

ORIGINAL

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

030000-Pu

IN RE:)
)
PATHNET OPERATING, INC.,)
)
Debtor.)
_____)

Case No. 01-12266-SSM
Chapter 7

COMMISSION
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**MOTION AND MEMORANDUM IN SUPPORT OF
MOTION FOR AUTHORITY TO SETTLE CLASSES OF
AVOIDANCE CLAIMS AND CONTROVERSIES PURSUANT
TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019(b)**

Gordon P. Peyton, Chapter 7 Trustee (the "Trustee") for Pathnet Operating, Inc. (the "Debtor"), by and through the undersigned counsel, pursuant to Rules 9019(a) and 2002(a)(3) of the Federal Rules of Bankruptcy Procedure, hereby moves for an order authorizing the Trustee to settle classes of avoidance claims and controversies, within the parameters set forth herein, without the need of further Court approval. In so doing, the Trustee seeks an Order modifying the notice and approval procedures regarding the compromise of controversies.

The grounds and authorities for this request are more fully set forth below.

FACTUAL BACKGROUND

The Trustee is engaged in prosecuting, settling and collecting the estate's claims for avoidance of transfers pursuant to Chapter 5 of the Bankruptcy Code. The Trustee has filed

- AUS _____
- CAF _____
- CMP _____
- COM _____
- CTR _____
- ECR _____
- GCL _____
- OPC _____
- MMS _____
- SEC _____
- OTH _____

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approximately seventy avoidance actions (the “Avoidance Actions”). The *ad damnum* clauses in these actions ranges from approximately \$5,000 to \$900,000.

A significant number of the Avoidance Actions are for relatively modest claims with initial demands in the range of \$20,000 or less. When taking into consideration the cost of prosecuting these actions, defenses that may reduce the amount of the claims, the uncertainty of litigation, and questions about collecting on judgments that may be obtained, it is readily apparent that it may be advantageous to reach a compromise of the claims. Indeed, in this case, the calculus for valuing preference claims is distorted somewhat by the increased likelihood that judgments, even if obtained, may be of little value since so many of the defendants are companies in the telecommunications business, which is in considerable distress.¹

Were the Trustee required to file a motion and serve notice on all creditors and other parties in interest pursuant to Bankruptcy Rules 9019 and 2002(a)(3) requesting Court approval for each settlement whenever he resolves an Avoidance Action, the expense to the estate and demand on the Court’s time would be considerable. In order to seek efficiencies for the estate and to increase the return to creditors, the Trustee proposes that the Court modify the compromise procedures pursuant to Bankruptcy Rule 9019(b), and grant the Trustee authority to settle classes of claims within certain parameters without further necessity of notice or Court approval.

¹ In fact, a number of the companies that received allegedly preferential payments are debtors in various bankruptcy proceedings.

LEGAL AUTHORITY

BANKRUPTCY RULE 9019(b) AUTHORIZES COMPROMISES PROCEDURES OF THE TYPE CONTEMPLATED HEREIN.

1. Bankruptcy Rule 9019(b)

Federal Rule of Bankruptcy Procedure 9019(b) sets forth the requirements for the settlement or compromise of controversies after notice to all creditors and a hearing upon each such proposed compromise. Rule 9019(b) provides an exception to this procedure:

(b) Authority to Compromise or Settle Controversies Within Classes.

After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the Trustee to compromise or settle controversies within such class or classes without further hearing or notice.

Rule 9019(b) (emphasis added). Where, as here, numerous settlements are anticipated, the Court in its discretion may grant the Trustee the authority to settle under Rule 9019(b). *Collier on Bankruptcy*, §9019.03 at 9019-5-6 (15th Ed. Revised 2001). In Boyd v. North End Auto Sales, Inc. (In re Check Reporting Service), 137 B.R. 653 (W.D. Mich. 1992), the Bankruptcy Court entered an order under Rule 9019(b) authorizing the trustee in that case to settle without further notice and hearing “any of the pending preferential transfer adversary proceedings . . . for no less than twenty-five percent (25%) of the amount of the judgment requested by the Trustee in the proceeding which it settled.” Id. at 656.

