

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: : Chapter 11
: :
AFA Investment Inc., *et al.*,¹ : Case No. 12-11127 (MFW)
: :
Debtors. : (Jointly Administered)

Hearing Date: 2/24/14 @ 10:30 a.m.
Objection Deadline: 1/24/14 @ 4 p.m.

**MOTION FOR AUTHORITY TO SETTLE CLASSES OF PREFERENCE CLAIM
CONTROVERSIES PURSUANT TO BANKRUPTCY RULE 9019(b) AND TO
MODIFY COMPROMISE PROCEDURES**

AFA Investment Inc., *et al.* (the “Debtors”), by and through their undersigned counsel, hereby files this Motion for Authority to Settle Classes of Preference Claim Controversies Pursuant to Bankruptcy Rule 9019(b) and Modify Compromise Procedures (the “Motion”), and in support of the Motion respectfully state as follows:

JURISDICTION AND VENUE

This Court has Jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory predicates for the relief requested herein are 11 U.S.C. §§ 105, 363, 1107; and Fed. R. Bankr. P. 9019.

BACKGROUND

1. Pursuant to the *Order Approving Revised Global Settlement* [D.I. 1114, filed July 2, 2013] (the “Order”), the undersigned counsel was appointed as Avoidance Action Counsel charged with bringing certain actions arising under chapter 5 of the Bankruptcy Code (the “Avoidance Actions”) on behalf of the Debtors.

¹ The Debtors are the following nine entities: AFA Investment Inc.; American Foodservice Corporation; American Fresh Foods, Inc.; American Fresh Foods, L.P.; AFA Foods, Inc.; American Fresh Foods, LLC; Fairbank Reconstruction Corporation; American Foodservice Investment Company, LLC; and United Food Group LLC.



2. The Debtors, through their Avoidance Action Counsel, will prosecute, collect and settle Avoidance Actions relating to the bankruptcy of AFA Investment Inc., *et al.* Pursuant to the Order, the Avoidance Action Committee was put in place to manage the prosecution of Avoidance Actions and has reviewed and approved the Motion.

3. The Debtors anticipate that the net benefit to the Debtors' estates (the "Estates") will be maximized by compromising certain claims rather than incurring the expense and uncertainty of litigation. Possible considerations for compromise include but are not limited to the following:

- A. Errors and omissions in the Debtors' books and records;
- B. New value as made applicable pursuant to 11 U.S.C. § 547(c)(4) documented by Defendants;
- C. Ordinary course of business defense as made applicable pursuant to 11 U.S.C. § 547(c)(2);
- D. Risk of not prevailing in litigation;
- E. Cost of litigating claims to judgment; and/or
- F. The desirability of concluding contested matters by compromise and settlement.

4. Rather than burden this Court, and the Estates with the administrative expenses of presenting a motion to compromise a claim each time the Debtors believe it appropriate to do so, the Debtors propose that this Court modify the compromise procedures pursuant to Rule 9019(b), and grant the Debtors authority to settle classes of claims without further necessity of notice or court approval.

RELIEF REQUESTED

Avoidance Action Counsel has identified approximately three hundred (300) potential avoidance claims. Because of the number of Defendants and the need to promptly and efficiently resolve these adversary proceedings, the Debtors hereby seek blanket authority to settle adversary proceedings seeking the recovery of preferences within the following settlement ranges and guidelines:

1. Net Preference Claims² (“NPC”) Less Than \$75,000.00:

The Debtors, through the Avoidance Action Counsel, will be free to consummate settlements in this class in their business judgment without further leave of the Court or additional notice to the parties that have been served with this Motion;

2. Net Preference Claims Between \$75,000.01 to \$250,000.00:

Provided that a proposed settlement represents a minimum recovery of at least 65% of the NPC, the Debtors, through the Avoidance Action Counsel, will be free to consummate settlements in their business judgment without further leave of the Court or additional notice to the parties that have been served with this Motion;

