

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:) Chapter 11
)
GULF PACKAGING, INC.,) Case No. 15-15249
)
Debtor.) Hon. Pamela S. Hollis
)
) Hearing: June 14, 2016 at 10:30 a.m.
)

NOTICE OF MOTION

PLEASE TAKE NOTICE that on June 14, 2016 at 10:30 a.m., the undersigned shall appear before the Honorable Pamela S. Hollis in Courtroom 644, or whomever may be sitting in her place and stead, at the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, 219 S. Dearborn Street, Chicago, Illinois and will then and there present the *Motion for Entry of an Order pursuant to Bankruptcy Rule 9019 Approving the Settlement Between the Creditor Trustee and Xsys, Inc. and Request for Shortened and Limited Notice* a copy of which is attached hereto and herewith served upon you.

Dated: June 7, 2016

**JOSEPH MYERS, CREDITOR TRUSTEE
OF THE GULF PACKAGING, INC.
CREDITOR TRUST**

By: /s/ Shelly A. DeRousse
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Shelly A DeRousse, an attorney, hereby certify that on June 7, 2016, I caused a true and correct copy of the foregoing *Notice of Motion* and *Motion for Entry of an Order pursuant to Bankruptcy Rule 9019 Approving the Settlement Between the Creditor Trustee and Xsys, Inc. and Request for Shortened and Limited Notice* to be filed with the Court and served upon the following parties by the manner listed.

/s/ Shelly A. DeRousse

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**MOTION FOR ENTRY OF AN ORDER PURSUANT TO BANKRUPTCY RULE 9019
APPROVING THE SETTLEMENT BETWEEN THE CREDITOR TRUSTEE AND
XSYS, INC. AND REQUEST FOR SHORTENED AND LIMITED NOTICE**

Joseph Myers, not individually but solely as trustee (the “*Creditor Trustee*”) of the Gulf Packaging, Inc. Creditor Trust (the “*Creditor Trust*”), by and through his undersigned counsel, hereby moves (the “*Motion*”) this Court for entry of an order, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “*Bankruptcy Rules*”), approving the settlement between the Creditor Trustee and Xsys, Inc. (“*Xsys*”) and requesting shortened and limited notice of this Motion. In support of the Motion, the Trustee states as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(a) and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1408.
3. The predicate for the relief requested in this Motion is Bankruptcy Rule 9019.

¹ The last four digits of the Debtor’s tax identification number are 5030.

BACKGROUND

I. General Case Background

4. On April 29, 2015 (the “*Petition Date*”), Gulf Packaging, Inc. (the “*Debtor*”) filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois (the “*Court*”).

5. On December 15, 2015, the Court entered an order confirming the Debtor’s First Amended Chapter 11 Plan (the “*Plan*”) [ECF No. 266], which included approval of the Gulf Packaging, Inc. Creditor Trust Agreement (the “*Creditor Trust Agreement*”) [ECF No. 331].

6. The Plan became effective on January 22, 2016.

7. Pursuant to Section 3.2 of the Creditor Trust Agreement, the Creditor Trustee is authorized to, among other things, analyze, prosecute and settle avoidance actions under chapter 5 of the Bankruptcy Code.

II. The Data Preservation Order, Administrative Claim, and 2004 Motion

8. Prior to the Petition Date and during the course of the Debtor’s bankruptcy case, Xsys provided certain information technology services to the Debtor including hosting, managing and retrieving data, creating reports, and performing special projects upon request.

9. On February 10, 2016, the Creditor Trustee filed a Motion to Compel Xsys to Turnover the Debtor’s Books and Records to which Xsys objected.

10. On February 11, 2016, the Bankruptcy Court entered an order (the “*Data Preservation Order*”) [ECF No. 343] requiring Xsys to take all necessary steps to preserve and protect the Debtor’s data and restricting Xsys’ agents, attorneys, employees from manipulating, destroying, deleting or otherwise causing the loss of the data, and restricting the Creditor Trustee’s access to the Data after February 12, 2016.

11. On February 17, 2016, Xsys filed a Request for Payment of Administrative Claim, asserting that it has a claim in the amount of \$62,006.10 against the Debtor entitled to administrative priority (the “*Administrative Claim*”). On March 10, 2016, the Trustee filed an objection to the Administrative Claim (the “*Administrative Claim Objection*”).

