

CAUSE NO. D-1-GV-12-001713

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
VS.	§	TRAVIS COUNTY, TEXAS
GRAMERCY NSURANCE COMPANY	§	53RD JUDICIAL DISTRICT

**APPLICATION TO APPROVE SETTLEMENT AGREEMENT AND
RELEASE OF TRUST FUNDS**

(Companion Property and Casualty Insurance Company and Kemper Cost Management)

TO THE HONORABLE JUDGE OF THE COURT:

Comes now Resolution Oversight Corporation, Special Deputy Receiver for Gramercy Insurance Company (the “SDR” and “Gramercy”, respectively), Companion Property and Casualty Insurance Company (“Companion”), and Kemper Cost Management, Inc. (“KCM”), and files this *Application to Approve Settlement Agreement and Release of Trust Funds* (“Application”), and in support respectfully shows the Court as follows:

I. INTRODUCTION

The SDR requests authority to settle a dispute with Companion related to funds in a reinsurance trust account for which Bank of New York Melon (“BNYM”) serves as trustee. Pursuant to the settlement, BNYM will release \$1.65 million from the trust account to the SDR, the SDR will pay \$285,000 of that amount to KCM, and BNYM will release the balance of the trust account to Companion.

II. GRAMERCY RECEIVERSHIP

On December 4, 2012, this Court entered an Agreed Order of Rehabilitation and Permanent Injunction in this proceeding, placing Gramercy into rehabilitation and appointing the Texas Commissioner of Insurance as Rehabilitator (“Rehabilitator”). The Rehabilitator appointed Resolution Oversight as Special Deputy Receiver. On August 26, 2013, this Court

entered an *Order Appointing Liquidator and Permanent Injunction*, placing Gramercy into liquidation and appointing the Texas Commissioner of Insurance as Liquidator (the “Liquidator”).

III. AUTHORITY AND JURISDICTION

The SDR is authorized to file this Application pursuant to TEX. INS. CODE § 443.154(y). This Court has exclusive jurisdiction over the subject matter of this Application pursuant to TEX. INS. CODE § 443.005, and the subject matter of this Application is referred to the Master pursuant to the *Supplemental Order of Reference to Master* entered by this Court on August 26, 2013. The SDR seeks approval of the Compromise Settlement Agreement and Release attached as Exhibit A setting forth the division of trust funds among the parties and providing for mutual releases.

IV. BACKGROUND

In February 2009, Gramercy and Companion entered into a fronting arrangement whereby Gramercy would market, underwrite and issue Companion policies for long-term warranties on solar panels and wind turbines (the “Program”). KCM served as the Claims Administrator of the Program, and was entitled to a percentage of the written premium as its fee. In connection with the Program, Companion ceded 100% of its interests and liabilities under the Program to Gramercy by way of the *General Liability Quota Share Reinsurance Agreement*, dated December 1, 2008 (the “Reinsurance Agreement”). To secure Gramercy’s obligations under the Reinsurance Agreement and to satisfy respective state regulatory requirements, Companion, Gramercy, and BNYM created a trust (the “Trust”), by executing a *Trust Agreement*, dated June 1, 2009 (the “Trust Agreement”), whereby BNYM serves as Trustee. The liquidation order entered on August 26, 2013 cancelled all Gramercy reinsurance agreements.

Companion asserts that the funds in the trust account are its sole property and not the property of the Liquidator, and that the stay does not apply to the trust agreement and thus does not prevent BNYM from releasing the entirety of the trust funds to Companion. The SDR and KCM dispute these assertions and assert individual claims to the funds.

V. PROPOSED SETTLEMENT

After due investigation and deliberation, the SDR and Companion, and the SDR and KCM have entered into respective settlements of past, present and future claims arising under the Program, pursuant to which BNYM will release \$1.65 million from the trust account to the SDR, the SDR will pay \$285,000 of that amount to KCM, and BNYM will release the balance of the trust account to Companion. The SDR represents to the Court that the settlement is in the best interests of the Gramercy estate and its policyholders and creditors. The SDR submits that the settlement will resolve the uncertainty, delays and costs that would be involved in litigating Companion's claims related to the trust funds.

