

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT LAFAYETTE**

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<b>In the Matter of:</b> )	)	
	)	<b>CASE NO.: 98-40533</b>
<b>CONSOLIDATED INDUSTRIES CORP.</b> )	)	
	)	
<b>Debtor.</b> )	)	<b>Chapter 7</b>
	)	
_____ )	)	

**MOTION BY THE TRUSTEE FOR AUTHORITY TO COMPROMISE  
AND SETTLE KB LITIGATION, ALLOW A GENERAL UNSECURED  
CLAIM AND REQUEST FOR HEARING AND OPPORTUNITY TO OBJECT**

The Trustee, Daniel L. Freeland, by counsel, and pursuant to 11 U.S.C. §§105 (a), 363, 362 (d), and Federal Rules of Bankruptcy Procedure 2002 and 9019, requests that this Court enter an Order (i) authorizing the Trustee to compromise and settle the pending litigation known as Case No. BC 250181 in the State of California entitled KB Home, et al. v. Consolidated Industries Corporation, et al. (the "KB Litigation"), (ii) approving the stipulation of settlement between KB Home, Kaufman & Broad of Northern California, Inc., Kaufman & Broad of Southern California, Inc., Kaufman & Broad Land Company, Kaufman & Broad of San Diego, Inc., Lewis Homes of California, and Lewis Development Company (collectively, the "KB Entities"), and Consolidated Industries Corp. ("Consolidated" or "Debtor"), and (iii) approving the stipulation of settlement between the KB Entities, Consolidated, Inland Heating, Inc. ("Inland"), Air Design Systems, Inc. ("Air Design"), Lotshaw Air Conditioning, Inc. ("Lotshaw"), and Rancho Air, Inc. ("Rancho") (Inland, Air Design, Lotshaw, and Rancho are collectively referred to as the "Installers"). In support of this Motion, the Trustee states as follows:

## I. INTRODUCTION

1. The KB Entities developed, built and/or constructed numerous California residences containing NOx rod furnaces manufactured by Consolidated under various trade and brand names (the "Consolidated Furnaces") (collectively, the "Residences").
2. Consolidated's business involved the manufacture of furnaces primarily for installation in residential homes in California and other states.
3. Certain disputes and disagreements have arisen or may arise between the parties concerning the Residences, including but not limited to the Consolidated Furnaces.
4. As a result of disputes and disagreements referred to in paragraph 3 above, the KB Entities commenced the KB Litigation on May 9, 2001.
5. In the KB Litigation, the KB Entities allege that Consolidated manufactured defective furnaces, which were replaced by the KB Entities or homeowners (who received full or partial reimbursement from the KB Entities), and assert claims for strict liability, negligence, breach of warranty and fraud, and as to each such claim, seek damages in excess of \$5 million.
6. In or about August 2001, the KB Entities were granted relief from the automatic stay by this Court in order to liquidate claims against Consolidated.
7. In or about February 1994, John Salah, et al., commenced a proposed class action lawsuit in Santa Clara County Superior Court, entitled Salah, et al. v. Consolidated Industries, Inc., et al., Case No. CV 738376 (the "Salah Action") against Consolidated and others on behalf of owners of certain Consolidated Furnaces.
8. On May 28, 1998, Consolidated filed a voluntary Petition for Relief under

Chapter 11 of the Bankruptcy Code. On August 11, 2000, the Consolidated bankruptcy proceeding was converted from Chapter 11 to Chapter 7. On August 14, 2000, this Court appointed Daniel L. Freeland as Chapter 7 Trustee of the estate and entered an Order granting the Salah Class Plaintiffs relief from the automatic stay to proceed with the Salah Class Action Litigation.

9. In or about February 2002, the plaintiffs in the Salah Action entered into a class-wide settlement agreement with Consolidated (the "Class Settlement"). On or about February 22, 2002, the court in the Salah Action granted preliminary approval of the Class Settlement and conditionally certified a settlement class defined as:

All Persons who were, are, or become Owners of Furnaces and/or who have asserted, or could assert, claims in any way arising out of or relating to Furnaces, and all subrogees, assignees, successors, and other Persons or Representatives who have asserted or could assert any such claims by, through, or on behalf of such past, current, and future Owners and/or residents and occupants of such Residences. Excluded from the Settlement Class are all Persons to the extent that they properly and timely opt out pursuant to the Consolidated Stipulation of Settlement. As used herein, Person means any individual, proprietorship, corporation, partnership, association, trustee, unincorporated association, or any other type of legal entity. As used herein, Owner means a Person who: (a) owns a Residence that contains or previously contained a Furnace; (b) received an assignment of rights from a Person who owns a Residence that contains or previously contained a Furnace; (c) replaced (or paid for the replacement of) a Furnace at no cost to the owner of a residence that contains or previously contained a Furnace; and/or (d) had or has any one or more Furnaces. As used herein, Furnace means a horizontal gas furnace manufactured by Consolidated Industries Corp. containing NOx rods. As used herein, Residences means all structures, including homes, townhomes, condominiums, apartments, mobile homes, and other types of buildings or structures, in which Furnaces were installed.

