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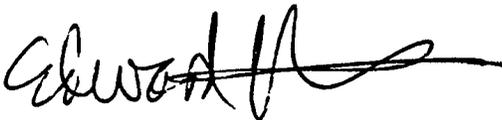
10 MAR 1994

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 94-50-CC
MPC Liquidating Trust
File No. 132-3

On the basis of the facts and representations in your letter of January 25, 1994, we would not recommend enforcement action to the Commission if the trust created to liquidate the assets of McCrory Parent Corp. ("MPC") and to distribute its proceeds (the "Trust") does not register under the Investment Company Act of 1940 (the "1940 Act") in reliance on the exemption in Section 7(b) for "transactions which are merely incidental to the dissolution of an investment company."¹ This position is based on your representations that the Trust: (1) exists solely to liquidate MPC's assets and to distribute the proceeds to beneficiaries; (2) will be prohibited from conducting a trade or business, and from making any investments, except for temporary investments in government securities, pending the distribution of liquidation proceeds to beneficiaries; (3) will not hold itself out to be an investment company, but rather as a trust in the process of liquidation; (4) will be under the continuing jurisdiction of the Bankruptcy Court; and (5) will terminate on or before the third anniversary of the effective date of the plan of liquidation unless the Bankruptcy Court grants an extension for cause, and additional no-action assurance is obtained from the staff. This position is also based on your representations that, although the certificates of beneficial interest in the Trust (the "CBIs") will be transferable for the benefit of the creditors: (1) the CBIs will not be listed on any national securities exchange or NASDAQ; (2) neither the Trust nor the trustees will engage the services of any market maker, facilitate the development of an active trading market or encourage others to do so, place any advertisements in the media promoting investments in the Trust,² or collect or publish information about prices at which the CBIs may be transferred; (3) an active trading market in the CBIs is unlikely to develop; and (4) the Trust will comply with the registration and reporting requirements of the Securities Exchange Act of 1934.

Our position is based on the facts and representations in your letter. Any different facts or representations may require a different conclusion. Moreover, this response expresses the Division's position on enforcement action only and does not express any legal conclusions on the issues presented.



Edward J. Rubenstein
Attorney

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- ¹ We express no opinion on whether the principal assets of the Trust would constitute "securities" for purposes of Section 2(a)(36), or "investment securities" for purposes of Section 3(a)(3).
 - ² Telephone conversation between Edward J. Rubenstein and Michael J. Rosenfelder, March 7, 1994.

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PUBLIC

Investment Company Act
§§2(a)(36), 3(a)(3) and 7(b)

January 25, 1994

Office of Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

ACT ICA
SECTION ~~2(a)(36), 3(a)(3)~~ 7(b)
RULE _____
PUBLIC _____
AVAILABILITY 3/10/94

Re: MPC Liquidating Trust

Ladies and Gentlemen:

As counsel to and on behalf of the Official Committee of Unsecured Creditors (the "Committee") of McCrory Parent Corp., a Delaware corporation ("MPC"), we respectfully request that the staff of the Division of Investment Management (the "Staff") confirm that it will not recommend any enforcement action to the Securities and Exchange Commission based upon the facts set forth below, if the liquidating trust created by MPC (the "Trust") pursuant to a plan of liquidation (the "Plan") proposed by the Committee under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") carries out the program for liquidation of its assets and distribution of the proceeds thereof without registering as an investment company under the Investment Company Act of 1940, as amended (the "1940 Act"), in reliance on the last sentence of Section 7(b) thereof.

I. MPC

MPC was formed in 1989 as a successor in interest to substantially all the assets and certain of the liabilities of Rapid American Corporation, a Delaware corporation, pursuant to a purchase agreement dated as of May 20, 1989. On November 25, 1991, an involuntary petition for relief under Chapter 11 of Title 11 of the Bankruptcy Code was filed against MPC by certain of its creditors in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). On March 4, 1992, MPC's bankruptcy case was converted to a voluntary Chapter

11 case. As discussed in the disclosure statement relating to the Plan (the "Disclosure Statement"), MPC has as of the date hereof, total assets of approximately \$29 million and total liabilities to its creditors (the "Claimants") of approximately \$536 million. Of MPC's total assets of \$29 million, it is expected that approximately \$24 million will be transferred to the Trust.

