

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK

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In re:

Malese 18 Corp.,

Debtor.

Case No. 8-02-80586-478

Chapter 11

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**MEMORANDUM DECISION**

*Appearances:*

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Honorable Dorothy T. Eisenberg, United States Bankruptcy Judge

The issue before this Court on remand from the District Court of the Eastern District of New York (Arthur D. Spatt, Judge) is whether the settlement of a claim for lease rejection damages between Aztex Associates L.P. (“Aztex”) and Kmart Corporation (“Kmart”), which this Court previously approved by order dated June 28, 2005, is reasonable.

### FACTS

This matter concerns the parties to 18 leases of real property and the rights of the various parties thereunder in connection with this bankruptcy case and the Kmart bankruptcy case pending before the Bankruptcy Court for the Northern District of Illinois. Aztex Corp. purchased 18 parcels of real property (the “Aztex Properties”) from a wholly-owned subsidiary of Kmart on November 30, 1982, for \$25,693,939 and then leased the Aztex Properties back to Kmart pursuant to 18 separate leases (the “Kmart Leases”), each with an initial term of 25 years. Malese 18 Corp., the Debtor, and RM 18 Corp. were formed to participate in a "sandwich lease" with respect to the Aztex Properties. RM 18 Corp. was formed by Howard Kadish as President and Malese 18 Corp. was formed by Lawrence Kadish as President. Under the sandwich lease arrangement, Malese 18 Corp. was the lessee with respect to the Aztex Properties under a master lease agreement and, in turn, leased the Aztex Properties to Kmart under 18 separate operating leases (the “Kmart Leases”). On January 1, 2010, RM 18 Corp. (the “Remainderman”) will receive from Aztex Corp. a fee interest in the land of the Aztex Properties to commence after the expiration of the estate in years held by Aztex Associates L.P. (“Aztex”).

To finance its purchase and to enable it to complete the transaction, Aztex Corp. issued notes in favor of Merrill Lynch Corporate Pass Through Securities (“MLCPS”) which was

secured by first mortgage liens on the Aztex Properties and assignments of the Kmart Leases. In 1982, MLCPS sold all of its interest in the notes, mortgages and lease assignments to Kmart which financed its acquisition by creating a trust and entering into a pooling arrangement with NDB, formerly known as National Bank of Detroit. The holders of the notes issued by Aztex Corp. are the beneficiaries of the mortgages on the Aztex Properties. The trustee for the noteholders (the "Trustee") is currently Mellon Bank of New York.

On January 22, 2002, Kmart filed for protection under Chapter 11 of the Bankruptcy Code. Two days later, on January 24, 2002, Malese 18 Corp. also filed a petition for Chapter 11 relief. Malese 18 Corp. filed a proof of claim in the Kmart bankruptcy in the amount of \$72,848,058 which included a claim of \$29,710,555 for Deferred Basic Rent under the Kmart Leases.

All outstanding issues in the Malese 18 Corp. bankruptcy case pending before this Court were ultimately resolved through a Stipulation and Order, dated July 1, 2002 (the "Malese Stipulation"). Pursuant to the Malese Stipulation, as agreed to by Aztex and Malese 18 Corp., Aztex had the right to pursue, at its sole cost and expense, Malese 18 Corp.'s claims against Kmart under the Kmart Leases whether or not Aztex abandons the Aztex Properties. Aztex had the authority to settle the claims but it agreed that it shall "not adversely affect the rights of the Remainderman pursuant to the Transaction Documents, as amended herein, or applicable law." No settlement or compromise of all or any portion of the claims will be made without Lawrence Kadish's prior written consent, which consent shall not be unreasonably withheld or delayed. All recoveries from the claims, less legal fees, would be used first to pay down the principal and interest on the mortgage debt on each Aztex Property. In addition, the Malese Stipulation also

provided for the dismissal of the Malese 18 Corp. bankruptcy case.

In addition to being the President of Malese 18 Corp., Lawrence Kadish is also a principal of RM 18 Corp. and it appears that he has control over Malese 18 Corp. as well as RM 18 Corp. As a principal of Malese 18 Corp. and the Remainderman, Kadish was fully apprised and familiar with the terms of the Malese Stipulation.