The Trustee proposes that this Court authorize him to consummate settlements within the following settlement ranges and procedural guidelines (the “Settlement Procedures”):

(a) Net Preference Claims² Less Than \$10,000:

For any Avoidance Actions in which the *ad damnum* clause is \$10,000 or less, the Trustee shall be authorized to settle such action in his discretion without further notice or Court order;

(b) Net Preference Claims Between \$10,000 and \$100,000:

For any Avoidance Actions in which the *ad damnum* clause is more than \$10,000 but less than \$100,000, the Trustee shall be authorized to settle such action without further notice or order of the Court so long as the present value of the proposed settlement is at least 65% of the amount of the actual claim, after reduction of the claim to account for properly documented new value;

(c) Net Preference Claims Exceeding \$100,000:

For any Avoidance Action in which (i) the *ad damnum* clause is greater than \$100,000 or (ii) the proposed settlement is for less than 65% of the net preference claim, the Trustee shall be authorized to settle such action without further order of the Court if:

(1) The Trustee provides notice of the proposed settlement (the "Settlement Notice") to (i) the Office of the United States Trustee; (ii) the secured lenders (Nortel Networks Inc. and Cisco Systems Capital Corporation) and (iii) all parties who requested notice pursuant to Bankruptcy Rule 2002 (the "Notice Parties");

(2) The Settlement Notice shall contain (i) the amount of the *ad damnum* clause, (ii) the name of the defendant, (iii) an analysis of the reasons underlying the Trustee's decision to accept the proposed settlement, and (iv) instructions regarding the procedure for lodging an objection to the proposed settlement;

(3) The Notice Parties shall have fourteen days, unless extended by the Trustee, from the date of the Settlement Notice to file with the Court and serve on counsel to the Trustee and the other Notice Parties an objection, if any, to the proposed settlement; and

² The term "net preference claims" as used herein means the total preference period transfers made to a creditor less the value to the debtor of subsequent extensions of credit (new value) documented by the transferee.

(4) No objection is properly and timely filed in accordance with these procedures.

If an objection is timely filed by a Notice Party, a hearing on the proposed compromise will be scheduled and noticed to the United States Trustee and the Notice Parties.

2. Bankruptcy Rule 2002(a).

Pursuant to Bankruptcy Rule 2002(a), a Trustee is to provide at least twenty days notice by mail of ...

(3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the Court for cause shown directs that notice not be sent. (emphasis added).

This estate has hundreds of unsecured creditors. The costs of producing and mailing notices of settlement to all creditors, whether or not they desire such notice, is burdensome to the estate.

The Trustee submits that limiting notice and authorizing compromises of claims as provide herein will preserve resources of the estate. All known creditors are being served with this Motion and would, upon request, receive notice of proposed compromises as set forth in the procedures requested in this Motion. No creditor that requests notice of proposed compromises will be deprived of such notice.

In summary, the Trustee submits that the proposed compromise authority is reasonable and appropriate under the circumstances in this case and will result in a more efficient and economic administration of the estate. The Trustee further submits that, for the reasons set forth in this Motion, good cause exists to modify the notice provisions of Rules 2002 and 9019 as requested herein.

NOTICE

The Trustee is providing notice of this Motion to the Office of the United States Trustee, the creditors in this case, and to all other parties that have requested notice and service of papers in this case.

CONCLUSION

For the forgoing reasons, the Trustee respectfully requests that the Court enter an Order Modifying Compromise Procedures and Granting Settlement Authority on the terms requested in this Motion.

Respectfully submitted,

**Gordon P. Peyton, Chapter 7
Trustee for Pathnet Operating, Inc.**

By: Piper Rudnick LLP

/s/ J. David Folds

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and Memorandum in Support of Motion was served electronically as available, and mailed, postage prepaid, on June 11, 2003 to the Office of the U.S. Trustee, and via first class mail to the creditors in this case and to entities who have requested notice pursuant to Bankruptcy Rule 2002 as set forth on the attached service list.*

/s/ J. David Folds

J. David Folds

*Pursuant to Local Rule 5005-1(C) (8), the attached service lists are not being served on each of the parties, but are attached to the original Certificate of Service filed with the Court.

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
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PATHNET OPERATING, INC.,)	Case No. 01-12266-SSM
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Debtor.)	Chapter 7
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ORDER

Having considered the Motion and Memorandum in Support of Motion for Authority to Settle Classes of Avoidance Claims and Controversies Pursuant to Federal Rule of Bankruptcy Procedure 9019(b) (the "Motion") filed by Gordon P. Peyton, Chapter 7 Trustee (the "Trustee") for Pathnet Operating, Inc. (the "Debtor"), any opposition to the Motion, and the presentation by counsel on the Motion, and finding that there is cause to grant the relief requested, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

- (a) The Motion is Granted;
- (b) The Trustee shall have the authority to consummate settlements in accordance with the Settlement Procedures set forth in the Motion; and
- (c) The notice requirements of Bankruptcy Rule 2002 are modified as requested in the Motion, and the Trustee shall be required to provide notice of proposed settlements as set forth in the Motion.

It is so ORDERED this ____ day of _____, 2003.

Stephen S. Mitchell
United States Bankruptcy Judge