

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

IN RE:	§	
	§	CASE NO. 03-15721-FRM
WARRANTY GOLD, LTD.,	§	
	§	CHAPTER 11
Debtor	§	

**DEBTOR'S FIRST MODIFICATION TO DEBTOR'S
THIRD AMENDED PLAN OF LIQUIDATION DATED APRIL 15, 2005**

TO THE HONORABLE FRANK R. MONROE, U.S. BANKRUPTCY JUDGE:

In connection with the confirmation hearing in this case, Warranty Gold, Ltd. ("Debtor") files this its *First Modification to Debtor's Third Amended Plan of Liquidation Dated April 15, 2005* pursuant to Bankruptcy Code § 1127(a), and would respectfully show the Court as follows:

U.S. Trustee Objections

1. In response to the confirmation objection filed by the U.S. Trustee, the Debtor has taken steps to effectuate the filing of all monthly operating reports through May 2005 and the payment of all U.S. Trustee fees. The U.S. Trustee has not filed or expressed a further objection to the confirmation of the *Debtor's Third Amended Plan of Liquidation Dated April 15, 2005* (as hereafter modified, the "Plan").

Other Parties' Substantive Objections

2. In response to the confirmation objection filed by the Official Committee of Warranty Holders, to concerns expressed by the proposed post-confirmation liquidation trustee and his counsel, and to an informal objection made by counsel for American Bank of Commerce ("ABC"), the Plan Articles set forth in the paragraphs below are hereby modified as follows:

3. **1.2 Definitions (Incorporating Exhibit "A" Glossary):** Various definitions are added and/or modified for clarification purposes as follows:

a. “Transfer Date” means the Effective Date.

b. “Petition Date” means November 11, 2003.

c. “Newman Class Settlement” means the Settlement Agreement between the Debtor and class of Warranty Gold VSC Holders (the “Newman Class”) incorporated in Debtor’s *Motion for Order Approving Settlement of Debtor’s Objection to Class Proof of Claim Filed by Melissa Newman* (the “Settlement Motion”), which class was certified in connection with the Court’s prior approval of the *Amended Motion for Certification of a Class of Warranty Gold Vehicle Service Contract Holders for a Class Proof of Claim and Appointment of a Class Representative* (the “Certification Motion”) filed by counsel for representatives of such Newman Class.

d. “NWIG Professionals” means and includes, in addition to any entities or other persons specifically named in this provision of the Plan’s Glossary, all entities or other persons: (i) constituting any “Professionals” as that term is defined in § 1(k) of the Asset Distribution Agreement being approved in conjunction with Plan confirmation; and/or (ii) constituting any “NWIG Third Parties” as that term is defined in § II(A)(20) of the Newman Class Settlement.

e. “Professional Fee Claim” means, in addition to any compensation and/or reimbursement claims as specifically listed in this provision of the Plan’s Glossary, any “substantial contribution” claims for compensation and/or reimbursement of expenses by Newman Class Counsel or the Plan Trustee’s counsel, the assertion of which is provided for and agreed to as reflected in, *inter alia*, the Newman Class Settlement.

4. **3.3 Payment of Administrative Claims and Professional Fee Claims:** In the first two sentences of this Plan Article paragraph, all references to the “Administrative Expense

Reserve” are deleted and replaced by the term “available non-reserved funds to the extent, if any, that such funds exist”. In this paragraph’s third sentence, the words “, the Liquidating Trustee” shall be added between the terms “Debtor” and “the Committee”. This paragraph’s last sentence is deleted and a new, second paragraph shall be added containing the following provisions:

“Notwithstanding the preceding paragraph or any other provision of this Plan, all Allowed Administrative Claims and all Allowed Professional Fee Claims are to be paid in accordance with their priority. If funds are unavailable to fully pay all the Allowed Administrative/Professional Fee Claims, holders of such allowed claims shall receive interim distributions of non-reserved funds – when and if determined by the Plan Trustee to be available – *in pari passu* until such time as all holders of such allowed claims have received equalized aggregate percentages of distribution, and thereafter on a *pro rata* basis. Holders of such allowed claims shall receive final payment at such time as available non-reserved funds exist in the possession of the Trust to fully pay such claims.”

5. **4.3.1 Calculation of Claim Amount For Class 3:** The last sentence of the first paragraph of this Plan Article, regarding the calculation of Allowed Class 3 Refund Claims, is deleted and replaced by the following: “The proration of each Refund Claim will be based on the time left on each VSC, with the claim amount equaling the purchase price of the particular contract multiplied by the percentage of use left on such contract as of November 11, 2003.” Also, in the last sentence of the third paragraph of this Plan Article, the reference to June 6, 2003 is deleted and replaced by the term “June 9, 2003”.