II. The Plan and Trust

The Committee has recently filed the Plan with the Bankruptcy Court. The Plan contemplates that as of its effective date (the "Effective Date"), MPC will distribute its cash on hand to the Claimants, retain reserves for certain costs and expenses and the payment of certain currently disputed claims, and transfer the remainder of its assets (the "Trust Property") to the Claimants, who will immediately transfer the Trust Property to the Trust which will hold the Trust Property on behalf of the Claimants. Under the Plan, MPC is to dissolve itself as quickly as possible after the Effective Date. The Trust will be established pursuant to a trust agreement (the "Trust Agreement") to liquidate and distribute the Trust's assets to designated beneficiaries of the Trust, who will be those Claimants with allowed claims ("Allowed Claims"). The Trust will also be responsible for settling and resolving certain disputed claims ("Disputed Claims") that are not resolved by the Effective Date.¹

Under the Plan, each holder of an Allowed Claim will receive for such Claim a pro rata portion of the Trust Property and immediately thereafter transfer such property to the Trust in exchange for CBIs issued by the Trust. CBIs will be issued pro rata to the dollar value of Claims exchanged therefor in accordance with a ratio set forth in the Plan applicable to each class of Claimant. The CBIs will evidence a fractional undivided beneficial interest in the Trust and will be transferable for the benefit of the Claimants. The Plan provides that the Trust will issue the CBIs on the later of (i) the Effective Date or (ii) the date

¹ The Plan provides for Claimants with Disputed Claims against MPC by creating reserves (as described below). Upon resolution of their Disputed Claims and to the extent such Disputed Claims become Allowed Claims, the holders of such Allowed Claims will receive CBIs as provided in the Plan and Trust Agreement.

each Disputed Claim becomes an Allowed Claim. The CBIs are evidenced by certificates and are freely transferable.

A. Terms of the Trust

The Trust will liquidate all its assets and terminate on or before the third anniversary of the Plan's Effective Date, unless such time is extended for cause by the Bankruptcy Court which will retain jurisdiction over the Trust for various purposes, including settling Disputed Claims, supervising distributions to holders of CBIs, remedying any omissions or inconsistencies with respect to the CBIs and issuing or modifying any injunctions or other orders as necessary to effectuate the purposes of the Plan. In addition, the Trust will be prohibited from extending its existence beyond the three year term without first obtaining additional no-action assurance from the Staff. The Trust's affairs will be managed by three trustees ("Trustees") who will be appointed by the Committee and thereafter, upon a Trustee vacancy, by the remaining Trustee(s). Under the Trust Agreement, the powers of the Trustees are exercisable solely in a fiduciary capacity consistent with, and in furtherance of, the purposes of the Trust as set forth in the Trust Agreement. The Trustees may act only upon a majority vote at any meeting at which all Trustees received reasonable advance notice, or by unanimous written consent. Trustees may be removed upon the vote of persons holding in excess of 66% of the outstanding number of CBIs.

Under the Trust Agreement, the Trust will be prohibited from conducting a trade or business and from making any investments, except that it will be allowed to temporarily invest its cash pending quarterly distribution in securities guaranteed by the United States or an agency, department or instrumentality of the United States, or backed by the full faith and credit of the United States.

The Trust will comply with the registration and reporting requirements of the Securities and Exchange Act of 1934, as amended (the "1934 Act"). The Trust will enter into a registration rights agreement (the "Registration Rights Agreement") which will give holders of CBIs the right to require that the Trust register the CBIs under Rule 415 under the Securities Act of 1933, as amended (the "1933 Act"). The Trust Agreement will provide that the Trustees are permitted to comply with the Registration Rights Agreement but are not authorized to otherwise facilitate the development of an active trading market for the CBIs. Neither the Trustees nor the Trust will make a market in the

CBIs, encourage others to do so, or list the CBIs on a national securities exchange or the Nasdaq National Market or collect or publish information about prices at which the CBIs are transferred. It is anticipated that transfers of the CBIs will be settled and cleared through the Depository Trust Company.

The Trust will not hold itself out to be an investment company but rather as a trust in the process of liquidation. Further, it will not place any advertisements in the media promoting investments in itself on the basis of compensation of or returns earned on its assets.

