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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **NORTHERN DIVISION**

11 In re
12 REED E. SLATKIN,
13 Debtor.

Bk. No. ND 01-11549-RR
Chapter 11

**NOTICE OF MOTION AND MOTION BY
CHAPTER 11 TRUSTEE FOR
(1) APPROVAL OF SETTLEMENT WITH
BEACON PARTIES AND BERNSTEIN
PARTIES PURSUANT TO RULE 9019 OF
THE FEDERAL RULES OF
BANKRUPTCY PROCEDURE AND
(2) SALE OF ASSETS PURSUANT TO 11
U.S.C. SECTION 363(b)(1), (f);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF R. TODD NEILSON;
EXHIBIT**

Date: December 20, 2002
Time: 10:00 a.m.
Place: Courtroom 201
1415 State Street
Santa Barbara, CA 93101
The Honorable Robin Riblet

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1 TO THE HONORABLE ROBIN RIBLET, UNITED STATES BANKRUPTCY JUDGE, THE
2 UNITED STATES TRUSTEE, THE MEMBERS OF THE OFFICIAL COMMITTEE OF
3 UNSECURED CREDITORS AND THEIR COUNSEL OF RECORD, THE DISTRICT
4 DIRECTOR OF THE INTERNAL REVENUE SERVICE AND ALL PARTIES REQUESTING
5 SPECIAL NOTICE:

6 PLEASE TAKE NOTICE that at 10:00 a.m. on December 20, 2002, before the
7 Honorable Robin Riblet, United States Bankruptcy Court Judge, in Courtroom 201, located at
8 1415 State Street, Santa Barbara, California 93101, the chapter 11 trustee (the "Trustee") for the
9 estate of Reed E. Slatkin, an individual, will bring on for hearing his motion entitled "Motion By
10 Chapter 11 Trustee For (1) Approval of Settlement Agreement with Beacon Parties and Bernstein
11 Parties Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure and (2) Sale of Assets
12 Pursuant to 11 U.S.C. Section 363(b)(1), (f)" (the "Motion").

13 PLEASE TAKE FURTHER NOTICE that, by the Motion, the Trustee seeks an order
14 from the Bankruptcy Court, pursuant to Federal Rule of Bankruptcy Procedure 9019(a), 11 U.S.C.
15 §363(b)(1), (f) and other applicable law, authorizing the Trustee to enter into and approving the
16 terms of a settlement agreement (the "Settlement Agreement", a copy of which is attached hereto
17 as Exhibit "1") among (1) Boomtown Investments, LLC ("Boomtown"), Beacon Media Group,
18 LLC ("BMG"), and Beacon Communications, LLC (on behalf of itself and its subsidiaries,¹
19 collectively, "Beacon"); (Beacon, Boomtown and BMG are collectively referred to as the "Beacon
20 Parties"); (2) Arnyan Bernstein ("Bernstein", on behalf of himself and his spouse, Christine
21 Bernstein, his father, Armand Bernstein, and his mother, Lynne Bernstein, Flying Barzini
22 Brothers, Inc. and ANG Capital Corporation (collectively, the "Bernstein Parties")); and (3) R.
23 Todd Neilson, in his capacity as the Chapter 11 Trustee of the chapter 11 estate (the "Estate") of
24 Reed E. Slatkin ("Slatkin"). In consideration of the mutual promises set forth in the Settlement
25

26
27 ¹ Beacon's subsidiaries are: Beacon Music Publishing, LLC, Club Pictures, LLC, ATA Films,
28 Inc., Lucifilms, Inc., 16th Round Productions Corp., Lazarus Pictures, Inc., Trippin Films, Inc.,
Presidential Productions, Mutually Assured Productions, LLC, Fever Films, LLC, Fever
International, Inc., Big Ed Picture Company, LLC, Family Man Productions, Inc., Front Films,
LLC, Palace Pictures, LLC, and Palace International, Inc.

1 Agreement, the Beacon Parties, the Bernstein Parties and the Trustee agree to fully settle and
2 resolve all of their current and potential disputes and claims, asserted, threatened or which could
3 have been asserted between them, on the terms and conditions set forth in the Settlement
4 Agreement.

5 As set forth in more detail in the Settlement Agreement itself, pursuant to the Settlement
6 Agreement, (1) in respect of the Slatkin Boomtown Interest,² Boomtown shall deposit
7 \$3,328,140.70 into the Escrow Account, which Escrow Account shall also include \$432,246.19
8 deposited in June, 2002 by BMG and Boomtown; (2) in respect of the Slatkin BMG Interest,
9 BMG shall deposit \$371,859.30 into the Escrow Account; (3) simultaneously with the two
10 aforementioned deposits, the Trustee shall sell, transfer and assign all of the Bankruptcy Estate's
11 right, title and interest in and to the Slatkin Boomtown Interest and the Slatkin BMG Interest free
12 and clear of all interests, save for the O'Donnell Claims, to Boomtown and BMG, respectively, (4)
13 following Final Court Approval of the Settlement Agreement, Bernstein shall pay \$1.5 million to
14 the Trustee; (5) all amounts deposited into the Escrow Account shall be held in the Escrow
15 Account pending Final Court Approval of the Settlement Agreement and Resolution of the
16 O'Donnell Claims; (6) the Beacon Parties, Bernstein Parties, the Trustee and the Estate shall
17 execute mutual, general releases with exceptions; and (7) the amounts deposited into the Escrow
18 Account shall be released in accordance with the terms of the Settlement Agreement, which terms
19 vary depending on the receipt of Final Court Approval and the Resolution of O'Donnell Claims.

20 The Trustee bases this Motion upon the attached Memorandum of Points and Authorities,
21 the Declaration of R. Todd Neilson (the "Neilson Declaration"), the Settlement Agreement, the
22 arguments of counsel and such other admissible evidence brought before the Court prior to or at
23 the hearing on the Motion.

