

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	Chapter 11
)	
Conseco Finance Corp.,)	Case No. 02-49675
)	Honorable Carol A. Doyle
Debtor.)	
)	Hearing Date: October 27, 2004 at 11:00 a.m.
)	Objection Date: October 20, 2004 at 4:30 p.m.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on **October 27, 2004 at 11:00 a.m.**, or a soon thereafter as counsel may be heard, the undersigned shall appear before the Honorable Judge Carol A. Doyle, Courtroom 742, at the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois 60604, and present the **MOTION OF THE POST-CONSUMMATION ESTATE OF THE CONSECO FINANCE COMPANY DEBTORS FOR ENTRY OF AN ORDER APPROVING (I) DISCOVERY PROTOCOL, (II) OMNIBUS HEARING DATES, (III) NOTICE PROCEDURES, (IV) CASE MANAGEMENT PROCEDURES AND (V) MEDIATION PROCEDURES FOR PREFERENCE ACTIONS** (the "Motion"), a copy of which is attached hereto and hereby served upon you

PLEASE ALSO TAKE NOTICE that objections to the Motion must be filed no later than **October 20, 2004 at 4:30 p.m.**, and a copy served on counsel for the CFC Estate (i) Greenberg Traurig, LLP, Attn: Nancy A. Peterman and Robert W. Lannan, 77 West Wacker Drive, Suite 2500, Chicago, IL 60601.

Dated: October 8, 2004

THE CFC ESTATE

By: /s/ Robert W. Lannan
One of Its Attorneys

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**MOTION OF THE POST-CONSUMMATION ESTATE OF THE CONSECO
FINANCE COMPANY DEBTORS FOR ENTRY OF AN ORDER APPROVING
(I) DISCOVERY PROTOCOL, (II) OMNIBUS HEARING DATES, (III) NOTICE
PROCEDURES, (IV) CASE MANAGEMENT PROCEDURES AND
(V) MEDIATION PROCEDURES FOR PREFERENCE ACTIONS**

The Plan Administrator, on behalf of the Post-Consummation Estate for the Finance Company Debtors (the “**CFC Estate**”)¹, by and through its attorneys, presents this motion (the “**Motion**”) for entry of an order (the “**Pre-Trial Procedures Order**”), pursuant to Sections 102(a), 105(a) and 547(b) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (2004) (the “**Bankruptcy Code**”), Rules 7026, 7029, 9006(c) and 9007 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rules 101, 402, 1000 and 9060-1(a) of the Bankruptcy Rules for the United States District Court and the United States Bankruptcy Court for the Northern District of Illinois (the “**Local Rules**”), approving (i) discovery protocol, (ii) omnibus hearing dates, (iii) notice procedures, and (iv) other case management procedures, and (v) mediation procedures set forth herein, for those adversary proceedings seeking avoidance and recovery of preference payments pursuant to Sections 547 and 550 of the Bankruptcy Code. In support of this Motion, the CFC Estate respectfully states as follows:

¹ The post consummation estate for Conseco Finance Corp. (the “**CFC Estate**”) is the liquidating trust that holds in trust for distribution to creditors certain assets of the entities referred to as the “Finance Company Debtors” in the Finance Company Debtors’ Sixth Amended Joint Liquidating Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code (the “**Plan**”). Capitalized terms not otherwise defined herein shall have the meaning ascribed in the Plan.

I. JURISDICTION

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F). The statutory predicates for the relief sought by this Motion are Sections 102(a), 105(a) and 547(a) of the Bankruptcy Code. This Motion is also brought pursuant to Bankruptcy Rules 7026, 7029, 9006(c) and 9007, as well as Local Rules 101, 402, 1000 and 9060-1(a).

II. BACKGROUND

2. On December 17, 2002, Conseco Finance Corp. and Conseco Finance Servicing Corp. filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

3. On February 3, 2003, the CFC Subsidiary Debtors filed their voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

4. On June 2, 2003, the New Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

5. On June 24, 2003, Conseco Finance Credit Card Funding Corp. filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

6. On September 9, 2003, this Court entered an order confirming the CFC Debtors' Sixth Amended Joint Liquidating Plan of Reorganization (the "**Plan**").

7. On September 15, 2003 (the "**Effective Date**"), the Plan became effective.

8. On September 15, 2003, pursuant to the First Amended Post-Consummation Estate Agreement (the "**CFC Estate Agreement**"), the CFC Estate was established for the primary purpose of liquidating the remaining assets of the CFC Debtors (the "**CFC Estate Assets**"), pursuant to the Plan.

9. Pursuant to the Plan and the CFC Estate Agreement, Bridge Associates, LLC was appointed as the administrator of the Plan (the “**Plan Administrator**”) for the purpose of overseeing the liquidation and administration of the CFC Estate Assets.

10. Among the CFC Estate Assets are claims for avoidance and recovery of preferential transfers made by the CFC Debtors, pursuant to Sections 547 and 550 of the Bankruptcy Code. On February 23, 2004, the CFC Estate had already commenced a limited number of adversary proceedings (the “**Pending Preference Actions**”)² to pursue such avoidance and recovery. Pursuant to Section 502(d) of the Bankruptcy Code, the CFC Estate has also objected to certain claims against the CFC Estate on the grounds that the claimants have received transfers that are subject to avoidance and recovery under Sections 547 and 550.

11. While reserving any arguments to the contrary, the CFC Estate anticipates that the statute of limitations for actions to recover preference payments will run on December 17, 2004. Therefore, since September 21, 2004, the CFC Estate has commenced one hundred seventy-six (176) new adversary proceedings, and between the date of this Motion and December 17, 2004 will commence more new adversary proceedings, all to pursue avoidance and recovery of preferential transfers made by the CFC Debtors, pursuant to Sections 547 and 550 of the Bankruptcy Code (the “**Preference Actions**”).

