IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	Chapter 11
	)	
KIEL BROS. OIL COMPANY, INC.,	)	Case No. 04-11121-BHL-11
KP OIL, INC.,	)	Jointly Administered
	)	
Debtors.	)	

MOTION TO APPROVE GLOBAL SETTLEMENT WITH MCLANE COMPANY, INC.

Comes now Kiel Bros. Oil Company, Inc. ("Kiel Bros.") and KP Oil, Inc. ("KP"), the Debtors herein (collectively, the "Debtors"), by counsel, and respectfully file their Motion for Global Settlement with McLane Company, Inc. ("Motion"). In support of this Motion, the Debtors respectfully represent:

1. On June 15, 2004 (the "Petition Date"), the Debtors filed voluntary Chapter 11 petitions under the United States Bankruptcy Code. The Debtors remain as debtors-in-possession while the assets of their respective estates are being liquidated in an orderly manner.

2. An Official Committee of Unsecured Creditors (the "Committee") has been appointed in these Chapter 11 cases.

3. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157(a) and 1334(b), 11 U.S.C. §105, and Bankruptcy Rule 9019. This Motion involves core proceedings under 28 U.S.C. §157(b)(2)(A), (B), (C), (F), and (O).

4. McLane Company, Inc., d/b/a McLane Grocery Distribution ("McLane") is a Texas corporation in the business of wholesale distribution of food and non-food products. Prior to the Petition Date, McLane was the primary or exclusive wholesale distributor for the 201 convenience stores operated by Kiel Bros in Indiana, Kentucky and Illinois. McLane asserts a

general, unsecured claim against the Debtors in the sum of approximately $7.3 million, plus a reclamation claim in the sum of approximately $660,000.00.

THE ADVERSARY PROCEEDING

5. On or about November 23, 2004, the Debtors filed Adversary Proceeding No. 04-00679 against McLane (the "Adversary Proceeding") alleging, *inter alia,* causes of action for breach of contract and fraud, and demanding damages in the range of $8 million to $10 million. The firm of Plews Shadley Racher & Braun ("Plews Shadley") represents Debtors as special counsel in the Adversary Proceeding.

6. On or about January 28, 2005, McLane filed an answer and counterclaim in the Adversary Proceeding denying liability for damages and alleging several affirmative defenses, including the right to set-off McLane's pre-petition claim in the sum of approximately $8 million.

7. Although formal discovery has not taken place in the Adversary Proceeding, the parties have shared documents, conducted negotiations, and submitted a Joint Pre-Trial Statement on March 4, 2005.

THE AVOIDANCE CLAIMS

8. Aside from the Adversary Proceeding, the Debtors believe that McLane received pre-petition payments that are avoidable and recoverable by the estate under 11 U.S.C. §§ 547, 548 and 550 (the "Avoidance Claims"). On March 17, 2005, the Debtors filed an application to employ Dann Pecar Newman & Kleiman, P.C. ("Dann Pecar") as special counsel to investigate and pursue the Avoidance Claims against McLane. Dann Pecar commenced its investigation of the Avoidance Claims on March 7, 2005.

9. Notwithstanding the relatively short time frame, as a result of the cooperation among counsel and the parties, Dann Pecar was able to perform sufficient due diligence to advise

the Debtors on a range of possible recoveries under the Avoidance Claims. Although Dann Pecar concluded that there is a wide range of possible Avoidance Claims against McLane, each with different probabilities and defenses, the cause of action believed to have the most merit is a preference claim for $1.2 million, subject to the new value defense at 11 U.S.C. § 547(c)(4).

10. McLane vigorously disputes any liability for the Avoidance Claims and asserts, among other defenses, that all payments made by the Debtors within ninety (90) days prior to the Petition Date were contemporaneous with the exchange of new value (i.e. new deliveries of goods), made within the ordinary course of business, and protected by the subsequent delivery of new value to the Debtors.

THE MEDIATION AND SETTLEMENT

11. By agreement of the Debtors, the Committee, and several creditors, a mediation process began in January, 2005, primarily to resolve claims asserted by HomeFederal Bank. The scope of that mediation expanded in the course of the process, to include the claims by and between the Debtors and McLane." On March 29, 2005, an all-day mediation session was held with the ambitious goal of resolving substantially all of the major issues remaining in this case.[1] Although initially there was concern that the mediation was premature at least with respect to the Adversary Proceeding and the Avoidance Claims against McLane, it was apparent to the Debtors and other parties that only a quick resolution of the pending disputes could produce a distribution for unsecured creditors.

12. Prior to the mediation, the Debtors and McLane agreed that the parties should attempt to reach a global settlement resolving both the Adversary Proceeding and the unfiled

[1] James Carlberg served as the mediator. The following parties or their counsel participated in the mediation: the Debtors, Committee, Home Federal, the Guarantors, BP, and McLane.

