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**OBJECTION DEADLINE: DECEMBER 11, 2009**
**REPLY DEADLINE: DECEMBER 22, 2009**

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re<br><br>Adelphia Communications Corp., et al.,<br><br>Debtors. | Chapter 11 Cases<br><br>Case No. 02-41729 (REG)<br>Jointly Administered |
| ADELPHIA COMMUNICATIONS CORPORATION, ET AL.,<br><br>Plaintiffs,<br><br>vs.<br><br>MOTOROLA, INC., GENERAL INSTRUMENT CORPORATION, d/b/a Broadband Communications Sector Of Motorola, Inc. and d/b/a Motorola Broadband Communications Sector, SYNCHRONOUS, INC., GENERAL INSTRUMENT AUTHORIZATION SERVICES, INC., BEAR, STEARNS & CO. INC. (as Claim Transferee), DK ACQUISITION PARTNERS, L.P. (as Claim Transferee), VARDE INVESTMENT PARTNERS, LP (as Claim Transferee),<br><br>Defendants. | Adversary No.: 06-01558-reg<br><br>Honorable Cecelia G. Morris |

**MOTION FOR ORDER (1) APPROVING SETTLEMENT WITH MOTOROLA DEFENDANTS AND (2) FINDING THAT SUBSIDIARY DEBTORS ARE NOT LIABLE ON MOTOROLA'S CLAIM**

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Plaintiffs Adelphia Communications Corporation ("ACC") and those of its affiliated, subsidiary debtors (collectively with ACC, "Debtors" or "Adelphia") identified in the adversary complaint in this action (the "Complaint"), and the Adelphia Recovery Trust ("Trust," and collectively with Debtors, "Plaintiffs"), request pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure this Court's approval of a settlement between Plaintiffs and the Motorola defendants, consisting of Motorola, Inc., General Instrument Corporation ("BCS"), Synchronous, Inc., and General Instrument Authorization Services, Inc. (collectively, "Motorola"). A copy of the proposed order granting this Motion (the "Proposed Order") is Exhibit A hereto. In support of this Motion, Plaintiffs represent as follows:

## I. INTRODUCTION

After more than three years of litigation, several unsuccessful attempts to settle this case through mediation, and a one-week trial, Plaintiffs and Motorola have agreed to a settlement under which, *inter alia*, Motorola will pay $68 million to ACC and the Trust, and relinquish part of the Motorola Claim (as defined below), while allowing estate beneficiaries to avoid the cost, delay, and uncertainty of further litigation. The settlement easily meets the "fair and equitable" threshold for approval under Rule 9019. Accordingly, the Court should approve the settlement as being in the best interests of Adelphia's creditors.

The settlement is conditioned on this Court finding that only ACC, not its subsidiary Debtors, is liable on Motorola's $66.6 million Claim. This finding would give effect to the binding judicial admissions that Motorola filed in its proofs of claim against the Debtors. In those proofs of claim, Motorola identified itself as a creditor of ACC only and expressly asserted that ACC was the "Buyer" under the Terms and Conditions of its invoices. Motorola filed these proofs of claim under the direction of Bear Stearns & Co. Inc. ("Bear Stearns"), which had acquired rights as to $58.2 million of Motorola's Claim with the understanding that ACC was the sole obligor. Bear Stearns subsequently re-assigned a portion of its share of Motorola's Claim to certain hedge funds (collectively with Bear Stearns, the "Claims Transferees") pursuant to

agreements that identified ACC as the relevant Debtor. Recognizing Motorola's Claim as anything other than an ACC liability therefore would grant a windfall to the Claim Transferees, who would receive the higher distributions on claims against ACC's subsidiaries rather than what they actually paid for – namely, a parent company claim.

Even setting aside these equities and Motorola's judicial admissions, a finding that Motorola's Claim is a liability of ACC, and not ACC's subsidiaries, also is plainly correct as a matter of contract law. As bankruptcy courts in this District have recognized, a debtor is not liable on a contract to which it is not a party. Here, the substantial discovery that has taken place to date has shown that Motorola entered purchase agreements and other contracts exclusively with ACC. The evidence further shows that Motorola looked to ACC alone for payment on the invoices comprising its Claim. There is, in short, more than enough evidence in the record for this Court to find that ACC is the only proper Debtor on Motorola's claim. Given the length of this litigation and the substantial discovery that has already occurred, the Court would be acting well within its discretion in doing so now and thereby give effect to a settlement that will provide substantial value for ACC's creditors – including the Claims Transferees, whose $58.2 million portion of the Motorola Claim will be fully allowed as an ACC Trade Claim, entitled to full distributions from the estate and Trust on a pari passu basis with all other ACC trade claimants.

## II. JURISDICTION

This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, the "Standing Order of Referral of Cases to Bankruptcy Judges" dated July 10, 1984, issued by The Honorable Robert J. Ward, District Court Judge, and this Court's order confirming the First Modified Fifth Amended Joint Chapter 11 Plan for Adelphia Communications Corporation and Certain of its Affiliated Debtors, dated as of January 3, 2007, as Confirmed (the "Plan"). This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding in this district is proper under 28 U.S.C. §§ 1408 and 1409. The predicates for the relief sought herein are Rule 9019 and sections 105(a) and 502(b) of the Bankruptcy Code.

## III. FACTUAL & PROCEDURAL BACKGROUND

### A. The Motorola Claim

On January 8, 2004, Motorola filed a proof of claim against ACC for over $68 million in goods and services delivered prepetition. *See* Palmquist Decl. ¶ 5; Ex. 547. At the same time, Motorola also filed 230 substantially identical proofs of claim against ACC's subsidiaries. *Id.* When these subsidiary claims were subsequently disallowed and expunged by stipulated order of this Court (the "Claim Stipulation"), the parties reserved for a later date the issue of whether the subsidiaries were liable on the remaining Motorola claim instead of, or in addition to, ACC. *See* Palmquist Decl. Ex. 552 (Claim Stipulation). Under the Claim Stipulation, the maximum allowable principal amount of Motorola's claim is $66,595,574.47 (the "Motorola Claim"), an amount that was the result of a nine-month process of reconciling the respective books and records of the Debtors and Motorola. *See* Palmquist Decl. ¶ 7. Of this amount, the Claim Transferees collectively hold $58.2 million (the "Transferred Claim"),[1] and Motorola holds $8.4 million (the "Residual Claim"). *See id.* ¶ 8; Exs. 2016 (list of invoices comprising Transferred Claim) & 2017 (list of invoices comprising Residual Claim).