24 **PLEASE TAKE FURTHER NOTICE** that, pursuant to the "Order Granting Trustee's
25 Motion to Limit Notice" in the above captioned case entered by the Court on August 8, 2001, with
26 respect to motions for approval of the sale, use, lease of property of the Estate and motions for
27

28 ² All capitalized terms not defined herein are as defined in the Settlement Agreement.

1 approval of compromises or settlements of claims or disputes, such as the Motion, notice need
2 only be sent to the Debtor, the Trustee, the members of the Official Committee of Unsecured
3 Creditors and its counsel of record, all parties requesting special notice, the United States Trustee,
4 the District Director of the Internal Revenue Service, each party to the proposed compromise or
5 settlement, and any persons and entities named in recorded liens on the property to be sold, used
6 or leased.

7 **PLEASE TAKE FURTHER NOTICE** that, pursuant to Local Bankruptcy Rule 9013-
8 1(a)(7)(A), each interested party opposing, joining or responding to the Motion shall file with the
9 Bankruptcy Court and serve on the special litigation counsel for the Trustee 'the appropriate
10 written response not less than fourteen (14) days prior to the hearing scheduled on the Motion.
11 Pursuant to Local Bankruptcy Rule 9013-1(a)(11), failure to file and serve a timely response in
12 accordance with Local Bankruptcy Rule 9013-1(a)(7)(A), setting forth in detail the basis for such
13 opposition including all evidence that such opposition requires, may be deemed by the Bankruptcy
14 Court to be consent to the granting of the relief requested in the Motion.

15 **WHEREFORE**, the Trustee asks the Court to issue an order (i) granting the Motion; (ii)
16 authorizing the Trustee to compromise its controversy on the terms and conditions set forth in the
17 Settlement Agreement; (iii) authorizing the Trustee to execute such documents as may be
18 necessary to effectuate the Settlement Agreement; (iv) authorizing the Trustee to sell, transfer and
19 assign to Boomtown and BMG all of the Estate's interests in the Slatkin Boomtown Interest and
20 the Slatkin BMG Interest free and clear of all Interests, save for the O'Donnell Claims; and (v)
21 granting such further relief as the Court deems appropriate.

22 Respectfully submitted,

23 **R. TODD NEILSON, TRUSTEE OF THE CHAPTER**
24 **11 BANKRUPTCY ESTATE OF REED E. SLATKIN**

25 By: 

26 Bennett L. Spiegel
27 Jacqueline H. Sloan

28 **KIRKLAND & ELLIS**

Special Litigation Counsel for R. Todd Neilson,
Trustee of the Chapter 11 Bankruptcy Estate of
Reed E. Slatkin

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. BACKGROUND**

3 On May 1, 2001, Slatkin filed a voluntary petition for relief pursuant to chapter 11 of the
4 United States Bankruptcy Code (the "Code") in the United States Bankruptcy Court, Central
5 District of California, Northern Division ("Bankruptcy Court") in a case entitled In re Reed E.
6 Slatkin (Bk. No. ND 01-11549-RR) (the "Bankruptcy Proceedings"). The Trustee was duly
7 appointed by Order of the Bankruptcy Court on May 16, 2001.

8 In 1989, Bernstein founded Beacon Communications, a motion picture production
9 company. In or about the latter part of 1998, Bernstein had an opportunity to purchase Beacon
10 Communications from its then current owner, Ascent Entertainment Group, Inc. But to do so,
11 Bernstein needed investors willing to pursue the opportunity. To this end, Slatkin, O'Donnell, and
12 Bernstein entered into the Limited Liability Company Agreement and Operating Agreement of
13 Beacon Media Group, LLC , and, later, the Restated and Amended Limited Liability Company
14 Agreement and Operating Agreement of Boomtown Investments, LLC (collectively the "LLC
15 Agreements"). Pursuant to the LLC Agreements, Boomtown and BMG were formed for the
16 purposes of owning and controlling Beacon Communications and investing in other entertainment
17 and media related projects.

18 Slatkin holds of record, and the Trustee claims, a 21.7876595% interest in Boomtown (the
19 "Slatkin Boomtown Interest") and a 21.7876595% interest in BMG (the "Slatkin BMG Interest",
20 collectively, with the Slatkin Boomtown Interest, the "Slatkin Interests"). Slatkin had previously
21 advanced funds to the Beacon Parties in the form of capital contributions, bridge loans and gap
22 financing.

23 Boomtown and Beacon have previously distributed and advanced funds to Slatkin. The
24 Bernstein Parties had previously advanced funds to Slatkin for investment. From time to time,
25 Slatkin returned funds to or made payments on behalf of the Bernstein Parties.

26 Bernstein contends that he owns a 19.75% interest in RBG Capital Group, LLC ("RBG"),
27 with respect to which total capital contributions in the amount of \$775,224 have been made (such
28

1 interest, including all such capital contributions and any rights to distributions, the "Bernstein
2 RBG Interest").

3 The Beacon Parties filed a lawsuit, entitled Boomtown Investments, LLC, et al. v. R. Todd
4 Neilson, Adv. No. 02-01027 (the "Boomtown Litigation"), in which they have contended (among
5 other things) that Slatkin's investment in Boomtown and BMG was induced by fraud on the part of
6 Slatkin.

7 Beacon filed a proof of claim in connection with the Bankruptcy Proceedings (the "Beacon
8 Proof of Claim").

9 In June, 2002, BMG and Boomtown deposited \$432,246.19 into a separate interest bearing
10 escrow account held in trust by Kirkland & Ellis. Such deposits correspond to the tax distribution
11 amounts that otherwise would have been distributed in respect of the Slatkin Interests but which
12 were not distributed because of the Boomtown Litigation (such prior deposit, as increased by any
13 earnings thereon, shall be referred to as the "June Deposit").

14 The parties have concluded that it is desirable to resolve their respective claims and that
15 the Slatkin Interests be sold, transferred and assigned as set forth below.