VI. NOTICE

The SDR is providing notice of the filing of this Application to all persons who have requested notice in the receivership estate in accordance with TEX. INS. CODE ANN. § 443.007 and the *Supplemental Order of Reference to Master*. The SDR is also noticing all parties in interest as that term is defined in TEX. INS. CODE ANN. § 443.004(a)(17) and as shown on the certificate of service. The Application will also be posted on the SDR's website.

VII. OFFER OF PROOF AND VERIFICATION

This Application is supported by the affidavit of Ernesto A. Garza, President of Resolution Oversight Corporation, as Special Deputy Receiver of Gramercy, attached hereto and incorporated herein by reference as Exhibit B.

VIII. REQUEST FOR EXPEDITED CONSIDERATION

The SDR requests that this Application be set for expedited consideration with a submission date of December 20, 2013. The investments in the trust consist of bonds, which can be highly volatile under current market conditions. The parties desire to terminate the trust and disburse the assets as quickly as possible to protect their investment value. Further, Companion needs the balance of the trust funds released to it before year end to clarify state regulatory reporting. Companion's motion to obtain the funds and KCM's responses have been on file since June, 2013 and this submission date would give all parties in interest 8 days to consider the terms of the settlement on these claims to the Trust Fund.

IX. PRAYER

WHEREFORE, PREMISES CONSIDERED, the SDR prays that the Court enter an order which approves the Compromise Settlement Agreement and Release among the SDR and Companion, and the SDR and KCM or one in substantially in same the form as Exhibit A.

Respectfully submitted,

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ATTORNEYS FOR THE SPECIAL
DEPUTY RECEIVER

APPLICANT'S NOTICE OF SUBMISSION

Pursuant to the terms of the Amended Order of Reference to Master entered by the District Court in this cause, the *Application to Approve Release and Settlement of Claims to Trust Funds (Companion Property and Casualty Insurance Company and Kemper Cost Management)* is hereby set for written submission before the Special Master, Tom Collins, on **Friday, December 20, 2013.**

The Special Master has established the following rules pursuant to Rule 171 of the Texas Rules of Civil Procedure:

1. Any objection must be filed with the Travis County District Clerk at least three (3) calendar days before the submission date.
2. A copy of any objection shall be served by email by such date on:
 - (a) The Special Master's Docket Clerk, Ms. Deona Sokol, at specialmasterclerk@tdi.texas.gov.
 - (b) All interested parties, including the undersigned counsel and those listed on the Applicant's Certificate of Service.
3. The written objection must specifically list all reasons for objection with supporting references to and discussion of statutory and case authorities. Reasons not stated in writing will not be considered orally.
4. If a matter is set for submission, an objecting party shall expeditiously coordinate with Applicant's counsel and the master's docket clerk [(512) 475-1761] to obtain an oral hearing, unless the master determines that an oral hearing is not necessary. The objecting party shall serve a Notice of Oral Hearing on applicant's counsel and all interested parties, including those listed on the Applicant's Certificate of Service.
5. Failure to file timely a written objection before the Special Master constitutes a waiver of the right to object to the Special Master's recommendation to the District Court.
6. Any Acknowledgment of Notice and Waiver to be filed by a Guaranty Association or other interested party should be filed at least three (3) calendar days before the submission or hearing date.

/s/ Rachel Stroud
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all interested parties in accordance with the Texas Rules of Civil Procedure and TEX. INS. CODE ANN. § 443.007(d) this 12th of December, 2013.

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EXHIBIT A

COMPROMISE SETTLEMENT AGREEMENT AND RELEASE

A. Parties.

The parties to this **Compromise Settlement Agreement and Release** (the “Agreement”) are **GRAMERCY INSURANCE COMPANY** (“Gramercy”), by and through Resolution Oversight Corporation as Special Deputy Receiver, and **COMPANION PROPERTY AND CASUALTY INSURANCE COMPANY** (“Companion”). Gramercy and Companion are sometimes referred to herein collectively as the “Parties” or individually as a “Party.” Kemper Cost Management, Inc. (“KCM”) joins this Agreement for the limited and sole purpose of acknowledging and agreeing to the terms of Paragraphs B.4 and C.3, 10, and 15 of this Agreement.