On February 14, 2003, Judge Sonderby entered an order in the Kmart bankruptcy case authorizing Kmart to assume and assign the Kmart Leases to Aztex and approving an agreement by Kmart that allowed Aztex and the Trustee to file a general unsecured claim under 11 U.S.C. § 502 as if the Kmart Leases had been rejected notwithstanding their assumption and assignment. On April 23, 2003, Kmart's plan of reorganization was confirmed.

Pursuant to the Malese Stipulation, Aztex filed a proof of claim in the Kmart bankruptcy case with respect to the damages arising from the deemed "rejection" of the Kmart Leases (the "Lease Rejection Claim"). In the Spring of 2005, Aztex and Kmart reached a settlement of the Lease Rejection Claim which provided that the claim was to be allowed as a Class 5 Lease Rejection Claim under Kmart's plan of reorganization in the amount of \$16,947,571.39 (the "Kmart Settlement"). Under the Kmart Settlement, Aztex and Kmart agreed to the allowance of various components of the Lease Rejection Claim as follows:

Basic rent - allowed the full statutorily capped amount of \$10,543,183.55 asserted by Aztex;

Deferred Basic rent - allowed the full statutory capped amount of \$4,290,734.49 asserted by Aztex;

Taxes - allowed the full statutorily capped amount of \$226,480.81 asserted by Aztex;

Insurance - allowed the full statutorily capped amount of \$106,605.62 asserted by Aztex; and

Deferred maintenance - allowed in amount of \$1,780,566.92.

The Kmart Settlement was embodied in the form of an Agreed Order to be presented to and

signed by Judge Sonderby and sets forth an allocation of the allowed claim amount with respect to each of the 18 Aztex Properties but does not contain the foregoing break down as to the components of the allowed lease rejection claim. The allowed claim is to be paid with shares of Kmart stock. Sears and Kmart merged on March 25, 2005 pursuant to the Agreement and Plan of Merger, dated November 16, 2004.

When Aztex presented the Kmart Settlement to the Remainderman, Kadish refused to consent to the settlement. As a result, on June 3, 2005, Aztex and the Trustee made a motion (1) to reopen this bankruptcy case and to have this Court enforce the terms of the Malese Stipulation and (2) to have the Court find that (a) the proposed Kmart Settlement was reasonable, (b) that Kadish's refusal to consent to the Kmart Settlement was unreasonable, and (c) that Kadish's consent be deemed given and that Aztex be authorized to effectuate the Kmart Settlement.

At the June 28, 2005 hearing, the Remainderman argued that (1) the Lease Rejection Claim filed by Aztex sought, *inter alia*, payment for deferred basic rent only in the amount of \$4,290,734.49 rather than the \$29,710,555 previously asserted by Malese 18 Corp. and (2) the deferred basic rent component of the Kmart Claim should not have been subject to the cap under 11 U.S.C. § 502(b)(6) because \$29,710,555 of the deferred basic rent accrued prepetition as the basic rent obligation became due. The Remainderman argued that the fact that Kmart was able to defer the actual payment of a portion of the basic rent due to a later date (i.e., the deferred basic rent), did not mean that such rent was not owed prior to termination of the Kmart Leases. In fact, the entire lease transaction was structured so that Kmart as an accrual taxpayer could deduct deferred basic rent that had accrued for tax purposes even though the deferred rent expense was not yet paid. Accordingly, the Remainderman took the position that Kadish's

refusal to consent to the Kmart Settlement was not unreasonable because Aztex failed to negotiate for uncapped deferred basic rent with Kmart.

Aztex took the position that the deferred basic rent became an obligation of Kmart only if the Kmart Leases were terminated during the term of the leases and accordingly the deferred basic rent was subject to the cap under 11 U.S.C. § 502(b)(6) and limited to \$4,290,734.49. Aztex argued that the Kmart Settlement was reasonable because Aztex was allowed 97% of the filed Lease Rejection Claim and that litigation over such claim could have gone on for years. Moreover, because the distribution was paid in Kmart stock, there was a risk that any Kmart stock Aztex would receive at the conclusion of any litigation over the Lease Rejection Claim would be worth less if there was any decline in the value of Kmart stock. Therefore, Aztex argued that the Kmart Settlement was reasonable and that Kadish unreasonably withheld his consent.

At the June 28, 2005 hearing, this Court granted the motion by Aztex and the Trustee to reopen this bankruptcy case and found that Kadish unreasonably withheld his consent. The Remainderman appealed the Court's June 28, 2005 Order to the District Court.