16 **II. SUMMARY OF TERMS AND CONDITIONS OF THE SETTLEMENT**
17 **AGREEMENT**

18 By this Motion, the Trustee seeks approval of the Settlement Agreement among (1) the
19 Beacon Parties, (2) the Bernstein Parties, and (3) the Trustee, whereby, in consideration of the
20 mutual promises set forth in the Settlement Agreement, the Beacon Parties, the Bernstein Parties
21 and the Trustee agree to fully settle and resolve all of their current and potential disputes and
22 claims, asserted, threatened or which could have been asserted between them. The complete
23 Settlement Agreement, as attached hereto as "Exhibit 1," is hereby incorporated by reference. The
24 following is a summary of the most salient terms and conditions of the Settlement Agreement. In
25 the event of any inconsistency between this summary and the Settlement Agreement itself, the
26 Settlement Agreement will control.

27 ///

1 In general terms, the Settlement Agreement provides for the following:

2 • **Deposits of Funds by Boomtown and BMG into Escrow**

3 (1) in respect of the Slatkin Boomtown Interest, Boomtown shall deposit
4 \$3,328,140.70 into the Escrow Account; which Escrow Account shall also include \$432,246.19
5 June Deposit;

6 (2) in respect of the Slatkin BMG Interest, BMG shall deposit \$371,859.30
7 into the Escrow Account;

8 • **Sale, Transfer and Assignment of Estate's Interests to Boomtown and BMG**

9 (3) simultaneously with the two aforementioned deposits, the Trustee shall
10 sell, transfer and assign to Boomtown and BMG, respectively, all of the Bankruptcy Estate's right,
11 title and interest in and to the Slatkin Boomtown interest and the Slatkin BMG Interest free and
12 clear of all interests, save for the O'Donnell Claims (the "Trustee's Transfer");

13 • **Payment by Bernstein to Trustee**

14 (4) following Final Court Approval of the Settlement Agreement, Bernstein
15 shall pay \$1.5 million to the Trustee (the "Bernstein Payment");

16 • **Mutual General Releases (the "Mutual General Releases")**

17 (5) the Beacon Parties release and discharge the Trustee and the Estate from
18 all claims the Beacon Parties may have against them with exceptions, as set forth more fully in the
19 Settlement Agreement attached;

20 (6) the Bernstein Parties release and discharge the Trustee and the
21 Bankruptcy Estate from all claims the Bernstein Parties may have against them with exceptions, as
22 set forth more fully in the Settlement Agreement attached; and,

23 (7) the Trustee releases and discharges the Beacon Parties and the Bernstein
24 Parties from the claims the Trustee has against them with exceptions, as set forth more fully in the
25 Settlement Agreement attached.

26 ///

27 ///

1 • **Holding of Deposits in Escrow Until Final Court Approval and Final**
2 **Resolution of O'Donnell Claims**

3 (8) all amounts deposited into the Escrow Account, and the June Deposit,
4 shall be held in the Escrow Account pending final Court approval of the Settlement Agreement
5 and final resolution of the claims asserted by O'Donnell;

6 • **Final Court Approval; Resolution of O'Donnell Claims; Release From Escrow**
7 **Account**

8 (9) If Final Court Disapproval is received, then the Trustee and the Beacon
9 Parties shall instruct the Escrow Agent to return all amounts in the Escrow Account (other than the
10 June Deposit and any earnings thereon) to the Beacon Parties, and the Settlement Agreement shall
11 be void and of no effect, and the releases provided therein shall be ineffective.

12 (10) Upon the occurrence of both (a) Final Court Approval and (b) a Final
13 O'Donnell Claims Resolution in which it is determined by a court of competent jurisdiction that
14 the Trustee has all right, title and interest in the Slatkin Interests, free and clear of all Interests held
15 or claimed by O'Donnell, and the assignment of the Slatkin Interests to the Beacon Parties is free
16 and clear of all O'Donnell Claims and Interests, then the Trustee and the Beacon Parties shall
17 instruct the Escrow Agent to distribute all funds in the Escrow Account to the Trustee.

18 (11) Upon the occurrence of both (a) Final Court Approval and (b) a Final
19 O'Donnell Claims Resolution in which it is determined by a court of competent jurisdiction that
20 O'Donnell has some Interest in the Slatkin Interests, or that the Transfer of the Slatkin Interests to
21 the Beacon Parties is subject to any Interest of O'Donnell (any such determination, an "Adverse
22 Determination"), then the following shall occur:

23 (i) If the Final O'Donnell Claims Resolution provides that the
24 Trustee has a partial interest in the Slatkin Interests and that such partial interest is free and clear
25 of all O'Donnell Claims and Interests, then the Trustee and the Beacon Parties shall instruct the
26 Escrow Agent to distribute the funds in the Escrow Account as follows: the Trustee shall be
27 distributed a proportion of the funds in the Escrow Account attributable to Boomtown equal to the
28 proportion which the Slatkin Boomtown Interest that is determined to be owned free and clear by

1 the Trustee bears to the total Slatkin Boomtown Interest, and a proportion of the funds in the
2 Escrow Account attributable to BMG equal to the proportion which the Slatkin BMG Interest that
3 is determined to be owned free and clear by the Trustee bears to the total Slatkin BMG Interest.
4 Any remaining funds in the Escrow Account shall be returned to the Beacon Parties.

5 (ii) If the Final O'Donnell Claims Resolution provides that the
6 Trustee has no interest in the Slatkin Interests, then the Trustee and the Beacon Parties shall
7 instruct the Escrow Agent to return all funds in the Escrow Account to the Beacon Parties.

