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ATTORNEYS FOR UNSECURED CREDITORS COMMITTEE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
LORAX CORPORATION,	§	**CASE NO. 02-48396-DML-11**
	§	
DEBTORS.	§	**CHAPTER 11**
	§	
	§	**Hearing: May 3, 2004 at 2:30 p.m.**

COMMITTEE'S RESPONSE AND PARTIAL OBJECTION TO
JOINT MOTION FOR ORDER APPROVING SETTLEMENT AGREEMENT
PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019

COMES NOW, the Unsecured Creditors Committee for Lorax Corporation ("Committee"), by and through their counsel of record, and files this their Response and Partial Objection to the Joint Motion for Order Approving Settlement Agreement Pursuant to Federal Rule of Bankruptcy Procedure 9019 (the "Motion") filed herein by Shawn Brown, the Chapter 11 Trustee appointed herein ("Trustee"), Henderson County Property Corporation ("HCPC"), Dallas Manufacturing Company ("DMC"), J. Baxter Brinkmann ("Brinkmann"), Philip Sheperd, as Trustee for the Greenwall Liquidating Trust (respectively, "Trustee Shepherd" and the "Trust") (collectively, the "Movants"), and would show the Court the following in support thereof:

1. The Committee generally admits the allegations contained in Section I of the Motion, although the Committee denies that the settlement proposed in the Motion is for adequate consideration, as is set forth more fully below in the remainder of this Response and Partial Objection.

2. The Committee generally admits the allegations contained in Section II, parts A. through F., paragraphs 1-15 of the Motion, and asserts that they generally correctly outline the factual background of the matters in controversy.

3. Section II, part G., paragraphs 16 and 17 of the Motion, contain allegations and a summary of the proposed Settlement Agreement attached to the Motion as Exhibit "1" thereto (the "Settlement Agreement"). While the Committee believes that the Movants have fairly correctly and completely summarized the terms of the Settlement Agreement, the Committee denies that the Settlement Agreement should be approved as proposed, as set forth in more detail below.

4. Section III of the Motion contains arguments and authorities submitted by the Movants, which are not properly the subject of admission nor denial. To the extent that admission or denial is required, the Committee agrees that the Movants have correctly stated the general factors the Court should consider in review of settlement agreements. The Committee denies, however, that the Movants have met their burden on all or even a majority of such factors, as the Settlement Agreement is currently proposed, and asserts that the Settlement Agreement must be revised or denied.

5. Since there are slight variations in the summary and outline of the proposed settlement in the Motion from the actual Settlement Agreement, the Committee's Response and Partial Objection references and addresses the specific provisions of the Settlement Agreement.

6. The Committee does not dispute that the Movants can meet several of the factors outlined in Section III of the Motion. The Committee further agrees that the litigation proposed to be settled is complex and has been vigorously litigated by parties to the litigation.[1] The Committee supports resolution of the litigation, particularly along the lines set forth in the declaratory judgments resolving the State Court Litigation and the Bankruptcy Litigation (collectively hereafter, the "Litigation") in the forms attached as Exhibits "A" and "B" to the Settlement Agreement. The Committee also has no problem with the agreement to a stay of the Litigation pending bankruptcy court review of the Settlement Agreement nor the proposed forms of Motion and Order to be filed with the Court to accomplish same, which are attached to the Agreement as Exhibits "C" through "F."

7. The Committee notes, however, the following problems with the Settlement Agreement, which make it unapprovable by the Court in its current form:

A. There are parties identified in the Settlement Agreement as part of the "Brinkmann Parties," as defined in the Settlement Agreement, that are not parties to the Motion. Those parties, namely, J. Baxter Brinkmann International Corporation, Resolute Corporation, and the Brinkmann Corporation (collectively, the "Non-Motion Parties"), are not parties to any of the pending Litigation, and are not indicated as either creditors, parties who acquired affected rights prior to or during the bankruptcy case, or parties-in-interest to this bankruptcy proceeding. In fact, other than being identified as part of the "Brinkmann Parties" in the Settlement Agreement, the Non-Motion Parties are not otherwise identified, defined, or discussed anywhere else in the Settlement

[1] In the Committee's opinion, overly litigated by the Brinkmann Parties.

