

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

RMS Titanic Inc., *et al.*¹,

Debtors.

CHAPTER 11

Case No. 3:16-bk-002230-PMG

(Jointly Administered)

**MOTION OF THE DEBTORS FOR APPROVAL OF SETTLEMENT
AGREEMENT WITH 417 FIFTH AVE REAL ESTATE LLC PURSUANT TO
RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**

**NOTICE OF OPPORTUNITY TO
OBJECT AND REQUEST FOR HEARING**

Pursuant to Local Rule 2002-4, the Court will consider the relief requested in this paper without further notice or hearing unless a party in interest files a response within 21 days from the date set forth on the attached proof of service, plus an additional three days for service if any party was served by U.S. Mail.

If you object to the relief requested in this paper, you must file a response with the Clerk of the Court at Bryan Simpson Courthouse, 300 North Hogan Street, Suite 3-150, Jacksonville, Florida 32202 and serve a copy on the movant's attorney, Daniel F. Blanks, Esq., Nelson Mullins Riley & Scarborough LLP, 50 N. Laura Street, Suite 4100, Jacksonville, Florida, 32202, and any other appropriate persons within the time allowed. If you file and serve a response within the time permitted, the Court will either schedule and notify you of a hearing or consider the response and grant or deny the relief requested without a hearing.

¹¹ The Debtors in the chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number include: RMS Titanic, Inc. (3162); Premier Exhibitions, Inc. (4922); Premier Exhibitions Management, LLC (3101); Arts and Exhibitions International, LLC (3101); Premier Exhibitions International, LLC (5075); Premier Exhibitions NYC, Inc. (9246); Premier Merchandising, LLC (3867); and Dinosaurs Unearthed Corp. (7309). The Debtors' service address is 3045 Kingston Court, Suite I, Peachtree Corners, Georgia 30071.

If you do not file a response within the time permitted, the Court will consider that you do not oppose the relief requested in the paper, will proceed to consider the paper without further notice or hearing, and may grant the relief requested.

RMS Titanic, Inc. ("RMST") and its affiliate debtors and debtors in possession in the above-captioned case (collectively, the "Debtors") by and through their undersigned counsel, hereby move the Court (the "Motion") for the entry of an order, substantially in the form attached hereto as Exhibit A, authorizing the Debtors to enter in to a settlement on the terms reflected in the *Mediated Stipulation to File a Joint 9019 Motion* (the "Stipulation") a copy of which is attached hereto as Exhibit B, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this Motion, the Debtors respectfully state as follows:

Jurisdiction and Venue

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

Factual Background

2. On April 9, 2014, the parent corporation of RMST, Premier Exhibitions, Inc. ("Premier"), and 417 Fifth Ave Real Estate LLC (the "Landlord") entered into that certain *Standard Form of Office Lease* of non-residential real property in New York, New York (the "Lease") to showcase the Debtors' "Saturday Night Live: The Experience" exhibition. The Lease was subsequently amended pursuant to that certain

First Amendment to Lease, dated November 24, 2014 (the “Lease Amendment” and, together with the Lease, the “Amended Lease”).

3. The Amended Lease provided, among other things, a Landlord advance of \$5.5 million to complete the buildout of the leased premises (the “Construction Allowance”).

4. The Construction Allowance was paid by the Landlord directly to various contractors and other third parties – not to the Debtors – for improvements to the leased premises.

5. Additionally, the Amended Lease designated the Construction Allowance as “Additional Amortized Rent” and provided for its reimbursement to the Landlord as part of the fixed monthly rent in an amount set forth in an amortization table annexed to the Amended Lease.

6. After substantial completion of the buildout process, the lease commenced in July 2014 and the Debtors began presenting exhibitions in the leased space in May 2015.

7. Unfortunately, the New York space was unprofitable for the Debtors and on or about June 6, 2016, the Debtors were forced to close all exhibitions operating in the space.

Procedural Background

8. On June 14, 2016 (the “Petition Date”), each of the Debtors filed a voluntary petition in this Court for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”).

9. The Debtors continue to manage and operate their businesses as debtors in possession under Bankruptcy Code Sections 1107 and 1108.

10. On August 24, 2016, the United States Trustee appointed an Official Committee of Unsecured Creditors (the “Creditors’ Committee”) and an Official Committee of Equity Security Holders (the “Equity Committee”, and together with the Creditors’ Committee, collectively, the “Committees”) [D.E. 166, 167].

11. On June 24, 2016, the Debtors filed their Motion to Reject Unexpired Lease of Non-Residential Real Property Effective *Nunc Pro Tunc* to the Petition Date [D.E. 46] (the “Lease Rejection Motion”) to reject the Amended Lease.