B. The Assets and Liabilities of the Trust

It is anticipated that on the Effective Date, the Trust's assets and liabilities will consist of the following items:

1. The E-II Obligation. The remaining portion of a \$38.5 million claim (the "E-II Obligation") against another liquidating trust (the "E-II Trust") created by E-II Holdings, Inc. ("E-II"), a former affiliate of MPC, under E-II's plan of reorganization confirmed in its own Chapter 11 case. The E-II Obligation represents the settlement of a claim in excess of \$900 million against E-II in E-II's Chapter 11 case arising out of certain asset transfers from MPC to E-II alleged by the Committee to have been fraudulent conveyances. In consideration of MPC's release of E-II, MPC received the E-II Obligation and the parties agreed that it would be paid by the E-II Trust. The E-II Obligation is not certificated and is evidenced only by an order of the Bankruptcy Court. The E-II Obligation requires the E-II Trust to pay to the Trust by no later than approximately 36 months from the date E-II's plan of reorganization was confirmed a percentage of \$38.5 million equal to the rate of recovery realized by E-II's other creditors, less payments already received by MPC. The E-II Trust has already paid to MPC \$3.85 million on account of the E-II Obligation. The Disclosure Statement indicates that the E-II Obligation has an approximate present value of \$16.4 million.

2. The E-II Beneficial Interest. A 25% beneficial interest in the E-II Trust (the "E-II Beneficial Interest"). The E-II Beneficial Interest represents the right to 25% of the remaining assets of the E-II Trust after the payment of the E-II Obligation and the E-II Trust's other obligations. The E-II Beneficial Interest is (i) evidenced by an order of the Bankruptcy Court and is not

certificated, and (ii) non-transferable except by will, intestate succession by operation of law or under circumstances that would not require registration under the federal securities laws. The Disclosure Statement indicates that the E-II Beneficial Interest has an approximate present value of approximately \$5.6 million.

3. 7th Avenue Leasehold Sale Proceeds. The right to receive \$100,000 each month from the date hereof through September, 1994 from the landlord of certain property as a result of the landlord's buyout of MPC's lease of the property pursuant to an agreement approved by an order of the Bankruptcy Court.

4. McGregor Preferred Stock Dividend. \$1.37 million present value in dividends previously paid by McGregor Corporation, a subsidiary of E-II, on certain of its preferred stock which will be received by MPC from an E-II escrow account as part of a settlement of a dispute between MPC and McCrory Corporation, a former subsidiary of MPC which is also a Chapter 11 debtor, approved by an order of the Bankruptcy Court.

5. Administrative Expense Reserve. Cash of approximately \$1,000,000 for administrative expenses, expenses incurred in resolving Disputed Claims and in operating the Trust.

6. The Disputed Claims. Under the Plan, prior to the Effective Date, MPC will calculate the amount of cash and CBIs necessary to reserve on account of holders of Disputed Claims. On the Effective Date, MPC will transfer to the Trust, and the Trust will assume liability with respect to, Disputed Claims relating to senior, general unsecured and subordinated debt claims against MPC and the Trust will receive from MPC certain reserves on account of holders of such Disputed Claims. Under the Plan, MPC will upon its dissolution, transfer additional reserves to the Trust.

All CBIs held in the Trust's reserves as of any date will be treated in all respects as "outstanding" CBIs and will be deemed to have voted, and to have abstained from voting, in the same proportion as the CBIs not held in reserve. The Trust will distribute to the relevant reserve such CBIs' pro rata share of all distributions made by the Trust on account of CBIs.

Discussion

The relevant definition of investment company, as set forth in Section 3(a)(3) of the 1940 Act, is any issuer which:

"is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis."

It is unclear whether the Trust's principal assets such as the E-II Obligation or the E-II Beneficial Interest would constitute "securities" under the 1940 Act's statutory definition² or the tests set forth in the leading cases under the federal securities laws.³ Even if such assets are "securities," it is unclear whether they constitute "investment securities" for purposes of the 40% test set forth in Section 3(a)(3). In *SEC v. Fifth Avenue Coach*

² Section 2(a)(36) of the 1940 Act.

³ E.g., *SEC v. W.J. Howey & Co.*, 328 U.S. 293 (1946) setting forth a four-part test to determine whether a financial interest constitutes an "investment contract" within the general definition of "security" under the 1933 Act. The Howey test turns on "the presence of an investment in a common venture premised on a reasonable expectation of profit to be derived from the entrepreneurial efforts of others." *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975). See also *Reves v. Ernst & Young*, 494 U.S. 56 (1990), adopting the "family resemblance test" to determine whether notes are securities. Under the family resemblance test, every note is presumed to be a security unless it bears a strong resemblance to other notes that are not viewed as securities. If the instrument bears a resemblance to a note that is viewed as a security, then the underlying transaction is examined to see whether it is an investment with a reasonable expectation of profit, offered to a broad segment of the public for common trading and whether another regulatory scheme exists to significantly reduce the risk of the instrument.