### B. The Settlement Will Provide Very Substantial Value to Creditors

In this adversary proceeding, Plaintiffs have objected that the Motorola Claim cannot be allowed against the subsidiary Debtors, and have asserted various counterclaims including claims for equitable subordination and/or disallowance of the Motorola Claim, recovery of avoidable transfers, and aiding and abetting breaches of fiduciary duties by the Debtors' former management. For over three years, the parties have been embroiled in litigation, culminating in the recent Phase I trial before this Court, concluding on October 30, 2009, on Plaintiffs' claims for equitable subordination and disallowance. Following that trial, Plaintiffs and Motorola finally reached a settlement (which had eluded them during several mediations and numerous

[1] The Transferred Claim consists of: Bear Stearns' Claim 1222101 in the amount of $28,335,202.31; Varde Investment Partners, L.P.'s Claim 1222102 in the amount of $21,359,947.44, and DK Acquisition Partners L.P.'s Claim 1222103 in the amount of $8,543,978.98.

telephonic discussions with the mediator) that will resolve all issues between them. Plaintiffs now seek this Court's approval of that agreement.

Under the proposed settlement – which is set forth in the settlement agreement attached as Exhibit B hereto (the "Settlement Agreement") – Motorola will pay $68 million to Plaintiffs ($28 million to ACC and $40 million to the Trust) and will waive all distributions on the $8.4 million Residual Claim still held by Motorola (or otherwise hold Plaintiffs harmless thereon). In addition, the Transferred Claim will be allowed as an ACC Trade Claim and the Claim Transferees will receive a distribution on that claim of cash and stock (equal to a recovery of approximately 76%, at Plan deemed value, of the claim's face value) with current fair market value of about $32.5 million. The Claims Transferees also would receive an interest in the Trust (pari passu with other trade creditors) and would be entitled to share, pari passu, in the future distributions to holders of ACC Trade Claims from ACC and the Trust.[2]

As an additional benefit, the settlement would free up about $73.6 million (fair market value) from the reserve presently held by Adelphia on account of the Motorola Claim, all or a portion of which could then become available for distribution to ACC creditors generally.

The effectiveness of the Settlement Agreement, including all of the foregoing, is contingent upon a finding that only ACC is liable on the Motorola Claim.[3]

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[2] Under the Plan, the Claim Transferees' $58.2 million claim, as an allowed ACC trade claim, will immediately receive a distribution of $19,642,895.05 in cash, plus 296,105 shares of Time Warner Cable Corporation common stock, with aggregate value (at TWC's current price) of about $32.5 million. In addition, the Claim Transferees will share in future distributions to ACC trade creditors. Further, as an allowed ACC trade claim, the Claims Transferees will receive Trust interests, the value of which is contingent on future Trust recoveries and thus is not presently ascertainable.

[3] If the Settlement Agreement does not become effective, the Motorola Claim will not be allowed pursuant to the Settlement Agreement, but instead will remain Disputed under the Plan, and all of Plaintiffs' counterclaims, defenses, or offsets with respect to allowance of or distributions on the Motorola Claim will be retained and preserved for subsequent litigation. In that case, the parties would resume post-trial briefing on the Phase One trial, followed by full litigation of all the other claims in the case (and the Claims Transferees will continue to be able to hold up settlement based in part upon potential allowance of a subsidiary-level claim that Motorola never believed it possessed in the first place).

### C. Motorola Sold and Filed Its Claim As A Liability of ACC Only

#### 1. The Claim Transferees Accepted Motorola's Representations That ACC Was the Only Obligor on Motorola's Claim

After the Debtors' filed for bankruptcy, Motorola reviewed its records and concluded that ACC was the only Debtor liable for its claim. As early as June 28, 2002, Motorola represented in a letter to the United States Trustee that it was simply a creditor of ACC and requested a seat on ACC's unsecured creditors' committee. *See* Baniewicz Decl. Ex. 1238. More than a year later, when it had become clear that creditors of subsidiary Debtors would enjoy higher recoveries than ACC's creditors, Motorola's conclusion had not changed. *See* Allred Decl. Ex. 2208 (Email from Motorola employee Dave Klieforth dated September 25, 2003: "I understand that all of our trade debt is at the parent company level."). Indeed, when a Motorola employee managing Motorola's claim was asked whether Motorola had a "winning argument to convince the bankruptcy court that [Motorola's] trade debt should be at the operating level," he answered succinctly: "**no**." *See* Baniewicz Decl. Ex. 2011 (emphasis added).

By this point, Motorola had been negotiating a potential assignment of its claim to Bear Stearns for several months. From the outset, Motorola made clear to Bear Stearns that ACC was the only Debtor entity liable on its claim. In particular, once Bear Stearns signed a non-disclosure agreement (which itself identified ACC alone as the pertinent "customer," (*see* Allred Decl. Ex. 2020, at 3), Motorola sent Bear Stearns a list of the invoices comprising its claim and an "Information Memorandum" that summarized Motorola's relationship with ACC and answered specific questions that Bear Stearns had raised about Motorola's receivables. *See* Baniewicz Decl. Ex. 2008 (email from Lisa Saxon of Motorola to Bear Stearns dated June 18, 2003). Among the questions that Bear Stearns had asked was: "Which part of Adelphia is the obligor." *Id.* at p.5. The Information Memorandum answered without qualification: "Adelphia Communications Corporation." *Id*.

After reviewing this memorandum and Motorola invoices, Bear Stearns employees stated that they were "very happy" with what they had seen, and that "[e]verything indicate[d that Motorola had] a general corporate [i.e., ACC] unsecured claim." *See* Baniewicz Decl. Ex. 2009.

On December 3, 2003, Motorola authorized Bear Stearns to commit to purchase its "$68,165,785 of Holding Company [i.e., ACC] trade debt[.]" *See* Baniewicz Decl. Ex. 2013. Bear Stearns accepted. *See* Baniewicz Decl. Ex. 1288 ("Assignment of Claim" agreement between Motorola and Bear Stearns). *See also* Allred Decl. Ex. 2029 (Bear Stearns trade sheet dated December 3, 2003, reflecting acquisition of "Adelphia Communications Trade Claim" from Motorola).

Bear Stearns subsequently assigned a portion of its Motorola Claim to Varde Investment Partners, L.P. ("Varde") and another portion to DK Acquisition Partners L.P. ("DK"). As with the initial transfer from Motorola to Bear Stearns, these assignments were made with the express understanding that Motorola's Claim was against ACC only. Bear Stearns' trade confirmations with Varde and DK, for example, both identify ACC alone as the debtor. *See* Allred Decl. Exs. 2021 (Trade Confirmation from Bear Stearns to Varde), 2025 (Trade Confirmation from Bear Stearns to DK), 2030 (Bear Stearns trade sheet reflecting transfer to Varde of "Adelphia HoldCo TC [*i.e.*, Trade Claim]"). Moreover, Bear Stearns agreed to indemnify Varde and DK *only* against the risk that they would receive less favorable treatment than other creditors of *ACC*. *See* Allred Decl. Ex. 2024 at p. 2 ¶ 1(m); Allred Decl. Ex. 2026 at p. 2 ¶ 1(k).

