

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:) No. 07-06720
)
AUTOMOTIVE PROFESSIONALS, INC.,) Chapter 11
)
Debtor.) Honorable Carol A. Doyle
)
) Hearing Date: October 30, 2008
) Hearing Time: 10:00 a.m.
) Room No.: 742

NOTICE OF MOTION

PLEASE TAKE NOTICE that on October 30, 2008 at 10:00 a.m., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Carol A. Doyle in her usual Courtroom No. 742 in the Dirksen Federal Building at 219 South Dearborn Street, Chicago, Illinois, or whomever may be sitting in her place and stead, and then and there present the Trustee's Motion To Approve Settlement Agreement With Almatterese Investments, LLC a copy of which is attached hereto and hereby served upon you.

Dated: October 7, 2008

Respectfully submitted,

FRANCES GECKER, not individually, but as
Chapter 11 Trustee for the bankruptcy estate of
AUTOMOTIVE PROFESSIONALS, INC.

By: /s/ Zane L. Zielinski
One of her attorneys

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**TRUSTEE'S MOTION TO APPROVE SETTLEMENT
AGREEMENT WITH ALMATTERESE INVESTMENTS, LLC**

Frances Gecker (the "Trustee"), not individually, but as the Chapter 11 trustee for Automotive Professionals, Inc. ("API," or the "Debtor") respectfully requests the entry of an order, pursuant to 11 U.S.C. § 363(b) and Fed. R. Bankr. P. 9019, approving the Trustee's settlement with Almatterese Investments, LLC (the "Dealer"), as described herein and more particularly set forth in the Settlement Agreement and Release (the "Settlement Agreement"), a copy of which is attached hereto as Exhibit A. In support of her motion (the "Motion"), the Trustee respectfully states as follows:

JURISDICTION

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.
2. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b).
3. The relief sought is appropriate and proper pursuant to 11 U.S.C. § 363(b) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

CASE BACKGROUND

4. On April 13, 2007 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code").

5. On June 6, 2007, the Court ordered the appointment of a Chapter 11 trustee.

6. Upon the recommendation of the U.S. Trustee, on June 12, 2007, the Court approved the appointment of Frances Gecker as Chapter 11 Trustee.

THE API PROGRAM

7. Prior to the Petition Date, API entered into an agreement with the Dealer (the "Dealer Agreement"). Pursuant to the Dealer Agreement, among other things, API agreed to serve as claims administrator under vehicle service contracts (the "VSCs") covered by Marathon Financial Insurance Co., Inc., RRG ("Marathon") which the Dealer had sold to their customers in the State of Missouri through the Maximum Protection Plan ("MPP Program," or the "API Program").

8. As of July 31, 2007, there were approximately 755 active Marathon-backed VSCs sold by the Dealer and administered by API. Some of the VSCs sold to the Dealer's customers contain a Guaranteed Price Refund ("GPR") option. A customer who purchased the GPR option would be entitled to a refund of the majority of the purchase price of the VSC at the end of the VSC term if that customer never filed a claim under the VSC and certain other criteria were met.

9. Under the API Program, when the Dealer met certain criteria, API was required to establish an account into which a portion of that Dealer's VSC sale proceeds were deposited (the "Reserve Account"). API paid the cost of repairs from the Reserve Account.

10. The MPP Program further provided that the Dealer would have no beneficial or other property interest in the funds in the Reserve Accounts. In addition, the MPP Program contract provided that when all Contracts issued by the Dealer have expired by their terms and all obligations thereunder have been fully satisfied, the remaining balance in the Reserve Escrow Accounts, if any, shall be paid to the Dealer. If the Dealer is no longer in business, has no heirs, successors or assigns or has relinquished its right to Additional Commissions, as provided in this Addendum, the remaining balance in the Reserve Escrow Accounts, if any, shall be retained by the Administrator.

11. The Trustee and the Dealer understand that any claim reserve accounts that existed in connection with GPRs sold to the Dealer's customers have been depleted in their entirety. However, despite the lack of funds, the Dealer has agreed to accept full responsibility to satisfy GPR claims pursuant to industry custom.

API'S ASSIGNMENT FOR THE BENEFIT OF CREDITORS

12. Prior to the Petition Date, on February 15, 2007 (the "Assignment Date"), API executed an assignment for the benefit of creditors, and transferred its assets, including the Reserve Accounts, to the API Creditors' Trust, administered by Michael Kayman as Assignee (the "Assignee"). Subsequently, API ceased processing claims in connection with the VSCs.