8 (iii) If the Final O'Donnell Claims Resolution provides for some
9 other Adverse Determination not specified in clauses (i) or (ii) above, and if the funds on deposit
10 in the Escrow Account are sufficient to satisfy and obtain the release of all O'Donnell Claims such
11 that the Transfer of the Slatkin Interests to the Beacon Parties is free and clear of all O'Donnell
12 Claims and Interests, then the Trustee and the Beacon Parties shall instruct the Escrow Agent to
13 make payments from the Escrow Account to satisfy such claims and the remainder of the funds in
14 the Escrow Account shall be released to the Trustee.

15 (iv) If the Final O'Donnell Claims Resolution provides for some
16 other Adverse Determination not specified in clauses (i) or (ii) above, and if the funds on deposit
17 in the Escrow Account are not sufficient to satisfy and obtain the release of all O'Donnell Claims
18 such that the Transfer of the Slatkin Interests to the Beacon Parties is free and clear of all
19 O'Donnell Claims and Interests, then the Trustee and the Beacon Parties shall instruct the Escrow
20 Agent to release all amounts in the Escrow Account to the Beacon Parties.

21 (v) An Adverse Determination shall not impact or affect the
22 Trustee's Transfer to Boomtown and BMG, the Bernstein Payment, or the Mutual General
23 Releases; provided, however, for the avoidance of doubt, nothing in the Settlement Agreement is
24 intended to limit the Beacon Parties' ability or right to assert against O'Donnell, by way of set-off,
25 recoupment or defense, any Claims or rights which the Beacon Parties may have against Slatkin or
26 the Trustee.

1 **III. LEGAL ARGUMENT**

2 **A. The Court Should Approve the Settlement Agreement As A Compromise Or**
3 **Settlement of Compromise of Controversy Pursuant to Federal Rule of**
4 **Bankruptcy Procedure 9019.**

5 **1. The Applicable Legal Standard.**

6 The authority granted a chapter 11 trustee to compromise a controversy is set forth in Rule
7 9019(a) of the Federal Rules of Bankruptcy Procedure, which provides in pertinent part, "on
8 motion by the trustee and after hearing on notice to creditors ... the court may approve a
9 compromise or settlement." Fed. R. Bankr. P. 9019(a).

10 In passing on proposed settlements, the standard that Courts applied under the former
11 Bankruptcy Act is also applicable under the Bankruptcy Code. Matter of Carla Leather, Inc., 44
12 B.R. 457, 466 (Bankr. S.D.N.Y. 1984). As stated by the Supreme Court in Protective Committee
13 v. Anderson, under the Act, in order to approve a proposed settlement, a court must have found
14 that the settlement was "fair and equitable" based on an "educated estimate of the complexity,
15 expense, and likely duration of ... litigation, the possible difficulties of collecting on any judgment
16 which might be obtained and all other factors relevant to a full and fair assessment of the wisdom
17 of the proposed compromise." Protective Committee for Independent Stockholders of TMT
18 Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 425, *rehearing denied*, 391 U.S. 909 (1968).

19 The Ninth Circuit has held that, in considering a proposed compromise, the Court must
20 evaluate, (i) the probability of success; (ii) the difficulties with collection, if any, to be
21 encountered in the matter of collection; (iii) the complexity of the litigation involved, and the
22 expense, inconvenience and delay necessarily attending to it; and (iv) the paramount interest of the
23 creditors and a proper deference to their reasonable views in the premises. In re A & C Properties,
24 784 F.2d 1377, 1381 (9th Cir.), *cert. denied*, 479 U.S. 854, 107 S. Ct. 189, 93 L. Ed.2d 122
25 (1986)("A&C"). See also Drexel v. Loomis, 35 F.2d 800 (8th Cir. 1929); In re Lion Capital
26 Group, 49 B.R. 163 (Bankr. S.D.N.Y. 1985); Matter of Marshall, 33 B.R. 42 (Bankr. D. Conn.
27 1983).

1 A court, however, should not substitute its own judgment for the judgment of a trustee or
2 the debtor. Matter of Carla Leather, Inc., 44 B.R. at 465. A court, in reviewing a proposed
3 settlement, is not "to decide the numerous questions of law and fact ... but rather to canvass the
4 issues and see whether the settlement falls below the lowest point in the range of reasonableness."
5 In re W. T. Grant & Co., 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied*, 464 U.S. 822, 104 S. Ct.
6 89, 78 L. Ed. 2d 97 (1983). A "mini-trial" on the merits of the underlying cause of action is not
7 required and should not be undertaken by the Bankruptcy Court. In re Walsh Construction, Inc.,
8 669 F.2d 1325 (9th Cir. 1982); In re Blair, 538 F.2d 849 (9th Cir. 1976).

9 **2. The Court Should Approve the Settlement Agreement Because It Is**
10 **Fair, Reasonable, And In the Best Interests Of The Creditors and The**
11 **Estate.**

12 Pursuant to the Settlement Agreement, the Beacon Parties, the Bernstein Parties and the
13 Trustee agree to fully settle and resolve all of their current and potential disputes and claims,
14 asserted, threatened or which could have been asserted between them. The current and potential
15 disputes and claims among these three groups are complex, and the opportunity to settle them all
16 via the Settlement Agreement will ultimately save the Estate the significant costs of litigating such
17 claims.

18 Examining the four factors the Ninth Circuit laid out in In re A & C Properties, the Court
19 has ample reason to approve the Settlement Agreement. First, the probability of the Trustee's
20 success in the Boomtown Litigation, and in the various threatened disputes and claims among the
21 Beacon Parties, the Bernstein Parties and the Trustee, is not absolute. The parties are each poised
22 to litigate and assert viable arguments in support of their conflicting claims. The costs of litigating
23 each of the claims is likely to consume a substantial portion of any sums the Trustee would
24 ultimately recover. As such, absent this Settlement Agreement, the Trustee would continue to be
25 involved in substantial and complex litigation in which the result would be uncertain. Moreover,
26 such litigation would be extremely time consuming and expensive.

27 Second, the Trustee might encounter difficulties in collecting on any judgment in his favor
28 if the value of the assets of Boomtown and BMG were depleted by virtue of the litigation itself.

