

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

In re:)	Chapter 11
)	
AUTOMOTIVE PROFESSIONALS, INC.,)	Case No. 07-6720
)	
)	Honorable Carol A. Doyle
Debtor.)	

**TRUSTEE’S MOTION TO APPROVE SETTLEMENT AGREEMENT
WITH JPMORGAN CHASE BANK, N.A. AND CHASE BANK USA, N.A.**

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 JPMorgan Chase Bank, N.A. (“JPMC”) and Chase Bank USA, N.A. (“Chase Card,” and together with JPMC, “JPMorgan”), as described herein and more particularly set forth in the Settlement Agreement (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.

API’S COMMERCIAL CARD PROGRAM

7. Prior to the Petition Date, API was in the business of marketing and distributing vehicle service contracts (“VSCs”), which pay for the cost of automobile repairs for a fixed period of time after the expiration of the original manufacturer’s warranty. API sold VSCs in 46 states. As of the Petition Date, there were approximately 254,000 active VSCs.

The Card Agreement

8. Prior to the Petition Date, Chase Card provided API with commercial card services pursuant to that certain Chase Commercial Card Master Agreement dated July 16, 2002, and that certain First Amendment to Chase Commercial Card Agreement dated January 30, 2003 between Chase Card and API (collectively, the “Card Agreement”). (A copy of the Card Agreement is attached hereto as Exhibit B.)

9. Under API’s commercial card program, Chase Card made advances (the “Advances”) on behalf of API to fund payment of amounts due for automobile repairs made under API’s VSCs. In addition, API could earn an annual performance incentive (the “Incentive”) based on API’s level of usage of the commercial card program each year after certain adjustments including the deduction of certain defined “Losses”.

10. As of the Petition Date, under the Card Agreement, (a) API owed Chase Card approximately \$416,245 for unpaid Advances, and (b) API had earned Incentives totaling approximately \$354,000. In addition, Chase Card asserts that API is liable under the Card Agreement for certain fees, costs, and expenses, including late fees and attorneys' fees.

11. Chase Card maintains that after required adjustments under the Card Agreement no Incentive is due to API. Chase Card further asserts recoupment and setoff rights against all amounts Chase Card may owe API under the Card Agreement.

JPMC's Indemnification of Chase Card

12. JPMC agreed to indemnify Chase Card against any losses from API's failure to perform under the Card Agreement. Further to such agreement, API, its corporate affiliate Brokerage Professionals, Inc. ("BPI"), and JPMC entered into that certain letter agreement dated April 29, 2002 (the "Letter Agreement"). (A copy of the Letter Agreement is attached hereto as Exhibit C.)

13. Pursuant to the Letter Agreement, among other things, API agreed (a) to repay JPMC on account of any payments that JPMC made to Chase Card to indemnify Chase Card against any losses from API's failure to perform under the Card Agreement, and (b) to grant JPMC a security interest in certain funds maintained in a collateral account (the "Collateral Account") designated to secure API's obligations to JPMC on account of any indemnification payments that JPMC made to Chase Card.

14. As of the Petition Date, there was a negative balance in the Collateral Account.

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The DDA and Money Market Reserve Accounts

15. Prepetition and continuing to date, JPMC has provided API with a number of demand deposit accounts and related services. Such accounts are designated as Account Nos. 114-30059, 114-731314, 114-731527 and 114-925070 (collectively, the “DDAs”).

16. As of June 18, 2008, the aggregate principal balance and accrued interest on deposit in the DDAs totaled \$3,516,313.20.

17. Prepetition and continuing to date, API and BPI maintained certain money market mutual fund accounts for the benefit of API’s dealers and consumer customers (the “Reserve Accounts”) at JPMorgan Prime Money Market Fund (“JPM Fund”). BPI acts as the Escrow Trustee with respect to the Reserve Accounts.

18. At various times during the Bankruptcy Case, the Trustee and BPI have directed JPM Fund to redeem and transfer the balances in the Reserve Accounts to effectuate settlement agreements between the Trustee and other parties pursuant to orders entered by the Bankruptcy Court. JPMC has asserted that under 11 U.S.C. § 503, it is entitled to payment of its customary fees for effecting such transfers as an administrative expense of API’s bankruptcy estate.