### 2. Under Bear Stearns' Direction, Motorola Filed Proofs of Claim Asserting That it Was a Creditor of ACC Only

As part of the transfer to Bear Stearns, Motorola agreed to file its claim in the Debtors' bankruptcy case at Bear Stearns' direction. *See* Allred Decl. Ex. 2022 (email from Laura Torrado, attorney for Bear Stearns, dated December 15, 2003, noting: "The filing of the proof of clam was a negotiation point in the confirm. Motorola will file the claim at our direction."). Accordingly, with Bear Stearns' consent, Motorola filed a proof of claim against ACC on

January 8, 2004. The proof of claim expressly identified Motorola as a creditor of ACC only. *See* Palmquist Ex. 547 at ¶ 13 (Claim #12221).

At the same time, Motorola filed 230 back-up proofs of claim against ACC's operating subsidiaries (for the same goods and services and in the same amount as asserted in the claim against ACC). While again asserting that it was a creditor of ACC, Motorola explained that it was filing these proofs of claim as fall-backs to the extent that "the debtor received any products or services from Motorola which *Adelphia alleges* are to be paid by the debtor rather than by Adelphia." *See* Baniewicz Del. ¶ 3, Palmquist Decl. Ex. 2015 ¶ 13 (emphasis added). In other words, under Bear Stearns' oversight, Motorola filed proofs of claim against ACC's operating subsidiaries only to preserve its rights in case the Debtors argued that ACC was not the entity liable on Motorola's claim.

Motorola took this position despite the fact that, due to the Debtors' historical cost center accounting method (which did not take account of Motorola's written purchase agreements with ACC and the purchase orders issued by ACC), the Debtors' schedules initially showed various Adelphia subsidiaries as debtors on the Motorola Claim. *See* Palmquist Decl. ¶ 2. Indeed, Motorola internally discussed the schedules in drafting its proofs of claim, s*ee* Baniewicz Decl. Ex. 1230 (internal Motorola email exchange, discussing review of the schedules), and shared these drafts with Bear Stearns prior to filing. *See, e.g.*, Baniewicz Decl. Ex. 2014.

### D. Motorola's Proofs of Claim Are Consistent with its Pre-Petition Business Dealings with the Debtors

#### 1. Motorola Contracted with, and Sought Payment From, ACC Only

Motorola's proofs of claim were consistent with its business dealings with the Debtors before bankruptcy: As Motorola executive John Burke has testified, Motorola "did all of [its] deals directly with the [Adelphia] corporate office." Burke Dep. Tr. at p. 53:12-19.[4] Over the period that encompasses Motorola's claim (2000 to 2002), Motorola entered major purchase

[4] Excerpts of cited deposition testimony are attached as exhibits to Kevin Allred's declaration.

agreements and other contracts that – as is obvious from the face of the agreements – are *exclusively* with ACC, not ACC's subsidiaries. Significant examples include:

- ***May/June 2000 Agreement*** (Baniewicz Decl. Ex. 1012). Under this amendment to Motorola's (then "NextLevel") 1997 Mega-Deal agreement with ACC (Baniewicz Decl. Ex. 151), Motorola committed to supply ACC 1.6 million set-top boxes, 300,000 modems, and millions of dollars in head-end equipment and services through the end of 2001. Motorola and ACC subsequently agreed to extend this agreement to ACC's modem purchases in 2002. *See e.g.*, Baniewicz Decl. Ex. 2003 (Email from John Simons to John Burke dated April 23, 2001). Moreover, as this Court is aware from the Phase I Trial, this agreement also was amended by the "price increase" letters dated December 29, 2000 and December 18, 2001, which likewise on their face (a) showed ACC as the sole Adelphia contracting party and (b) covered all set-top box purchases in 2000 and 2001. *See* Allred Decl. Exs. 1088 & 1053.
- ***December 2001 Agreement*** (Baniewicz Decl. Ex. 2004). Under this agreement between ACC and Motorola, ACC agreed to purchase 200,000 set-top boxes in 2002. In total, approximately half of Motorola's claim is for set-top boxes sold pursuant to this agreement and the May/June 2000 Agreement.
- ***"HITS" Agreement*** (Palmquist Decl. Ex. 2019). ACC is also expressly identified as the party to this agreement, which allowed ACC to control the programming that a customer received through a set-top box. *See* Palmquist Decl. ¶ 7.

Motorola's written purchase agreements with ACC set forth projected purchase volumes, prices, and other terms. Motorola thereafter provided individual shipments of products to the Debtors pursuant to purchase orders that were issued by ACC's corporate office. Even where a product was not subject to a written purchase agreement, Adelphia's corporate office in almost every instance issued the purchase order, which authorized Motorola to ship and to invoice ACC

for the ordered good or service. And as described below, regardless of which Adelphia entity issued a purchase order, ACC would decide whether and when to pay Motorola's invoices.

All of these facts point to one conclusion: whether it was selling set-top boxes or transmission equipment, Motorola contracted with ACC and ACC only. Motorola certainly had no doubt on this point. In its press releases announcing major sales of cable equipment from 2000 to 2002, Motorola consistently identified "Adelphia Communications Corporation" – and not any other Adelphia entity – as its customer. *See, e.g.*, Baniewicz Decl. Ex. 2001 (May 8, 2000 Press Release announcing $33 million order of transmission equipment from ACC); Baniewicz Decl. Ex. 2002 (press release announcing May/June 2000 Agreement).

Motorola not only contracted with ACC exclusively; it also looked for payment from ACC, not ACC's subsidiaries. For example, when Motorola insured its receivables, it only insured against the risk that ACC would fail to pay. *See, e.g.*, Baniewicz Decl. Ex. 2006 (letter from Motorola's broker noting "that the AIG insured entity is Adelphia Communications in Coudersport, PA."). In its application for this insurance policy, Motorola identified ACC as the sole "Buyer" of its goods and services and expressly stated that it did not do business with any related companies of ACC. *See* Baniewicz Decl. Ex. 2005 at pp. 1, 2 (answers to questions 1.2 and 2.4 on "Application for Buyer Endorsement for a Single Buyer Policy").

### 2. ACC Had the Ultimate Authority Over the Debtors' Purchasing and Payment Decisions Before Bankruptcy

Motorola contracted exclusively with ACC for a reason: As Motorola knew, ACC controlled all aspects of the purchasing process for goods distributed to any of the Debtors, from deciding what equipment could be purchased, setting subsidiaries' budget for capital assets (*e.g.*, set-top boxes and modems), and deciding whether and when to pay a vendor's invoices.