² The term “*net preference claim*” as used herein means the total preference period transfers made to a creditor, less (i) the value to the debtor of subsequent extensions of credit (“*new value*”), and (ii) less credit for the ordinary course of business (“OCB”) defense. For purposes of determining OCB credit for purposes of this Motion *only*, OCB credit shall be calculated as the sum of all transfers paying invoices within thirty (30) days of stated terms, or within fifteen (15) days earlier or later than the historical weighted average days past due of the parties pre-preference period transactions (weighted average is obtained by multiplying invoice amount times the number of days past due, then summing the weight and dividing by amount paid). Although this calculation is used for purposes of establishing objective criteria upon which to categorize the subjective OCB defense, each case must be analyzed on its own individualized facts and circumstances. Accordingly, while this definition is used as a general measure of settlement recovery for purposes of the Motion, it is **not** an admission by Plaintiff that this calculation is the appropriate methodology to be applied in every adversary proceeding. Plaintiff reserves the right to contest a defendant’s asserted OCB defense in each adversary proceeding based on the facts of each case, and in no way admits that the calculation listed above is the benchmark upon which to measure the OCB defense.

3. Net Preference Claims Greater Than \$250,000.00:

Provided that a proposed settlement represents a minimum recovery of at least 75% of the NPC, the Debtors, through the Avoidance Action Counsel, will be free to consummate settlements in their business judgment without further leave of the Court or additional notice to the parties that have been served with this Motion.

Should any proposed settlement not comply with the parameters set forth in Paragraphs 1-3, such proposed settlement shall be noticed to; the Debtors' lenders, Official Committee of Unsecured Creditors or Liquidating Trustee, as applicable and to creditors who request notice by contacting the undersigned in writing within fourteen (14) calendar days hereof (the "Notice Party" or "Notice Parties"). The notice shall include a general description of the claim including the amount of the claim, and the proposed settlement amount. Unless a Notice Party files with the Court and serves upon the undersigned an objection to the proposed compromise within 14 days of service of the Notice, the Debtors shall be free to consummate the compromise without necessity of further notice or order of the Court.

If an objection is timely filed by a Notice Party, a hearing on the proposed compromise will be scheduled and noticed to the Debtors' Lenders, the Office of the United States Trustee and each objecting Notice Party.

The Debtors submit that the settlement parameters requested herein are in the best interest of the Estates because the time and expense of seeking Court approval with respect to each and every settlement would significantly diminish the Estates' net recovery on Avoidance Actions.

DISCUSSION

A. **An Order Establishing Compromise Procedures of the Kind Contemplated Herein is Permissible Pursuant to Bankruptcy Rule 9019(b).**

1. **Bankruptcy Rule 9019(b):**

Federal Rules of Bankruptcy Procedure 9019(a) sets forth the requirements for the settlement or compromise of controversies after notice to all creditors and a hearing upon each such proposed compromise. Rule 9019(b) provides an exception to this procedure:

(b) Authority to Compromise or Settle Controversies Within Classes.

After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize Plaintiff to compromise or settle controversies within such class or classes without further hearing or notice.

Id. (emphasis added).

Where, as here, numerous settlements are anticipated, the court in its discretion may grant Plaintiff authority to settle under Rule 9019(b). Collier on Bankruptcy, Section 9019.04 at 9019-7 (15th ed. 1991). In Boyd v. North End Auto Sales, Inc. (In re Check Reporting Service), 137 BR 653 (W.D. Mich. 1992), the Bankruptcy Court entered an order under Rule 9019(b) authorizing the Debtor in that case to settle without further notice and hearing "any of the pending preferential transfer adversary proceedings...for no less than twenty-five percent (25%) of the amount of the judgment requested by Plaintiff in the proceeding which is settled." Id. at 137 Bankr. 653, 656 (emphasis added).

The Debtors ask that this Court authorize them to consummate settlements within the following settlement ranges and procedural guidelines:

1. Net Preference Claims Less Than \$75,000.00:

The Debtors, through the Avoidance Action Counsel, will be free to consummate settlements in this class in their business judgment without further leave of the Court or additional notice to the parties that have been served with this Motion;

2. Net Preference Claims Between \$75,000.01 to \$250,000.00:

Provided that a proposed settlement represents a minimum recovery of at least 65% of the NPC, the Debtors, through the Avoidance Action Counsel, will be free to consummate settlements in their business judgment without further leave of the Court or additional notice to the parties that have been served with this Motion;

3. Net Preference Claims Greater Than \$250,000.00:

Provided that a proposed settlement represents a minimum recovery of at least 75% of the NPC, the Debtors, through the Avoidance Action Counsel, will be free to consummate settlements in their business judgment without further leave of the Court or additional notice to the parties that have been served with this Motion.