1 Moreover, the Beacon Parties have ceased their business of producing movies, thereby limiting the
2 going concern value of the company, and thus the Slatkin Boomtown Interest and the Slatkin
3 BMG Interest therein. Settling the disputes and claims via the Settlement Agreement allows the
4 Trustee to liquidate the Estate's interests in Boomtown and BMG, and obviating the risk of
5 depletion of that value over time.

6 Third, the Boomtown Litigation is complex and will be expensive and inconvenient to the
7 Trustee. Not only does the litigation involve the complex valuation of motion picture industry
8 assets, but also the interpretation of sophisticated motion picture industry LLC agreements and the
9 resolution of alleged fraudulent inducement claims.

10 Finally, the paramount interest of the creditors is the maximization of the Estate. The
11 Trustee's efforts are better focused on maximizing the value of the Estate's interests in Boomtown
12 and BMG such that the Estate's interests can be liquidated swiftly to a sum certain, and returned to
13 the Estate for distribution to the creditors of the Estate pursuant to a plan of liquidation.

14 Each of the four factors considered by the Ninth Circuit in determining the appropriateness
15 of settlements militates in favor of approving the Motion.

16 **B. The Court Should Approve the Sale of the Estate's Interests in Boomtown**
17 **And Beacon Pursuant To The Settlement Agreement.**

18 **1. Bankruptcy Code § 363 (b)(1) Permits The Sale Of The Estate's**
19 **Interests in Boomtown And Beacon Outside Of The Ordinary Course**
20 **Of Business.**

21 Bankruptcy Code §363 (b)(1) permits a debtor in possession, after notice and a hearing, to
22 "sell..., other than in the ordinary course of business, property of the estate." 11 U.S.C. §
23 363(b)(1). In applying section 363(b)(1), courts typically have approved sale of the assets of a
24 debtor's estate where, as here, the sale satisfies the business judgment test, in that it is proposed in
25 good faith and is fair and equitable. See e.g., In re Phoenix Steel Corp., 82 B.R. 334 (Bankr. D.
26 Del. 1987); WBQ Partnership v. Commonwealth of Virginia, 189 B.R. 97 (Bankr. E.D. Va. 1995).
27 When the contemplated sale is a sale of substantially all of the assets of the estate, courts may
28

1 require a showing that the price to be paid is fair and reasonable. In re Delaware & Hudson
2 Railway Co., 124 B.R. 169, 175-76 (D. Del. 1991).

3 Other courts also find it appropriate to examine whether (a) the debtor provided adequate
4 notice of the proposed sale, (b) the sale is the result of good faith negotiations, and (c) the
5 proposed purchase price is fair and reasonable. In re Abbotts Dairies of Pa., Inc., 788 F.2d 143,
6 149-50 (3d Cir. 1986); In re Engineering Prods., Co., Inc., 121 B.R. 246, 247-48 (Bankr. E.D.
7 Wisc. 1990); See also In re Tempo Technology Corp., 202 B.R. 363, 365 (D. Del. 1996), aff'd,
8 141 F.3d 1155 (3d Cir. 1998); Delaware & Hudson Railway Co., 124 B.R. at 176.

9 The Trustee's proposed sale of the Estate's interests in the Slatkin Boomtown Interest and
10 the Slatkin BMG Interest (the "Estate's Interests") meets all of the factors mentioned above.
11 Accordingly, a sale of the Estate's Interests is appropriate under section 363(b)(1) as the courts in
12 this Circuit and elsewhere have applied it.

13 **2. The Trustee Has Determined In His Sound Business Judgment That**
14 **the Sale of the Estate's Interests Pursuant To The Settlement**
15 **Agreement Is The Highest And Best Use Of The Assets.**

16 The Ninth Circuit Bankruptcy Appellate Panel in Walter v. Sunwest Bank (In re Walter)
17 83 B.R. 14 (B.A.P. 9th Cir. 1988) ("Walter"), adopted a flexible, case by case test to determine
18 whether the business purpose for the proposed sale justifies disposition of property of the estate
19 under Section 363 (b). In Walter, the Court adopted the reasoning of the Fifth Circuit in
20 Institutional Creditors of Continental Airlines, Inc. v. Continental Airlines (In re Continental
21 Airlines, Inc.), 780 F.2d 1223 (5th Cir. 1986), and the Second Circuit in Committee of Equity
22 Security Holders v. The Lionel Corporation (In re Lionel Corp.), 722 F.2d 1063 (2d Cir. 1983),
23 and articulated the criteria a bankruptcy court is to consider in deciding whether to approve or
24 disapprove the use or sale of estate property under Section 363 (b):

25 "Whether the proffered business justification is sufficient depends on the case. As
26 the Second Circuit held in Lionel, the bankruptcy judge should consider all salient
27 factors pertaining to the proceeding and, accordingly, act to further the diverse
28 interests of the debtor, creditors and equity holders, alike. He might, for example,
look to such relevant facts as the proportionate value of the asset to the estate as a
whole, the amount of elapsed time since the filing, the likelihood that a plan of
reorganization will be proposed and confirmed in the near future, the effect of the

1 proposed disposition on future plans of reorganization, the proceeds to be obtained
2 from the disposition vis-a-vis any appraisals of the property, which of the
3 alternatives of use, sale or lease the proposal envisions and, most importantly
perhaps, whether the asset is increasing or decreasing in value. This list is not
intended to be exclusive, but merely to provide guidance to the bankruptcy judge."