13. After the Assignment Date, the Assignee transferred the funds in the Reserve Accounts to an account (the "LaSalle Account") at LaSalle Bank National Association ("LaSalle"). Based on the Debtor's records, the Trustee has been able to allocate the funds in the LaSalle Account to the separate reserve accounts which API had maintained in connection with the individual dealers.

14. The following Reserve Account was established for the Dealer at JP Morgan Bank, Account Number 3002687, with a balance as of July 31, 2007 in the amount of \$217,609.62.

15. Since the Assignment Date, the Dealer has not had access to the funds in Reserve Account, which under the Dealer Agreements, were to be used to pay repair, replacement and cancellation costs associated with claims made by consumers participating in the API Program. Instead, the Dealer has been forced to find alternative options related to the payment and processing of claims asserted in the API Program, and in addition will pay sums in order to procure an appropriate reinsurance coverage package for the outstanding VSCs.

THE JM&A GROUP AND COURTESY INSURANCE COMPANY

16. To preserve the integrity of the API Program, and to otherwise facilitate and serve the interests of consumers who purchased VSCs under the API Program, the affiliated companies comprising the JM&A Group ("JM&A") have established a servicing arrangement with Fidelity Warranty Services ("FWS") as an administrative agent to perform claims administration in connection with the API Program. JM&A's program is insured through Courtesy Insurance Company ("Courtesy").

17. In an effort to minimize any further disruptions and inconveniences to the Dealers' customers holding VSCs issued by API, and to resolve any issues regarding the disposition of the Reserve Account, the Trustee, the Dealer, FWS, JM&A and Courtesy have engaged in good faith, arm's-length discussions with respect to resolving all of the respective rights, obligations, claims and defenses of the Dealer, the Trustee, API and API's bankruptcy estate in connection with the Dealer Agreements. In that regard, the Trustee has proposed that

the Trustee and the Dealer enter into a settlement, the terms of which are incorporated into the Settlement Agreement.

18. Michael T. McRaith, Director of the Division of Insurance of the State of Illinois, is not a party to the Settlement Agreement, and has neither reviewed nor approved of its content.

THE SETTLEMENT

19. Pursuant to the terms of the Settlement Agreement, upon execution of the Settlement Agreement with the Dealer, Courtesy will issue a vehicle service contract reimbursement insurance policy naming FWS as the Named Insured and the Trustee as additional loss payee (the "Courtesy Policy"). FWS will administer the claims under the Courtesy Policy, and provide the Trustee with quarterly reports detailing all payments and claims processed thereunder.

20. In consideration for the Courtesy Policy, the Trustee will transfer to FWS the sum of \$200,200.85 (the "Transferred Funds"), which amount the Parties acknowledge consists of the adjusted total outstanding balance of the Reserve Account as of July 31, 2007, less (a) \$17,408.77, which will be held by the Trustee as an asset of API's bankruptcy. The Trustee will also retain as an asset of API's bankruptcy estate the accrued interest earned on the Reserve Account through the date the Transferred Funds are transferred.

21. As further conditions of the Settlement Agreement, the Dealer will (a) satisfy all valid GPR claims pursuant to industry custom, and (b) waive all of its claims against API's bankruptcy estate, including any claims on account of GPRs or funds contributed to the estate. The Dealer will provide the Trustee with a quarterly reports as to the GPR claims paid.

NOTICE TO CONSUMERS

22. The Dealer has agreed that notice of the terms of the Settlement Agreement will be: (i) mailed to all their consumers in the API Program; and (ii) posted in their places of business, where other statutory notices are required. The language for this notice, which will supplement the notice on the Trustee's website at www.apibankruptcy.com, is incorporated as an exhibit to the Settlement Agreement.

RELIEF REQUESTED

23. The Trustee requests, pursuant to 11 U.S.C. § 363 and Bankruptcy Rule 9019, that this Court enter an order approving the terms of her proposed settlement agreements with the Dealer in the form attached hereto as Exhibit A.

BASIS FOR RELIEF SOUGHT

25. The Settlement Agreement is fair and reasonable and in the best interest of the estate and its creditors, and should be approved by the Court. Pursuant to Bankruptcy Rule 9019(a), after notice and a hearing, the court may approve a settlement or compromise. Fed. R. Bankr. P. 9019. Compromises are tools for expediting the administration of the case and reducing administrative costs and are favored in bankruptcy. *See Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000). In addition, to the extent that the Settlement Agreement implicates the use of property of the estate, such use is permitted under 11 U.S.C. § 363 because the Trustee has articulated sound business reasons. *See, e.g., In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991).