The District Court pursuant to a Memorandum Decision and Order, dated September 26, 2006, found the deferred basic rent to be a component of both pre-termination rent, which is not capped, and post-termination damages, which are capped under the Bankruptcy Code. The District Court based its decision in its interpretation of the Kmart Leases in their entirety and not on the arguments raised by RM 18 Corp. regarding the tax structure of the lease transactions. Therefore, deferred basic rent to the extent it had accrued as pre-termination rent was not subject to the statutory cap under 11 U.S.C. § 502(b)(6). Based on this finding, the District Court held

that the Remainderman had a legitimate business purpose for withholding its consent and that its “objection was neither arbitrary or irrational” because the capping of the deferred basic rent may result in a reduced recovery from Kmart. *RM 18 Corp. v. Aztex Associates, L.P. (In re Malese 14FK Corp.)*, 351 B.R. 34, 44 (E.D.N.Y. 2006).

RM 18 Corp. describes itself as the “remainderman” because it is entitled to the fee interest in the Aztex Properties after the estate for years expires . . . . Under the Malese Stipulation the parties agreed that any recovery from Kmart would be used first to pay down the principal and interest on the mortgage debt on the Aztex Properties, as was originally contemplated under the Aztex Leases, the Kmart Leases, and the Three Party Agreements. If the settlement with Kmart was for an amount far less than the principal and interest owed on the Aztex Properties, RM 18 Corp. May eventually inherit a property that is encumbered by a substantial mortgage debt. Under these circumstances, RM 18 Corp. appears justified in seeking to protect itself by conditioning its consent to any settlement of Kmart Claims on the receipt of sufficient money to pay the liens on the property.

*Id.* However, the District Court noted that a determination of whether Kadish’s withholding of consent was unreasonable rested on the reasonableness of the Kmart Settlement as a whole. As this Court did not make any specific finding with respect to the reasonableness of the Kmart Settlement, the District Court remanded the issue back to this Court for such a determination.

Aztex and the Trustee appealed the District Court decision. On March 13, 2008, the Court of Appeals for the Second Circuit dismissed the appeal due to lack of subject matter jurisdiction because the District Court’s remand to this Court was not a final order as the District Court requires this Court to hear and consider additional evidence relating to the reasonableness of the Kmart Settlement.

Consistent with the District Court’s decision, this Court is to examine the reasonableness of the Kmart Settlement based on the following factors: 1) the probability of success in the litigation, 2) the difficulties that may be encountered in collection, 3) the complexity of the

litigation and the attendant expense, inconvenience and delay, and 4) the paramount interest of the creditors, as of the time of the hearing on this motion on June 28, 2005. These are the factors in regard to determining whether a settlement which compromises issues in dispute is to be approved by the Court.

The Court held a hearing on February 3, 2009 (the “February 3 Hearing”) on the reasonableness of the Kmart Settlement. In addition to the arguments originally raised at the June 28, 2005 hearing, the Remainderman argued that Judge Spatt’s ruling that the deferred basic rent that had accrued during the term was not subject to the statutory cap under section 502(b)(6) is the law of the case. The reasoning behind Judge Spatt’s determination regarding the section 502(b)(6) issue was not originally argued by the Remainderman when the Kmart Settlement was previously presented to this Court. In addition, the Remainderman argued that had the Lease Rejection Claim been litigated before the Illinois Bankruptcy Court, that court would have decided the issue of whether the deferred basic rent should be capped in the same manner as Judge Spatt. Accordingly, the Remainderman insists that Aztex could have easily prevailed in any litigation regarding the Lease Rejection Claim had Aztex asserted a claim for deferred basic rent in the amount of \$29,710,555 instead of \$4,290,734.49 and Aztex and the Trustee would have received a much larger recovery; therefore, the Kmart Settlement was unreasonable.