III. RELIEF REQUESTED

12. By this Motion, the CFC Estate is seeking entry of a Pre-Trial Procedures Order establishing certain notice, case management, discovery and other administrative procedures

² The Pending Preference Actions are: CFC Estate v. Adel Housing, Adv. No. 04-00297; CFC Estate v. California Plasticard, Inc., Adv. No. 04-00298, CFC Estate v. Economy Homes, LLC, Adv. No. 04-00299, CFC Estate v. Fleishman-Hillard, Inc., Adv. No. 04-00300, CFC Estate v. Mid-City Mobile Home Service, Inc., Adv. No. 04-00301, CFC Estate v. Morrison & Foerster, Adv. No. 04-00302, CFC Estate v. Nexus Information Systems, Adv. No. 04-00303, CFC Estate v. PDS Real Estate, Adv. No. 04-00304, CFC Estate v. Repo-Mart Corporation, Adv. No. 04-00305, CFC Estate v. Kenny & Solomon, P.C., Adv. No. 04-00306, CFC Estate v. West River Electric, Adv. No. 04-00307, and CFC Estate v. ZC Sterling, Adv. No. 04-00308.

(collectively the “**Pre-Trial Procedures**”), including certain mandatory Mediation Procedures, defined and discussed below, to govern the pre-trial stages of litigation of all of the Preference Actions, including those Preference Actions commenced on the date of this Motion and all subsequently-filed Preference Actions. Although this Motion is filed in the above-captioned Chapter 11 case, the CFC Estate is requesting that any order entered approving this Motion apply in all of the Preference Actions.

13. The CFC Estate proposes that these Pre-Trial Procedures not apply to the Pending Preference Actions (as defined above). The CFC Estate also proposes that the Pre-Trial Procedures not apply to Conseco Finance Servicing Corp. v. Chipman, Adv. No. 03-03742, an adversary proceeding for recovery of certain preference payments that the CFC Estate is pursuing as a successor-in-interest to Conseco Finance Servicing Corp.

A. Proposed Procedures

(1) Omnibus Procedures for Chapter 11 Cases Not Applicable

14. The CFC Estate proposes that the Pre-Trial Procedures Order establish that the First Amended Notice, Case Management and Administrative Procedures, approved by this Court on January 14, 2004 in the Chapter 11 case In re Conseco, Inc., et al., Case No. 02-49672 (jointly administered with the above-captioned Chapter 11 case) are not applicable to the Preference Actions. Procedures applicable to the Preference Actions should be limited to those procedures contained in the Pre-Trial Procedures Order (including Mediation Procedures discussed below) and, for issues not addressed in the Pre-Trial Procedures Order, the Bankruptcy Code, the Bankruptcy Rules, the Local Rules and standing orders of the Court.

15. The Pre-Trial Procedures are modeled, in part, after case management procedures for litigation of preference cases approved by this Court in In re HA2003, Inc., formerly known as HA-LO Industries, Inc., et al., Case No. 02-12059. See Order Approving (I) Discovery

Protocol, (II) Omnibus Hearing Dates, (III) Notice Procedures and (IV) Case Management Procedures for Litigation of Preference Claims, entered on January 6, 2004. The Mediation Procedures are modeled after similar procedures approved by this Court in In re Anicom, Inc., Case Nos. 01-00485 (Sept. 14, 2004).

(2) **Discovery Protocol**

(a) **Continued Adversary Proceedings**

16. The CFC Estate requests that under the Pre-Trial Procedures, each Preference Action automatically be deemed a “**Continued Adversary Proceeding**” during the twenty-eight (28) calendar day period following the defendant’s deadline to file an answer.

17. The CFC Estate requests that, for all Continued Adversary Proceedings (and for all Mediation Adversary Proceedings (defined below), the Court suspend the requirements of: (i) initial disclosures under Rule 26(a)(1) of the Federal Rules of Civil Procedure (the “**Federal Rules**”) and (ii) discovery conferences and reports under Federal Rule 26(f).

18. Under the Pre-Trial Procedures proposed herein, the parties to a Continued Adversary Proceeding would be authorized, but not required, to engage in the informal exchange of information to facilitate settlement. The parties would be prohibited from serving formal discovery requests including, but not limited to, requests for production of documents, interrogatories or requests for admissions (“**Discovery Requests**”). Pursuant to Rule 408 of the Federal Rules of Evidence, any information exchanged by parties pursuant to such settlement discussions would be inadmissible at any hearing or in any Filing (defined below) in a Preference Action.

19. Further, in order to facilitate settlement discussions and to reduce administrative costs, the CFC Estate would be authorized to extend the Defendants’ time to answer or otherwise

plead in response to the Complaint filed in connection with a Continued Adversary Proceeding without obtaining further approval from the Court.

20. The CFC Estate requests that the CFC Estate be authorized to seek the entry of a default judgment in any Preference Action where the defendant(s) to the Preference Action have not (i) timely answered or otherwise responded to the Adversary Complaint in accordance with the Bankruptcy Rules or (ii) received an extension of the time period to file such answer or response.

21. If the Pre-Trial Procedures are implemented, the CFC Estate will inform the Court of the status of the Continued Adversary Proceedings on or before each Status Hearing Date.

22. The CFC Estate requests that under the Pre-Trial Procedures, any Preference Action in which the parties have not reached a settlement within twenty-eight (28) calendar days after the deadline to file an answer shall, without leave of the Court or consent of the parties, become a “**Mediation Adversary Proceeding**.”

(b) Mediation Adversary Proceedings

23. The CFC Estate proposes that all Mediation Adversary Proceedings be referred to mandatory mediation, and mediated pursuant to certain “**Mediation Procedures**” attached to this Motion as **Exhibit A**.

24. The proposed Mediation Procedures are designed to facilitate efficient and inexpensive settlement of the Adversary Proceedings.