Should any proposed settlement not comply with the parameters set forth above, such proposed settlement shall be noticed to the Notice Parties. Unless a Notice Party files with the Court and serves upon the undersigned an objection to the proposed compromise within 14 days of service of the Notice, the Debtors shall be free to consummate the compromise without necessity of further notice or order of the Court.

If an objection is timely filed by a Notice Party, a hearing on the proposed compromise will be scheduled and noticed to the Debtors' lenders, the Office of the United States Trustee and each objecting Notice Party.

B. Bankruptcy Rule 2002(a):

Pursuant to Bankruptcy Rule 2002(a) Creditors shall be given “at least 21 days’ notice by mail of...the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the Court for cause shown directs that notice not be sent[.]” Id. (emphasis added.)

The Estates have numerous unsecured creditors. The cost of producing and mailing notice of settlement to all creditors, or even a short list of creditors, whether or not they desire such notice, is burdensome and wasteful to the Estate.

The Debtors submit that limiting notice and authorizing compromises of claims as provided herein-above will preserve the resources of the Estates. All known creditors have received notice of this Motion and may, upon written request to the undersigned, receive notice of proposed compromises pursuant to the procedure established by this Motion. No creditor desiring notice of proposed compromises will be deprived of such notice.

In summary, the Debtors submit that the proposed compromise authority is reasonable and appropriate under the circumstances of this case as described herein, will result in a more efficient and economic administration of these Estates, and will not deny notice to any creditor that who asks to receive such notice.

CONCLUSION

For all the foregoing reasons, the Debtors respectfully request that this Court enter an Order:

- (i) Granting Settlement Authority on the terms set forth in the Motion, pursuant to Bankruptcy Rule 9019(b);
- (ii) Modifying Compromise Procedures, pursuant to Bankruptcy Rule 2002(a); and

(iii) Granting such other and further relief as the Court may deem just and proper.

Dated: January 10, 2014

THE ROSNER LAW GROUP LLC

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Avoidance Action Counsel to the Debtors

Proposed Form of Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: : Chapter 11
: :
AFA Investment Inc., *et al.*,¹ : Case No. 12-11127 (MFW)
: :
Debtors. : (Jointly Administered)

Re: Dkt. Nos. ____ & ____

**ORDER GRANTING MOTION FOR AUTHORITY TO SETTLE CLASSES OF
PREFERENCE CLAIM CONTROVERSIES PURSUANT TO BANKRUPTCY RULE
9019(b) AND TO MODIFY COMPROMISE PROCEDURES**

Upon consideration of the Motion of AFA Investment Inc., *et al.* (the “Debtors”) for Authority to Settle Classes of Preference Claim Controversies Pursuant to Bankruptcy Rule 9019(b) and to Modify Compromise Procedures (the “Motion”); and it appearing the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157 and 1334; and it appearing that approval of the Motion is warranted, that due and timely notice of the Motion has been given, it is hereby:

ORDERED that the Motion is GRANTED; and it is further

ORDERED that the Debtors, through their Avoidance Action Counsel,² may settle certain Avoidance Actions without further notice or Court approval pursuant to the terms set forth in the Motion; and it is

ORDERED that the modifications to Compromise Procedures pursuant to Bankruptcy Rule 2002(a) set forth in the Motion are GRANTED.

¹ The Debtors are the following nine entities: AFA Investment Inc.; American Foodservice Corporation; American Fresh Foods, Inc.; American Fresh Foods, L.P.; AFA Foods, Inc.; American Fresh Foods, LLC; Fairbank Reconstruction Corporation; American Foodservice Investment Company, LLC; and United Food Group LLC.

² Capitalized terms used but not otherwise defined herein shall take the meaning ascribed to them in the Motion.

ORDERED that the Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: February ____, 2014
Wilmington, Delaware

Honorable Mary F. Walrath
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: : Chapter 11
: :
AFA Investment Inc., *et al.*,¹ : Case No. 12-11127 (MFW)
: :
Debtors. : (Jointly Administered)

Hearing Date: 2/24/14 @ 10:30 a.m.
Objection Deadline: 1/24/14 @ 4 p.m.

