

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<p>SECURITIES AND EXCHANGE COMMISSION,</p> <p style="text-align:center">Plaintiff,</p> <p>v.</p> <p>MOBILE BILLBOARDS OF AMERICA, INC., INTERNATIONAL PAYPHONE COMPANY, TIGER MEDIA, INC., RESERVE GUARANTY TRUST, CALIFORNIA MOBILE BILLBOARDS, INC., WESTERN RESERVE GUARANTY TRUST, MICHAEL A. LOMAS and MICHAEL L. YOUNG,</p> <p style="text-align:center">Defendants.</p>	<p style="text-align:center">CIVIL ACTION NO.  1:04-CV-2763-WBH</p>
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**MEMORANDUM IN SUPPORT OF MOTION FOR APPROVAL  
OF SETTLEMENT AGREEMENT AND RELEASE**

S. Gregory Hays (“Receiver”), the court-appointed Receiver for Mobile Billboards of America, Inc, California Mobile Billboards, Inc., and other affiliated entities (collectively the “Receiver Entities” or “Receiver Estate”), has filed a Motion for Approval of Settlement Agreement and Release asking this Court to approve the terms of a settlement with Heiser & Jesko, Inc., and its shareholders and employees (collectively referred to as “H&J”) and H&J’s professional liability

insurance carrier, Philadelphia Indemnity Insurance Company ("PIIC"). In support of that motion, the Receiver files this Memorandum showing this Court as follows:

### **Background**

This case was filed by the SEC seeking damages, as well as injunctive and other equitable relief, arising from a fraudulent offering of unregistered securities that raised in excess of \$60 million from individual investors. Pursuant to Orders entered in this action on September 21, 2004, October 18, 2004 and February 7, 2005 ("the Receivership Orders"), this Court appointed S. Gregory Hays to serve as Receiver for Defendants Mobile Billboards of America, Inc. ("MBA"), California Mobile Billboards, Inc. ("CMBI") and other affiliated entities that were involved in the subject offering. In sum, the Receivership Orders direct the Receiver to perform an accounting and tracing of the proceeds of the investment offering and to administer the Receiver Estate in the hope of making a distribution to the aggrieved investors. Among other things, the Receivership Orders authorize and direct the Receiver to "... pursue ... all suits, actions, claims and demands which may ... be brought by" the Receiver Entities.

As indicated in the interim reports filed by the Receiver, there was a relatively small amount of money and other assets in the Receiver Estate at the time of his appointment. Accordingly, if there is to be a distribution to investors, the

Receiver will need to recover assets and successfully prosecute claims against those who participated in or otherwise are liable for acts or omissions that resulted in the subject offering's "success."

H&J is an Ohio accounting corporation that was ultimately responsible for the audits of MBA and its predecessor for the years 2000, 2001, 2002 and 2003, and the audit of CMBI in 2003 (collectively referred to as "the Audits") (Affidavit of Donald Jesko - "Jesko Aff." - at ¶ 11). The audited financial statements and H&J's auditor's report were included in the offering circular that was provided to prospective purchasers of the subject investment.

In the course of investigating claims, the Receiver and the professionals working with him have obtained and analyzed H&J's work papers and other documents and taken deposition testimony from the H&J employee in charge of the Audits. Based upon the facts discovered during the course of his investigation of the Audits, the Receiver determined that MBA and CMBI had viable claims for professional negligence that could be asserted against H&J. Importantly, the Receiver did not conclude that H&J and its shareholders and employees were knowing participants in the underlying fraudulent scheme.

Through his counsel, the Receiver sent a demand letter to H&J's counsel outlining the Receiver's claims that the Audits had not been performed in

accordance with the applicable standards of care. While H&J denied any liability whatsoever, counsel for the Receiver, H&J and PIIC engaged in extensive settlement negotiations. In addition to the merits of the respective claims and defenses, there were two issues that were critical to the Receiver in determining whether a settlement and compromise was feasible. First, the Receiver was concerned about whether H&J had sufficient cash and other assets to respond to a substantial judgment if he successfully prosecuted his claims. Second, H&J had been sued in three separate actions filed by individual investors in North Carolina and, theoretically, was exposed to additional suits filed by investors (“the Investor Lawsuits”). The Receiver, (as well as H&J and PIIC) ultimately concluded that it would not be possible to resolve the Receiver’s claims short of litigation if the Investor Lawsuits continued against H&J. In sum, H&J and PIIC were unwilling to use the insurance policy to settle the Receiver’s claims if H&J was required to continue defending the Investor Lawsuits.

The Receiver was provided with historical and current financial information regarding H&J, as well as the compensation paid to H&J's shareholders and employees. As a result, the Receiver determined that, with the exception of H&J’s professional liability insurance policy, H&J has no readily available assets with which to satisfy a substantial judgment against it. (See, *Jesko Aff.*, *generally.*)

H&J's professional liability insurance policy, issued by PIIC, has an aggregate policy limit of \$500,000. These limits are eroded as attorneys' fees and expenses are incurred in the defense of any claims against H&J, including claims asserted by the Receiver and those asserted in the Investor Lawsuits. Accordingly, the proceeds of the PIIC policy are being diminished by the cost of defending those claims.