In fact, during the relevant period from 2000 to 2002, ACC had in place a formal purchasing policy governing all Adelphia entities. *See* Ragosta Decl. Ex. 9 (ACC Purchasing Policy); Hicks Dep. Tr. at p. 133:4-5 (testifying that Exhibit 9 represented the procedures that Adelphia's cable systems were required to follow in the purchasing process). Under that policy,

the ACC corporate office had to approve all orders for goods or services from a vendor. *See* Ragosta Decl. ¶ 10. With the exception of purchases below $250, a purchase order only could be issued by ACC's corporate office. *See, e.g.*, Ragosta Decl. ¶ 6; Ex. 1003; Pekarski Dep. Tr. at p. 26:5-17. Even for the smallest orders below this threshold (less than 0.2% of Motorola's Claim), a subsidiary's order had to comply with an ACC-approved corporate budget, equipment listing, and pricing. *See* Ragosta Decl. ¶ 10; Bear Dep. Tr. at pp. 89:12-90:3. Moreover, regardless of which entity issued a purchase order, ACC decided whether and when to pay a vendor's invoice. *See id*; Pekarski Dep. Tr. at pp. 77:19-78:7; Blumer Dep. Tr. at pp. 138:14-139:19. ACC personnel trained both corporate and subsidiary level employees to adhere to this policy. *See* Ragosta Decl. ¶ 4; Hicks Dep. Tr. 133:9-134:5; Bear Dep. Tr. at p. 36:2-14; *id*. at p. 37 (testifying that ACC would inform newly-acquired systems that vendors should go through corporate and that vendors' representatives should not be visiting them).

ACC also made sure that its vendors, including Motorola, understood its purchasing policy. As Sandra Hicks, the Supervisor in ACC's purchasing department, testified, ACC sent Motorola several letters notifying Motorola that, except for orders below $250, only ACC could issue a purchase order. *See* Hicks Dep. Tr. at p. 135:12-19; Baniewicz Decl. and Ragosta Decl., Exs. 1001 to 1003. One of these letters, for example, explained:

> The purchase order, not only gives the supplier authority to ship and to invoice the ordered goods, but also becomes Adelphia's commitment for the detailed description of goods and services. . . . The purchase order is generated at the [ACC] corporate office and any changes must be confirmed with a written change order, which will be mailed or faxed to the supplier upon approval.

Ragosta Decl. Ex. 1002 (emphasis in original); *see also* Pekarski Dep. Tr. at pp. 79-82 (testifying that Exhibit 1002 reflected ACC's purchasing policy from 1999 to 2002). Motorola recognized and abided by this policy, turning down purchase orders from ACC's subsidiaries that exceeded the $250 threshold. *See, e.g.*, Baniewicz Decl. Ex. 1004 (email from Motorola purchasing agent, Audrey York, to employee at Adelphia subsidiary, stating that Motorola "cannot process a local PO for more than $200.00. You'll have to send this through corporate.").

As late as May 2002, ACC sent Motorola a letter stating that ACC was "strictly enforcing without exception" its "existing policy" that purchase orders could not be increased by more than $250.00 and new orders could not be accepted by any entity other than ACC. *See* Baniewicz Decl. Ex. 1001. The letter added that "[o]nly Adelphia Communications Purchasing department or our Materials Management department" was authorized to "approve changes to existing orders over $250.00 or issue new Purchase Orders over this amount." *Id*.

ACC's purchasing policy is reflected in Motorola's Claim: 99.8% of the $66.6 million Claim arises from purchase orders issued by ACC ($64.7 million) or from amounts owed by ACC under the HITS Agreement ($1.76 million). *See* Palmquist Decl. ¶ 8. As noted above, even with respect to the 0.2% of Motorola's Claim that does not correspond to an ACC purchase order or other written contract, ACC alone decided whether and when to pay Motorola.

In short, Motorola entered contracts – whether purchase agreements, or matching purchase orders and invoices – exclusively with ACC, not its subsidiaries, and Motorola looked to ACC alone to pay for the goods and services that it supplied the Debtors.

### E. Substantial Discovery on the Claims Allowance Issue Has Confirmed That the Subsidiary Debtors Are Not Liable on Motorola's Claim.

Substantial discovery has borne out Motorola's own internal conclusion that it has no claim against Adelphia's subsidiaries. After Adelphia filed its Complaint on June 22, 2006, the Claim Transferees spent more than a year actively conducting discovery on the "claim allowance" issue. *See* Allred Decl. ¶¶ 2-4. During this period, they received the universe of potentially relevant documents, starting with the more than 300,000 pages of documents that Motorola and the Plaintiffs produced as part of their initial disclosures. The Claim Transferees also were given the other 24 million pages produced by Plaintiffs in this case, in text searchable format, including productions in response to three sets of document requests from the Claim Transferees. Plaintiffs also provided the Claim Transferees production indices and identified page ranges most likely to contain documents related to claim allowance. *Id*. ¶3. Thus, the

Claim Transferees have had, for more than two years, all of the documents relevant to where Motorola's Claim should be allowed.

In addition to producing documents, Plaintiffs responded to two sets of interrogatory requests from the Claim Transferees with detailed exhibits and other information about the process of reconciling the Motorola Claim and the specific invoices making up the reconciled Motorola Claim and related purchase orders and purchase agreements. *Id.* ¶ 2.

Finally, the Claim Transferees deposed both Adelphia and Motorola witnesses on claim allowance issues. In early 2008, the Claim Transferees deposed three former employees from ACC's purchasing and accounts payable departments: Sandra Hicks, Linda Pekarski, and Rosemary Bear. Each of these witnesses had been involved in ordering and paying for goods and services from Motorola during the relevant period. *See* Hicks Dep. Tr. at pp. 17-18; 21-22; Pekarski Dep. Tr. at p. 10. These witnesses were also personally involved in establishing and implementing ACC's purchasing policy, both internally at the Debtors and externally with vendors such as Motorola. And the Claim Transferees also deposed Shelly Jermyn, a senior employee in Motorola's customer service department, which was responsible for processing purchase orders from Adelphia. *See* Allred Decl. ¶ 4.

Even after Judge Gerber bifurcated this action by a March 18, 2008 order that stayed further discovery unique to claim allowance (while allowing jointly-applicable discovery), the Claim Transferees attended 18 deposition (and were invited to attend numerous others). *Id.* ¶5. Many of these witnesses were knowledgeable about claim allowance issues, including: Robert Benson (the "Colonel"), the ACC employee who managed ACC's inventory of set-top boxes and modems; John Burke, an executive in Motorola's modem division; Mike Brady, the ACC employee who oversaw the company's budgets; Dan Moloney, who executed Motorola's Assignment of Claim agreement with Bear Stearns (Baniewicz Decl. Ex. 1288); Karen Reabuck, a Motorola lawyer who was involved in Motorola's proofs of claim; and Jana Blumer, a supervisor in ACC's accounts payable department. *Id.*

This extensive discovery has confirmed what Motorola represented to Bear Stearns back in 2003: ACC is the only Debtor entity liable on Motorola's claim. As the Claim Transferees have had more than ample opportunity to confirm from the voluminous document productions, *all* of Motorola's written purchase agreements were with ACC, not with any other Debtor. Adelphia witnesses, such as Sandra Hicks and Rosemary Bear, have testified to ACC's control over the Debtors' purchasing process. Motorola witnesses, such as John Burke, have affirmed that Motorola "did [its] deals" with ACC and not ACC's subsidiaries. Put simply, discovery has shown that the Claim Transferees got exactly what they paid for: a claim against ACC only.