Avoidance Claims. Following extended negotiations, and with the assistance of the mediator, the Debtors and McLane agreed to the following global settlement, which would become effective upon entry of a final order approving this Motion:

(a) McLane shall pay the sum of $400,000 to the Debtors;

(b) McLane shall release its rights under the Theodore Kiel guaranty[2];

(c) McLane shall withdraw any and all claims against the Debtors or their estates including, without limitation, the pre-petition claim in the sum of approximately $7.3 million and the alleged reclamation claim of approximately $660,000, and McLane shall receive no distribution whatsoever from the Debtors' estates[3];

(d) The Debtors shall release McLane from any and all claims (other than the performance of the proposed settlement), including without limitation claims that were or could have been asserted in the Adversary Proceeding, Avoidance Claims, and claims for post petition credits and rebates;

(e) McLane and Debtors both agree and represent that they have not assigned or conveyed any of the claims or rights referenced in this agreement in any manner to any other party and that each holds the rights and claims which are withdrawn, waived, released or assigned in this Motion. McLane and Debtors further agree that any claim that is withdrawn by McLane will not be assigned, conveyed or transferred to any other

[2] The Debtors and Theodore Kiel have agreed to a resolution of disputed claims between them, which is the subject of a separate settlement motion, filed contemporaneously herewith. Under the terms of that separate settlement, Theodore Kiel has agreed to pay the Debtors' estates the sum of $400,000 in consideration for the release by McLane and HomeFederal of Theodore Kiel's guarantees to these two creditors, and a waiver of any subrogation rights arising by virtue of such payment. As partial consideration for McLane releasing Ted Kiel from his Guaranty Ted Kiel will grant McLane a general release.

[3] There is a certain guaranty by Greg Pence to McLane which is not affected by this Settlement.

person or entity in the future, nor be later asserted in the Debtors' bankruptcy cases by McLane or any party claiming by, on behalf, or through McLane; and

(f) The Adversary Proceeding shall be dismissed, with prejudice, (said subparagraphs (a)-(f), together, are referred to herein as the "Settlement").

13. The Debtors, in the exercise of their sound business judgment, believe that the Settlement is reasonable and in the best interests of the estate. With respect to the Adversary Proceeding, the Settlement reflects the reality that even a significant damage recovery against McLane would be subject to set-off by McLane's equally large unsecured claim. Moreover, a recovery against McLane under the Adversary Proceeding would have entailed protracted and costly litigation, with uncertain results.

14. The Settlement is also a reasonable compromise of the Avoidance Claims. The Settlement allows the estate to save the expense of litigating the Avoidance Claims, which are subject to bona fide defenses, while allowing the estate to realize a substantial recovery (estimated at 75% of the most likely recovery in litigation).

15. Significantly, the Settlement will generate significant benefit to the estate, including $400,000 in cash, $400,000 in consideration from the Kiel guaranty and the elimination of significant unsecured and reclamation claims. The fact that the Settlement was the product of a collaborative effort, involving an impartial mediator who proposed the basic structure of the Settlement, further demonstrates the reasonableness of the Settlement. Finally, the Settlement will avoid expensive litigation and make it more likely that unsecured creditors will receive some distribution.

RELIEF REQUESTED

16. Pursuant to Bankruptcy Rule 9019, after notice and opportunity for a hearing, the Debtors request that the Court enter an order approving the Motion and consummation of the Settlement.

17. Bankruptcy Rule 9019 provides that the Court, after notice and a hearing, may approve a compromise or settlement. See Fed. R. Bankr. P. 9019(a). Under §363(b) and Bankruptcy Rule 9019, a bankruptcy court should approve a proposed compromise if it is fair and equitable and in the best interest of the estate. See Depoister v. Mary M. Holloway Found., 36 F.3d 582, 586 (7th Cir. 1994); In re Energy Coop., Inc., 886 F.2d 921, 927 (7th Cir. 1989) ("[t]he benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interest of the estate."). The Seventh Circuit has offered the following guidance to courts in making such determinations:

> 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 his analysis are the litigation's probability of success, the litigation's complexity, and the litigation's attendant expense, inconvenience, and delay.

LaSalle Nat'l Bank v. Holland (In re American Reserve Corp.), 841 F.2d 159, 161 (7th Cir. 1987) (citations omitted).

WHEREFORE, the Debtors respectfully request that the Court approve the Motion and Settlement, and grant such other relief as is just and proper.

KIEL BROS. OIL COMPANY, INC. and
KP OIL, INC.

/s/ William L. O'Connor
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served by the Court's electronic service, via e-mail delivery, and/or by U.S. mail on this 4th day of April, 2005.

/s/ William L. O'Connor
William L.O'Connor