**NOTICE OF MOTION FOR AUTHORITY TO SETTLE CLASSES OF PREFERENCE
CLAIM CONTROVERSIES PURSUANT TO BANKRUPTCY RULE 9019(b) AND TO
MODIFY COMPROMISE PROCEDURES**

PLEASE TAKE NOTICE that on January 10, 2014, AFA Investment Inc., *et al.* (the “Debtors”) filed their Motion for Authority to Settle Classes of Preference Claim Controversies Pursuant to Bankruptcy Rule 9019(b) and to Modify Compromise Procedures (the “Motion”) with the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

PLEASE TAKE FURTHER NOTICE that responses, if any, to the Motion are required to be filed on or before **January 24, 2014 at 4:00 p.m. (Prevailing Eastern Time)** (“Objection Deadline”) with the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same, you must also serve a copy of the response upon the undersigned counsel so as to be received on or before the Objection Deadline.

¹ The Debtors are the following nine entities: AFA Investment Inc.; American Foodservice Corporation; American Fresh Foods, Inc.; American Fresh Foods, L.P.; AFA Foods, Inc.; American Fresh Foods, LLC; Fairbank Reconstruction Corporation; American Foodservice Investment Company, LLC; and United Food Group LLC.

PLEASE TAKE FURTHER NOTICE THAT A HEARING ON THE OBJECTION WILL BE HELD ON FEBRUARY 24, 2014 AT 10:30 A.M. (PREVAILING EASTERN TIME) BEFORE THE HONORABLE MARY F. WALRATH AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, 5TH FLOOR, COURTROOM #4, WILMINGTON, DELAWARE 19801.

PLEASE TAKE FURTHER NOTICE THAT IF YOU DO NOT PROPERLY FILE AND SERVE AN OBJECTION OR OTHER RESPONSE TO THE MOTION BY THE OBJECTION DEADLINE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: January 10, 2014

THE ROSNER LAW GROUP LLC

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Avoidance Action Counsel to the Debtors

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: : Chapter 11
: :
AFA Investment Inc., *et al.*,¹ : Case No. 12-11127 (MFW)
: :
Debtors. : (Jointly Administered)

CERTIFICATE OF SERVICE

I, Alex Govze, Esquire, hereby certify that on January 10, 2014, a copy of the *Motion for Authority to Settle Classes of Preference Claim Controversies Pursuant to Bankruptcy Rule 9019(B) and to Modify Compromise Procedures* was caused to be served on the persons on the attached service list via first class mail.

Dated: January 10, 2014

ASK LLP

Primary Counsel : /s/ Alex Govze
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Walt's Wholesale Meats
Walt Houser
350 SO Peking Road
Woodland, WA 98674

Dale T. Smith & Sons Inc.
Dale Smith
P O Box 479
Draper, UT 84020

Palo Duro Meat Processing
Trevor Canviness
P O Box 31117
Amarillo, TX 79120

C.H. Robinson Worldwide, Inc.
Scott Satterle
14701 Charlson Road
Suite 1400
Eden Prairie, MN 55347

H&B Packing Company, Inc.
Richard Bauer
702 Forest Dr.
Waco, TX 76703

American Capital, Ltd.
Gregory Shanahan
2 Bethesda Metro Center
14th Floor
Bethesda, MD 20814

International Paper Company
John Faraci
6400 Poplar Avenue
Memphis, TN 38197

Sealed Air Corporation - Cryovac Division
William Hickey
200 Riverfront Blvd.
Elmwood Park, NJ 07407

Anzco Foods North America
Peter Conley
666 Dundee Road, Suite 1605
Northbrook, IL 60062

Creekstone Farms
Dennis Buhlke
604 Goff Industrial Park Road
Arkansas City, KS 67005

Martin's Abattoir & Wholesale Meats
Greg Myrick
P O Box 890203
Charlotte, NC 28289-0203

Pierce Trading International
Stuart Leifer
1099 Wall St. West #170
Lyndhurst, NJ 07071

L&H Packing Company
AL Leonard
647 Steeves Avenue
San Antonio, TX 78210