25. The CFC Estate proposes that it be given discretion to select a qualified mediator from the list maintained by this Court pursuant to Local Rule 1004 to serve as the mediator (the “**Mediator**”) in the Mediation Adversary Proceedings. Within thirty (30) days of entry of a Pre-Trial Procedures Order by this Court approving Mediation Procedures, the CFC Estate will file a notice designating the Mediator.

26. Under the proposed Mediation Procedures, the Mediator would set forth the place and time that the mediations would be conducted, with an accompanying schedule reflecting the times for each defendant to appear for its respective mediation, together with any additional procedures and the dates for the submission of Position Statements (defined in the Mediation Procedures) by the parties to the Mediator.

27. The fee paid to the Mediator would be \$5,000 per mediation day, regardless of how many mediations were conducted on such day, plus reimbursement of expenses, plus \$600 per hour for all other hourly services such as preparation. The CFC Estate estimates that the Mediator's fees and expenses would amount to approximately \$1,300 per mediation. In an effort to share the cost of mediating each Mediation Adversary Proceeding equally by the CFC Estate and each defendant, not later than fourteen (14) calendar days after a Preference Action becomes a Mediation Adversary Proceeding (the "**Fee Deadline**"), each defendant would be required to deliver to counsel for the CFC Estate the sum of \$650 (the "**Defendant Funds**") made payable to "Greenberg Traurig LLP Mediation Escrow Account" (the "**Mediation Account**"). The CFC Estate would, likewise, deposit in the Mediation Account the sum of \$650 for each Mediation Adversary Proceeding (the "**Plaintiff Funds**", together with the Defendant Funds, the "**Funds**") that will be the subject of mediation by the Fee Deadline.

28. The Funds would be deemed earned by the Mediator upon deposit into the Mediation Account, and would be non-refundable.

29. On a date set forth in the Mediation Procedures, and after receipt of an invoice from the Mediator, counsel for the CFC Estate would forward all Funds in the Mediation Account to the Mediator. To the extent the Mediator's fees and expenses exceed the amount of the Funds, the balance would be paid by the CFC Estate.

30. Consistent with the Mediation Procedures, the order directing mediation as entered by the Court, and the Mediator's Protocol (defined in the Mediation Procedures), the Mediator would handle all Mediation Adversary Proceedings in his or her discretion. In all cases, the procedures used by the Mediator would be reasonable and practical under the existing circumstances.

31. Any party to a Mediation Adversary Proceeding could be represented by legal counsel, although the participation of legal counsel would not be required for the conduct of the mediation.

32. The Mediator would meet with the parties or their representatives, individually and jointly, for a conference or a series of conferences as determined by the Mediator and set forth in the Mediator's Protocol.

33. The Mediator would have discretion, in accordance with the Mediation Procedures, to review the claims and defenses of the parties, the prior negotiations between the parties, all correspondence between the parties during prior, informal negotiations, if any, and such additional information as the parties may, in their discretion, wish to submit.

34. The Mediator's Protocol would provide for simultaneous submission of Position Statements in each mediation. Consistent with the Mediation Procedures and the Mediator's Protocol, the defendant(s) would be required to submit to the Mediator (1) a Defendant Position (defined in the Mediation Procedures), composed of a concise outline of its defense(s) to preference liability with evidentiary support, and (2) a Settlement Position (defined in the Mediation Procedures), composed of an outline of the defendant's position on settlement value, by the date set forth in the Mediator's Protocol.

35. Consistent with the Mediation Procedures and the Mediator's Protocol, the CFC Estate would be required to submit to the Mediator (1) a Plaintiff Position (defined in the

Mediation Procedures), composed of a concise outline of its claims set forth in the Complaint with evidentiary support and any rebuttal to defenses asserted by defendants in connection with the Mediation Adversary Proceeding, with evidentiary support, and (2) a Settlement Position, composed of an outline of the CFC Estate's position on settlement value by the date set forth in the Mediator's Protocol. Unless otherwise directed by the Mediator, and consistent with and pursuant to the Mediator's Protocol, each of the defendants would serve the CFC Estate with a copy of the Defendant Position. The CFC Estate would serve the defendant with a copy of the Plaintiff Position in the respective Mediation Adversary Proceeding.

36. The Settlement Positions would be sent only to the Mediator and would not be disclosed to the opposing party. The Settlement Positions and Position Statements would be deemed to be compromise and settlement communication, pursuant to Rule 408 of the Federal Rules of Evidence.

37. The Mediator would work with each opposing party to reach a settlement of the Mediation Adversary Proceeding mutually acceptable to the parties.

38. Any statement made by the Mediator, by the parties or by others during the mediation process could not be divulged by any of the participants in the mediation (or their agents) or by the Mediator to the Court or to any third party unless otherwise ordered by the Court. All records, reports, or other documents received or made by the Mediator while serving in such capacity would be confidential and would not be provided to the Court, unless they would otherwise be admissible.

39. Pursuant to the Mediator's Protocol, the Mediation Procedures and applicable rules and orders of this Court, the place and time of the mediations would be set forth in the Mediator's Protocol and would continue on consecutive days thereafter until completed and at the discretion of the Mediator. Representatives of the CFC Estate with ultimate authority to

settle (meaning full discretion to settle for any amount between \$0.00 and the full amount in controversy) would be required to be present at the mediation. If the disputed portion of the Mediation Adversary Proceeding were \$15,000.00 or less, the parties would have the option of appearing by telephone. Mediations of all Mediation Adversary Proceedings involving claims in excess of \$15,000.00 would be conducted, in person, in Chicago, Illinois. All mediations would be limited to one day or less, unless otherwise agreed by the participants.