Agreement, nor in the Motion. Notwithstanding same, the Settlement Agreement envisions that all the Brinkmann Parties be released and discharged in full by the Trustee Parties pursuant to paragraph 3 thereof.[2] There is no adequate description of the Non-Motion Parties participation or inclusion, in the Settlement Agreement or Motion, no indication of any consideration coming to the Trustee Parties from the Non-Motion Parties, and no reason given why the Non-Motion Parties should receive a release and discharge from the Trustee Parties. Absent further detail and explanation, the Court should not approve the Settlement Agreement as presented, since it envisions a release and discharge of all of the Brinkmann Parties without presenting a basis inclusion of the Non-Motion Parties in same.

B. For the reasons set forth in further detail below, including lack of adequate consideration, without additional consideration being paid to the Trustee Parties, the Committee disputes that any of the Brinkmann Parties should receive a release and discharge in this matter.

C. Additionally, the Settlement Agreement indicates that the releases contained in paragraphs 3, 4, and 11 of the Settlement Agreement shall only become effective when two events take place: (i) the Settlement Agreement is approved and is final and non-appealable, and (ii) the Trustee Parties and the Brinkmann Parties have conveyed and delivered the title to the Property[3] to a purchaser as part of the sale described [therein]. As a further condition to the effectiveness of a release of any of the Brinkmann Parties, to the extent that any of the Brinkmann Parties is adjudged worthy of a release, any release for the Brinkmann Parties should not become effective until the Brinkmann Parties have paid all funds to the Trustee Parties contemplated by the Settlement

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[2] Also defined in the Settlement Agreement.

[3] As defined in the Settlement Agreement.

Agreement, or any amendment to same, in such form as is ultimately approved by the Bankruptcy Court. The Settlement Agreement should not be approved, as presented to the Court, since the wording of the Settlement Agreement does not otherwise require payment of the funds contemplated by the Brinkmann Parties prior to their receipt of their releases from the Trustee Parties, nor is there any enforcement mechanism otherwise contained in the Settlement Agreement in the event of non-payment, breach or other failure by the Brinkmann Parties to perform thereunder.

D. The Committee believes that the proposed Marketing Period of two hundred fifty (250) days is not adequate. The Brinkmann Parties' actions in connection with the Property have clouded the title to same, which has had a chilling effect and caused prospective purchasers to shy away from acquisition of the Property. The Committee believes that there will be a significant period of time required by the broker to "warm back up" interest in the Property and get the word out that all title disputes have been put in the past, with the Trustee Parties holding full right and authority to convey the Property free and clear of liens, claims, encumbrances, or any further litigation to title. The Committee believes that this will take roughly a quarter year, or ninety (90) days. Accordingly, the Committee believes that a period of three hundred (300) days would be more appropriate for a "marketing period," as that would give the Trustee Parties a little more than half a year to market the Property after the anticipated 90 day "warming up" period, in order to get a qualified and higher purchase price for the Property.[4]

E. The Committee partially objects to the language contained in paragraph 9 of

[4] As set forth in more detail below, the Committee is not suggesting that DMC get an even longer period in which they get "free rent" at the facility by suggesting that the Marketing Period be extended by an additional fifty (50) days. In fact, the Committee objects to any further free rent to DMC, and believes that the Settlement Agreement, if it is to include a release of DMC, must include DMC's agreement to pay appropriate rentals to the Trustee Parties so long as title to the Property remains with the Estate.

the Settlement Agreement, to the extent that the Trustee, in his sole discretion, can curtail the Marketing Period and offer the Property at a public auction. The Committee objects to this language, to the extent that approval by the Court of the Settlement Agreement was or is intended to impinge or curtail the Committee's, or any other party-in-interest's, right to object to holding of any such public auction, prior to the expiration of the Marketing Period, at the Trustee's sole discretion. The Committee suggests that language such as the following be included at the end of paragraph 9 of the Settlement Agreement to resolve this problem:

> "The foregoing is not intended to restrict or waive the right of any party not a party to this Settlement Agreement to object in the Bankruptcy Court to a public auction commenced solely at the Trustee's discretion prior to expiration of the Marketing Period."