Aztex and the Trustee argued that this Court’s determination should be based upon the circumstances at the time the Kmart Settlement was presented and not retroactively in light of Judge Spatt’s ruling on the issue of 11 U.S.C. § 502(b)(6). Should the Lease Rejection Claim have been litigated, it was not certain that Aztex would have been successful. At the February 3



hearing, Dennis J. Drebsky, Esq., an experienced bankruptcy attorney who represented Aztex in this bankruptcy case and in the negotiations of the Kmart Settlement testified as to, *inter alia*, the negotiations process with Kmart regarding the settlement of the Lease Rejection Claim.<sup>1</sup>

Mr. Drebsky testified that Kmart objected to the filed claim and denied owing anything under the Kmart Leases other than basic rent and that even the basic rent component of the claim should be capped. After several rounds of negotiation, the parties were able to resolve the issue of the amount of basic rent that would be allowed and negotiated the other portions of the claim, including the deferred basic rent portion to determine the allowed amount of Aztex's Lease Rejection Claim. Mr. Drebsky explained that Kmart made it clear that if Aztex did not agree to the proposed settlement, then Kmart would proceed with litigation. Aztex argued that litigation of the Lease Rejection Claim would have been costly and would have gone on for several years. Other than Aztex's claim, Kmart had numerous other claims that it was disputing at the same time. Mr. Drebsky saw how aggressively Kmart was litigating some of the other claim objections and factored that into the analysis of the cost and delay involved should it decide to litigate this claim. Litigation would also require, *inter alia*, a visit to each of the 18 Aztex Properties located throughout the country for a detailed inspection and expert testimony regarding the issue of deferred maintenance. Aztex was also concerned that a delay in approval

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<sup>1</sup> Other than Mr. Drebsky's testimony regarding the negotiation process in which he participated, the Court declines to consider any accounting testimony from him regarding how Aztex or the Trustee arrived at the actual amount of the Kmart Claim for deferred basic rent other than that the amount represents deferred basic rent as capped as such testimony would be inadmissible as hearsay since Mr. Drebsky did not personally calculate the amounts due under the 18 Aztex Leases. In addition, the Court declines to consider any testimony as to how much Aztex received as a result of the liquidation of the Kmart stock it received on the Kmart Claim as Mr. Drebsky did not oversee the liquidation of the Kmart stock.

of a settlement with Kmart would result in the Lease Rejection Claim being worth less due to the possibility of (1) volatility in the stock market that would result in a decline in the trading price of any Kmart stock received and (2) Kmart resolving numerous other claim objections before this claim which might result in fewer shares of Kmart stock being available for distribution on this claim. Furthermore, Aztex did not expect a large payout arising from the Kmart bankruptcy at the time even if the deferred basic rent were to be uncapped.

After presenting the Kmart Settlement to the Remainderman, Mr. Drebsky received two memoranda of law, one dated April 12, 2005 and the other dated May 4, 2005, written by counsel for the Remainderman regarding its position on the inapplicability of 11 U.S.C. § 502(b)(6) with respect to deferred basic rent. After reviewing the memoranda, he personally researched the points raised in the memoranda, and after discussing the memoranda with counsel for the Remainderman, Mr. Drebsky found the issues raised in the memoranda would not deter settlement of Kmart's objection to the Lease Rejection Claim. Mr. Drebsky discussed this with Aztex and the Trustee and believed at the time that it was best to settle the claim than risk getting a significantly smaller recovery than the \$16,947,571.39 agreed to by Kmart should Aztex litigate the claim. Mr. Drebsky had offered counsel for the Remainderman the right to buy the Lease Rejection Claim at the agreed settlement price of \$16,947,571.39 and the Remainderman could pursue the claim itself, thereby protecting Aztex from the downside of any litigation and allowing the Remainderman to take any upside the Remainderman believed the lease rejection claim may be worth. However, the Remainderman declined to purchase the claim. There was no other testimony or evidence produced.

## DISCUSSION

### A. General.

A bankruptcy court may approve a settlement or compromise that is “fair and equitable” and in the best interest of the bankruptcy estate. *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 426 (S.D.N.Y. 1993) citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968). “As a general matter, settlements or compromises are favored in bankruptcy and, in fact, encouraged.” *In re Adelpia Commc’ns Corp.*, 368 B.R. 140, 226 (Bankr. S.D.N.Y. 2007). “It is not necessary for the bankruptcy court to rule on disputed issues of fact and law or to conduct a “mini-trial” on the merits of the underlying litigation.” *Plaza Equities LLC v. Paucker (In re Copperfield Inv., LLC)*, 2009 WL 483144 at \*3 (Bankr.E.D.N.Y.2009) citing *Adelpia*, 368 B.R. at 159; *In re Ashford Hotels*, 226 B.R. 797,802 (Bankr. S.D.N.Y. 1998). The court needs to only ‘canvass the issues and see whether the settlement “fall[s] below the lowest point in the range of reasonableness.”’ *In re Prudential Lines, Inc.*, 170 B.R. 222, 247 (S.D.N.Y. 1994) citing *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1972).