B. Recitals.

1. As a part of a fronted insurance program (the “Program”), Gramercy issued Companion policies for long-term warranties on solar panels and wind turbines (the “Policies”). In connection with the Program, Companion ceded 100% of its interests and liabilities under the Program to Gramercy by way of the *General Liability Quota Share Reinsurance Agreement*, dated December 1, 2008 (the “Reinsurance Agreement”). To secure Gramercy’s obligation under the Program and to satisfy respective state regulatory requirements, Companion, Gramercy, and Bank of New York Mellon (“BNYM”) created a trust (the “Trust”), by executing a *Trust Agreement*, dated June 1, 2009 (the “Trust Agreement”), whereby BNYM serves as Trustee. The Trust is currently funded in an amount of approximately \$13,120,440 (the “Trust Assets”) intended to secure Gramercy’s reinsurance obligations to Companion.

2. On December 4, 2012, the State of Texas filed *Plaintiff’s Original Petition, Application for Order Appointing Rehabilitator and Request for Injunctive Relief* (“Petition”), in Cause No. D-1-GV-12-001713, pending in the 53rd Judicial District Court, Travis County, Texas

(respectively, the "Receivership Proceeding" and "Receivership Court, "). On that same date, the Receivership Court entered an Order placing Gramercy into rehabilitation and appointing the Texas Commissioner of Insurance as Rehabilitator ("Rehabilitator"). Rehabilitator designated Resolution Oversight Corporation as Special Deputy Receiver. Thereafter, on August 26, 2013, the Receivership Court entered its *Order Appointing Liquidator and Permanent Injunction* ("Liquidation Order"), placing Gramercy into liquidation and appointing the Texas Commissioner of Insurance as Liquidator ("Liquidator"). Resolution Oversight Corporation continued as Special Deputy Receiver on behalf of Liquidator.

3. A dispute has arisen in the Receivership Proceeding regarding the current and future respective rights of Gramercy and Companion to access and utilize Trust Assets, as well as with regard to other alleged rights and liabilities between Gramercy and Companion arising from and relating to the Program and the Trust.

4. The Parties contracted with KCM to function as the Claims Administrator of the Program, and as a result, KCM was entitled to receive from Gramercy payment for its services. KCM claims it is entitled to certain payments from the Trust and the Parties pursuant to its agreements with them (the "KCM Payment Claims").

5. In an effort to compromise and resolve their disputes, Gramercy and Companion have agreed to settle and release, on the terms set forth in this Agreement, all claims against one another, including all matters relating to the Program, the Policies, and the Trust Assets.

C. Covenants, Terms, and Releases.

For and in consideration of the mutual covenants, terms, and releases contained herein and the other good and valuable consideration stated herein, the Parties agree as follows:

1. This agreement is subject to and contingent upon approval of the Receivership Court. Gramercy shall present to the Receivership Court an application for approval of the terms of this Agreement and distribution of the Trust Assets as set forth herein ("Application").

2. Upon the Receivership Court's approval of the Application, Gramercy shall be entitled to immediately withdraw from the Trust the sum of one million, six hundred and fifty thousand dollars (\$1,650,000) (the "Gramercy Distribution") and Companion shall be entitled to immediately withdraw from the Trust all Trust Assets in excess of one million, six hundred and fifty thousand dollars (\$1,650,000) (the "Companion Distribution"). After completion of the Gramercy Distribution and the Companion Distribution, the Trust shall be terminated. The Parties agree to promptly execute any additional documentation necessary to effectuate the foregoing distributions and termination of the Trust. The Parties acknowledge that the Gramercy Distribution and the Companion Distribution represent the only monetary considerations for the settlement underlying this Agreement.

3. Gramercy and KCM have agreed that KCM will receive \$285,000 in full and final settlement of the KCM Payment Claims from the Gramercy Distribution. Gramercy will indemnify and hold Companion harmless from the KCM Payment Claims arising by, through, or under Gramercy with respect to any claims that exist prior to the execution of this agreement. KCM will indemnify and hold Companion harmless from the KCM Payment Claims arising by, through, or under KCM. KCM agrees that Companion is an express third-party beneficiary of Gramercy's resolution of the KCM Payment Claims.

