IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In Re:	)	
	)	Case No. 307-09024
SOFA EXPRESS, INC.,	)	Chapter 11
	)	Hon. George C. Paine
Debtor.	)	
	)	

MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR STANDING AND AUTHORITY TO COMMENCE AND PROSECUTE NON-INSIDER AVOIDANCE ACTIONS ON BEHALF OF THE DEBTOR'S ESTATE AND FOR SHORTENED NOTICE AND EXPEDITED HEARING

The Official Committee of Unsecured Creditors (the "Committee") of Sofa Express, Inc. (the "Debtor"), by and through counsel, hereby moves this Court, pursuant to sections 105, 1103(c)(5) and 1109(b) of the Bankruptcy Code[1] for the entry of an Order granting the Committee standing and authority to commence and prosecute avoidance actions under Chapter 5 of the Bankruptcy Code on behalf of the Debtor's estate against non-insider defendants. In support of its Motion, the Committee respectfully states as follows:

I. BASIS FOR EXPEDITED RELIEF

1. Pursuant to L.B.R. 9075-1, the Committee requests the Court grant, on an expedited basis, the Committee's request for standing to pursue avoidance actions under Chapter 5 of the Bankruptcy Code on behalf of the Debtor's estate. The Debtor consents to the Committee's pursuit of these actions.

[1] 11 U.S.C. § 101, et seq. shall be referred to herein as the "Bankruptcy Code".

2. Expedited relief is necessary and appropriate because the statute of limitations for pursuing avoidance actions expires on December 6, 2009. The Committee requests standing be granted it as soon as possible so that it can begin filing avoidance action complaints before the end of November.

3. Notice of this Motion and the Order shortening notice and setting the Motion for expedited hearing, if entered, will be given to all parties on the Master Service List by BMC Group, Inc., Debtor's servicing agent, pursuant to the Order on Debtor's Motion for an Order Pursuant to Sections 102 and 105(a) and Bankruptcy Rules 2002(m) and 9007 Establishing Certain Notice, Case Management and Administrative Procedures, entered December 10, 2007, Docket No. 72.

4. The Committee requests the Court set this Motion and any objections thereto for hearing on November 17, 2009 or as soon thereafter as possible. The Committee requests the Court set November 12, 2009 as the deadline for filing any objections to the Motion. A proposed order is submitted herewith.

5. In further support of the substantive relief requested, the Committee states as follows.

II. BACKGROUND

6. On December 6, 2007 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

7. The Debtor has continued to operate and manage its business and property as a debtor-in-possession under sections 1107 and 1108 of the Bankruptcy Code. As of this date, no trustee or examiner has been appointed pursuant to section 1104 of the Bankruptcy Code.

8. On December 13, 2007, the United States Trustee appointed the Committee and its members. Pursuant to an order of this Court dated January 15, 2008, the Committee was authorized to retain Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP as its counsel and Harwell Howard Hyne Gabbert & Manner, P.C. as its local counsel *nunc pro tunc* from December 13, 2007.

9. In accordance with its fiduciary duties to unsecured creditors of the Debtor's estate, the Committee's accountants, CBIZ Accounting, Tax and Advisory of New York, LLC, formerly, Mahoney Cohen & Company, CPA, P.C. ("CBIZ Mahoney"), have conducted an initial analysis of Debtor's payment records to determine the viability of preference avoidance actions under section 547 of the Bankruptcy Code and fraudulent conveyance actions under section 548. CBIZ Mahoney's investigation is ongoing.

10. As a result of this investigation, the Committee has identified avoidance actions under Chapter 5 of the Bankruptcy Code that it believes are viable and likely to benefit the estate. All creditors are advised that they might be subject to an avoidance action, especially if they received payments from the Debtor in the 90 days preceding the Petition Date.

11. The Committee has consulted with the Debtor, and the Debtor consents to the Committee having standing to pursue avoidance actions under Chapter 5 of the Bankruptcy Code against non-insider defendants on behalf of Debtor's estate.

12. Previously, with the Debtor's consent, the Committee was given standing to pursue claims against Debtor's insiders. Standing was given by the Expedited Order Granting the Expedited Motion of the Official Committee of Unsecured Creditors for (I) Authority to Prosecute Certain Claims of the Debtor's Estate; (II) Clarification Regarding the Committee's

Deadline to File Claims Against Certain Parties; and (III) Permission to File Complaint Under Seal, entered April 30, 2008.