12. On June 30, 2016, the Landlord filed its Response in Opposition to Debtors’ Motion to Reject Unexpired Lease of Non-Residential Real Property Effective *Nunc Pro Tunc* to the Petition Date [D.E. 61] (the “Lease Rejection Response”).

13. On July 26, 2016, after a hearing and oral arguments, this Court granted the Debtor’s Lease Rejection Motion, [D.E. 107], as set forth in the corresponding Order Granting Debtors’ Motion to Reject Unexpired Lease of Non-Residential Real Property Effective *Nunc Pro Tunc* to the Petition Date, dated August 9, 2016 [D.E. 125].

14. Subsequently, on October 24, 2016, the Landlord filed two proofs of claim against RMST:

- a. Claim No. 30-1, as subsequently amended by Claim No. 30-2 which together asserted a general unsecured claim in the total amount of \$8,127,546.66, comprised of the unpaid principal balance of the Construction Allowance in the amount of \$5,087,381.34 and the interest thereon totaling \$3,040,165.32 (the "Construction Allowance Claim"); and
- b. Claim No. 32-1, as subsequently amended by Claim No. 32-2 which asserted a general unsecured claim in the amount of \$4,466,666.60 for the remaining rent reserved under the Amended Lease, purportedly limited by 11 U.S.C. § 502(b)(6) (the "Remaining Rent Claim").

15. The Landlord also filed virtually identical claims against Premier in the bankruptcy case captioned as *In re Premier Exhibitions, Inc.*, Case No. 3:16-bk-02232, on November 20, 2017, as follows:

- a. Claim No. 48-1, which asserted a general unsecured claim in the amount of \$4,466,666.60 for the remaining rent reserved under the Amended Lease, purportedly limited by 11 U.S.C. § 502(b)(6); and
- b. Claim No. 49-1, which asserted a general unsecured claim in the amount of \$8,127,546.66, comprised of the unpaid principal balance of the Construction Allowance in the amount of \$5,087,381.34 and the interest thereon totaling \$3,040,165.32.

16. The Construction Allowance Claim included a footnote stating that the Landlord would seek to amend its Remaining Rent Claim to include the amounts due for the Construction Allowance should the Construction Allowance Claim be disallowed.

17. On February 13, 2017, the Debtors filed their Objection to Claim No. 30 [D.E. 471], asserting that the Construction Allowance Claim should be disallowed in its entirety because the Construction Allowance was additional rent and, therefore, the

Construction Allowance Claim must be calculated, and capped, pursuant to 11 U.S.C. § 502(b)(6) (the “Construction Allowance Claim Objection”).

18. On February 28, 2017, the Landlord filed its response to the Construction Allowance Claim Objection (the “Claim Objection Response”) [D.E. 488] opposing the relief sought by the Construction Allowance Claim Objection and requesting an evidentiary hearing thereon.

19. Thereafter, on May 16, 2017, the Debtors filed their Motion for Summary Judgment on Debtors’ Objection to Claim No. 30 Filed by Fifth Ave Real Estate (“Summary Judgment Motion”) [D.E. 586] showing that the Construction Allowance constituted “rent reserved” under the Amended Lease and should thus be disallowed.

20. On December 21, 2017, in its Order Appointing Judicial Mediator (“Mediation Order”) [D.E. 882], this Court directed the parties to mediate the dispute over the Construction Allowance Claim pursuant to the mediation procedures set forth in M.D. Fla. L.B.R. 9019-2, and appointed the Honorable Catherine P. McEwen as judicial mediator.

21. Thereafter, the Debtors and the Landlord attended mediation on January 5, 2018 pursuant to the Mediation Order.

22. Subject to Bankruptcy Court approval, the Debtors and the Landlord successfully resolved all claims between the parties at the mediation, on terms memorialized in the Stipulation (which was signed at the mediation) and summarized below:

- a. The Landlord's Claim No. 48-1 is hereby amended and shall be an allowed unsecured claim against Premier in the total amount of \$5,500,000.00;
- b. The Construction Allowance Claim (filed against RMST), the Remaining Rent Claim (filed against RMST), and Claim No. 49-1 (filed against Premier) are withdrawn with prejudice and the Landlord shall have no further claim against the estates.

Relief Requested

23. The Debtors seek entry of an order under Bankruptcy Rule 9019 authorizing the Debtors to enter into and perform the settlement reflected in the Stipulation.

Argument

24. Bankruptcy Rule 9019 provides that “[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. In reviewing any proposed settlement under Bankruptcy Rule 9019, courts will approve the settlement if it is “fair and equitable” and in the best interests of the debtor’s bankruptcy estate. *Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). Within the Eleventh Circuit, courts evaluate a settlement proposed under Bankruptcy Rule 9019 by considering the following factors:

- (a) The probability of success in the litigation;
- (b) the difficulties, if any, to be encountered in the matter of collection;
- (c) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it;
- (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.), 898 F.2d 1544, 1549 (11th Cir. 1990). “Courts consider these factors to determine ‘the fairness, reasonableness and adequacy of a proposed settlement agreement.’” *Chira v. Saal (In re Chira)*, 567 F.3d 1307, 1312-1313 (11th Cir. 2009) (quoting *Martin v. Kane (In re A & C Props.)*, 784 F.2d 1377, 1381 (9th Cir. 1986)).