4. Gramercy hereby releases, acquits, and forever discharges Companion (together with its past and present officers, directors, shareholders, parent corporations, subsidiaries, affiliates, reinsurers, employees, and attorneys) of and from all claims, actions, causes of action, suits, disputes, demands, or liabilities of any kind, nature, description, or character, whether in tort or contract, or by virtue of common law, statute, or regulation, that are in any way based upon facts presently existing, whether now known or unknown, and including, without limitation, any claim that relates to or arises from the Program, the Policies, the Trust, and/or the Trust Assets to be released to Companion pursuant to the terms of this Agreement.

5. Companion hereby releases, acquits, and forever discharges Gramercy (together with its past and present officers, directors, shareholders, parent corporations, subsidiaries, affiliates, reinsurers, employees, receivers, liquidators, and attorneys) of and from all claims, actions, causes of action, suits, disputes, demands, or liabilities of any kind, nature, description, or character, whether in tort or contract, or by virtue of common law, statute, or regulation, that are in any way based upon facts presently existing, whether now known or unknown, and including, without limitation, any claim that relates to or arises from the Program, the Policies, the Trust, and/or the Trust Assets to be released to Gramercy pursuant to the terms of this Agreement; provided, however, that this release does not apply to the obligations undertaken by Gramercy in Sections C.1 and C.3 of this Agreement.

6. The Parties expressly agree that, except as provided for in this Agreement, they shall have no further obligations to one another arising from or relating to the Program (including as otherwise set forth in the Reinsurance Agreement, the Administrative Agreement, and/or the Trust Agreement).

7. Gramercy and Companion are responsible for the attorneys' fees and expenses they respectively incurred in connection with the Receivership Proceeding and the dispute which gave rise to this Agreement. Accordingly, Gramercy is not responsible for any attorneys' fees or expenses incurred by Companion, and Companion is not responsible for any attorneys' fees or expenses incurred by Gramercy.

8. The settlement memorialized in this Agreement is entered into by the Parties as a compromise of disputed claims. No Party admits any liability, fault, or wrongdoing. Rather, each Party expressly denies any liability, fault, or wrongdoing and this Agreement does not constitute, and shall not be construed as, an admission of liability, fault, or wrongdoing for any purpose.

9. The Parties respectively warrant and represent that they are the sole owners and holders of all claims they have released by means of this Agreement, that they have not

previously assigned or conveyed such claims, and that they are disposing of all claims released by means of this Agreement at this time.

10. This Agreement is binding on and shall inure to the benefit of the Parties and KCM and their respective successors and permitted assigns, if any.

11. This Agreement, when executed and delivered, is the only agreement between Gramercy and Companion relative to the settlement of the matters that are the subject of this Agreement. There are no oral agreements or side agreements that relate to or affect the settlement provided in this Agreement.

12. This Agreement is the result of substantial negotiations between the Parties and their respective attorneys. Accordingly, the fact that counsel for one Party or another may have drafted this Agreement is immaterial, and this Agreement shall not be strictly construed against any Party.

13. Each Party, through its respective authorized representative, is fully authorized to execute this Agreement and to bind the Party for which it has executed this Agreement.

14. Each Party, through its respective authorized representative, has read this Agreement, understands its terms, and has voluntarily entered into this Agreement after consulting with legal counsel of its choice.

15. This Agreement may be executed in any number of counterparts, and each such counterpart shall be deemed to be an original instrument, but all such counterparts together shall constitute one Agreement. A copy of the fully executed Agreement shall have the full force and effect of the Agreement bearing original signatures.

16. This Agreement is governed by and shall be construed in accordance with Texas law. If at any time, any part of this Agreement is found to be or held to be invalid, then such finding or holding shall not affect the validity of the remainder hereof.

SIGNED on the date(s) indicated below.