19. The remaining Reserve Accounts as of June 13, 2008 are listed on Exhibit A to the Settlement Agreement.

The Settlement Agreement

20. Other than Chase Card’s right to recoup the unpaid Incentive owed to API from API’s unpaid balance under the Card Agreement, the Trustee disputes the asserted rights and claims of JPMorgan against the DDAs and the Reserve Accounts.

21. Nonetheless, in order to resolve any issues regarding the disposition of the DDAs and the Reserve Accounts, the Trustee and JPMorgan have engaged in good faith, arm’s-length

discussions with respect to resolving all of the respective rights, obligations, claims and defenses of JPMorgan, the Trustee, and API's bankruptcy estate in connection with API's commercial card program, the Card Agreement, the Letter Agreement, the DDAs, and the Reserve Accounts.

22. The Trustee and JPMorgan have elected to enter into a settlement, the terms of which are incorporated into the Settlement Agreement. Pursuant to the Settlement Agreement, JPMorgan has agreed to accept payment in the amount of \$40,000 (the "Settlement Payment") in full satisfaction of all of its claims, and claims that any of its affiliates may assert, against API's estate.

23. In addition, the Settlement Agreement provides that all API funds held by JPMorgan and JPM Fund, other than the Settlement Payment, will be transferred to the Trustee at the direction of the Trustee and BPI, as Escrow Trustee.

RELIEF REQUESTED

24. 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 agreement with JPMorgan Chase Bank, N.A. and Chase Bank USA, N.A., in the form attached hereto as Exhibit A.

BASIS FOR RELIEF SOUGHT

25. The Settlement Agreement is fair and reasonable and in the best interests of API's 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, the Trustee has articulated sound business reasons under 11 U.S.C. § 363. *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*, 36 F.3d at 586. 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 all of JPMorgan's claims to the funds in the DDAs and the Reserve Accounts and enable the Trustee to allocate those funds for the benefit of API's creditors pursuant to further orders of this Court.

31. The disputes between JPMorgan and the Trustee 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.

32. In approving the settlement as in the best interests 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. JPMorgan asserts recoupment and setoff rights against the funds on deposit in the DDAs and the Reserve Accounts, to the extent of unpaid Advances, accrued interest, fees and costs. After application of its recoupment defense against API's unpaid Incentive, JPMorgan estimates that its secured claim against API's estate totals approximately \$80,000.00.

35. In the exercise of her business judgment, the Trustee believes that payment to JPMorgan in the amount of \$40,000, in settlement of JPMorgan's secured claim against the estate, is fair and equitable and in the best interests of API's estate and its creditors.

36. The issues raised by JPMorgan under UCC Article 4A, the Bankruptcy Code and applicable setoff law both under the common law and as codified under New York law are significant. Such issues include whether JPMC and API have mutual, prepetition obligations that may be set off under 11 U.S.C. § 553 and New York debtor and creditor law, and whether JPMC has any additional rights of setoff under Article 4A, Section 502(c) of the UCC (involving funds wired into a customer's bank account).

37. Litigation of JPMorgan's secured claim therefore would be both time consuming and costly, likely exceeding the amount of the Settlement Payment, and there is no assurance that the Trustee would ultimately prevail.

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 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).

39. In exchange for the Settlement Payment, the Trustee’s proposed settlement will make millions of dollars currently on deposit in the DDAs and in the Reserve Accounts available for allocation to API’s creditors pursuant to further orders of the Court. On the other hand, litigation in the absence of the proposed settlement would generate substantial legal fees that would deplete the assets that could otherwise be distributed to creditors. The Trustee respectfully submits that these are sound business reasons justifying approval of the proposed settlement.

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, and all parties that have requested notice of all pleadings filed in the Bankruptcy Case. 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 JPMorgan Chase Bank, N.A. and Chase Bank USA, N.A., 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.

Respectfully submitted,

FRANCES GECKER, not individually, but as
Chapter 11 Trustee for AUTOMOTIVE
PROFESSIONALS, INC.

By: /s/ Micah R. Krohn
One of her attorneys

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