(c) Disputed Adversary Proceedings

40. Upon conclusion by the Mediator that any Mediation Adversary Proceeding could not be resolved through the Mediation Procedures, such Preference Action would become a **“Disputed Adversary Proceeding.”**

41. The CFC Estate requests that the Court require the parties to a Disputed Adversary Proceeding to conduct a conference pursuant to Rule 26(f) of the Federal Rules of Civil Procedure within fourteen (14) calendar days after the date on which it becomes a Disputed Adversary Proceeding.

42. The CFC Estate requests that the Court continue to waive the requirement that the parties to a Disputed Adversary Proceeding file a Rule 26(f) discovery report with the Court prior to serving Discovery Requests or Rule 26(a)(1) disclosures (the **“Initial Disclosures”**).

43. The CFC Estate further requests that parties to the Disputed Adversary Proceedings be required to exchange their Initial Disclosures within seven (7) calendar days after the above deadline for a Rule 26(f) conference (i.e., within twenty-one (21) calendar days after the date on which it becomes a Disputed Adversary Proceeding (the **“Initial Disclosure Date”**)).

44. Under the proposed Pre-Trial Procedures, all written and oral fact discovery would be required to be completed within four (4) months of the Initial Disclosure Date (the **“Discovery Cut-Off Date”**), without prejudice to any party to a Disputed Adversary Proceeding

to request an extension of the Discovery Cut-Off Date. Under the proposed Pre-Trial Procedures, if Discovery Requests are made by any party to a Disputed Adversary Proceeding, the party on whom such Discovery Requests are served will have thirty (30) days to respond to such Discovery Requests, without prejudice to that party's right to seek extensions of that deadline.

45. Under the Pre-Trial Procedures, all discovery regarding expert testimony shall be completed within thirty (30) days after the Discovery Cut-Off Date (the “**Expert Deadline**”), without prejudice to any party to a Disputed Adversary Proceeding to request an extension of the Expert Deadline.

46. The CFC Estate further requests that under the Pre-Trial Procedures, Disputed Adversary Proceedings be set for a pretrial status hearing (the “**Pretrial Status Hearing**”) on the first Status Hearing Date (as defined below) that is at least seven (7) calendar days after the Expert Deadline. Under these Pre-Trial Procedures, unless otherwise authorized by the Court, for good cause shown, all parties to the Disputed Adversary Proceeding will be required to personally appear at the Pretrial Status Hearing by and through their appointed counsel.

(3) **Status Hearings**

47. Given the large number of parties to the Preference Actions, the CFC Estate seeks to establish bi-monthly omnibus status hearings (the “**Status Hearing Dates**”) for all of the Preference Actions. Unless otherwise provided by separate order entered by this Court, the CFC Estate will inform the Court of the status of each Preference Action on every Status Hearing Date through the Preference Status Chart (as defined below).

48. All motions, applications and other filings (collectively “**Filings**”) in a Preference Action shall be served on all counsel of record in the Preference Action in accordance with the Bankruptcy the Bankruptcy Rules, the Local Rules and any applicable standing orders of the

Court. By mutual consent of the parties to a Preference Action, such parties shall also be permitted to service notice of filings by electronic transmission (“**e-mail**”). Service on any other person shall not be required except as otherwise ordered by the Court.

49. The CFC Estate requests that, without leave of the Court or consent of all parties, a party making a Filing be limited in its Filing or any memorandum in support thereof to twenty-five (25) double-spaced pages with a twelve (12)-point font.

50. The CFC Estate requests that any party seeking to schedule a hearing in connection with any Filing be required to schedule the same to accommodate the following briefing schedule: Any party opposing a motion or other Filing shall then have twenty-eight (28) days from the date of service of such Filing to file a memorandum in support of its position and to serve such memorandum on all parties to the Preference Action. This memorandum shall also be limited to twenty-five (25) double-spaced pages, with a twelve (12)-point font. The moving party shall then have fourteen (14) days to file any reply memorandum supporting its motion and serve such memorandum on all parties to the Preference Action. A reply memorandum shall be no more than fifteen (15) double-spaced pages in length, with a twelve (12)-point font. The hearing on the motion shall take place at the next omnibus hearing following this briefing schedule. Nothing in these procedures shall prevent the parties to a Preference Action from agreeing to a different briefing schedule or changes in a briefing schedule with respect to a Filing. Also, nothing in these procedures shall prevent a party making a Filing from seeking leave of the Court to present the Filing pursuant to a different briefing schedule.

(4) Notice Procedures

51. The CFC Estate proposes that under the Pre-Trial Procedures, if a party to a Preference Action wishes to receive notice from the CFC Estate of filings of the Preference Status Chart (as defined below) or electronic notice of any other filing by the CFC Estate

pertaining to that Preference Action or to all Preference Actions, the party shall be required to submit a request to counsel to the CFC Estate for such notification, identifying any e-mail address to which such notices shall be sent.

52. The CFC Estate proposes that any entity submitting a Filing shall serve a notice of such Filing (a “**Notice of Filing**”) in accordance with the procedures contained in this Motion. Such Notice of Filing shall include the title of the Filing and the date and time of any Status Hearing Date (or other hearing date as authorized by the Court) at which the Court will consider the Filing. The Pre-Trial Procedures should not prejudice the rights of any party to seek the entry of an order (i) limiting or expanding notice of, and hearings related to, such Filings upon a showing of good cause or (ii) enlarging or reducing any time period under Bankruptcy Rule 9006(b) or (c).

53. The CFC Estate also proposes that service of a Filing shall be made on all parties to a Preference Action, by hand delivery, overnight delivery or e-mail. The CFC Estate proposes that the Pre-Trial Procedures require that Filings be served only on parties to a Preference Action, and not on other persons entitled to receive notice of filings made in the above-captioned Chapter 11 case.