F. The Committee objects to the Secured Claim, as defined in the Settlement Agreement, and various components of same. While the Committee understands the inclusion in the Secured Claim of the amounts for principal, for accrued interest, and for ad valorem and other taxes paid by the Brinkmann Parties with respect to the Enterprise Notes,[5] the amount paid for insurance on the Property, the cure amount under the Environmental Agreement, the amount of the Purchase Option under the Lease, and the amounts paid for facility maintenance and repair costs, all of which amounts the Committee assumes the Trustee has verified as accurate, in accordance with his fiduciary duties to the Estate, the Committee objects to inclusion of the amount of $505,137.92, asserted to be for attorney's fees related to the enforcement of the Enterprise Notes and the cure related to the Lease and the Environmental Agreement, and believes that same is wholly without merit, is excessive, and is an improper attempt by the Brinkmann Parties to recover or gain credit

[5] As defined in the Settlement Agreement.

for their attorney's fees and costs related, not to any attempt to collect on the Enterprise Notes, but instead, for litigation fees and expenses incurred in the Litigation. This is particularly offensive since the proposed agreed judgments to resolve the Litigation state that each party will bear its own costs in relation to the Litigation. Inclusion of those amounts, nonetheless, by the Brinkmann Parties, as part of their Secured Claim, is a blatant attempt to end run and disregard that portion of the proposed judgments and would render same nullities. If the provisions in the proposed judgment are to be given effect, then the only portion of attorney's fees and costs that could possibly be recoverable, or given credit for, as part of the Secured Claim, are amounts not related to the Litigation, relating solely to alleged enforcement of the Enterprise Notes.

G. In addition, and simply put, the amount sought for the attorney's fees is excessive. The amount sought by the Brinkmann Parties as part of the Secured Claim for attorney's fees comprises approximately 5/12ths, or an amount just under 42%, of the total principal, interest, and cost amounts asserted to be owing under the Enterprise Notes, which notes and related security interests have not been disputed by any of the parties.[6] The requested attorney's fees portion represents 31% of the total of the non-attorneys fee portions of the proposed Secured Claim, and constitutes nearly 24% of the total proposed Secured Claim. In lieu of the excessive attorney's fees, apparently placed solely to inflate the "credit amount" as the starting point for bidding for the Brinkmann Parties at an auction or other sale of the Property, the Secured Claim must be reduced by that amount, or, preferably to the Committee, the amount in paragraph 10(ii) should be increased correspondingly.

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[6] Except, of course, pre-petition by the Brinkmann Parties themselves, who asserted that since the Debtor had no rights in anything, any lien granted by the Debtor to Enterprise Bank was not a lien on anything.

H. The Committee objects to settlement with DMC for only $200,000.00 for "rent allegedly owed" as set forth in paragraph 10(iii) and paragraph 11 of the Settlement Agreement. The amount proposed is woefully deficient compared to the amount of rent outstanding from DMC through the date of the Motion. And, to add insult to under-payment, paragraph 11 of the Settlement Agreement contemplates that DMC will pay no further rent to the Trustee Parties during the remainder of the Marketing Period, or such shorter or longer time until the Property is sold, as determined by the Trustee and the other parties to the Settlement Agreement, and DMC is to receive an advance release for same. Such an advance release is simply not prudent, since, if the Brinkmann Parties are not the ultimate purchaser of the Property, the Trustee will have no ability to recover against DMC, or any other of the Brinkmann Parties who occupy space at the Property, in the event they cause destruction to or remove items that are not theirs from the Property.

I. In fact, non-payment of rent by the subtenants at the Property, particularly DMC, who not only failed to pay rent, but took over other space outside their subleased premises, all of which they failed to pay rent on, by way of which, DMC precluded entry on to the Property by other subtenants who had signed their own subleases with the Debtor, thereby further depriving the Debtor of another stream of income, ultimately caused the bankruptcy filing. The Committee calculates that back rent owed by DMC for their actual subleased premises is $165,000.00, through the date of filing of the Motion,[7] plus the amount of $500,000.00 for space taken by DMC in addition

[7] DMC's sublease contemplates rent of $5,500.00 per month (approximately $2 per square foot per year). Rent has been unpaid by DMC for thirty (30) months.

to their subleased premises for which they have not paid the Debtor,[8] plus the additional amount of $178,514.72, through the date of filing of the Motion,[9] for lost rents from other sublessees that the Debtor was unable to collect on due to DMC's conversion of excess space in the Debtor's building, all without payment for same. In addition, from the date of the Motion forward, rent on the sublease and excess space being utilized by DMC should be paid at the amount of $30,500.00 per month by DMC to Trustee Parties.[10] Thus, for a two hundred fifty (250) day marketing period (approximately eight months), DMC would be expected to pay an additional $244,000.00 in rent, and for a three hundred (300) day marketing period (approximately ten months), the Estate should expect to receive an additional $305,000.00 in rent from DMC.