12. On March 16, 2016, Xsys filed a Motion for (I) Authority to Issue Rule 2004 Subpoenas and Conduct Rule 2004 Examinations; and (II) Extension of Time to Reply to Objection to Administrative Claim (the “*2004 Motion*”) [ECF No. 361].

13. Xsys asserts that after the Plan’s effective date, it performed services for the benefit of the Creditor Trustee valued at approximately \$8,000 (the “*Post-Effective Date Claim*”).

III. The Avoidance Claims

14. On or about March 17, 2016, the Creditor Trustee filed an adversary proceeding in the Bankruptcy Case against Xsys, in the Bankruptcy Court as case number 16-00201 (the “*Adversary Proceeding*”), seeking recovery of allegedly preferential or fraudulent transfers in an amount not less than \$367,682.78 (the “*Xsys Avoidance Claims*”).

15. The Creditor Trustee also asserts that he holds certain chapter 5 avoidance claims (the “*Arman Avoidance Claims*” together with the Xsys Avoidance Claims, the “*Avoidance Claims*”) against Arman Sarkisian (“*Arman*”), the Debtor’s former chief executive officer.

16. Arman is married to Xsys’ chief executive officer, Melissa Sarkisian.

IV. The Settlement

17. In an effort to globally resolve the Data Preservation Order, the Administrative Claim, the 2004 Motion, the Post-Effective Date Claim, and the Avoidance Claims, the Creditor Trustee engaged in settlement discussions with Xsys and Arman and the Creditor Trustee, Xsys,

and Arman have agreed to settle their disputes pursuant to the terms set forth in the settlement agreement (the “*Settlement Agreement*”) attached hereto as Exhibit A.²

18. The relevant terms of the Settlement Agreement are as follows:³

- Xsys shall provide the services to the Creditor Trustee that it previously provided to the Debtor for an initial period of eighteen (18) months (the “*Service Period*”).
- Xsys shall receive credit for the value of its services (collectively, the “*Xsys Credit*”) as follows:
 - Hosting of the system at a fixed rate of \$650.00/month;
 - Archive, storage services, and other services necessary to protect against disaster or less of the main system at a fixed rate of \$950.00/month;
 - Services related to retrieving electronic data, creating reports, and performing special projects billed at \$150.00/hour;
- Beginning six (6) months after the effective date of the Settlement Agreement, the Creditor Trustee may unilaterally reduce the Service Period by providing written notice.
- The Administrative Claim, the Post-Effective Date Claim, and the Xsys Avoidance Claims shall be globally settled for the amount of \$100,000 (the “*Settlement Amount*”) payable by Xsys to the Creditor Trust. The Settlement Amount shall be due at the expiration of the Service Period.
- The Settlement Amount shall be reduced by the amount of the Xsys Credit. If the Xsys Credit exceeds the Settlement Amount, the Creditor Trust shall have no obligation to pay the Xsys Credit.
- The Creditor Trustee shall be unilaterally entitled to extend the Service Period by an additional six (6) months by providing written notice to Xsys.
- The Creditor Trustee shall forbear from pursuing the Arman Avoidance Claims during the Service Period or Extended Service Period. Any

² The parties have not yet executed the Settlement Agreement, but the Creditor Trustee does not anticipate any substantive changes to the Settlement Agreement. In the event any substantive changes are made, the Creditor Trustee will file an amended Exhibit A prior to the hearing.

³ The discussion of the Settlement Agreement set forth in this Motion is merely a summary of the settlement terms. All parties-in-interest should read the entire Settlement Agreement to understand the entire scope of the parties’ agreements. In the event of any discrepancy between the discussion in the Motion and the Settlement Agreement, the terms of the Settlement Agreement shall govern.

applicable statutes of limitations or deadlines to bring such claims shall be tolled.