54. Under the proposed Pre-Trial Procedures, prior to each Status Hearing Date, the CFC Estate shall send to the Court a chart (the “**Preference Status Chart**”), including an agenda of Filings and other matters to be considered by the Court on the Status Hearing Date. The CFC Estate will file the Preference Status Chart in the above-captioned Chapter 11 Case and deliver a copy of the Preference Status Chart to chambers by 4:00 p.m. on the day that is two (2) business days prior to the applicable Status Hearing Date. The CFC Estate shall not be required to file the Preference Status Chart in each of the Preference Actions. However, the CFC Estate shall provide e-mail notification, to all of the parties to the Preference Actions, of each filing of the

Preference Status Chart. Under the proposed Pre-Trial Procedures, it shall be the obligation of each party to carefully review the Preference Status Chart as updated by the CFC Estate to ensure that the information set forth therein is accurate, and to inform the CFC Estate of any disagreement with such information.

55. In addition to delivering the Preference Status Chart to the Court, the CFC Estate will also post the Preference Status Chart on the following URL: <http://www.bmccorp.net/cfc> (the “**Website**”). The Preference Status Chart will be updated two (2) business days prior to every Status Hearing Date. Where (i) no Filing seeking affirmative relief against a particular Defendant has been filed or (ii) the Court has not scheduled the particular Preference Action for a pretrial conference, trial or hearing requiring the appearance of all parties, neither that Defendant nor its attorney need attend the Status Hearing Date. Therefore, a defendant named in the Preference Actions need not attend Status Hearing Dates that are simply status conferences, with no particular relevance to that defendant.

56. The Preference Status Chart posted on the Website shall serve as notice to the Defendants of the Status Hearing Dates and no further notice of such dates shall be given.

57. The CFC Estate shall be authorized, but not required, to update the Preference Status Chart more frequently than the monthly updates required above. However, except as required above, the CFC Estate will not be required to serve notices of updates to the Preference Status Chart on parties to the Preference Actions.

58. As stated above, before the date of this Motion, the CFC Estate filed approximately 176 complaints initiating new Preference Actions to which the CFC Estate proposes these Pre-Trial Procedures be applied. The CFC Estate is serving notice of this Motion on all of the defendants named in those complaints.

59. The CFC Estate expects to file additional Preference Actions against other recipients of preference payments during the next few weeks. If the Court enters the Pre-Trial Procedures Order as requested by the CFC Estate, the Pre-Trial Procedures will affect these subsequently-named preference defendants, as well as the defendants who will have received notice of this Motion and have had an opportunity to object. The subsequent defendants should also have an opportunity to review this Motion and the Pre-Trial Procedures Order and to file any objection they have to these procedures.

60. The CFC Estate therefore proposes that the Pre-Trial Procedures Order require the CFC Estate to serve a copy of this Motion and the Pre-Trial Procedures Order on all defendants against which the CFC Estate files subsequent Preference Actions after the date of this Motion (the “**Subsequent Preference Defendants**”). A Subsequent Preference Defendant should then be given an opportunity to file any objection to this Motion, which objection must be filed no later than the deadline for a subsequent Defendant’s answer or other pleading in response to the CFC Estate’s complaint initiating a Preference Action. Any Subsequent Preference Defendant should send a Notice of Filing pertaining to such objection pursuant to the procedures discussed above, scheduling consideration of the objection for the applicable Status Hearing Date.

(5) **Settlement of Preference Actions**

61. On September 9, 2003, this Court entered the Order Confirming Finance Company Debtors’ Sixth Amended Joint Liquidating Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code (the “**Confirmation Order**”). Paragraph (41) of the Confirmation Order provides that “[t]he Plan Administrator, on behalf of the Post-Consummation Estate, shall have . . . the exclusive right, authority, and discretion to . . . settle, or compromise any and all . . . Claims, rights, and Causes of Action, without the consent or approval of any third party and without any further order of court.”

62. Consistent with this Confirmation Order, the CFC Estate will enter into agreements settling the Preference Actions without leave of the Court. The CFC Estate requests that the proposed Pre-Trial Procedures require only that the parties to a Preference Action file a stipulation of dismissal, or that the Plan Administrator file a notice of voluntary dismissal of a Preference Action, upon reaching a settlement whose terms include such dismissal.

(6) ***Continuance of Omnibus Objections to Claims Filed Pursuant to Section 502(d) of the Bankruptcy Code, for Consideration by the Court Concurrent with the Preference Actions***

63. The CFC Estate has filed four omnibus objections to claims in this Chapter 11 Case pursuant to section 502(d) of the Bankruptcy Code (the “**502(d) Objections**”).³ That section states, in pertinent part, that “the court shall disallow any claim of any entity from which property is recoverable under Section 550 ... of this title or that is a transferee of a transfer avoidable under section ... 547 ... of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section ... 550 ... of this title.” 11 U.S.C. § 502(d).

64. The CFC Estate requests that adjudication of the 502(d) Objections be continued with respect to all of the claims of parties that are named as defendants in the Preference Actions, and that the 502(d) Objections be considered concurrently with the Preference Actions, with respect to the claims of the corresponding Preference Action defendants.

65. Most or all of the issues presented by the 502(d) Objections with respect to these claimant-defendants are identical to the issues presented by the corresponding Preference Actions. In the interest of judicial economy and to avoid the possibility of inconsistent rulings,

³ Specifically, these omnibus objections are: CFC Estate’s Twenty-Fourth Omnibus Objection to Claims Pursuant to Section 502(d) of the Bankruptcy Code, CFC Estate’s Fortieth Omnibus Objection to Claims Pursuant to Section 502(d) of the Bankruptcy Code, CFC Estate’s Forty-First Omnibus Objection to Claims Pursuant to Section 502(d) of the Bankruptcy Code, and CFC Estate’s Forty-Fourth Omnibus Objection to Claims Pursuant to Section 502(d) of the Bankruptcy Code.

the CFC Estate requests that these issues be adjudicated through the Adversary Proceedings for those claimants that are both listed in 502(d) Objections and named as defendants in the Preference Actions.

