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Adjourned Hearing Date:
February 9, 2010 at 10:00 a.m.

*Attorneys for Gerard A. McHale, Jr., P.A.
As Liquidation Trustee to the 1031 Debtors
Liquidate Trust*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

THE 1031 TAX GROUP, LLC, *et al.*,

Case No. 07-B-11448 (MG)
Jointly Administered

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In re:
INVESTMENT PROPERTIES OF AMERICA,
LLC, *et al.*

Chapter 11

Case No. 07-13621 (MG)
Jointly Administered

Debtors

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**RESPONSE OF GERARD A. McHALE, JR., P.A., AS
LIQUIDATION TRUSTEE FOR THE 1031 DEBTORS
LIQUIDATION TRUST, TO THE MOTION OF CORDELL TO
ENFORCE CHANNELING INJUNCTION AND CONFIRMATION ORDER**

Gerard A. McHale, Jr., P.A. (the "Trustee"), as Liquidation Trustee for the 1031 Debtors Liquidation Trust (the "Trust"), by and through its undersigned counsel, Golenbock Eiseman Assor Bell & Peskoe LLP, hereby responds to the Motion by Cordell Consultants, Inc., Money Purchase Plan, A Qualified Retirement Plan Trust and Cordell Funding LLLP (together, "Cordell") to Enforce Channeling Injunction and Confirmation Order (the "Motion"), and in support thereof, represents as follows:

In its Motion, Cordell argues that this Court's Order, dated December 1, 2008 (the "Settlement Approval Order"), approving the settlement agreement between and among Gerard A. McHale, Jr., as Chapter 11 Trustee of the estate of the 1031 Tax Group, LLC, *et al.*, and as manager of each of the Investment Properties of America, LLC, *et al.*, and Cordell (the "Cordell/Trustee Settlement"), bars the prosecution of claims against Cordell in the class action entitled *Hunter et al. and all others similarly situated v. Citibank, N.A., et al.*, Case No. CV 09 02079 JW, pending in the United States District Court for the Northern District of California, San Jose Division (the "Class Action"). Cordell also argues that the same result is mandated by the Second Amended Chapter 11 Plan of Reorganization of Gerard A. McHale, Jr., as Chapter 11 Trustee for each of the 1031 Debtors, and IPofA Shreveport Industrial Park, LLC (the "Plan of Reorganization"), which incorporates provisions from the Settlement Approval Order enjoining the prosecution of certain claims against Cordell, and which was confirmed by the Court on October 7, 2009.

The Settlement Approval Order enjoins all persons or entities who have held, hold or may hold claims against or interests in the estates of the 1031 Debtors and IPofA Debtors from prosecuting any claim against the Cordell Parties on account of any claim released or governed by or relating to the Settlement Agreement "that is based upon or derivative of any claim or cause of action that could have been asserted against the Cordell Parties by, or injury to, the estates of the 1031 Debtors and/or the IPofA Debtors" The issue on this Motion, therefore, is whether the claims asserted in the Class Action fall within the scope of the claims enjoined by the Settlement Approval Order and the Plan of Reorganization. This, in turn, involves interpreting the Court's

Orders, on one hand, and the claims asserted in the Complaint in the Class Action, on the other.

Inasmuch as the Trustee is not a party to the Class Action, the Trustee expresses no view on this Motion as to whether the language of the Settlement Approval Order and the Plan of Reorganization bars any of the claims asserted by the Class. The Trustee does wish, however, to clarify certain matters relating to the Agreement, dated on or about January 20, 2009, between the Trustee and Class Representatives in the Class Action (together with amendments, the “Class/Trustee Agreement” or the “Agreement”). The Trustee believes that the Class/Trustee Agreement is mischaracterized in the Motion.

The Class/Trustee Agreement is discussed twice in the Motion: in the Background section (pp. 12-13), and in the Argument section, where it is used to support Cordell’s argument that allowing the Class Representatives to proceed against Cordell would lead to double recovery by Class Action Plaintiffs (pp. 23-24). In both instances, Cordell invokes the Class/Trustee Agreement in an effort to demonstrate that the Trustee and the Class Representatives coordinated in settling the Trustee’s claims against Cordell, and that the Cordell/Trustee Agreement should be treated as in effect a joint settlement on behalf of both the Trustee and the Class. This inaccurately portrays the Class/Trustee Agreement and the relevant facts.