- Arman will not interfere with the Creditor Trustee in the preparation, use and transmission of the data and will reasonably cooperate in working with the Creditor Trustee to pursue any claims on behalf of the Creditor Trust.
- Xsys, for and on behalf of itself and its representatives, participants, affiliates, agents, owners, attorneys, shareholders, successors, assigns and insurers (“*Xsys Releasors*”), hereby fully and completely remise, release and forever discharge the Creditor Trust, the Debtor, the Debtor’s bankruptcy estate, the Creditor Trustee and EisnerAmper LLP and their agents, attorneys, officers, directors, employees, successors, partners, owners, and insurers of and from any and all actions, causes of action, demands, debts, suits, sums of money, accounts, bonds, bills, covenants, contracts, controversies, agreements, promises, damages, judgments, deficiency judgments of any kind, assessments, liabilities, losses, obligations, expenses (including attorneys’ fees, interest and costs), claims and demands whatsoever, in law or in equity, whether known or unknown, matured or unmatured, that Xsys ever had, now has, shall or may have or hereinafter attempt to assert against the Creditor Trustee, the Creditor Trust, the Debtor and its estate that arise from or are related to the Debtor, the Creditor Trust, the Bankruptcy Case, or the Adversary Proceeding as well as any actions or omissions, issue or relationship that has occurred or could have existed from the beginning of time through the execution of this Settlement Agreement, including, without limitation, the Administrative Claim and Post-Effective Date Claim; provided that the Xsys Releasors shall not be deemed to have released any obligations of the Trustee imposed by the terms of this Settlement Agreement.
- The Creditor Trustee, for and on behalf of the Creditor Trust, the Debtor, the Debtor’s bankruptcy estate, EisnerAmper LLP and all of their respective representatives, participants, affiliates, agents, owners, attorneys, successors, assigns and insurers (the “*Trustee Releasors*”), hereby fully and completely remises, releases and forever discharges Xsys and their agents, attorneys, officers, directors, employees, successors, shareholders other than Arman), and insurers, of and from any and all actions, causes of action, demands, debts, suits, sums of money, accounts, bonds, bills, covenants, contracts, controversies, agreements, promises, damages, judgments, deficiency judgments of any kind, assessments, liabilities, losses, obligations, expenses (including attorneys’ fees, interest and costs), claims and demands whatsoever, in law or in equity, whether known or unknown, matured or unmatured, that the Creditor Trustee, Creditor Trust, Debtor, Debtor’s bankruptcy estate or EisnerAmper LLP ever had, now has, shall or may have or hereinafter attempt to assert

against Xsys; provided that the Creditor Trustee shall not be deemed to have released any obligations of Xsys or Arman imposed or any rights provided by the terms of this Settlement Agreement.

- The parties shall file a stipulation to dismiss the Adversary Proceeding.

RELIEF REQUESTED

19. By this Motion, the Creditor Trustee seeks entry of an order approving the Settlement Agreement pursuant to Bankruptcy Rule 9019(a) and approving shortened and limited notice of this Motion.

20. Pursuant to Bankruptcy Rule 9019(a), “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.” Fed. R. Bankr. P. 9019(a). Such settlements should be approved by a court if they are fair and reasonable and in the best interests of the debtor’s estate. *See Depoister v. Mary M. Halloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994) (“In conducting a hearing under Rule 9019(a), the bankruptcy court is to determine whether the proposed compromise is fair and equitable and in the best interests of the bankruptcy estate.”) (internal citations omitted); *In re Andreuccetti*, 975 F.2d 413, 421 (7th Cir. 1992) (holding that Bankruptcy Rule 9019(a) authorizes the court to approve a settlement if “the settlement is in the best interests of the estate”); *In re Energy Coop., Inc.*, 886 F.2d 921, 926-27 (7th Cir. 1989) (providing that “[t]he benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interests of the estate”); *In re Griffen Trading Co.*, 270 B.R. 883, 903 (Bankr. N.D. Ill.), *aff’d*, 270 B.R. 905 (N.D. Ill. 2001) (citing *LaSalle Nat’l Bank v. Holland (In re Am. Reserve Corp.)*, 841 F.2d 159, 161 (7th Cir. 1987)).

21. 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) (“Judges naturally prefer to settle complex litigation than to see it litigated to the hilt,

especially when it is litigation in a bankruptcy proceeding – the expenses of administering the bankruptcy often consume most or even all of the bankrupt’s assets.”); *Meyers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (“To minimize litigation and expedite the administration of a bankruptcy estate, compromises are favored in bankruptcy.”); *In re A&C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986).