IV. BASIS FOR RELIEF

66. There is ample cause and authority for the Court to approve the Pre-Trial Procedures, including the Mediation Procedures. This section of the Motion will first address cause and authorities for the Pre-Trial Procedures other than the Mediation Procedures. It will then address the cause and authorities applicable to the Mediation Procedures.

A. The Pre-Trial Procedures (Other Than the Mediation Procedures)

67. Section 102(1) of the Bankruptcy Code gives the Court broad discretion to determine what requirements are appropriate for “notice and a hearing” under specific circumstances. The phrase “after notice and a hearing” is defined to “mean[] after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances ...” 11 U.S.C. § 102(1)(A). Moreover, this definition

authorizes an act without an actual hearing if such notice is given properly and if –

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act[.]

Id. § 102(1)(B).

68. Section 105(a) of the Bankruptcy Code provides that bankruptcy court “may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code].”

69. Bankruptcy Rule 9007 provides that “[w]hen notice is to be given under these rules, the Court shall designate, if not otherwise specified herein, ... the form and manner in which the notice shall be given.”

70. Local Rule 101(A) provides that the Local Rules of this Court “shall be construed to secure the expeditious and economical administration of every case within the District under the Bankruptcy Code and the just, speedy, and inexpensive determination of every proceeding therein.”

71. If approved, the Pre-Trial Procedures proposed in this Motion will contribute to more “expeditious and economical administration” of a large number of Preference Actions that will be pending at the same time as this Chapter 11 Case. Id. The Pre-Trial Procedures encourage settlement negotiations, facilitate mediation, and avoid certain costly procedures (such as initial disclosures, pre-trial conferences and discovery) to the extent that these are unnecessary to resolve a Preference Action. If the Court does not approve omnibus pretrial procedures such as those proposed by this Motion, the parties to the Preference Actions and the Court will be burdened by pretrial procedures in a large number of adversary proceedings that will, in many cases, be unnecessary and fail to contribute to the resolution of these Preference Actions.

72. The Pre-Trial Procedures are designed to secure the expeditious, economical, and inexpensive litigation and administration of the Preference Actions, and to afford notice to the relevant parties of applicable deadlines and hearing dates in advance of such deadlines and dates. If approved, the Pre-Trial Procedures will also minimize the amount of time devoted to scheduling matters and continuances, and afford the parties and the Court reasonable time to prepare for the Status Hearing Dates.

73. By scheduling Status Hearing Dates in advance, the Court will facilitate the fair and efficient resolution of the Preference Actions by enabling the parties to prepare and present

any Filings in an orderly fashion. Otherwise, the CFC Estate will incur unnecessary costs and expenses associated with numerous hearing dates. Further, given the large number of Preference Actions, using Status Hearing Dates will fulfill the goal of “secur[ing] the expeditious and economical” administration of the Preference Actions. Local Rule 101(A). Even under this practice, all parties will retain their rights to request an emergency hearing for a particular Filing where appropriate under the Local Rules.

74. Finally, as stated above, it will serve the interest of judicial economy and avoid inconsistent rulings if the Court continues adjudication of the 502(d) Objections with respect to all of the claims of parties that are named as defendants in the Preference Actions, and if the Court considers these 502(d) Objections concurrently with the Preference Actions, with respect to the claims of the corresponding Preference Action defendants.

B. The Mediation Procedures

75. Due to the large volume of Preference Actions the CFC Estate is commencing and given the strong prospect of settlement of each of the Preference Actions, the CFC Estate respectfully submits that it will be more cost and time efficient for all parties if the Court directs mandatory mediation of the Mediation Adversary Proceedings, pursuant to the terms set forth herein and reflected in the proposed Mediation Procedures.

76. The proposed attached Pre-Trial Procedures would incorporate the Mediation Procedures and require the parties to the Mediation Adversary Proceedings to mediate these actions in an effort to facilitate settlement. This mediation process would supplement direct negotiations between the parties to each Preference Action, and would facilitate settlement of the Preference Actions in a cost- and time-efficient manner. This would limit the costs of litigation to the CFC Estate as well as defendants named in Preference Actions.

77. The mandatory mediation procedures proposed by the CFC Estate are both authorized by law and warranted.

(1) **Mandatory Mediation Is Authorized by Law.**

78. The Court's authority to mandate mediation of the Mediation Adversary Proceedings derives from multiple sources. First, Section 105(a) of the Bankruptcy Code states, in pertinent part, that "[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The proposed mediation procedures are both necessary and appropriate for the efficient administration and resolution of the Mediation Adversary Proceedings, and ultimately the CFC Estates. Accordingly, this Court has the authority to approve the proposed mediation procedures and authorize the CFC Estate to implement such procedures.

79. Second, Rule 16 of the Federal Rules of Civil Procedure, made applicable to each Preference Action by Bankruptcy Rule 7016, provides in pertinent part, as follows:

(a) **Pretrial Conferences; Objectives.** In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as,

* * * * *

(5) facilitating settlement of the case.

* * * * *

(c) **Subjects for Consideration at Pretrial Conferences.** At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to,

* * * * *

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute and local rule;

* * * * *

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

* * * * *

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

Fed. R. Civ. P. 16.

80. Third, the Local Rules provide additional authority for the entry of the Mediation Procedures. See Local Rule 9060-1(a) (party to any dispute pending before the court may request entry of an order referring the dispute to mediation); see also 28 U.S.C. § 65 1(b) (authorizing, *inter alia*, local rules implementing alternative dispute resolution procedures in bankruptcy adversary proceedings).