In formulating its independent judgment, the bankruptcy court should consider numerous factors including: (1) the probability of success in the litigation; (2) the difficulties that may be encountered in collection; (3) the complexity of the litigation and the attendant expense, inconvenience, and delay; and (4) the “paramount” interest of the creditors. (citations omitted)

*In re Prudential Lines, Inc.*, 179 B.R. at 247. This is what the District Court has directed this Court to do on remand.

B. Probability of Success in the Litigation.

In determining the probability of success of litigation, this Court must consider the probability of success under the facts and circumstances that existed at the time the settlement was entered into if the Lease Rejection Claim were to be litigated and not the facts and circumstances that existed more than a year later when the District Court rendered its decision.

At the time of the Kmart Settlement, there was no guarantee or certainty that the Illinois Bankruptcy Court (1) would not cap the \$29,710,555 of deferred basic rent claimed by the Remainderman under 11 U.S.C. § 502(b)(6), or (2) would have rendered a decision similar to that of the New York District Court should the Rejection Lease Claim be litigated. The probability of success of litigation was not as certain as the Remainderman argues. ‘As the Supreme Court noted in another context, “[i]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case.”’ *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 203 (2d Cir. 2006)(citing *Whitmore v. Arkansas*, 495 U.S. 149, 159-60, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). Aztex was represented by competent and experienced bankruptcy counsel in preparing its Lease Rejection Claim and in the negotiations with Kmart. Aztex’s counsel had legitimate concerns over the legal issues concerning the various components of the Lease Rejection Claim, including the deferred basic rent, and although Aztex had capped its claim for deferred basic rent, it apparently was an item that Kmart resisted even as capped. Aztex considered the arguments raised by the Remainderman and tried to obtain Kadish’s consent.

Ultimately, Aztex was satisfied with the Kmart Settlement and the proposed Kmart Settlement received the review and approval of the Trustee who had a fiduciary duty to ensure that the maximum recovery possible was obtained as any recovery on the lease rejection claim would be used to pay down the principal and interest on the mortgage debt on each of the Aztex Properties and the noteholders were the beneficiaries of those mortgages. Given that Aztex and the Trustee believed that Aztex obtained the best recovery possible, it is difficult to see why Aztex would be willing to use its own funds to finance and zealously prosecute any litigation against Kmart for the allowance of its Lease Rejection Claim as well as the allowance of approximately an additional \$25 million of the deferred basic rent asserted by the Remainderman when the Kmart Settlement provided Aztex with a 97% recovery on its filed claim. To the extent the Remainderman believed that the Lease Rejection Claim was worth more than the amount claimed by Aztex or the Kmart Settlement amount and that any litigation would highly be successful, the Remainderman could have purchased Aztex's claim against Kmart and pursued litigation on its own. While the Remainderman argues that it need not accept Aztex's offer to purchase the Lease Rejection Claim because it was Aztex's responsibility to pursue the claim, if there was a high probability of success that litigation over the claim would result in a \$25 million increase in the potential recovery of deferred basic rent from the \$4,290,734.49 agreed to by Kmart under the settlement, then it would be reasonable to expect an interested party such as the Remainderman to take control of the claim and pursue the litigation. The fact that the Remainderman choose not to pursue litigation on its own despite given the opportunity to do so reveals an uncertainty as to the outcome of any such litigation by the Remainderman or an unwillingness to fund such litigation. Accordingly, at the time the Kmart Settlement was

entered, this Court finds that there was a questionable probability of success of any litigation against Kmart.

C. Difficulty in Collection.

With respect to the issue of the difficulties that may be encountered in collection, Kmart's plan of reorganization contained the terms and conditions relating to the distribution available to Class 5 Lease Rejection Claimants with allowed claims. To the extent there are sufficient shares of stock set aside for the resolution of claims, there is no difficulty collecting on the claim. While the volatility of the stock market price may affect how much Aztex and the Trustee may actually receive when the stock is sold, this is not an issue of collectibility but timing as the price of Kmart stock is relevant with respect to when the stock is distributed and when the stock is sold. Rather, the issue of collectibility arises where Kmart has a finite number of stocks set aside after the confirmation of its plan to distribute to creditors that hold disputed, contingent or unliquidated claims and Aztex is competing with other creditors for its share of the remaining Kmart stock. To the extent Kmart's objection to Aztex's claim took longer to resolve as a result of litigation, there was a concern that most of the shares of Kmart stock may have been distributed to other creditors whose claims have been resolved earlier which may result in less stock being available for Aztex, or it might have forced Aztex to accept a reduced allowance on its claim because of a dwindling number of shares available. Assuming a declining or even a constant stock market price, any reduction of the shares of Kmart stock received would affect the amount of the reduction of the mortgages and notes outstanding on the Aztex Properties.