The Class/Trustee Agreement was entered into on January 20, 2009, in an effort “to maximize recovery with respect to claims the Trustee and the Class Representatives may have against the same third parties arising out of events relating to the 1031 Debtors” (Class/Trustee Agreement, at Recital G). The Class/Trustee Agreement contained a Schedule A, listing certain parties with whom the Trustee had

negotiated settlement, or was in the process of negotiating settlement, or had brought suit against, or expected shortly to bring suit against. With respect to these Schedule A parties, the Trustee and the Class Representatives agreed “to the extent practicable, [to] conduct joint settlement discussions [and]. . . to reduce, to the extent practicable, duplicative expenses by, among other things, coordinating discovery and conducting joint depositions” The parties also agreed to the allocation of certain recoveries obtained on behalf of the 1031 Debtors’ Estates or the Class from specified parties, without regard to the source of such recovery or the claims in respect of which the recovery was obtained. The Class/Trustee Agreement further recited that the Class Representatives approved the financial terms of the settlements the Trustee reached with specified Schedule A parties as being in the best interests of the Class, and would present these settlements to the Class Action Court for approval.

By subsequent amendment, the following additional defendants or potential defendants were brought within the scope of the Class/Trustee Agreement: banking institutions holding exchange deposits in the name of the 1031 Debtors in their capacity as Qualified Intermediaries (Amendment 1); persons or entities who provided professional services to the 1031 Debtors or to Edward H. Okun, or whose services caused loss or injury to any of the 1031 Debtors or the Exchangers, and current or former family members or relatives of Okun (Amendment 3); and Boulder Capital LLC and related entities and an individual (Amendment 4).

Contrary to Cordell’s arguments, none of the provisions in the Class/Trustee Agreement relating to the conduct of settlement discussions, the coordination of discovery, or the sharing of recoveries by the 1031 Debtors and the Class

relate to Cordell. The Cordell/Trustee Settlement was entered into by Cordell and the Trustee on October 30, 2008 – nearly three months before the Trustee and the Class entered into Class/Trustee Agreement. Unlike settlement agreements the Trustee reached with certain other defendants and potential defendants, the Cordell/Trustee Agreement did not require an Order from the Class Action Court barring claims by Exchangers. Accordingly, the Cordell/Trustee Agreement did not require any involvement by the Class Representatives. And in late January, 2009, when the Trustee entered into the Class/Trustee Agreement, there was no need to include Cordell among the settlements to be approved by the Class Representatives or by the Class Action Court, and it was therefore not included.

The non-applicability of the Class/Trustee Agreement to Cordell is evident from the Agreement itself. Cordell is not included in Schedule A attached to the Class/Trustee Agreement and does not fall within any of the additional categories made subject to the Agreement by its subsequent amendments. Moreover, the Agreement makes no allocation of the recoveries obtained from Cordell by the 1031 Debtors or the Class. To the contrary, Amendment 4 to the Class/Trustee Agreement specifically states that “(i) the Estates shall not receive any portion of any recovery obtained by Class from Cordell . . . and (ii) other than shares of distributions from the Estates pursuant to Title 11 of the Bankruptcy Code, the Class shall not receive any allocation of monies obtained to date by the Estates from Cordell.”

In short, the Trustee’s settlement with Cordell was not coordinated with the Class, and that settlement does not in any way reflect a joint settlement on behalf of the Trustee and the Class. Moreover, under the Class/Trustee Agreement, the Class will

not receive any allocation of the recovery obtained by the Trustee from Cordell (other than whatever distributions are made as part of the 1031 Debtors bankruptcy proceeding), and the 1031 Debtors will not receive any allocation of any recovery obtained by the Class from Cordell.

Dated: New York, New York
February 3, 2010

Respectfully submitted,

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