6. **4.3.5 Distribution of Customer Premium Trust Funds:** This Plan Article relating the treatment of certain funds potentially characterized as VSC Holder premium trust funds, is deleted and replaced by the following provisions:

“To the extent that any funds held by National Warranty, or held by or for the Debtor’s benefit – including funds held in Debtor’s restricted accounts at ABC (the “ABC Account Funds”) – are determined to be held “in trust” for the Warranty Gold customers that owned National Warranty VSC contracts, the Plan Trustee will distribute all such funds of which he gains possession consistent with and pursuant to the Trust Agreement’s provisions governing the “Trust Funds Account” as defined therein. To the extent distributions of such funds remain uncollected

either by the failure of a Holder of a Class 3 Claim to cash a Distribution Check or by the return of a Distribution Check based on the inability to locate the Holder, the Plan Trustee shall further administer such distributions pursuant to, *inter alia*, section 6.03 of the Trust Agreement regarding funds to be deposited in the Trust's Holding Account.

“Notwithstanding the preceding paragraph, in recognition of a continuing dispute between the Debtor, Global Payment Systems (“GPS”) and ABC regarding the Debtor’s credit card merchant agreement, GPS’s recoupment of chargebacks under the alleged authority of such agreement and any administrative expense that may allegedly arise from such agreement, and the potential liability of ABC that may allegedly arise from an indemnification agreement entered into between ABC and GPS, Debtor has agreed to “set aside” \$400,000 of the ABC Account Funds by allowing ABC to continue holding such \$400,000 in funds (the “ABC Set Aside Funds”) pending resolution of the following:

- (a) GPS’s alleged right to an administrative expense claim and the magnitude of such claim to the extent allowable, if any;
- (b) The “trust fund” nature of the ABC Set Aside Funds;
- (c) The extent and validity, if any, of ABC’s alleged contingent secured claim arising from any indemnity liability that may arise in favor of GPS; and
- (d) Any Rights of Action (including all defenses, counterclaims, set offs, recoupments and other claims, rights or interests) that the Debtor may have in relation to any of the above issues.

In conjunction with implementation of the confirmed Plan, ABC shall remit and deliver all ABC Account Funds other than ABC Set Aside Funds (the “Released ABC Funds”) to whomever the Bankruptcy Court appoints as “Successor Trustee” to NWIG in its capacity as trustee of the accounts holding the ABC Account Funds (the Debtor currently being in the process of obtaining an agreement pursuant to which NWIG will terminate its rights as the trustee of such funds and a successor trustee will succeed NWIG in such capacity). With respect to all such Released ABC Funds: (i) the Debtor and ABC agree that the Plan Trustee may act as such a Successor Trustee, take possession of such funds upon confirmation of the Plan and distribute them pursuant to the Trust Agreement; and (ii) the delivery of Released ABC Funds to any appointed NWIG Successor Trustee shall not in any way modify, alter or otherwise affect the Debtor or Plan Trustee’s right to assert a claim seeking a declaration that the Debtor or the Liquidating Trust is entitled to reimbursement from such Released ABC Funds for the previous payment of National Warranty-approved claims from Warranty Gold’s operating revenue (such reimbursement claim presently estimated to approximate \$200,000 in amount).

At such time as there is any resolution of the above-described disputes, the \$400,000 in ABC Set Aside Funds will be distributed by the Plan Trustee pursuant to the confirmed Plan (including the incorporated Trust Agreement) or, in that such a resolution is anticipated to occur post-confirmation, any further orders of the Bankruptcy Court.

7. **6.2 Selection of Plan Trustee:** Consistent with and pursuant to § 4.02 of the Trust Agreement, reflecting governing terms regarding the Liquidation Trustee’s compensation, subparagraph (b) of the second paragraph of this Plan Article is modified to clarify and provide that the Liquidating Trustee’s success fee shall be “based upon all monies disbursed or turned over in the case by the Liquidating Trustee to parties in interest (including, without limitation, all Beneficiaries), equivalent to the maximum fee allowed by the schedule set forth in 11 U.S.C. § 326(a); provided, that the resulting aggregate success fee shall be reduced by any monthly draw amounts previously received by the Liquidating Trustee.”

8. **6.5.3 Transfer of Trust Assets:** The one sentence comprising this Plan Article paragraph is deleted and replaced by the following: “All Property of the Debtor constituting the Trust Assets shall be transferred to, vested in and retained by the Trust – free and clear of all liens, claims, interests and encumbrances, except for liens securing any Class 2 Allowed Secured Claims – pursuant to the provisions of this Plan, including all provisions of the Trust Agreement which are fully incorporated herein as reflected in the Confirmation Order.”

9. **6.5.6 Amendment of Debtor’s Articles and By-Laws:** In subparagraph “(iii)” of this Plan Article, to the extent relevant to prepetition Equity Interest holders, the reference to Class 9 is deleted and replaced by the term “Class 6”.

10. **6.6 Section 1145 Determination:** In the last sentence of the first paragraph of this Plan Article, concerning the prohibition on transfers of Beneficial Interests, the reference to Article VIII.G is deleted and replaced by the term “Article 6.5.5”.