4 Walter, 83 B.R. at 19-20, quoting Continental Air Lines, Inc., 780 F.2d at 1226, citing Lionel, 722
5 F2d. at 1071.

6 As set forth in the Neilson Declaration, the facts pertaining to the sale at issue amply
7 justify and substantiate the Trustee's business decision that the contemplated sale of the Estate's
8 Interests is in the best interest of the Estate. The Trustee recognizes that the Estate's Interests are
9 likely to decrease in value if litigation with the Beacon Parties and threatened litigation with the
10 Bernstein Parties is prolonged. Furthermore, as the outcome of each of these disputes is uncertain,
11 if the Trustee is unsuccessful, the costs of continued litigation would only deplete the Estate's
12 existing assets without contributing any new assets for distribution to the creditors. Hence, a sale
13 of the Estate's Interests represents the best strategy to maximize the value of the bankruptcy estate.

14 **3. Adequate and Reasonable Notice Of The Sale Will Be Given.**

15 Courts have held that the notice of a proposed sale the assets of the estate should be
16 adequate and reasonable. Delaware & Hudson Railway., 124 B.R. at 180. Here, pursuant to the
17 Court's Order entered on August 8, 2001, all parties entitled to notice of a sale of assets in this
18 case are being served with the Notice of Motion and Motion. including (i) the United States
19 Trustee for this District; (ii) members of and counsel for the Creditors' Committee; (iii) all entities
20 that have requested special notice; (v) the District Director of the Internal Revenue Service, and
21 (vi) the other parties to the Settlement Agreement. The foregoing has been deemed by the Court,
22 as reflected in the "Order Granting Trustee's Motion to Limit Notice" entered on August 8, 2001,
23 to be reasonable and adequate notice under §363 of the Bankruptcy Code.

24 **4. The Sale Is The Result Of Arms-Length, Good Faith Negotiations.**

25 The good faith requirement "focuses principally on the element of special treatment of the
26 debtor's insiders in the sale transaction..." In re Industrial Valley Refrig. and Air Cond. Supplies,
27 Inc., 77 B.R. 15, 17(Bankr. E.D. Pa. 1987). The sale of the Estate's Interests to Boomtown and
28 BMG has been negotiated extensively on an arms-length basis and confers no special treatment on

1 any of the Debtor's insiders. The proposed sale is the product of good faith negotiations, in which
2 the Trustee bargained for the maximum possible purchase price for the Estate's Interests. Under
3 these circumstances, there is no question that the Settlement Agreement has been made in good
4 faith.

5 **5. The Beacon Parties' Payments Pursuant To The Settlement Agreement**
6 **Are Fair and Reasonable and Will Result In The Greatest Value**
7 **Received For The Slatkin Boomtown Interest And The Slatkin BMG**
8 **Interest.**

9 The price obtained under the Settlement Agreement for the sale of the Estate's Interests is
10 fair and reasonable under the circumstances and it is the product of extensive negotiations and
11 substantial due diligence with respect to the value of these motion picture industry assets by the
12 Trustee's professionals who specialize in the valuation of such complex assets.

13 **6. The Proposed Sale Of The Estate's Interests Should Be Approved.**

14 In sum, a sale will result in the maximization of the value of the Estate's Interests, thereby
15 enabling the estate to receive far more than it would have if the Trustee continues to litigate,
16 subjecting the vulnerable assets of Boomtown and BMG, and the Estate's Interests therein, to
17 potential depletion or substantial decrease in value over time. The proposed sale of the Estate's
18 Interests will convert the Estate's Interests to cash and minimize administrative costs and expenses
19 chargeable to the estate arising from continued litigation with the Beacon Parties and the Bernstein
20 Parties. The sale, as part of the Settlement Agreement, will also act to minimize, through the
21 mutual releases therein, the amount of unsecured claims that ultimately will be asserted against the
22 bankruptcy estate. For example, potential claims by Boomtown and BMG against the Estate in the
23 alleged amount of approximately \$7.8 million will be completely waived via the Settlement
24 Agreement.

25 In light of the compelling business reasons for the sale of the Estate's Interests and the
26 Trustee's satisfaction of the procedural and substantive requirements of Section 363(b)(1), the
27 Trustee submits that the Court should approve the sale under the Settlement Agreement to
28 Boomtown and BMG pursuant to Section 363 (b)(1).

1 **C. The Proposed Sale Free And Clear of Liens, Claims And Interests Is**
2 **Appropriate Under the Circumstances.**

3 Section 363(f) of the Bankruptcy code empowers a Trustee to sell property out of the
4 ordinary course of business "free and clear of an interest in such property of an entity" if any one
5 of the following five conditions is met:

- 6 (i) applicable non-bankruptcy law permits sale of such property free and clear of such
7 interest;
- 8 (ii) such entity consents;
- 9 (iii) such interest is a lien and the price at which such property is to be sold is greater
10 than the aggregate value of all liens on such property;
- 11 (iv) such interest is in bona fide dispute: or
- 12 (v) such entity could be compelled, in a legal or equitable proceeding, to accept a
13 money satisfaction of such interest.

14 11 U.S.C. § 363(f).

15 It should be noted that Section 363 (f) is written in the disjunctive -- satisfaction of any one
16 of the five conditions is sufficient to sell free and clear of liens. Citicorp Homeowners Services,
17 Inc. v. Elliot (In re Elliot), 94 B.R. 343 (Bankr. E.D. Pa. 1988); Mutual Life Ins. Co. of New York
18 v. Red Oak Farms, Inc. (In re Red Oak Farms, Inc.), 36 B.R. 856, 858 (Bankr. W.D. Mo. S.D.
19 1984).

20 In this case, the Settlement Agreement specifically states that the sale of the Estate's
21 Interests is not free and clear of the O'Donnell Claims. Other than the O'Donnell Claims, the
22 Trustee is not aware of any other alleged liens against or interests in the Estate's Interests.
23 However, if any were asserted, they would be disputed. Thus, Section 363(f) has been satisfied.

24 **D. Boomtown And BMG Are Good Faith Purchasers**

25 Boomtown and BMG have acted in "good faith" within the meaning of section 363(m) of
26 the Bankruptcy Code, which provides that "[t]he reversal or modification on appeal of an
27 authorization under [section 363(b) or (c)] of a sale or lease of property does not affect the validity
28

1 of a sale or lease under such authorization to an entity that purchased or leased such property in
2 good faith.” 11 U.S.C. § 363(m).