10. Absent a proper request for exclusion, the KB Entities would have been members of the Salah Class.
11. In May 2002, the KB Entities properly opted out of the Salah Class.

12. In June 2002, the court in the Salah Action granted final approval to the Class Settlement.

13. Section 7.3 of the Class Settlement provides, in part: "At any time after the entry of the Final Approval Order, any Person who has elected to opt out of this Stipulation may withdraw that election only upon receiving the written consent of Consolidated and Court approval."

14. This Court has jurisdiction over this case and this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. §§ 157 (b) (2).

## II. PROPOSED SETTLEMENT OF KB LITIGATION

15. It is now the desire and intention of the parties to settle all of the KB Entities' claims relating to or arising out of the Residences and/or the Consolidated NOx Furnaces, that are referred to above and/or that are referred to in the KB Litigation, by, among other things, allowing the KB Entities' withdrawal of their election to opt out of the Salah Class.

16. The KB Entities have agreed to settle and release all claims arising out of the allegedly defective Consolidated NOx Furnaces against Consolidated, the Estate, Consolidated's Insurers, the Installers, and each of their representatives. In return, the Trustee and Consolidated's Insurers have entered into a Confidential Settlement Funding Agreement and Release (the "Funding Agreement") resolving the funding of the KB Settlement Agreement. Under the Funding Agreement, Consolidated's Insurers have agreed to provide the required settlement payment(s) under the KB Settlement Agreement on certain terms and conditions set forth therein.

17. After extensive negotiations with the KB Entities' counsel and Consolidated's Insurers, the Trustee has entered into the KB Settlement Agreement, which allows the KB

Entities to opt back into the Salah Class, provides for the distribution of \$585,900 as the KB Entities' total benefits under the Class Settlement, and provides for a payment to the KB Entities equal to one-third of the undisbursed funds from the Addison class action settlement that are transferred to the Consolidated settlement fund pursuant to the terms of the Salah Court's March 12, 2003 Order, subject to certain terms and conditions, and subject to the approval of both the California State Court and this Court. The KB Settlement Agreement further provides that the KB Entities shall be allowed a pre-petition general unsecured claim in the amount of \$925,000, which amount shall be the compromised amount of KB's warranty claims against the Consolidated chapter 7 bankruptcy estate. The warranty claims are not covered by insurance. The terms and conditions of the proposed settlement with the KB Entities are fully set forth in the KB Settlement Agreement, a copy of which is attached hereto as Exhibit A.

18. The Trustee and Consolidated's Insurers have entered into a Confidential Settlement Funding Agreement and Release (the "Funding Agreement") regarding their respective rights concerning the KB Litigation and Consolidated's claims for insurance coverage related thereto. The Funding Agreement provides for payment by the Insurers, subject to certain terms and conditions provided for in the KB Settlement Agreement.

19. After extensive negotiations with the KB Entities' counsel and the Installers' counsel, the Trustee also has entered into a settlement agreement with those parties (the "Installer Settlement Agreement"). The Installer Settlement Agreement provides that 50% of the total settlement payments from the Installers will be paid to the estate and 50% will be paid to the KB Entities. Upon approval of the Installer Settlement Agreement, the estate will receive a total of \$11,250. This payment is in consideration for the release of certain claims against the Installers that the KB Entities assigned to the Trustee as a result of the KB Settlement Agreement. The terms and conditions of the proposed settlement with Installers are fully set forth in the Installer Settlement Agreement, a copy of which is attached hereto as Exhibit B.

20. The Trustee has negotiated the KB Settlement Agreement and the Installer Settlement Agreement at arm's length, and he believes that the agreements are fair and

reasonable and in the best interests of the estate for the reasons set forth in the Brief filed in support of this Settlement Motion.

21. The Trustee requests that the Court enter an Order at the Settlement Hearing substantially in the form attached as Exhibit C. (the "Settlement Order") which has been circulated to the KB Entities, the Installers, and Consolidated's Insurers.

### III. CONCLUSION

22. BY VIRTUE OF THE FOREGOING, THE Trustee submits that the approval of his intended settlement of the KB Litigation with Consolidated's Insurers is necessary and appropriate under the circumstances.

WHEREFORE, the Trustee requests this Court enter an Order, pursuant to Section 105 (a) and Federal Rules of Bankruptcy Procedure 2002 and 9019, substantially in the form annexed hereto (i) approving and authorizing the Trustee to compromise and settle the KB Litigation pursuant to the terms and conditions of the KB Settlement Agreement and the Installer Settlement Agreement, (ii) authorizing the Trustee to take all further actions and execute and deliver all documents necessary to consummate the transactions described herein; and (iii) allowing such other relief as is just and to which the Trustee may be entitled under the circumstances.

DANIEL L. FREELAND, CHAPTER 7 TRUSTEE OF  
CONSOLIDATED INDUSTRIES CORPORATION

By: /s/ Gordon E. Gouveia  
One of His Attorneys

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