition, the remaining outstanding obligations of the respective Trusts exceed their assets.

As set forth in the Petition at paragraphs 220-223, as of February 29, 2016, HITNY's liabilities exceed its assets by approximately $21.2 million.

As set forth in the Petition at paragraphs 229-238, as of February 29, 2016, WRWCT's liabilities exceed its assets by approximately $10.8 million.

As set forth in the Petition at paragraphs 244-253, as of February 29, 2016, TIWCT's liabilities exceed its assets by approximately $41.5 million.

As set forth in the Petition at paragraphs 259-268, as of February 29, 2016, TRADE's liabilities exceed its assets by approximately $4.2 million.

As set forth in the Petition at paragraphs 274-283, as of February 29, 2016, REMTNY's liabilities exceed its assets by approximately $3 million.

As set forth in the Petition at paragraphs 289-297, as of February 29, 2016, PETNY's liabilities exceed its assets by approximately $1.7 million.

As set forth in the Petition at paragraphs 303-312, as of February 29, 2016, NYSCT's liabilities exceed its assets by approximately $532,000.

As set forth in the Petition at paragraphs 318-327, as of February 29, 2016, ECTNY's liabilities exceed its assets by approximately $27.8 million.

The Trusts' assets and the monies collected by the Board from the Settling Members have been used to pay the claims and associated expenses, as well as other obligations of the Trusts, or will be used to make debt service payments on the bond proceeds used to purchase the ALP.

Since the Apportioned Settlement Amount for each Trust, as set forth in the Petition at paragraphs 200-202, is less than the remaining liabilities for each Trust, it is respectfully

submitted that no surplus exists in any of the Trusts to distribute to the Settling Members of the Trusts.

Based on the foregoing, the Board requests an order declaring that the entire amount of the Gross Settlement Proceeds, as set forth in the Petition at paragraphs 200-202, as apportioned to the Trusts, are required to pay the outstanding obligations of the respective Trusts, and that no former employer-members of the Trusts are entitled to any distribution or allocation of the Gross Settlement Proceeds.

CONCLUSION

For the foregoing reasons, the Board's Petition should be granted in all respects, and this Court should issue an order as follows:

(i) declaring that each and every one of the Trusts is an express trust within the meaning of CPLR ¶ 7701;

(ii) approving the SGRisk Settlement Agreement, containing the provisions set forth in Section V.(4)(f) of the SGRisk Settlement Agreement;

(iii) approving the CRM ID Settlement Agreement, containing the provisions set forth in Section V.(4)(e) of the CRM ID Settlement Agreement;

(iv) declaring that the SGRisk Settlement Agreement and the CRM ID Settlement Agreement are final and binding on the Notice Parties;

(v) declaring that the causes of action asserted by Petitioner against the CRM Individual Defendants and SGRisk be withdrawn;

(vi) declaring that any claims that have been asserted by the Notice Parties against SGRisk and/or the CRM Individual Defendants relative to their respective involvement in the Trusts, shall be dismissed with prejudice and be deemed fully and finally extinguished and satisfied;

(vii) permanently enjoining and forever prohibiting the Notice Parties from asserting any future lawsuit(s), claim(s), legal proceeding(s), and/or cause(s) of action against SGRisk and SGRisk's current and former shareholders, members, officers, directors, employees, agents, attorneys, accountants, consultants, and advisors relative to their respective involvement in the Trusts;

(viii) permanently enjoining and forever prohibiting the Notice Parties from asserting any future lawsuit(s), claim(s), legal proceeding(s), and/or cause(s) of action against the CRM Individual Defendants relative to their involvement in the Trusts;

(ix) declaring that the provisions of General Obligations Law §15-108 apply to any and all tort claims advanced by the non-settling defendants in the Professional Actions against the CRM Individual Defendants and SGRisk and declaring that claims for contribution advanced by non-settling defendants in the Professional Actions against the CRM Individual Defendants and SGRisk are barred by the provisions of CPLR Article 14;

(x) declaring that the WCB's proposed pro rata allocation of the settlement proceeds realized by Petitioner from the SGRisk Settlement Agreement and the CRM ID Settlement Agreement, as well as the settlement proceeds received by Petitioner in the Majestic Bankruptcy, is fair, reasonable, and equitable; and

(xi) declaring that the outstanding obligations of each of the Trusts exceeds the apportioned settlement proceeds realized by Petitioner from the SGRisk Settlement Agreement, the CRM ID Settlement Agreement and the Majestic Bankruptcy and, therefore, that no surplus monies exist for distribution to the former employer-members of the Trusts; together with all further and different relief that the Court deems just, proper, or necessary to effectuate the request relief.

Dated: Buffalo, New York
April 25, 2017

RUPP BAASE PFALZGRAF CUNNINGHAM LLC

By: _____

Daniel E. Sarzynski, Esq.
Matthew C. Lenahan, Esq.
Attorneys for Petitioner
The Powers Building
16 West Main Street, Ste. 300
Rochester, New York 14614
(585) 381-3400