3 In determining whether a purchaser has acted in good faith, courts have stated that “[t]he
4 requirement that a purchaser act in good faith . . . speaks to the integrity of his conduct in the
5 course of the sale proceedings.” Abbotts Dairies, 788 F.2d at 147 (citations omitted). More
6 specifically, courts generally consider the following factors in making a good faith determination:
7 (a) whether the purchaser and trustee negotiated at arm’s length, (b) whether there is any evidence
8 of fraud, collusion, or interested dealing, (c) whether an officer or director of the debtor obtains
9 any lucrative employment package for his or her part in the negotiations, and (d) whether the
10 parties to the transaction have attempted to take grossly unfair advantage of other bidders. E.g.,
11 id. at 147; Tempo Technology, 202 B.R. at 370.

12 Under that standard, and by any other, Boomtown and BMG clearly have acted in good
13 faith. First, the extensive negotiations among Boomtown, BMG and the Trustee have been
14 conducted at arms’ length. Indeed, the negotiating process between Boomtown and BMG, on the
15 one hand, and the Trustee, on the other hand, was complex and difficult. Second, there has been
16 no fraud, collusion, or interested dealing. Further, because the Estate’s Interests are ownership
17 interests in LLCs, the ownership of which is the subject of pending disputes both by the Beacon
18 Parties and by O’Donnell, the Trustee does not believe there are any other potential buyers other
19 than the other members of the LLCs or the LLCs themselves . As such there was no possibility of
20 Boomtown and BMG colluding with the Trustee to take unfair advantage of any other potential
21 buyers. Accordingly, this Court should find that Boomtown and BMG clearly are “good faith”
22 purchasers within the meaning of section 363(m).

23 IV. CONCLUSION

24 For all of the foregoing reasons, the Trustee respectfully requests that this Court enter an
25 order (i) granting the Motion; (ii) authorizing the Trustee to compromise its controversy on the
26 terms and conditions set forth in the Settlement Agreement; (iii) authorizing the Trustee to execute
27 such documents as may be necessary to effectuate the Settlement Agreement; (iv) authorizing the
28 Trustee to sell, transfer and assign to Boomtown and BMG all of the Estate’s interests in the

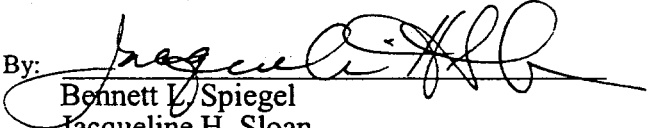
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Slatkin Boomtown Interest and the Slatkin BMG Interest free and clear of all Interests, save for the O'Donnell Claims; and (v) granting such further relief as the Court deems appropriate.

DATED: November 25, 2002

Respectfully submitted,

**R. TODD NEILSON, TRUSTEE OF THE
CHAPTER 11 BANKRUPTCY ESTATE
OF REED E. SLATKIN**

By: 

Bennett I. Spiegel
Jacqueline H. Sloan
KIRKLAND & ELLIS
Special Litigation Counsel for R. Todd
Neilson, Trustee of the Chapter 11
Bankruptcy Estate of Reed E. Slatkin

1 7. Bernstein contends that he owns a 19.75% interest in RBG Capital Group, LLC
2 ("RBG"), with respect to which total capital contributions in the amount of \$775,224 have been
3 made (such interest, including all such capital contributions and any rights to distributions, the
4 "Bernstein RBG Interest").

5 8. The Beacon Parties filed a lawsuit, entitled Boomtown Investments, LLC, et al. v.
6 R. Todd Neilson, Adv. No. 02-01027 (the "Boomtown Litigation"), in which they have contended
7 (among other things) that Slatkin's investment in Boomtown and BMG was induced by fraud on
8 the part of Slatkin.

9 9. Beacon filed a proof of claim in connection with the Bankruptcy Proceedings (the
10 "Beacon Proof of Claim").

11 10. In June, 2002, BMG and Boomtown deposited \$432,246.19 into a separate interest
12 bearing escrow account held in trust by Kirkland & Ellis. Such deposits correspond to the tax
13 distribution amounts that otherwise would have been distributed in respect of the Slatkin Interests
14 but which were not distributed because of the Boomtown Litigation (such prior deposit, as
15 increased by any earnings thereon, shall be referred to as the "June Deposit").

16 11. Subsequent to extensive negotiation, the Beacon Parties, the Bernstein Parties and
17 I, in my capacity as the Trustee of the Estate, entered into a Settlement Agreement. A true and
18 correct copy of the Settlement Agreement is annexed hereto as Exhibit "1." All capitalized terms
19 not defined in this Declaration are as defined in the Settlement Agreement.

20 12. As set forth in more detail in the Settlement Agreement itself, pursuant to the
21 Settlement Agreement, (1) in respect of the Slatkin Boomtown Interest, Boomtown shall deposit
22 \$3,328,140.70 into the Escrow Account, which account shall also contain the \$432,246.19 June
23 Deposit; (2) in respect of the Slatkin BMG Interest, BMG shall deposit \$371,859.30 into the
24 Escrow Account; (3) simultaneously with the two aforementioned deposits, the Trustee shall sell,
25 transfer and assign all of the Bankruptcy Estate's right, title and interest in and to the Slatkin
26 Boomtown Interest and the Slatkin BMG Interest free and clear of all interests, save for the
27 O'Donnell Claims, to Boomtown and BMG, respectively, (4) following Final Court Approval of
28 the Settlement Agreement, Bernstein shall pay \$1.5 million to the Trustee; (5) all amounts

1 deposited into the Escrow Account shall be held in the Escrow Account pending Final Court
2 Approval of the Settlement Agreement and Resolution of the O'Donnell Claims; (6) the Beacon
3 Parties, Bernstein Parties, the Trustee and the Estate shall execute mutual, general releases with
4 exceptions; and (7) the amounts deposited into the Escrow Account shall be released in
5 accordance with the terms of the Settlement Agreement, which terms vary, as described below,
6 depending on the receipt of Final Court Approval and the Resolution of O'Donnell Claims.