26. A bankruptcy judge has discretion whether to approve a settlement agreement. *In re American Reserve Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). The Court's discretion hinges upon whether the settlement is fair and equitable and in the best interest of the estate. *Depoister v. Mary M. Holloway Foundation*, 36 F.3d 582, 586 (7th Cir. 1994) (citations omitted).

27. In making its determination, this Court must first compare the terms of the settlement with the probable costs and benefits of litigation. *Id.*, quoting *Protective Committee for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (the Court should try to apprise itself “of all facts necessary for an intelligent and objective opinion on the probabilities of ultimate success should the claim be litigated”).

28. The Court should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance is the need to compare the terms of the compromise with the likely rewards of the litigation. *Id.* The Court should also consider the delay involved if the settlement is not approved, “including the possibility that disapproving the settlement will cause wasting of assets.” *Amer. Reserve Corp.*, 841 F.2d at 161.

29. Second, the Court should determine whether the settlement falls within the reasonable range of litigation possibilities. *In re Energy Coop.*, 886 F.2d 921, 929 (7th Cir. 1989). Such inquiry does not, however, require an evidentiary hearing. *Depoister*. Moreover, the latter determination is to be weighed in favor of settlement since a challenged settlement fails the test only if it falls below the lowest point in the range of reasonableness. *In re Telesphere Comm., Inc.*, 179 B.R. 544, 553 (Bankr. N.D. Ill. 1994) (internal citations omitted).

30. The Settlement Agreement is fair and equitable and in the best interest of the estate, and falls well within the range of litigation possibilities. If approved, the Settlement Agreement will resolve disputed claims against the funds in the Reserve Account while allowing more than 755 consumers to pass through this bankruptcy case with their pre-petition state law rights intact.

31. The proposed settlements will not only resolve the Dealer's claims that the funds in the Reserve Account are trust funds held for their benefit, but also myriad other claims asserted by the Dealer. Such claims include claims for: (1) the Dealer's payment and processing of claims tendered by consumers in the API Program, (2) the Dealer's procurement of reinsurance coverage packages for the outstanding VSCs, (3) alleged misrepresentations made to the Dealer with respect to Marathon's purported coverage of the API Program, and (4) losses incurred by the Dealer in terms of lost business as a result of API's failure to perform under the VSCs.

32. These disputes are the proper subject of a settlement considered under Rule 9019. *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 585-88 (7th Cir. 1994). In *Depoister*, the Seventh Circuit held that the Bankruptcy Court had properly approved a settlement pursuant to Rule 9019(a), without reference to 11 U.S.C. § 363 or other provisions of the Bankruptcy Code, and without having conducted an evidentiary hearing. In approving the settlement as in the best interest of the debtor's estate, the Bankruptcy Court reviewed the nature of the opposing claims and determined that (1) the estate's chances in prevailing in the disputed claims were low, (2) litigation in the absence of the proposed settlement would generate substantial legal fees that would deplete assets of the estate available for distributions to other creditors, (3) the process of evaluating the potential effects of the settlement on the other creditors was speculative at best, (4) the only party objecting to the proposed compromise had no tangible interest in the outcome, and (5) the trustee, an experienced bankruptcy practitioner, approved the compromise. *Id.* at 587.

33. The Seventh Circuit held that in view of the Bankruptcy Court's consideration of those factors, the Bankruptcy Court had "apprised himself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement." *Id.* at 587-88.

quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-34 (1968); *In re Am. Reserve Corp.*, 841 F.2d 159, 162 (7th Cir. 1987).

34. Similarly, there are sufficient facts before this Court to allow the approval of the Settlement Agreement. With approval of the Settlement Agreement, the benefits to API's estate are manifold. First, if consummated, the settlements will allow more than 755 consumers to receive, in large part, the benefit of their bargain with API by making approximately \$200,000.00 that was generated from the sale of VSCs to those consumers, available for the payment of their valid repair claims. Absent bankruptcy, these same funds would have been available to pay the claims of these same consumers. Bankruptcy is not intended to expand a creditor's pre-petition rights, but to honor those rights in an equitable way. The Settlement Agreement accomplishes just that.

35. Thus, the proposed settlement will preserve the prepetition rights under state law of the Dealer and their consumers with respect to the funds in the Reserve Account. *See Butner v. United States*, 440 U.S. 48, 55 (1978). The funds in the Reserve Account were generated from VSCs and Dealer Agreements, pursuant to which those funds were to be allocated for (a) the payment of the claims of the consumers who purchased the subject VSCs, and (b) under the MPP Program, upon the expiration of the VSCs, to the Dealer who sold the VSCs. The Settlement Agreement preserves those prepetition rights as nearly as possible, while at the same time making substantial funds available to the estate to maximize the recovery of other creditors.