III. JURISDICTION

13. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

IV. RELIEF REQUESTED

14. The Committee requests authority from the Court and recognition of the Committee's derivative standing, pursuant to sections 105, 1103(c)(5) and 1109(b) of the Bankruptcy Code, to assert and prosecute avoidance actions under Chapter 5 of the Bankruptcy Code against non-insiders on behalf of the Debtor's estate.

V. ARGUMENT

15. The Committee should be authorized to pursue certain avoidance actions under to Chapter 5 of the Bankruptcy Code against non-insiders.

16. Chapter 11 debtors-in-possession acting as trustees are obligated to maximize the value of the estate for the benefit of creditors. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). They have a duty to conserve and protect assets of the estate, including accounts receivable. *Canadian Pacific Forest Products Ltd. v. J.D. Irving Ltd* (*In re The Gibson Group, Inc.)*, 66 F.3d 1436, 1445 (6th Cir. 1995).

17. Normally, the trustee, or debtor-in-possession acting as trustee, has the exclusive right to prosecute claims held by a bankrupt estate. *In re Van Dresser Corp.*, 128 F.3d 945, 947 (6th Cir. 1997). However, if a debtor does not initiate such actions, the Court may authorize a creditor or creditors' committee to prosecute the claims on the estate's behalf. *See Gibson*, 66 F.3d at 1446; *see also In re STN Enters., Inc.*, 779 F.2d 901, 904 (2d Cir. 1985)(11 U.S.C. §§

1103(c)(5) and 1109(b) imply a qualified right for creditors' committees to initiate causes of action held by the debtor's estate with the approval of the bankruptcy court.).

18. In deciding whether a creditors' committee should be granted standing to sue on behalf of an estate, a Court should consider the following factors:

> (1) a demand has been made upon the statutorily authorized party to take action; (2) the demand is declined; (3) a colorable claim that would benefit the estate if successful exists, based on a cost-benefit analysis performed by the court; and (4) the inaction is an abuse of discretion ("unjustified") in light of the debtor-in-possession's duties in a Chapter 11 case.

Gibson, 66 F.3d at 1446.

19. In this case, the Committee satisfies each factor of the Sixth Circuit's test for standing as discussed below.

A. The Debtor consents to the Committee's standing and pursuit of the claims.

20. The Committee made demand on the Debtor to prosecute the non-insider avoidance actions or consent to the Committee's pursuit of the avoidance actions on behalf of the Debtor's estate. The Debtor has given its consent and agrees to the Committee being given standing to pursue these claims.

B. The Claims the Committee Seeks Authority to Pursue Are Colorable

21. The Committee would only pursue those avoidance actions pursuant to Chapter 5 of the Bankruptcy Code that are colorable claims. Colorable claims for relief are those that "on appropriate proof would support a recovery." *Gibson*, 66 F.3d at 1446 (quoting *In re STN Enters., Inc.*, 779 F.2d at 905).

22. Accordingly, the Committee assures parties in interest and the Court that it would only pursue colorable actions that have the potential to benefit the estate. The Committee's professionals have already begun analyzing Debtor's records to identify avoidance action claims

and also determine which of those claims are colorable and likely to result in a recovery to the estate.

C. The Debtor's Inaction Is Unjustified

23. The Debtor liquidated all of its assets at the outset of this case for the benefit of secured creditors. Along with the Debtor's causes of action against Insiders, avoidance actions under Chapter 5 of the Bankruptcy Code are the only assets of the Debtor's estate that may benefit unsecured creditors. The Debtor is not continuing in business, and it has no incentive to litigate claims for the benefit of creditors. The Debtor has consented to the Committee pursuing the avoidance actions on behalf of the Debtor's estate and creditors.

24. The Committee will adequately represent the interests of all creditors by pursuing claims which will ultimately augment Estate assets.

WHEREFORE, the Committee respectfully requests that the Court (i) grant the Committee standing and authority to commence and prosecute avoidance actions pursuant to Chapter 5 of the Bankruptcy Code against non-insiders for the benefit of the Debtor's estate; (ii) set this Motion for hearing on shortened notice; and (iii) grant such other, further and different relief as the Court may deem warranted.

Respectfully submitted,

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