J. The amount proposed as settlement of DMC's rent claim, therefore, is well short of even a reasonable resolution point, even in a situation where the Trustee Parties and the Brinkmann Parties each had a 50/50 chance of winning. The Committee believes that the Brinkmann Parties' chance of winning the issues involved in the Litigation were significantly smaller

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[8] Based on observation of the parties, DMC has taken over an additional 150,000 square feet at the Property. Using the same $2 per square foot per year accruing under DMC's actual sublease, results in a rental accruing at $25,000 per month for DMC's excess space, multiplied by the at least twenty (20) months that DMC has occupied that excess space.

[9] Based on the previously allotted and contracted lease spaces being occupied from January 01, 2003, the amount of rental income lost by the inaction of the Trustee is estimated at **$178,514.72** not including pro rata taxes and insurance, as follows:

D'Task - 16 months (Calendar year 2003 plus four months) x 4,103.63/mo.	= $ 65,658.08
Neo-Bru - 16 months (Calendar year 2003 plus four months) x 7,053.54/mo.	= $112,856.64
Total	**$178,514.72**

[10] Based on the sublease in place between the Debtor and DMC, plus reasonable extrapolation of the same per square foot per year rental amounts of the excess space being used by DMC in the Debtor's facility.

than 50%, and that a reasonable settlement amount for the rent by the Trustee Parties is a significantly higher amount, not an amount that is less than twenty percent (20%) of the amount owed or to be owed for rent and rent losses from DMC through the date of a sale contemplated by the Settlement Agreement, even using only a 250 day Marketing Period.

K. The Committee further objects to the inclusion of the phrase "prior to the closing of the sale of the Property" in the second sentence of paragraph 12 of the Settlement Agreement, as any and all funds paid by ATCO and Texas Ragtime, Inc., or any new subtenant at the Property, are and should remain property of the Estate and the Trustee Parties, if the Settlement Agreement is approved, whether or not they are collected prior to closing of a sale of the Property. The Estate owns all rights to recovery under the subleases it had with its sublessees, ATCO, Texas Ragtime, Inc., and DMC. There is no explanation as to why the interest and right to those amounts should be lost by the Estate, if they are not collected for some reason by the time of closing of the sale of the Property, and that such rights should revert to the purchaser of the Property, unless that purchaser, including the Brinkmann Parties, is going to pay additional equivalent consideration to the Trustee Parties to acquire those rights as well.

L. Finally, while the Committee is appreciative of the additional amount of $485,000.00 in cash to be paid as identified in paragraph 10(ii) of the Settlement Agreement, the Motion and the Settlement Agreement are devoid of information from which the Committee, or for that matter, any other party-in-interest, can ascertain whether the funds proposed to be paid are sufficient to pay even administrative expenses, much less provide any return to unsecured creditors of the Debtor. Information on those amounts, the Estate's current administrative expenses, and analysis of funds to be available for distribution to creditors, must be provided in order for the Court

to have the complete picture necessary to make its determination as to whether the settlement proposed is reasonable, and for the parties in their review of same.

8. The Committee believes that the Litigation can and should be resolved. The Committee also supports the concept of a global settlement agreement such as contemplated by the Settlement Agreement and the Motion to assist in minimizing additional accruing administrative expenses of the Estate. The Motion and the Settlement Agreement as currently proposed by Movants, however, fail to satisfy the showing required to meet a number of the factors required for approval, and must be denied.

WHEREFORE, PREMISES CONSIDERED, the Committee respectfully requests that the Court deny the Motion at this time, require the parties to come back to the Court with a fair and adequate settlement, or re-commence the pending litigation, if the parties are unable or unwilling to return to this Court with a fair and acceptable settlement, and for such other and further relief, at law or in equity, to which the Committee may show itself justly entitled.

Respectfully submitted,

MCGUIRE, CRADDOCK & STROTHER, P.C.

By:/s/Marc W. Taubenfeld (04/27/2004)
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CERTIFICATE OF SERVICE

The Undersigned hereby certifies that on this 27th day of April, 2004, a true and correct copy of the above and foregoing instrument was served on all parties on the attached Service List electronically or via First Class U.S. Mail, postage prepaid.

/s/Marc W. Taubenfeld (04/27/2004)
Marc W. Taubenfeld