25. The court must be informed of all the relevant facts and information to make an independent judgment as to whether the settlement is fair and reasonable under the circumstances. *In re Vazquez*, 325 B.R. 30, 36 (Bankr. S.D. Fla. 2005). “The court is neither to ‘rubber stamp’ the trustee’s proposals nor to substitute its judgment for the trustee’s, but rather to ‘canvass the issues’ and determine whether the settlement falls ‘below the lowest point in the range of reasonableness.’” *Id.* (internal citation omitted). In doing so, the “bankruptcy court is ‘entitled to give the trustee’s judgment some deference.’” *Regions Bank v. Herendeen (In re Able Body Temp. Servs.)*, No. 8:13-bk-6864-CED, 2015 U.S. Dist. LEXIS 22742, at *10 (M.D. Fla. Feb. 25, 2015) (quoting *GMGRSST, Ltd. v. Menotte (In re Air Safety Int’l, L.C.)*, 336 B.R. 843, 859 (S.D. Fla. 2005)).

26. Here, the settlement terms reflected in the Stipulation are fair and equitable and provide a substantial benefit to the Debtors and their estates. Among other things, the settlement will result in the resolution of large and contested claims asserted against multiple Debtors by the Landlord. Specifically, it will result in the reduction of unsecured claims in excess of \$12 million asserted against RMST by the

Landlord as well as a reduction of the unsecured claims asserted against Premier by the Landlord by in excess of \$7 million. Such a compromise agreement “allow[s] the trustee and creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims.” *In re A & C Props.*, 784 F.2d at 1380-81.

27. In addition, at least three² of the four *Justice Oaks* factors weigh in favor of settlement. The Construction Allowance Claim implicates issues that are, as yet, unresolved in the Eleventh Circuit (and, in fact, are unresolved in many other circuits as well). *Cf. Smith v. Sprayberry Square Holdings, Inc. (In re Smith)*, 249 B.R. 328, 337 (Bankr. S.D. Ga. 2000) (noting that the “rent reserved” test articulated by the Ninth Circuit Bankruptcy Appellate Panel in *In re McSheridan*, 184 B.R. 91 (B.A.P. 9th Cir. 1995) has not been “universally adopted”). Put simply, while the Debtors maintain the Bankruptcy Code and relevant precedent does not permit the uncapped recovery of the Construction Allowance, success in litigation is not absolutely certain. More to the point, even if the Debtors were completely successful on the merits and the Landlord’s Construction Allowance Claim was disallowed, the Landlord has previously indicated that it would amend its Remaining Rent Claim to include amounts due for the Construction Allowance, should the Construction Allowance Claim be disallowed. The Landlord has also indicated that it would appeal any denial of its Construction Allowance Claim, thus potentially leaving the resolution of a very large claim pending

² Notably, the second *Justice Oaks* factor, collectability, is a non-issue here and is thus a neutral factor. *Cf. Regions Bank v. Herendeen (In re Able Body Temp. Servs.)*, No. 8:13-bk-6864-CED, 2015 U.S. Dist. LEXIS 22742, at *8 (M.D. Fla. Feb. 25, 2015) (affirming the bankruptcy court’s approval of the settlement agreement, even though the second factor “played an insignificant role in the bankruptcy court’s analysis.”)

for an undefined period. In sum, any litigation regarding the Landlord's Construction Allowance Claim would implicate novel issues of law in the Eleventh Circuit, would be necessarily uncertain, and disputed fiercely (as is abundantly clear from the Procedural Background). Therefore, the first and third *Justice Oaks* factors weigh in favor of settlement.

28. Likewise, the fourth *Justice Oaks* factor weighs in favor of settlement. The Equity Committee supported resolution of the claims as negotiated at the mediation. Moreover, the Stipulation substantially reduces the unsecured creditor claims asserted against the Debtors and greatly enhances the prospects of a successful reorganization in these cases to the benefit of all constituencies. Accordingly, the fourth *Justice Oaks* factor weighs in favor of settlement.

29. As such, the settlement reflected in the Stipulation should be approved and the Bankruptcy Court should enter an order approving the Stipulation.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as **Exhibit A**, approving the Stipulation, attached hereto as **Exhibit B**, granting the relief requested in the Motion, and such other and further relief as may be just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF on February 12, 2018. I also certify that the foregoing document is being served this day on the following counsel of record via transmission of Electronic Filing generated by CM/ECF:

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

RMS Titanic Inc., *et al.*¹,

Debtors.