## IV. ARGUMENT

### A. The Settlement Is Well Within the "Range Of Reasonableness"

A settlement should be approved under Rule 9019 if it is "fair and equitable" and in the best interests of the estate. *In re Adelphia Commc'ns. Corp.*, 327 B.R. 143, 158 (Bankr. S.D.N.Y. 2005) (citing *In re Purofied Down Prods. Corp.*, 150 B.R. 519, 522 (Bankr. S.D.N.Y. 1993)). In assessing whether a settlement meets this standard, a court looks to "the probabilities of ultimate success should the claim be litigated," and is called upon to make:

> [A]n educated estimate of the complexity, expense, and likely duration of litigation, the possible difficulty of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

327 B.R. at 158-59 (internal quotations omitted).

In exercising the discretion to approve a settlement, "[t]he responsibility of the bankruptcy judge . . . is not to decide the numerous questions of law and fact but rather to canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re Teltronics Servs., Inc.*, 762 F.2d 185, 189 (2d Cir. 1984) (quoting *In re W.T. Grant & Co.*, 699 F.2d 599, 608 (2d Cir. 1983)) (internal quotations omitted). As this Court has stated:

> It is not necessary for the court to conduct a "mini-trial" of the facts or the merits underlying the dispute . . . . Rather, the court only need be apprised of those facts that are necessary to enable it to evaluate the settlement and to make a considered and independent judgment about the settlement.

*Adelphia*, 327 B.R. at 159 (internal citation omitted). In doing so, the court may rely on the opinions of the parties and their attorneys. *Id.*

In considering whether a settlement is fair and equitable to creditors, bankruptcy courts in this District have identified as instructive the seven factors applied to evaluate the fairness of class action settlements (known as the *Texaco* factors). Those factors are:

(1) The balance between the likelihood of plaintiff's or defendants' success should the case go to trial *vis á vis* the concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures;

(2) The prospect of complex and protracted litigation if the settlement is not approved;

(3) The proportion of the interested parties who do not object or who affirmatively support the proposed settlement;

(4) The competency and experience of counsel who support the settlement;

(5) The relative benefits to be received by individuals or groups within the class;

(6) The nature and breadth of releases to be obtained by the directors and officers as a result of the settlement; and

(7) The extent to which the settlement is truly the product of "arms-length" bargaining, and not of fraud or collusion.

*Adelphia*, 327 B.R. at 159-60 (citing *In re Texaco*, 84 B.R. 893, 902 (Bankr. S.D.N.Y. 1988)). In any particular settlement, some of these factors will have more relevance and should therefore have more weight. 327 B.R. at 160.

Here, the balance of factors weighs heavily in favor of approving the settlement. As to the first factor, it is uncertain whether Plaintiffs ultimately would achieve a similar or better result for Adelphia's creditors through continued, lengthy litigation, while the settlement's substantial benefits are immediate and concrete. For example, the settlement effectively

produces a similar result to fully subordinating Motorola's Claim at ACC, without the uncertainty of further litigation on this issue, because $28 million from Motorola will offset the vast majority of the distribution on that Claim. As to Adelphia's claims for affirmative recovery for avoidable transfers and tort, recovery would likely be years away and require additional fact and expert discovery. Moreover, Motorola has asserted certain defenses to those claims which, if successful, could prevent any recovery by Plaintiffs. For example, if Motorola prevails in its assertions that Plaintiffs cannot prove tort causation for quantifiable damages on the claim for aiding and abetting breach of fiduciary duties, Plaintiffs would recover nothing on this claim. In contrast, under the settlement, Adelphia estate and Trust beneficiaries will immediately realize substantial value, including $40 million paid directly to the Trust. These benefits clearly outweigh the uncertain prospect of achieving a more favorable result through continued litigation, and thus the first *Texaco* factor favors settlement.

As to the second factor, a failure to approve the settlement will lead inevitably to protracted and complex litigation. In addition to the substantial issues that remain to be litigated and tried in the action, including Plaintiffs' affirmative causes of action and Motorola's defenses to those claims, one or more parties almost certainly would appeal any a judgment if litigation were to continue. These appeals would add years to the time that Adelphia's creditors must wait to have Motorola's Claim resolved or to realize a recovery (if any) on Adelphia's tort and avoidance actions. The second factor thus strongly favors approving the settlement.

The third *Texaco* factor – the proportion of the interested parties who do not object or who affirmatively support the proposed settlement – does so as well. All of ACC's creditors and the Trust beneficiaries stand to benefit from the settlement, either by receiving additional distributions on their claims or through advancing their claims that much closer to payment under the Plan.[5] Plaintiffs therefore anticipate that, with the possible exception of the Claim Transferees (who will nonetheless receive substantial benefits under the Settlement Agreement,

[5] This creditor support is exemplified by the joinder in this settlement of the Trust, whose trustees were selected through input from major unsecured creditor groups, to oversee recovery efforts on their behalf.

from allowance of, and distribution on, their Transferred Claim, as an ACC Trade Claim), *all* of Adelphia's creditors either will support or at least not object to the settlement

To the extent that the Claim Transferees – consistent with their prior efforts to extract an undeserved windfall from any possible resolution, to the detriment of other creditors – object to a finding by this Court that Motorola's Claim is a liability of ACC only, the Court should not give such an objection any weight. As explained below, before assigning its Claim, Motorola expressly represented to Bear Stearns that ACC was the only Debtor liable on its Claim. Accepting that representation, Bear Stearns purchased, and then re-assigned to the other Claim Transferees, what it consistently treated as a claim against ACC only, at least before this litigation. Thus, the settlement will provide the Claim Transferees precisely what they paid for: a distribution on a parent company claim. They have no basis to object to this treatment.

On the fourth factor, Plaintiffs' counsel – who are highly experienced in litigating and settling complex financial disputes within the bankruptcy realm and beyond – have been involved at all stages in the mediation and settlement process, and have determined that the Settlement Agreement represents an appropriate balance between the potential rewards of litigation, and the concrete present and future benefits offered by the settlement.

As to factor five, the relative benefits to be received by individuals or groups of creditors, as noted above the settlement is a win-win scenario for all beneficiaries of the estate and the Trust, including the Claim Transferees, and this factor also favors settlement. In considering this factor, it is "preferable, and not just appropriate . . . to consider the good of the entire enterprise, as contrasted to the needs and concerns of any particular constituency, even a major one." *Adelphia*, 327 B.R. at 165. Here the good of the entire enterprise clearly favors settlement, and the Claim Transferees' desire to recover a windfall at the expense of other creditors by arguing that they hold a subsidiary-level claim must take a back seat.