Accordingly, there was an interest in getting the claim resolved as expeditiously as possible to

avoid a diminished allowance on, or value of, the claim. Reaching a settlement with Kmart as soon as possible would have increased Aztex's prospects for collectibility on its claim rather than being a party to a litigation that would delay collection and could have reduced the amount recovered on Aztex's claim.

D. Complexity of Litigation, Attendant Expense, Inconvenience and Delay.

The complexity of the litigation and the attendant expense, inconvenience and delay also favored a settlement of the Lease Rejection Claim. The issues involving the claim were complex as it dealt with defining what was owed for basic rent, deferred basic rent, taxes, insurance and deferred maintenance for the 18 Aztex Properties and Kmart Leases. Any litigation would have involved obtaining inspections of the various properties on issues of deferred maintenance and dispute over the interpretation of the Kmart Leases. The inconvenience and costs of litigation would have been borne by Aztex and not the Remainderman even though the Remainderman would have benefitted from the upside of any litigation without having to bear the burden of any downside should Aztex lose. As discussed above, any delay in reaching a resolution with Kmart could result in a diminished return to Aztex and the noteholders in terms of the number of shares of stock Aztex could receive and the amount of the recovery once the shares are sold.

Accordingly, it was reasonable for Aztex to settle for what it believed was close to the proper value of the claim rather than pursue litigation as the Remainderman wanted given that Aztex had not only control over the prosecution of the claim but also bore the costs of such litigation.

E. Paramount Interest of Creditors.

Lastly, it was in the paramount interest of most of the creditors not to delay the resolution of Kmart's objection to the Lease Rejection Claim. Aztex had to consider the interest of the noteholders and not just the Remainderman. While an increase in the amount allowed for the deferred basic rent portion of the claim would have benefitted the noteholders, as well as the Remainderman, in terms of reducing the mortgage on the Aztex Properties, it was uncertain whether the delay in resolution of the claim would have been worth the potential increase in the distribution of Kmart stock and whether Kmart still had enough stock on hand to distribute under its Plan of Reorganization. By settling with Kmart in 2005, Aztex was able to lock in a substantial stock price in exchange for eliminating any uncertainty regarding the volatility of the stock market or concerns of there being a shortage of Kmart stock. Aztex considered these factors and discussed the risks and benefits of the Kmart Settlement with the Trustee and both Aztex and the Trustee considered the Kmart Settlement to be in the best interest of the noteholders and supported the Kmart Settlement.

Accordingly, at the time the Kmart Settlement was entered, the Court finds that there was a low probability of success of any litigation, an almost certain delay in approval of a larger amended claim, and a delay of the collection of any proceeds from this claim should Kmart's objection to the claim be litigated.

F. Present Position of the Parties.

The Court notes that the Remainderman did not obtain a stay of any distribution under the Kmart Settlement when the Remainderman appealed this Court's June 28, 2005 Order to the



District Court. Prior to the District Court's 2006 decision, Aztex and/or the Trustee apparently received two stock distributions from Kmart pursuant to the allowed lease rejection claim and such stock were sold near their relative high. Aztex and/or the Trustee received at least two more stock distributions from Kmart after the District Court's decision and before the February 3, 2009 hearing before this Court which also have been sold. It would appear that this proceeding may be moot as it is uncertain whether the parties can be restored to the same positions they were in respectively at the time Aztex and Kmart negotiated the Kmart Settlement.

#### CONCLUSION

Based upon the foregoing, the Court finds that the Kmart Settlement is not below the lowest point in the range of reasonableness and was in fact reasonable at the time it was reached and therefore, the objection by Kadish was unreasonable under the circumstances outlined herein.

Dated: April 16, 2009  
Central Islip, New York

*s/ Dorothy Eisenberg*  
Dorothy Eisenberg  
United States Bankruptcy Judge