81. Consistent with these authorities, courts in other large or complex cases, in this District and others, have approved mediation, arbitration or settlement procedures, which are similar to the Mediation Procedures proposed by the CFC Estate. See, e.g., In re Anicom, Inc., Case Nos. 01-00485 (Bankr. N.D. Ill. September 14, 2004); In re Teligent, Inc., et al., Case No. 01-12974 (SMG) (Bankr. S.D.N.Y. February 3, 2004) (mandatory mediation for all avoidance adversary proceedings); In re Sun Healthcare, Inc., et al., No. 99-3657 (MFW) (Bankr. Del. March 7, 2003) (same); In re Kmart Corp., et al., No. 02-02474 (SFS) (Bankr. N.D. Ill. July 8, 2002); In re EPA Medical Management, Inc., No. 98-1596 (PJW) (Bankr. Del. 1998).

82. Court-ordered mediation is also supported by reported case law. See In re Atlantic Pipe Corp., 304 F.3d 135 (1st Cir. 2002) (authorizing court-ordered mandatory mediation, noting four potential sources of judicial authority: (1) local rules; (2) applicable statute; (3) rules of civil procedure; and (4) inherent power of the court); see also In re Anonymous, 283 F.3d 627, 637 (4th Cir. 2002); Folb v. Motion Picture Industry Pension &

Health Plans, 16 F.Supp.2d 1164 (N.D. Cal. 1993), aff'd 216 F.3d 1082 (9th Cir. 2000); Edwards v. General Motors Corp., 153 F.3d 242, 244 (5th Cir. 1998); Lenaghan v. Pepsico, Inc., 961 F.2d 1250, 1254 (6th Cir. 1992) (compulsory, non-binding alternative dispute resolution does not violate constitutional jury trial rights); Riggs v. Scrivner, Inc., 927 F.2d 1146, 1147-48 (10th Cir. 1991) (same); Tiedel v. Northwestern Michigan College, 865 F.2d 88, 90 (6th Cir. 1988); In re African-American Slave Descendants' Lit., 272 F.Supp.2d 755 (N.D. Ill. 2003) (discussing but not imposing mediation because premature); In re Sargeant Farms, Inc., 224 B.R. 842 (Bankr. M.D. Fla. 1998).

(2) **The Proposed Mediation Procedures Are Warranted.**

83. Implementation of the CFC Estate's proposed Mediation Procedures will promote quick and efficient settlements of the Mediation Adversary Proceedings. In conjunction with the Pre-Trial Procedures proposed by this Motion and the CFC Estate's existing authority to settle causes of action, approval of the proposed Mediation Procedures will enable the parties to the Preference Actions to resolve and settle Preference Actions that have become contentious or involve large claims without having to resort to protracted and expensive litigation. Thus, the procedures are not only beneficial to the parties to the Preference Actions, but to the CFC Estate and its creditors generally.

V. NO PRIOR REQUEST

84. No prior request has been made for the relief requested herein.

VI. NOTICE

85. Notice of this Motion has been provided by first class mail to (a) the United States Trustee, (b) the Core Group (as defined in the Plan), and (c) all of the Defendants in the pending Preference Actions. In light of the nature of the relief requested, the CFC Estate submits that such notice is sufficient and that no further notice is required.

VII. CONCLUSION

86. The CFC Estate believes that the Pre-Trial Procedures set forth herein, including the Mediation Procedures, will facilitate the fair and efficient handling of the Preference Actions and that such procedures are appropriate under the provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, case law and the inherent powers of this Court.

WHEREFORE, the CFC Estate respectfully requests that the Court (i) enter the Pre-Trial Procedures Order; and (ii) grant such other relief as the Court deems just and appropriate.

Dated: October 8, 2004

THE CFC ESTATE

By: /s/ Robert W. Lannan
One of Its Attorneys

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	Chapter 11
)	
Conseco Finance Corp.,)	Case No. 02 B49675
)	Honorable Carol A. Doyle
Debtor.)	
)	

**MEDIATION PROCEDURES FOR CERTAIN ACTIONS FOR AVOIDANCE AND
RECOVERY OF PREFERENCE PAYMENTS PURSUANT TO
SECTIONS 547 AND 530 OF THE BANKRUPTCY CODE**

These Mediation Procedures are designed to facilitate efficient and inexpensive settlement of the Mediation Adversary Proceedings, as defined in the Motion of the Post-Consummation Estate of the Conseco Finance Company Debtors for Entry of an Order Approving (I) Discovery Protocol, (II) Omnibus Hearing Dates, (III) Notice Procedures, (IV) Case Management Procedures and (V) Mediation Procedures for Preference Action (the “**Motion**”).¹ If you are a defendant in a Preference Action in the above-captioned Chapter 11 case, it is very important that you read and comply with the procedures set forth below. Your failure to do so may result in the entry of a default judgment against you in the Preference Action. *You should consult with an attorney about the contents of this document.*

1. Definitions

“Bankruptcy Case” means the above-captioned Chapter 11 case.

“Bankruptcy Court” means the United States Bankruptcy Court for the Northern District of Illinois.

“Chapter 5 Claims” mean any and all claims arising under Sections 547 or 550 of the Bankruptcy Code.

¹ Capitalized terms not otherwise defined herein shall have the same meanings given to them in the Motion or the Finance Company Debtors’ Sixth Amended Joint Liquidating Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code (the “**Plan**”).

“Defendant(s)” means parties against whom Preference Actions have been commenced.

“Defendant Position” means a concise written outline of the Defendant’s defenses to the Chapter 5 Claims with evidentiary support.

“Defenses” means all legal or equitable defenses to the Chapter 5 Claims that the Defendants are entitled to raise under applicable law.

“Mediator” means a qualified mediator selected by the CFC Estate from a list of approved mediators maintained by the Bankruptcy Court.

“Mediation Procedures” mean these Mediation Procedures, as approved by the Bankruptcy Court.