7 13. Pursuant to the Settlement Agreement, if Final Court Disapproval is received, then
8 the Trustee and the Beacon Parties shall instruct the Escrow Agent to return all amounts in the
9 Escrow Account (other than the June Deposit and any earnings thereon) to the Beacon Parties, and
10 the Settlement Agreement shall be void and of no effect, and the releases provided therein shall be
11 ineffective.

12 14. Upon the occurrence of both (a) Final Court Approval and (b) a Final O'Donnell
13 Claims Resolution in which it is determined by a court of competent jurisdiction that the Trustee
14 has all right, title and interest in the Slatkin Interests, free and clear of all Interests held or claimed
15 by O'Donnell, and the assignment of the Slatkin Interests to the Beacon Parties is free and clear of
16 all O'Donnell Claims and Interests, then the Trustee and the Beacon Parties shall instruct the
17 Escrow Agent to distribute all funds in the Escrow Account to the Trustee.

18 15. Upon the occurrence of both (a) Final Court Approval and (b) a Final O'Donnell
19 Claims Resolution in which it is determined by a court of competent jurisdiction that O'Donnell
20 has some Interest in the Slatkin Interests, or that the Transfer of the Slatkin Interests to the Beacon
21 Parties is subject to any Interest of O'Donnell (any such determination, an "Adverse
22 Determination"), then the following shall occur:

23 (a) If the Final O'Donnell Claims Resolution provides that the Trustee has a
24 partial interest in the Slatkin Interests and that such partial interest is free and clear of all
25 O'Donnell Claims and Interests, then the Trustee and the Beacon Parties shall instruct the Escrow
26 Agent to distribute the funds in the Escrow Account as follows: the Trustee shall be distributed a
27 proportion of the funds in the Escrow Account attributable to Boomtown equal to the proportion
28 which the Slatkin Boomtown Interest that is determined to be owned free and clear by the Trustee

1 bears to the total Slatkin Boomtown Interest, and a proportion of the funds in the Escrow Account
2 attributable to BMG equal to the proportion which the Slatkin BMG Interest that is determined to
3 be owned free and clear by the Trustee bears to the total Slatkin BMG Interest. Any remaining
4 funds in the Escrow Account shall be returned to the Beacon Parties.

5 (b) If the Final O'Donnell Claims Resolution provides that the Trustee has no
6 interest in the Slatkin Interests, then the Trustee and the Beacon Parties shall instruct the Escrow
7 Agent to return all funds in the Escrow Account to the Beacon Parties.

8 (c) If the Final O'Donnell Claims Resolution provides for some other Adverse
9 Determination not specified in clauses (i) or (ii) above, and if the funds on deposit in the Escrow
10 Account are sufficient to satisfy and obtain the release of all O'Donnell Claims such that the
11 Transfer of the Slatkin Interests to the Beacon Parties is free and clear of all O'Donnell Claims and
12 Interests, then the Trustee and the Beacon Parties shall instruct the Escrow Agent to make
13 payments from the Escrow Account to satisfy such claims and the remainder of the funds in the
14 Escrow Account shall be released to the Trustee.

15 (d) If the Final O'Donnell Claims Resolution provides for some other Adverse
16 Determination not specified in clauses (i) or (ii) above, and if the funds on deposit in the Escrow
17 Account are not sufficient to satisfy and obtain the release of all O'Donnell Claims such that the
18 Transfer of the Slatkin Interests to the Beacon Parties is free and clear of all O'Donnell Claims and
19 Interests, then the Trustee and the Beacon Parties shall instruct the Escrow Agent to release all
20 amounts in the Escrow Account to the Beacon Parties.

21 (e) An Adverse Determination shall not impact or affect the Trustee's Transfer
22 to Boomtown and BMG, the Bernstein Payment, or the Mutual General Releases; provided,
23 however, for the avoidance of doubt, nothing in the Settlement Agreement is intended to limit the
24 Beacon Parties' ability or right to assert against O'Donnell, by way of set-off, recoupment or
25 defense, any Claims or rights which the Beacon Parties may have against Slatkin or the Trustee.

26 16. As provided above, in consideration of the mutual promises set forth in the
27 Settlement Agreement, the Beacon Parties, the Bernstein Parties and the Trustee agree to fully
28 settle and resolve all of their current and potential disputes and claims, asserted, threatened or

1 which could have been asserted between them, on the terms and conditions set forth in the
2 Settlement Agreement. In addition, potential claims by Boomtown and BMG against the Estate in
3 the alleged amount of approximately \$7.8 million will be completely waived via the Settlement
4 Agreement.

5 17. Absent this settlement, I, as the Trustee, would continue to be involved in
6 substantial and complex litigation in which the result would be uncertain. Moreover, such
7 litigation would be extremely time consuming and expensive.

8 18. In light of all the foregoing, I respectfully submit that the Settlement Agreement
9 should be approved.

10 I declare under penalty of perjury under the laws of the United States of America that the
11 foregoing is true and correct.

12 Executed on November 25, 2002 at Los Angeles, California.

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16 R. TODD NEILSON
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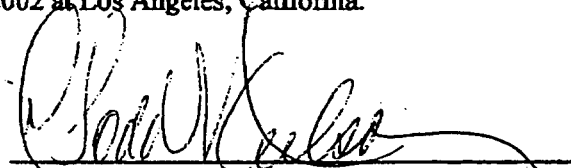
1 which could have been asserted between them, on the terms and conditions set forth in the
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3 the alleged amount of approximately \$7.8 million will be completely waived via the Settlement
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16 R. TODD NEILSON

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