(signatures on the pages that follow)

**GRAMERCY INSURANCE COMPANY, by
and through RESOLUTION OVERSIGHT
CORPORATION as Special Deputy
Receiver**

**ERNESTO A. GARZA
President, Resolution Oversight
Corporation**

Date Signed: _____

ACKNOWLEDGMENT

**THE STATE OF TEXAS §
 §
COUNTY OF _____ §**

BEFORE ME, the undersigned authority, on this day personally appeared **ERNESTO A. GARZA, President of Resolution Oversight Corporation as Special Deputy Receiver for GRAMERCY INSURANCE COMPANY**, known to me to be the person whose name is subscribed on the foregoing instrument, and acknowledged to me that the same was executed for the purposes and considerations therein expressed and in the capacity therein stated.

WITNESS my hand and seal of office on this ___ day of _____, 20__.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

(SEAL)

My Commission Expires: _____

(Print or Type Name of Notary)

**COMPANION PROPERTY AND
CASUALTY INSURANCE COMPANY**

BY: _____

ITS: _____

Date Signed: _____

ACKNOWLEDGMENT

THE STATE OF SOUTH CAROLINA §
§
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, _____ of **COMPANION PROPERTY AND CASUALTY INSURANCE COMPANY**, known to me to be the person whose name is subscribed on the foregoing instrument, and acknowledged to me that the same was executed for the purposes and considerations therein expressed and in the capacity therein stated.

WITNESS my hand and seal of office on this ___ day of _____, 20__.

NOTARY PUBLIC IN AND FOR
THE STATE OF SOUTH CAROLINA

My Commission Expires: _____

(SEAL)

(Print or Type Name of Notary)

AGREED AS TO THE TERMS OF PARAGRAPHS B.4 and C.3, 10, and 15 ONLY

KEMPER COST MANAGEMENT, INC.

BY: _____

ITS: _____

Date Signed: _____

ACKNOWLEDGMENT

THE STATE OF OKLAHOMA §
 §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, _____ of KEMPER COST MANAGEMENT, INC. known to me to be the person whose name is subscribed on the foregoing instrument, and acknowledged to me that the same was executed for the purposes and considerations therein expressed and in the capacity therein stated.

WITNESS my hand and seal of office on this ___ day of _____, 20__.

NOTARY PUBLIC IN AND FOR
THE STATE OF OKLAHOMA

(SEAL)

My Commission Expires: _____

(Print or Type Name of Notary)

APPROVED BY COUNSEL:

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CORPORATION, as Special Deputy Receiver for
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ATTORNEYS FOR KEMPER COST MANAGEMENT, INC.

STATE OF TEXAS

§
§
§

COUNTY OF BEXAR

AFFIDAVIT OF ERNESTO A. GARZA IN SUPPORT OF APPLICATION TO APPROVE SETTLEMENT AGREEMENT AND RELEASE OF TRUST FUNDS
(Companion Property and Casualty Insurance Company and Kemper Cost Management)

BEFORE ME, the undersigned notary, on this day personally appeared Ernesto A. Garza, who being duly sworn, states the following under oath:

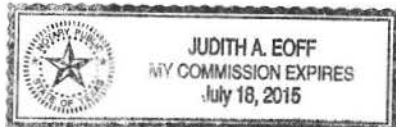
1. "My name is Ernesto A. Garza. I am competent to make this affidavit. I am the President of Resolution Oversight Corporation, the Special Deputy Receiver of Gramercy Insurance Company. I have personal knowledge of the facts to which I attest.

2. I have read the statements contained in the attached *Application to Approve Settlement Agreement and Release of Trust Funds (Companion Property and Casualty Insurance Company and Kemper Cost Management)* and they are true and correct based on my personal knowledge, my review of estate records and my consultation with my staff and sub-contractors."

Original Signed by

Ernesto A. Garza, President
Resolution Oversight Corporation
Special Deputy Receiver of Gramercy
Insurance Company

SWORN TO, SUBSCRIBED, and ACKNOWLEDGED BEFORE ME by Ernesto A. Garza, President of Resolution Oversight Corporation, on this the 12 day of December, 2013.



Original Signed by

Notary Public – State of Texas