22. The Court should grant a trustee’s request for approval of a settlement except in the very limited circumstance where a proposed settlement “falls below the lowest point in the range of reasonableness.” *Energy Coop.*, 886 F.2d at 929; *Official Comm. of Unsecured Creditors of Artra Group, Inc. v. Artra Group, Inc. (In re Artra Group, Inc.)*, 300 B.R. 699, 702 (Bankr. N.D. Ill. 2003) (same); *In re Rimsat, Ltd.*, 224 B.R. 685, 688 (Bankr. N.D. Ind. 1997) (providing that the court is required only “to canvas the issues in order to determine whether the settlement falls below the lowest point in the range of reasonableness”); *In re Telesphere Commc’ns, Inc.*, 179 B.R. 544, 553 (Bankr. N.D. Ill. 1994).

23. In determining whether a proposed settlement is appropriate, neither an evidentiary hearing nor a rigid mathematical analysis is required. *Depoister*, 36 F.3d at 586, 588 (evidentiary hearing not required); *In re Energy Coop.*, 886 F.2d at 928-29 (rigid mathematical analysis of settlement values not required); *In re Am. Reserve Corp.*, 841 F.2d at 163 (mini-trial not required). Rather, the Seventh Circuit offers the following guidelines:

Central to the bankruptcy judge’s determination is a comparison of the settlement’s terms with the litigation’s probable costs and probable benefits. Among the factors the bankruptcy judge should consider in [the] analysis are the litigation’s probability of success, the litigation’s complexity, and the litigation’s attendant expense, inconvenience, and delay.

Am. Reserve Corp., 841 F.2d at 161 (citations omitted).

24. The Settlement Agreement satisfies this standard. The Creditor Trustee and Xsys have informally exchanged their respective analyses of the Xsys Avoidance Claims and the

Creditor Trustee believes that Xsys may have at least a partial defense to some of the Avoidance Claims. In addition, the Creditor Trustee believes that the Administrative Claim and the Post-Effective Date Claim may be, at least in part, valid against the Creditor Trust. The Creditor Trustee recognizes the significant value in avoiding the fees, costs and uncertainty associated with further litigation with Xsys.

25. Furthermore, the Creditor Trustee understands that there are significant costs associated with transferring the Debtor's data which is currently stored with and hosted by Xsys. Xsys has institutional knowledge of the applicable software applications and operations that will most efficiently and economically aid the Creditor Trustee in pursuing actions against other recipients of avoidable and recoverable transfers.

26. In sum, the Creditor Trustee believes that it is in the best interests of creditors to enter into the Settlement Agreement in order to allow Xsys and the Creditor Trust to offset their claims against one another as well as permit the Creditor Trustee to receive the value of Xsys' data services and offset those services against the Xsys Avoidance Claims. In so doing, the Creditor Trustee will avoid the necessity of paying money out-of-pocket to transfer the data to another hosting service and take advantage of Xsys' institutional knowledge of the Debtor's data and software applications.

27. Accordingly, the Creditor Trustee submits that the Court should approve the Settlement Agreement pursuant to Bankruptcy Rule 9019(a).

REQUEST FOR SHORTENED AND LIMITED NOTICE

28. The Creditor Trustee submits that good cause exists to shorten and limit notice of this Motion because: (1) the Creditor Trustee has an urgent need to immediately access the Debtor's electronic data in connection with pursuing various chapter 5 avoidance actions, and (2)

the need to serve all creditors with this Motion would be unduly burdensome and costly to the Creditor Trust in light of the Creditor Trust's limited resources.

29. The Creditor Trustee is serving this Motion on seven (7) days' notice upon all parties who have appeared and requested notice in this bankruptcy case via the Court's ECF system. For the reasons stated above, the Creditor Trustee submits that cause exists to approve shortened and limited notice of this Motion.

WHEREFORE, the Trustee respectfully requests that the Court enter an order: (i) approving the Settlement Agreement, (ii) approving shortened and limited notice of this Motion, and (iii) granting such other and further relief as the Court deems just and proper.

Dated: June 7, 2016

**JOSEPH MYERS, CREDITOR TRUSTEE
OF THE GULF PACKAGING, INC.
CREDITOR TRUST**

By: /s/ Shelly A DeRousse
One of His Attorneys

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