Lines, 289 F. Supp. 3 (1968), a judgment in compensation for the taking of property by eminent domain was held not to be an "investment security" for purposes of Section 3(a)(3) because the holder of the judgment was not "investing" in either the suit or the resulting judgment. As described above, the E-II Obligation and the E-II Beneficial Interest exist by virtue of an order of the Bankruptcy Court in compensation for the release of fraudulent conveyance claims and other disputes. Neither the E-II Obligation nor the E-II Beneficial Interest should be viewed as an "investment security."

If the Trust's assets are nevertheless deemed to include investment securities and if such assets have a value exceeding 40 percent of the value of the Trust's assets as calculated in accordance with Section 3(a)(3), the Trust would be deemed to be an investment company subject to the prohibitions of Section 7(b). Section 7(b) prohibits an investment company without a board of directors and that has not registered under Section 8 from engaging in any business in interstate commerce, among other things. However, the last sentence of Section 7(b) provides that the subsection "shall not apply to transactions which are merely incidental to the dissolution of an investment company." It is our view that if the Trust is an investment company, its activities are merely incidental to its dissolution and satisfy the requirements of the last sentence of Section 7(b).

Review of No-Action Letter Criteria

The Staff has issued a number of no-action letters providing exemption from the registration requirements of the 1940 Act based on the last sentence of Section 7(a) or 7(b), both to corporations in the process of liquidation and

dissolution,⁴ and to liquidating trusts⁵ established to effectuate a liquidation.⁶

Letters from liquidating trusts requesting Section 7 relief have historically involved concurrent requests for relief from the registration and reporting requirements of the 1934 Act.⁷ Such trusts's requests for 1934 Act relief have usually been predicated on the theory that the beneficial interests of the trust are not "securities" for 1934 Act purposes and have recited, among other things, that the beneficial interests in the trust are not transferable except in certain limited circumstances such as by operation of law or pursuant to the laws of descent and distribution. Letters from corporations, on the other hand, have generally not involved concurrent requests for 1934 Act relief.⁸ Requesting corporations generally have had transferable interests (common stock) outstanding and have usually been already registered under the 1934 Act. There have been no recent Section 7 requests from a liquidating trust such as

⁴ E.g., Fund American Companies, Inc. (available November 16, 1990); and LDX Group, Inc. (available May 4, 1990); Merit Clothing Company (available March 9, 1982); Atlanta/LaSalle Corp. (available March 5, 1979) American Recreation Group, Inc. (available October 31, 1975).

⁵ E.g., VHA Enterprises, Inc. (available January 7, 1993); Grubb & Ellis Realty Income Trust (available May 26, 1992); Western Air Lines, Inc. (available January 28, 1992); Newhall Investment Properties (available September 21, 1988); Timber Realization Company (available June 15, 1987); Official Unsecured Creditors' Committee of D.H. Baldwin Co. (available June 13, 1986); Invest-Tex, Inc. (available January 12, 1987); United Western Corp. (available October 29, 1984) and Raymond Industries, Inc., (available September 12, 1984).

⁶ The process of liquidation is essentially similar whether a corporation or a liquidating trust is involved, and the form of entity does not alter the fact that the entity is liquidating and distributing its assets to holders of its beneficial interests. See Fund American Companies, Inc., *supra*, and LDX Group, Inc., *supra*.

⁷ See note 5, *supra*. Cf. Management Assistance Inc. (available January 17, 1986).

⁸ See note 4, *supra*.

the Trust that has transferable interests and that is or will be registered under the 1934 Act.

It is our view that the transferability of a trust's interests should not be relevant to a request for Section 7 relief if the trust is a 1934 Act registrant. Requiring non-transferability as a condition to Section 7 relief would be in keeping with the policies and purposes underlying the 1940 Act and the 1934 Act when an issuer is not a 1934 Act registrant, as such requirement would prevent the development of an active trading market for the securities of a liquidating investment company when there is no currently available public information about the issuer. If, however, a liquidating trust is a 1934 Act registrant, it is unclear why non-transferability should be relevant.

In a recent no-action letter, Western Air Lines, Inc. ("Western Air") (available January 28, 1992), the Staff took a no-action position under Section 7 and granted an exemption under the 1934 Act⁹ where the beneficial interests in the liquidating trust were transferable and an active trading market for the trust's beneficial interests was unlikely to develop.¹⁰ If the staff is unable to concur in our view that transferability is not relevant to a 1934 Act-registered trust's request for Section 7 relief, we seek the staff's concurrence with our view that the Trust satisfies the conditions for Section 7 relief set forth in Western Air.