The sixth factor is inapplicable here. *See id.* at 165. The seventh and final factor also favors settlement. Given the length of time that the parties have sought in vain to reach a settlement, and Motorola's vigorous litigation of the issues, there can be no doubt that the

proposed settlement is the product of intense arms-length negotiations. Indeed, these negotiations took place not only following the Phase I trial, but over a period of several years.

Thus, all of the applicable *Texaco* factors strongly support the settlement, and the Debtors therefore submit that the Settlement Agreement should be approved as fair and equitable, in the best interests of the bankruptcy estates, and within the range of reasonable litigation outcomes.

### B. The Subsidiary Debtors Are Not Liable on the Motorola Claim

A bankruptcy court's findings in approving a settlement are not limited to whether the settlement is fair and equitable and in the best interests of the estate, but may also extend to issues that are "part and parcel" of this determination. *See In re Kaiser Steel Corp.*, 105 B.R. 971, 977 (Bankr. D. Colo. 1989) (upholding bankruptcy court's approval of settlement containing findings regarding the comparative liability of the parties); s*ee also In re Delta Air Lines*, 374 B.R. 516, 526-27 (S.D.N.Y. 2007) (affirming bankruptcy court adjudication that eliminated certain non-settling party claims as part of order approving settlement, noting that objectors had opportunity to be heard). Here, determining which Debtor(s) are liable on the Motorola Claim is integral to assessing the merits of the settlement.

As explained below, the Court should find that the Motorola Claim is allowable, if at all, only against ACC because: (1) Motorola has made binding admissions that its claim is against ACC only; and (2) even apart from Motorola's admissions, as a matter of state law, ACC is the only Debtor entity that is contractually liable on Motorola's Claim.

#### 1. Binding Admissions in Motorola's Proof of Claim Dictate a Finding That the Subsidiaries Are Not Liable on Motorola's Claim

"In objection to claim matters, the proof of claim is seen as the initial pleading." *Jenkins v. Tomlinson* (*In re Basin Resources*), 182 B.R. 489, 493 (Bankr. N.D. Tex. 1995) (citing *In re Simmons*, 765 F.2d 547, 552 (5th Cir. 1985)). Thus, courts consistently hold that statements in a proof of claim constitute binding judicial admissions on the creditor in any proceeding involving an objection to the creditor's claim. *See, e.g.*, *Jordan v. Greentree Consumer Discount Co*. (*In re Jordan*), 403 B.R. 339, 351 (Bankr. W.D. Pa. 2009) (holding that where the debtor challenged

the status of a creditor's lien, "it [was] proper to treat the statements as to the nature of the collateral contained in [the creditor's] Proofs of Claim as binding, judicial admissions"); *Basin Resources*, 182 B.R. at 493 (holding that creditor's statements in proof of claim were "conclusively binding on him" in adversary proceeding to subordinate the creditor's claim). Where a debtor objects to a creditor's claim, the creditor is therefore precluded as a matter of law from "taking a position contrary to its Proofs of Claim[.]" *Jordan*, 403 B.R. at 351.

Here, Motorola's proofs of claim each state, unequivocally, that Motorola is a creditor of ACC. While Motorola filed proofs of claim against all of the Debtors, Motorola stated in its proofs of claim that it asserted claims against non-ACC Debtors only to the extent that ACC alleged the subsidiary Debtors were liable, which ACC does not. Accordingly, Motorola made binding judicial admissions that compel allowance of the Claim against ACC only.

The Claim Transferees are bound by Motorola's admissions. Bear Stearns had the contractual right to direct Motorola's filing of its proofs of claim. With respect to that portion of its claim that it had assigned to Bear Stearns, Motorola filed its proofs of Claim under the direction and control of Bear Stearns. For their part, Varde and DK hold their portions of Motorola's claim pursuant to assignments from Bear Stearns and, as such, are likewise bound by those admissions concerning the claim.

The Claim Transferees are not relieved of the binding effect of their admissions by the fact that the schedules listed various subsidiaries as debtors on Motorola's claims. As a matter of law, Motorola's proofs of claim superseded the schedules. *See* FED. R. BANKR. P. 3003(c)(4) ("A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521(a)(1) of the Code."); *see also In re Nutri*Bevco, Inc.*, 117 B.R. 771, 784 (Bankr. S.D.N.Y. 1990) (pursuant to Bankruptcy Rule 3003(c)(4) "no matter how or in what amount the claim is scheduled, the filed proof of claim supersedes any scheduling of that claim"). The schedules have no legal force or relevance in light of Motorola's proofs of claim.

Even if they had not been superseded, the schedules would fail to shed any light on which Debtor actually is liable on Motorola's Claim. As Mary Palmquist, ACC's Senior Vice President of Bankruptcy Administration has explained, the employees involved in preparing the schedules had not been involved in the Debtors' pre-petition business dealings with Motorola. Lacking relevant information about the contractual relationships between Motorola and ACC, these employees simply scheduled Motorola's claim in the amounts and at the Debtor entities that corresponded with the Debtors' historical cost center accounting for invoices, which reflected where the good had been shipped but *not* which entity had contracted to purchase the goods. *See* Palmquist Decl. ¶¶ 3-4. Accordingly, the Debtors' schedules cannot support any contention that the subsidiary Debtors are liable on Motorola's claim.

Indeed, neither Motorola nor the Claim Transferees ever thought otherwise. As explained above, Motorola filed its proofs of claim only *after* reviewing the schedules. Motorola and Bear Stearns knew how the Debtors had scheduled Motorola's Claim. Under Bear Stearns' direction, Motorola nonetheless filed proofs of claim against the Debtors that identified itself as a creditor of ACC only. Not only did those proofs of claim render the Schedules legally inoperative, they conclusively establish that both Motorola and the Claim Transferees understood Motorola's Claim to be a liability of ACC, not its subsidiaries.

### 2. The Subsidiary Debtors Are Not Liable on Motorola's Claim Because That Claim Arises From Contracts with ACC Only

The Court should find the subsidiaries are not liable for the additional, independent reason that ACC is the only Debtor that contracted with Motorola for the goods and services underlying Motorola's claim. Because Motorola entered purchase agreements solely with ACC, the subsidiaries are not liable on Motorola's claim. *See, e.g.*, *In re Blatstein*, 192 F.3d 88, 100 (3d Cir. 1999) (noting that under Pennsylvania law, a subsidiary corporation will be held liable for the debts of its parent only under "exceptional circumstances" where necessary to prevent "fraud, illegality, injustice, or a contravention [of] public policy") (internal quotations omitted).