11. **10.3 Authority to Seek Conditional Release of National Warranty:** The title of this Plan Article is modified as noted, and the second sentence comprising this paragraph is deleted and replaced by the following: “To the extent that the Bankruptcy Court overseeing National Warranty’s Nebraska proceeding issues similar release and injunctive orders protecting National Warranty from liability from both Warranty Gold and Warranty Gold’s customers for any and all liability arising from the National Warranty-administered contracts purchased by such customers, those orders will be deemed to supplement the Plan Trustee’s authority to seek any such conditional release of National Warranty; *provided*, however, that to the extent (if any) that the terms of this Plan Article conflict with any terms of the Newman Class Settlement, such provisions of the Newman Class Settlement, as approved by the Bankruptcy Court, will govern.”

12. **10.4 Determination Based Upon National Warranty Release:** The sentence comprising the final paragraph of this Plan Article is modified as follows: “The Bankruptcy Court has authorized a Class Representative for Warranty Gold VSC Holders pursuant to Fed. R. Civ. Proc. Rule 23, and the provisions of the Order granting such authorization are fully incorporated herein; *provided*, however, that – notwithstanding any provision of this Plan Article 10.4 – the respective authority of the Debtor, the Plan Trustee and Class Representatives will be as more specifically set forth in and shall be governed by, *inter alia*, such Orders authorizing the Class Representative, Newman Class Settlement and Trust Agreement, as the same are approved by the Bankruptcy Court and fully incorporated herein and in the Confirmation Order.”

13. **13.4.1 [Estimation of Class 3 Claims for Limited Purposes]:** This Plan Article regarding estimation of Class 3 Claims is deleted and replaced by the following: “The Plan and Newman class proof of claim (as filed in amended form in conjunction with the Newman Class Settlement) together act as an estimation of Class 3 Claims for purposes of voting and feasibility

under Bankruptcy Code § 502(c). All Class 3 Refund Claims will be estimated and calculated in an amount consistent with and pursuant to the terms of Plan Article 4.3.1 hereinabove.”

14. **16 Retention of Jurisdiction:** The prefatory language of this Plan Article is modified and clarified to provide that “[T]he Court expressly retains and specifically shall have, even after the entry of a final non-appealable Order confirming the Plan, jurisdiction over any and all matters arising under, arising in, or relating to the Debtor’s bankruptcy case, the Plan, the Newman Class Settlement and/or the Trust Agreement including, without limitation, proceedings” as further enumerated more particularly in Plan Articles 16.1 through 16.20.

15. **17.8 Ratification:** The one sentence comprising this Plan Article paragraph is modified to provide as follows: “The Confirmation Order shall ratify all enforceable agreements effectuated by Debtor during the pendency of its Chapter 11 case; *provided*, however, that such ratification shall in no way be deemed to waive, release, modify, alter, or impair or affect any of the Debtor’s and/or Liquidating Trust’s Rights of Action relating to disputes involving, *inter alia*, ABC or GPS as described in Plan Article 4.3.5 above (specifically including, without limitation, all Rights of Actions arising from or in connection with Debtor’s credit card merchant agreement or the circumstances surrounding the Debtor’s post-petition assumption of such contract).

16. **18.1 Substantial Consummation:** The one sentence comprising this Plan Article paragraph is modified to delete the reference to Plan Article “6.5.9”, which does not exist.

17. **20.1 – 20.3 Certification and Release of Class Creditor Claims:** The three paragraphs comprising Plan Articles 20.1-.3 are deleted and replaced by the following provisions:

“On May 24, 2005, the Court heard and considered the Certification Motion and Settlement Motion pertaining to the Newman Class. As relation to such hearing: (a) pursuant to an Order dated May 31, 2005, the Court approved certification of the Newman Class pursuant to Fed. R. Civ. P. Rule 23 for the purposes set forth in the Certification Motion; and (b) the Court found that notice of the Newman Class Settlement was sufficient as to Newman Class members and the settlement

should be approved. Prior to or in conjunction with entry of a Confirmation Order, Newman Class representatives' counsel are submitting, and the Court is expected to enter, an Order approving the Newman Class Settlement ("Settlement Order"). To the extent there appear to be or are any conflicts between provisions of this Plan and the Newman Class Settlement, the provisions of the latter will govern to the extent they are approved in the Settlement Order, which – along with further orders, if any, that may grant the Newman Class Representative supplemental authority – is to be deemed fully incorporated into the Confirmation Order."

Conclusion

ACCORDINGLY, Warranty Gold, Ltd. respectfully requests that the Court, pursuant to Code § 1127, deem the above-modified provisions of the proposed Plan (including relevant terms of the Trust Agreement) part of the Plan of Liquidation submitted to the Court for confirmation and that it grant such other relief as the Court may deem just and proper.

Respectfully submitted,

BROWN McCARROLL LLP

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**ATTORNEYS FOR WARRANTY GOLD,
LTD.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on July 15, 2005, upon the parties on the attached service list, by U.S. first class mail, postage prepaid.

/s/ Lynn Hamilton Butler
Lynn Hamilton Butler