The three Investor Lawsuits actually filed against H&J were filed in the state of North Carolina by various investors who purchased mobile billboard investments from MBA. As with the Receiver's claims, H&J denied that it is liable to any investors, including the plaintiffs in the Investor Lawsuits. H&J filed Motions to Dismiss each of these Investor Lawsuits based, among other things, on a lack of personal jurisdiction in North Carolina. In one of the cases, the motion was granted on jurisdictional grounds. Another case was voluntarily dismissed by the investor plaintiffs. H&J and its counsel believe the motion to dismiss should also be granted in the one Investor Lawsuit in which it remains pending. Importantly, these dismissals do not preclude the filing of these claims in another jurisdiction (e.g., Ohio).

The remaining coverage available under the PIIC insurance policy shall be slightly in excess of \$325,000. The assessment of the Receiver and his counsel is

that the PIIC policy would, in all likelihood, be fully exhausted in defending claims asserted against H&J. Therefore, rather than having this money consumed by expenses of litigation, the Receiver determined that it was in the best interest of the Receiver Estate and, ultimately, the entire class of investors for those proceeds to be turned over to the Receiver to be used or distributed as a part of the Receiver Estate.

In light of his assessment, the Receiver and H&J have entered into a Settlement Agreement dated March 29, 2006, a copy of which is attached to the Receiver's motion as Exhibit "A". In sum, the Settlement Agreement provides:

- H&J and/or PIIC shall pay the Receiver the full amount of the remaining coverage under the PIIC policy, which shall not be less than \$325,000;
- The Receiver releases H&J and PIIC from all causes of action that may arise from their involvement with MBA, CMBI or any other Receiver Entity;
- H&J and PIIC release the Receiver from all causes of action that may arise from the activities of MBA, CMBI or any other Receiver Entity; and,
- Upon approval of the Settlement Agreement, the Receiver will, up to the amount of the settlement payment, indemnify H&J from any claims asserted arising from the Audits.

The Settlement Agreement will be binding upon the parties only after approval by this Court, after notice to investors providing them with an opportunity to object.

### **Reasons for Settlement Agreement**

Despite the Receiver's belief that the value of his claims against H&J is well in excess of \$325,000, he is convinced that the proposed settlement is the best result for the Receiver Estate and investors, generally. Simply stated, it is better to recover the remaining insurance proceeds than to have them consumed by litigation, leaving no cash or assets readily available to satisfy a larger judgment.

Understandably, H&J is unwilling to agree to turn over the remaining insurance coverage if it remains exposed to claims from individual investors. The Investor Lawsuits clearly demonstrate that some investors and/or their lawyers may be willing to invest time and money in further litigation with H&J. Therefore, a condition of the underlying settlement is that this Court approve the settlement and enjoin further litigation against H&J arising out of the subject Audits. Notice of the filing of this motion and the terms of the settlement is being provided to all investors, allowing them an opportunity to object.

There are two statutes that govern the ability of a federal district court to issue an injunction of state court litigation: the Anti-Injunction Act and the All-Writs Act. In re: Inter-Op Hip Prosthesis Product Liability Litigation, 176 F. Supp. 2d 758, 762 (N.D. OH 2001) (*vacated in part*, on other grounds). Under the Anti-Injunction Act, there are three exceptions that allow a district court to enjoin state

court proceedings: (1) as expressly authorized by Congress, or (2) where necessary in aid of its jurisdiction, or (3) to protect or effectuate its judgments. 28 U.S.C. § 2283; see also, In re: Inter-Op, 176 F. Supp. 2d at 762. If an injunction falls into one of these exceptions, then the All Writs act provides the positive authority for an injunction. 28 U.S.C. § 1651 (providing that, “all courts established by an act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions . . .”); see also, In re: Inter-Op, 176 F. Supp. 2d at 762. Here, the entry of such an injunction is both necessary and appropriate to preserve and aid this Court’s jurisdiction over the Receiver Estate.

Absent a settlement that precludes further litigation against H&J, it is evident that the remaining proceeds of the subject insurance policy will be consumed in defending the Receiver’s claims, as well as any remaining or later-filed Investor Lawsuits. Such a result would deprive any investor of the benefit of those funds. Conversely, if the claims against H&J are settled and compromised in accordance with the terms of the Settlement Agreement, those proceeds will become a part of the Receiver Estate, which is being administered for the ultimate benefit of investors and other creditors of the Receiver Entities.

With respect to a potential recovery from H&J, the investors, as a group, will suffer substantial harm if the settlement is not approved. Simply stated, they will be

deprived of these funds, which can be used to: (1) fund the administration of the Receiver Estate in hopes of increasing its value; and/or (2) make a distribution to investors and other creditors.

An injunction barring further litigation actually works to preserve the proceeds before they are completely used up. Moreover, by enjoining further litigation and approving the proposed settlement, all investors will receive the pro rata benefit of the settlement payment, rather than having individual investors and the Receiver “racing to a judgment” with few if any assets available to satisfy it.

In cases such as this one where the Receiver can and will prosecute claims for the ultimate benefit of all investors, the Receiver believes that investors should share pro rata in any recovery, rather than having individual investors seek to improve their position vis a vis other victims by seeking to obtain an individual judgment. Obviously, allowing competing claims to continue, thereby depriving the Receiver Estate of the subject settlement payment, impairs the Receiver’s and, ultimately, this Court’s flexibility and authority in the administration of the Receiver Estate. Accordingly, this Court has the authority to enjoin the Investor Lawsuits and possible future investor litigation. 28 U.S.C. § 1651; 28 U.S.C. §2283.

This 29<sup>th</sup> day of March, 2006.

TROUTMAN SANDERS LLP

/s/ J. David Dantzler, Jr.  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2006, I electronically filed the Motion for Approval of Settlement Agreement and Release with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all parties of record.

/s/ Matthew R. Clark  
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