The Bankruptcy Court's decision in *In re Thomson McKinnon Secs., Inc*., 149 B.R. 61 (Bankr. S.D.N.Y. 1992) is directly on point. There, after a corporation (TMI) and its subsidiary (TMSI) filed for bankruptcy, several former executives of TMSI filed proofs of claim against both TMI and TMSI for damages arising from their employment contracts. *Id*. at 63. TMI admitted liability on the claims, but the subsidiary, TMSI, "denie[d] any liability to the claimants on the ground that it was not a party to any contracts with the claimants for such compensation and that [while claimants] performed duties for TMSI, were executive officers and directors of TMSI, and were compensated by TMSI [this was all] in accordance with the express terms of their written contracts with the parent corporation, TMI." *Id*. at 71.

The court sustained the objection, holding that the claimants failed to support their assertions as to "why the plain language of the written contracts between the parent, TMI, should be disregarded for the purpose of establishing that the subsidiary, TMSI, should be responsible for the contractual rights claimed by them." *Id*. In so holding, the court concluded that it was irrelevant that TMSI (the subsidiary) enjoyed the benefits of the claimants' services, explaining that the claimants "had no written contract with TMSI and, therefore, they must look to TMI for their compensation." *Id.* The court, moreover, determined that TMSI was not liable for TMI's contractual obligations even though TMSI had at one point recorded those obligations on its accounting records as a liability, and had even made payments to the claimants pursuant to their employment contracts with TMI. *Id*. at 72. Those facts were "consistent with the terms and condition of their contract with TMI," and neither fact demonstrated that TMSI had assumed TMI's contractual obligations to claimants. *Id*. at 71, 72. *See also In re Manhattan Woods Golf Club, Inc.*, 192 B.R. 80, 83-84 (Bankr. S.D.N.Y. 1996) (following *Thomson* and affirming bankruptcy court's dismissal of claims against the debtor, where the claimants had entered contracts only with the debtor's parent).

In this case, because Motorola's Claim arises under contracts with ACC, not ACC's subsidiaries, only ACC is potentially liable on the Claim. Motorola's contracts with ACC included not only its written purchase agreements such as the Mega-Deal, but also contracts

arising from the exchange of purchase orders and invoices. Under the Uniform Commercial Code, which governs Motorola's sale of goods, an exchange of purchase orders and invoices creates a written contract between ACC and Motorola. *See OM Intercontinental v. Geminex Int'l, Inc.*, No. 03 Civ. 6431, 2006 WL 2707327 at *4 (S.D.N.Y. 2006) (finding, under New York law, that "in each situation where Plaintiff received a purchase order requesting certain quantities of goods for shipment a contract was formed each time Plaintiff shipped the goods"); *Flender Corp. v. Tippins Int'l* Inc., 830 A.2d 1279, 1284 (Pa. Super. Ct. 2003) (recognizing that parties "did form a written contract" through their exchange of purchase orders and invoices).[6] But no such contractual relationship was formed between Motorola and the subsidiary Debtors.

That ACC's subsidiaries may have received Motorola's goods is irrelevant to where Motorola's claim should be allowed, just as it was irrelevant in *Thomson* that the subsidiary benefited from the services that had been provided pursuant to contracts with the corporate parent. Likewise, as *Thomson* also makes clear, the fact that ACC accounting allocated the costs of goods purchased to its cost centers has no bearing on which party is ultimately liable in these proceedings. Indeed, unlike the subsidiary's accounting in *Thomson*, ACC's cost center accounting was not even intended to reflect which Adelphia entity was liable for a particular invoice. *See* Palmquist Decl. ¶ 4.

Nor can the subsidiaries be liable on the transferees' post-hoc theory that ACC supposedly contracted with Motorola as the subsidiaries' agent. ACC was neither the actual nor the apparent agent of its subsidiaries. *See Bolus v. United Penn. Bank*, 525 A.2d 1215, 1221 (Pa.

[6] Generally, bankruptcy courts look to the relevant state law to determine whether a claim is allowed under § 502(b)(1). *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450 (2007) (noting that bankruptcy courts are generally required to "consult state law in determining the validity of most claims" for purposes of allowance under § 502(b)(1), because creditors' rights arise in the "first instance from the underlying substantive law creating the debtor's obligation"). Here, Pennsylvania is the jurisdiction with the most significant relationship to any dispute regarding which Debtor contracted with Motorola, so Pennsylvania law governs that issue. *See, e.g., Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 (2d Cir. 1997) (noting that federal courts engaging in choice-of-law analysis "seek to apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute"). There is not, however, a material difference between Pennsylvania and New York law with respect to the law set forth in this brief.

Super. 1987) (noting that, under Pennsylvania law, an agent can bind its principal based on actual or apparent authority). To demonstrate an actual principal-agent relationship, three elements are required: "[1] the manifestation by the principal that the agent shall act for him, [2] the agent's acceptance of the undertaking and [3] the understanding of the parties that the principal is to be in control of the undertaking." *Jones v. ABN AMRO Mortg. Group. Inc.*, 551 F. Supp. 2d 400, 410 (E.D. Pa. 2008) (internal quotations omitted). "The principal's power to control the agent is an essential element of an agency relationship." *Mouawad Natl'l Co. v. Lazare Kaplan Int'l. Inc*., 476 F. Supp. 2d 414, 422 (S.D.N.Y. 2007); *see also Smalich v. Westfall,* 269 A.2d 476, 480 (Pa. 1971) ("[A]gency results only if there is an agreement for the creation of a fiduciary relationship with *control* by the beneficiary.") (emphasis added).

Here, that "essential element" of an actual agency relationship – control of the agent by the purported principal – is utterly lacking. ACC was not acting under the control of its subsidiaries when it purchased goods or services from Motorola (or at any other time). Indeed, in the context of a parent-subsidiary relationship, the opposite is almost by definition true, and certainly that ordinary expectation is borne out here. As demonstrated by the extensive evidence described above, it was ACC that had the decision making authority as to what goods and services to purchase, when to purchase them, and whether and when to pay a vendor's invoices. Indeed, the notion that ACC was acting as the agent of its subsidiaries is impossible to reconcile with ACC's policies that restricted its subsidiaries from making purchases above $250, and that even below that threshold required compliance with the ACC approved budget and payment determinations by ACC's corporate finance department.

The Claim Transferees have noted that ACC often issued purchase orders for an item after receiving a "requisition" from a subsidiary. But such requisitions do not begin to imply that ACC was acting as the agent of the subsidiaries. To the contrary, "requisition" is simply another word for a *request*. Even where a subsidiary made a requisition, the corporate office (ACC) still had to accept the request and make the purchase. *See, e.g*., Bear Dep. Tr. at p. 16:20-23 (testifying that she received requisitions from a system only after they had gone through

corporate engineering and capital projects for approval). Indeed, ACC's operating subsidiaries submitted requisitions to ACC precisely because they *lacked the authority* to issue purchase orders above a trivial amount. Far from providing any evidence that ACC was serving as the agent of its subsidiaries, the requisition procedures provide further confirmation of ACC's exclusive control over purchasing decisions. *See, e.g.*, Bear Dep. Tr. at p. 49 (testifying that ACC rejected requisitions from systems). Thus, there is no basis for a finding that ACC was the actual agent of its subsidiaries, as opposed to the contracting principal.