“Mediator’s Protocol” means the document prepared and served by the Mediator upon the CFC Estate and the Defendants setting forth the place and time that the mediations will be conducted with an accompanying schedule reflecting the times each Defendant shall appear for its respective mediation, together with any additional procedures and dates for the submission of position papers, if any, by the parties to the Mediator.

“Plaintiff Position” means a concise outline of the CFC Estate’s Chapter 5 Claims with evidentiary support and a response to defenses asserted by the Defendant in its answer, if any, tiled in the Preference Action.

“Position Statements” means the Defendant Positions and the Plaintiff Positions, collectively.

“Settlement Position” means an outline of the Defendant’s and CFC Estate’s respective positions on settlement value relating to the Preference Actions.

2. Mediator.

The Mediator shall serve, upon the CFC Estate and all Defendants, the Mediator’s Protocol, setting forth the place and time that the mediations will be conducted with an accompanying schedule reflecting the times each Defendant shall appear for its respective mediation, together with any additional procedures and the dates for the submission of position papers by the parties to the Mediator.

3. Costs of Meditation.

The fee charged by the Mediator shall be \$5,000.00 per mediation day, regardless of how many mediations are conducted on such day, plus expenses, plus \$600.00 per hour for all other hourly services such as preparation. The CFC Estate estimates that the Mediator’s fees and expenses will amount to approximately \$1,300.00 per mediation. In an effort to share the cost of mediating each Mediation Adversary Proceeding equally by the Estate and the Defendant, not later than fourteen (14) calendar days after a Preference Action becomes a Mediation Adversary Proceeding (the “**Fee Deadline**”), each Defendant shall deliver to Counsel for the CFC Estate the sum of \$650.00 (the “**Defendant Funds**”) made payable to “Greenberg Traurig, LLP Mediation

Escrow Account” (the “**Mediation Account**”). The CFC Estate shall, likewise, deposit in the Mediation Account the sum of \$650.00 for each Mediation Adversary Proceeding (the “**Plaintiff Funds**”, together with the Defendant Funds, the “**Funds**”) that will be the subject of mediation by the Fee Deadline.

The Funds shall be deemed earned by the Mediator upon deposit into the Mediation Account, and the Funds are non-refundable.

On a date set forth in the Mediation Protocol, and after receipt of an invoice from the Mediator, Counsel for the CFC Estate shall forward all Funds in the Mediation Account to the Mediator, To the extent the Mediator’s fees and expenses exceed the amount of the Funds, the balance shall be paid as a cost of administering the CFC Estate.

4. Conduct of Mediation.

Consistent with the Mediation Procedures and the order directing mediation as entered by the Bankruptcy Court, the Mediator shall handle all Mediation Adversary Proceedings in his or her discretion. In all cases, the procedures used by the Mediator shall be reasonable and practical under the existing circumstances.

Any party may be represented by legal counsel, although the participation of legal counsel shall not be required for the conduct of the mediation.

The Mediator shall meet with the parties or their representative, individually and jointly, for a conference or a series of conferences as determined by the Mediator and set forth in the Mediator’s Protocol.

The Mediator may, in accordance with the Mediation Procedures and the Mediator’s Protocol, review the claims and defenses of the parties, the prior negotiations between the parties, all correspondence between the parties during prior, informal negotiations, if any, and such additional information as the parties may, in their discretion, wish to submit.

The Mediator’s Protocol shall provide for simultaneous submission of Position Statements in each mediation. Consistent with the Mediation Procedures and the Mediator’s Protocol, the Defendant(s) must submit to the Mediator (i) the Defendant Position, composed of a concise outline of its defense to the Chapter 5 Claims with evidentiary support, and (ii) the Settlement Position, composed of an outline of the defendant’s position on settlement value, by the date set forth in the Mediator’s Protocol.

Consistent with the Mediation Procedures and the Mediator’s Protocol, the CFC Estate must submit to the Mediator (i) the Plaintiff Position, composed of a concise outline of its claim set forth in the Complaint with evidentiary support and any rebuttal to defenses asserted by Defendants in connection with the Preference Action with evidentiary support, and (ii) the Settlement Position, composed of an outline of the Debtor’s position on settlement value by the date set forth in the Mediator’s Protocol. Unless otherwise directed by the Mediator, and consistent with and pursuant to the Mediator’s Protocol, each of the Defendants shall serve the CFC Estate with a copy of the Defendant Position, on the one hand, and the CFC Estate shall

serve the Defendant with a copy of the Plaintiff Position to each Defendant in the respective Adversary Proceeding, on the other hand.

The Settlement Positions shall be sent only to the Mediator and shall not be disclosed to the opposing party. The Settlement Positions and Position Statements shall be deemed to be compromise and settlement communication pursuant to Rule 408 of the Federal Rules of Evidence.

The Mediator shall work with each opposing party to reach a settlement of the Mediation Adversary Proceeding mutually acceptable to the parties.

Any statement made by the Mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation (or their agents) or by the Mediator to the Bankruptcy Court or to any third party unless otherwise ordered by the Bankruptcy Court. All records, reports, or other documents received or made by the Mediator while serving in such capacity shall be confidential and shall not be provided to the Bankruptcy Court, unless they would otherwise be admissible.

5. Time and Location of Mediations.

Pursuant to the Mediator's Protocol, the Mediation Procedures and applicable rules and orders of this Court, the place and time of the mediations will be set forth in the Mediator's Protocol and continue on consecutive days thereafter until completed and at the discretion of the Mediator. Representative of the CFC Estate and the Defendants with ultimate authority to settle ("ultimate authority" meaning full discretion to settle for any amount between \$0.00 and the full amount in controversy) must be present at the mediation, unless the disputed portion of the Adversary Proceeding is \$15,000.00 or less, in which case the parties may appear by telephone. Mediations of all Adversary Proceedings involving claims in excess of \$15,000.00 will be conducted, in person, in Chicago, Illinois. All mediations shall be limited to one day or less, unless otherwise agreed by the participants.