Like the Western Air trust, the Trust (1) exists solely to liquidate the company's assets and distribute the proceeds to beneficiaries, (2) will not make any new investments except for temporary investments in government securities pending the distribution of liquidation proceeds to beneficiaries, (3) will terminate within a reasonable time (three years, unless extended for cause by court order,

⁹ Western Air and Securities Exchange Rel. Nos. 29861 (Oct. 25, 1991) (notice of application for exemptive relief) and 30052 (Dec 9, 1991) (order granting application).

¹⁰ In our view, trading market activity, like transferability, should only be relevant to the question of whether beneficial interests in a trust are securities for 1934 Act purposes. Trading market activity was not an issue under Section 7 for issuers of transferable interests that were registered under the 1934 Act. See note 4, supra.

as opposed to ten years for the Western Air trust), (4) will issue reports no less frequently than semiannually (the Trust will issue reports quarterly pursuant to the 1934 Act), (5) will not hold itself out to be an investment company and (6) will not facilitate the development of an active trading market.

The Western Air letter emphasized that an active trading market was unlikely to develop for its beneficial interests and the Committee believes this also to be the case for the Trust. The Trust Agreement will provide that the Trustees are not authorized to facilitate the development of an active trading market or encourage others to do so. The CBIs will not be listed on any national securities exchange or Nasdaq nor will the Trustees engage the services of any market makers.¹¹

While it is possible that following the Effective Date a limited amount of trading of CBIs will occur among the initial CBI holders, the Committee believes it is unlikely that such trading will be active or that a significant market of non-initial holders will develop. Unless the CBI holders require that the Trust register transfers of CBIs under the 1933 Act pursuant to the Registration Rights Agreement, the Trust will not do so. Even if a registration statement for transfers of CBIs is filed under the 1933 Act, under most state securities law statutes, in the absence of a registration permit for the CBIs, a holder of the CBIs would be unable to resell the CBIs except to a person who qualified as an institutional investor under the applicable state securities act or pursuant to an isolated non-issuer transactional exemption. In addition, given the nature of the Trust's assets, the limited duration of its existence and its limited purpose, the Committee believes any such trading is unlikely to extend far beyond the universe of initial holders of the CBIs who are familiar with the facts surrounding the Trust. Accordingly, it is our view that the Trust satisfies the conditions for Section 7 relief set forth in Western Air.

We note that in Western Air, the issuer undertook to comply with various provisions of the following

¹¹ See also LDX Group, Inc., supra, in which the Staff adopted a no-action position under Section 7(a) despite the company granting registration rights under the 1933 Act on behalf of minority stockholders who desired increased liquidity during the liquidation process.

sections of the 1940 Act: Section 9 (Ineligibility of certain affiliated persons and underwriters); Section 17 (Transactions between certain affiliated persons and underwriters); Section 26 (Unit investment trusts) and Section 36 (Breach of fiduciary duty).

We do not believe that it should be necessary for the Trust to undertake to comply with the indicated provisions to achieve the purposes of the 1940 Act. In granting no-action relief in Fund American Companies, for example, the Staff noted that the issuer had established personnel policies designed to avoid the possibility of self-dealing by its officers, directors, and employees during the course of the issuer's proposed six-year liquidation. The Trustees of the Trust will be subject to similar, if not greater, obligations as a result of their fiduciary obligations imposed by the Trust Agreement as well as the Bankruptcy Court's continuing jurisdiction over the Trust's affairs. Accordingly, we believe no further purpose would be achieved by requiring that the Trust undertake to comply with the provisions of the 1940 Act.

Conclusion

For the reasons stated above, we respectfully request that the Division of Investment Management confirm that it will not recommend enforcement action if the Trust carries out the program of liquidation and distribution of its assets as described above without registration as an investment company under Section 8 of the 1940 Act, in reliance on the last sentence of Section 7(b).

In compliance with the procedures set forth in Securities Act Release Nos. 6269 (December 5, 1980) and 5127 (January 25, 1971), seven copies of this letter are submitted herewith, and the specific subsection of the particular statute to which this letter pertains is indicated in the upper right corner of the first page of this letter and each copy.

If for any reason you do not concur with our conclusions, we respectfully request a conference with the Staff before any adverse written response to this letter is rendered. Should any member of the Staff have any questions

concerning the foregoing or need additional information or clarification, please call me at 212-259-6615.

Very truly yours,

A handwritten signature in cursive script, appearing to read "M. J. Rosenfelder", with a long horizontal flourish extending to the right.

Michael J. Rosenfelder