Equally untenable is an apparent agency theory. "Apparent authority exists where a principal, by words or conduct, leads people with whom the alleged agent deals to believe that the principal has granted the agent authority he or she purports to exercise." *Turner Hydraulics, Inc. v. Susquehanna Constr. Corp.*, 606 A.2d 532, 534 (Pa. Super. Ct. 1992) (citation and emphasis omitted). "If the third party has actual knowledge of the limits of the agent's authority, the third party cannot rely on the agent's apparent authority to bind the principal." *Great Northern Ins. Co. v. ADT Security Servs.*, 517 F. Supp. 2d 723, 745 (W.D. Pa. 2007). Here, the apparent authority standard is clearly not satisfied. Far from communicating that its subsidiaries possessed authority to act on its behalf, ACC communicated to Motorola precisely the opposite: on at least three separate occasions in 1999-2002, ACC informed Motorola in writing that its subsidiaries lacked the authority to issue purchase orders greater than a trivial amount. Given these statements, it would have been entirely unreasonable for Motorola to believe that ACC was acting merely as the agent for its subsidiaries when issuing purchase orders. *See id*. (noting that a third party must exercise "reasonable diligence to ascertain an agent's authority").

In fact, Motorola clearly understood that ACC had centralized authority over purchasing. That is why, as Motorola executive John Burke has testified, Motorola "did all of [its] deals" with Adelphia corporate. *See* Burke Dep. Tr. at p. 53:12-19; *see also* Baniewicz Decl. Exs. 151, 1012, 2004, and Palmquist Decl. Ex. 2019 (purchase agreements, all showing ACC as the only contracting party), Ragosta Decl. Ex. 1003 (email from Motorola purchasing agent, Audrey

York, stating that ACC rules prevented acceptance of order from subsidiary above $200.00). For the same reason, Motorola insured receivables for non-payment by ACC only.

Grasping for any evidence to suggest Motorola viewed the subsidiary debtors as the real buyers of its products, the Claim Transferees seize upon a boilerplate clause that appears on the back of Motorola's invoices under "Terms of Sale of Goods And/Or Services" concerning compliance with cable licensing:

> REPRESENTATION OF BUYER. Buyer represents and warrants that (i) it is (or is acting as a distributor, repair center or other agent for a third party which is) duly licensed to operate a cable television system . . . and (ii) the goods and/or services that it purchased from Seller under this Order Acknowledgement . . . will be used in such licensed system . . .

*See* Palmquist Decl. Ex. 547 at p. 1 of Exhibit A. While Motorola's invoices do not define "Buyer," the Claim Transferees assert that the term can only refer to one of ACC's subsidiaries, because those subsidiaries, not ACC, were "duly licensed" to operate a cable television system.

This argument is unpersuasive for several reasons. As an initial matter, the obvious purpose of the clause is to require that Motorola's products not be used to steal cable signals from cable providers. It simply defies credulity to assert that Motorola intended this boilerplate provision to address the critical issue of which Adelphia entity was liable for paying its invoice, particularly given what Motorola knew about the centralization of purchasing at ACC.

Even if one pauses to take seriously the notion that Motorola defined the party liable for paying its invoices through a boilerplate clause on the back of its invoices (as opposed to the entity that it actually sent the invoice to and contracted with), Motorola itself has confirmed that ACC is the "Buyer" within the meaning of the Terms and Conditions on the back of its invoices. For example, Motorola asserted in its proofs of claim that *ACC* had granted it a purchase money security interest pursuant to the Terms of Sale that appeared on the back of its invoices. *See* Palmquist Decl. Ex. 547. Yet the Terms of Sale provide for a purchase money security interest only from the "Buyer" – meaning that the proofs of claim define "Buyer" as ACC.

Indeed, the interpretation of ACC as the "Buyer" under those terms and conditions went at least as far back as the Mega-Deal agreement in 1997. That agreement expressly defines ACC as the "Purchaser," yet goes on to include the following comparable representation about being licensed to use cable equipment to provide cable television services:

> ARTICLE 7. AUTHORIZED USE OF EQUIPMENT. Purchaser represents and warrants that it is duly licensed or authorized by the appropriate regulatory authority to operate cable television systems . . . .

Baniewicz Decl. Ex. 151 Article 7. Motorola sent thousands of invoices for goods ordered under the Mega-Deal and other purchase agreements – agreements that unambiguously described ACC (and only ACC) as the Buyer or Purchaser – so its beyond dispute that Motorola did not view the back-of-invoice "buyer" representation concerning cable licensing as establishing that the party liable on the invoices was some entity other than ACC (the party to whom invoices were addressed and sent, pursuant to the non-boilerplate front of the invoices).

Motorola's own interpretation of the terms and conditions on its invoices during its years of business dealings with the Debtors clearly trumps whatever strained construction the Claim Transferees now conjure up. "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." *See, e.g.*, *IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.*, 26 F.3d 370, 374 (2d Cir. 1994) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 202, cmt. g. (1981)). As the evidence above demonstrates, Motorola understood that it had contracted solely with ACC, not ACC's subsidiaries. Accordingly, Motorola's claim is allowable only against ACC.

## V. NOTICE & WAIVER

No previous motion for the relief sought herein has been made to this or any other court. Notice of this Motion and the hearing thereon, together with copies of the Motion and supporting declarations and exhibits, will be electronically provided to: (a) the Office of the United States Trustee for the Southern District of New York; and (b) all parties to this Adversary Proceeding.

In addition, Plaintiffs have filed a Notice of this Motion and the hearing thereon in the Debtors' bankruptcy case and served the Notice on all other parties that have served a written request on the Debtors on or after the date of the Confirmation Order for service of such pleadings. The Notice states that copies of the Motion and supporting documents are available in the "Important Documents-Adelphia Recovery Trust" section of Adelphia's website at www.adelphiarestructuring.com. Under the circumstances, no further notice is required.

Because the authority for the relief requested is cited herein, the Debtors respectfully request that the Court waive the requirement of Local Bankruptcy Rule 9013-1(b) that a separate memorandum of law be submitted herewith.

## VI. CONCLUSION

For all of the above reasons, Plaintiffs request that the Court enter an order substantially in the form of the attached Exhibit A: (1) approving the proposed settlement pursuant to Rule 9019 and finding that the settlement is fair and equitable and in the best interests of the estate; and (2) finding that the subsidiaries are not liable on the Motorola Claim and ordering that, as of the Effective Date of the Settlement Agreement, the Transferred Claim shall be allowed as a general unsecured claim against ACC in Class ACC-4.

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Los Angeles, California

Respectfully submitted,

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