36. As in *Depoister*, the process of evaluating the potential effects of the Settlement Agreement on consumer creditors other than the Dealer's customers is speculative. However, it is certain that these other consumers will receive more as a result of the proposed settlement in the form of (a) approximately \$17,000 in settlement proceeds, (b) the additional amounts that

may be generated from the use of the settlement proceeds, and (c) a larger *pro rata* distribution of API's assets resulting from the Dealer's waiver of all claims against the estate. Absent the proposed agreement, it is possible that the Dealer could prevail in their argument that the funds in the Reserve Account are trust funds held for their benefit, in which case all of the settlement proceeds would be excluded from the estate, and no funds would be available to pay consumers.

37. Furthermore, the Settlement Agreement will help facilitate confirmation of a plan. The proposed settlement will generate funds necessary for the responsible and expeditious administration of the estate, facilitate further agreements to ensure the protection of API's remaining creditors, substantially reduce the size of the creditor body, and thereby reduce the cost of the plan solicitation and balloting process. The Settlement Agreement will therefore foster a plan that maximizes value to all creditors. *See In re The Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 926-27 (S.D.N.Y. 1991) ("the Settlement is the necessary first step toward confirmation of the Plan."); *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 888-90 (Bankr. S.D.N.Y. 1990).

38. Moreover, to the extent that approval of the Settlement Agreement implicates the use of property of the estate, the Trustee has articulated sound business reasons for her proposed use of the Reserve Account in satisfaction of 11 U.S.C. § 363. *See, e.g., Schipper*, 933 F.2d at 515. Under Section 363, the Trustee may use property of the estate outside the ordinary course of business if she has an "articulated business justification," provides adequate notice to creditors, and a hearing is held at which creditors have an opportunity to object. *Id.*, quoting *In re Continental Airlines*, 780 F.2d 1223, 1226 (5th Cir. 1986). The Trustee's proposed settlement will ensure that more than 755 API consumers, whose purchase of the VSCs generated the funds in the Reserve Account, will receive payment for their valid repair claims; will protect the Dealer

who sold the VSCs generating those funds against potential litigation; preserve the Dealer's relationships with its customers; and will generate approximately \$17,000.00 for the benefit of API's estate. The Trustee respectfully submits that these are sound business reasons justifying approval of the proposed settlement.

39. This Court has previously approved substantially similar settlement agreements between the Trustee and other dealers and other entities. *See* Order Approving Trustee's Settlement With Dealers Financial Services, LLC entered on August 22, 2007 [Docket No. 330]; Order Approving Trustee's Settlement With Certain Dealers entered on October 30, 2007 [Docket No. 460]; Order Approving Trustee's Settlement With The Herb Chambers Companies entered on October 30, 2007 [Docket No. 461]; Order Approving Settlement Agreement Between the Trustee and The Travelers Indemnity Company entered on November 6, 2007 [Docket No. 463]; Order Approving Trustee's Settlement with the Gillman Companies entered on December 20, 2007 [Bankruptcy Docket No. 5307]; Order Approving Trustee's Second Settlement with certain Dealers entered on December 20, 2007 [Bankruptcy Docket No. 529]; Order Approving Trustee's Settlement with Premier Dealer Services, Inc. entered on January 22, 2008 [Bankruptcy Docket No. 564]; Order Approving Trustee's Settlement With Certain Dealers entered on March 13, 2008 [Docket No. 607].

NOTICE

40. Notice of this Motion has been posted on the Bankruptcy Court-approved website maintained by the Trustee in this bankruptcy case, and provided to the U.S. Trustee, API and its affiliates, counsel for the Official Committee of Unsecured Creditors, API's twenty largest creditors as listed in API's bankruptcy petition, all parties that have requested notice of all pleadings filed in the Bankruptcy Case, and the Attorney General of each state in which VSCs

and GPRs were sold. The Trustee requests that the limited notice of this Motion be deemed sufficient and further notice of the Motion be waived.

WHEREFORE, the Trustee respectfully requests entry of an order (a) authorizing the Trustee to enter into the agreement with the Dealer, substantially in the form set forth in Exhibit A hereto, and authorizing the transfer of funds as set forth therein; (b) approving the limited notice of the Motion as sufficient; and (c) granting such other and further relief as this Court deems just.

Dated: October 7, 2008

Respectfully submitted,

FRANCES GECKER, not individually, but as
Chapter 11 Trustee for the bankruptcy estate of
AUTOMOTIVE PROFESSIONALS, INC.

By: /s/ Zane L. Zielinski
One of her attorneys

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