CHAPTER 11

Case No. 13:16-bk-002230-PMG

(Jointly Administered)

**ORDER GRANTING MOTION OF THE DEBTORS
FOR APPROVAL OF SETTLEMENT AGREEMENT WITH
417 FIFTH AVE REAL ESTATE LLC PURSUANT TO RULE 9019
OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**

THIS PROCEEDING came before the Court without a hearing on the Motion for Approval of Settlement Agreement with 417 Fifth Ave Real Estate LLC Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure [D.E. ____] (the “Motion”)²

¹ The Debtors in the chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number include: RMS Titanic, Inc. (3162); Premier Exhibitions, Inc. (4922); Premier Exhibitions Management, LLC (3101); Arts and Exhibitions International, LLC (3101); Premier Exhibitions International, LLC (5075); Premier Exhibitions NYC, Inc. (9246); Premier Merchandising, LLC (3867); and Dinosaurs Unearthed Corp. (7309). The Debtors’ service address is 3045 Kingston Court, Suite I, Peachtree Corners, Georgia 30071.

² Capitalized terms used herein and not otherwise defined shall have the meanings given to them in the Motion.

filed by RMS Titanic, Inc. and its affiliate debtors and debtors in possession in the above-captioned case (collectively, the “Debtors”) under Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”); and due and proper notice of the Motion having been given; and no other further notice being required; and this Court having jurisdiction to consider the Motion in accordance with 28 U.S.C. §§ 157 and 1334; and this being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having considered the Motion and all responses to the Motion, if any; and after due deliberation thereon; and it appearing that the entry of this Order and granting the relief set forth herein are in the best interests of the Debtors and their bankruptcy estates; and good and sufficient cause appearing therefore; it is hereby ORDERED that:

1. The Motion is Granted as set forth herein.
2. The Debtors are authorized to enter into the Stipulation and otherwise effectuate the terms of the settlement described therein.
3. Claim No. 30-1, as amended by Claim No. 30-2, and Claim No. 32-1, as amended by Claim No. 32-2, filed against RMS Titanic, Inc. by 417 Fifth Ave Real Estate LLC are withdrawn with prejudice.
4. Claim No. 49-1 filed against Premier Exhibitions, Inc. by 417 Fifth Ave Real Estate LLC is withdrawn with prejudice.
5. Claim No. 48-1 filed against Premier Exhibitions, Inc. by 417 Fifth Ave Real Estate LLC is hereby amended and shall be an allowed unsecured claim against Premier Exhibitions, Inc. in the total amount of \$5,500,000.00.

6. 417 Fifth Ave Real Estate LLC shall have no further claims against the Debtors estates.

7. The Court shall retain jurisdiction to interpret, implement, and enforce the terms and provisions of this Order.

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Attorney Daniel F. Blanks is directed to serve a copy of this Order on all non-CM/ECF interested parties and file a proof of service within 3 days of entry of the Order.

~#4832-6603-2477~

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

RMS TITANIC, INC., *et al.*,

Debtors.

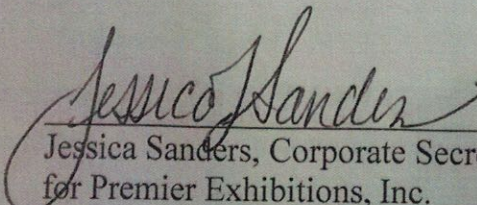
Case No.: 3:16-bk-02230-PMG
Chapter 11

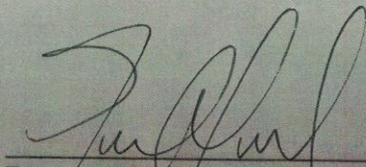
(Jointly Administered)

MEDIATED STIPULATION TO FILE A JOINT 9019 MOTION

On January 5, 2018, the below parties attended a mediation which resolved all claims filed by 417 Fifth Ave Real Estate LLC in the above styled Chapter 11 cases on the following terms:

1. 417 Fifth Ave Real Estate LLC's claim 48-1 is hereby amended and shall be an allowed unsecured claim against Premier Exhibitions, Inc. in the total amount of \$5,500,000.00.
2. Claim 30-1 as amended by 30-2 and Claim 32-1 as amended by 32-2 filed against RMS Titanic, Inc., and Claim 49-1 filed against Premier Exhibitions, Inc. are withdrawn with prejudice and 417 Fifth Ave Real Estate LLC shall have no further claims against the estates.
3. This settlement is subject to the Bankruptcy Court's approval.
4. The Equity Committee will not oppose this settlement.


Jessica Sanders, Corporate Secretary
for Premier Exhibitions, Inc.


Roxana Girand, authorized representative
for 417 Fifth Ave Real Estate LLC