IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division
www.ilnb.uscourts.gov

In re:	Chapter 11
EQUIPMENT ACQUISITION RESOURCES, INC.,	Case No. 09 B 39937
	Hon. John H. Squires
Debtor.	

NOTICE OF MOTION

To: See Attached Service List

PLEASE TAKE NOTICE that on **Thursday, January 6, 2011 at 9:30 a.m.**, or as soon thereafter as counsel may be heard, the undersigned will appear before the Honorable John H. Squires, Bankruptcy Judge, or such other judge as may be sitting in his/her stead, in courtroom 680, 219 South Dearborn Street, Chicago, Illinois and shall then and there present the attached **PLAN ADMINISTRATOR'S MOTION TO APPROVE SETTLEMENT PURSUANT TO RULE 9019 OF THE FEDERAL RULES OF BANKRUTPCY PROCEDURE WITH THE UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE AND TO BIND SHELDON PLAYER, DONNA MALONE, AND MARK AND MARTHA ANSTETT AND TO EXTEND THE DISPOSITIVE MOTION CUTOFF DATE**, at which time and place you may appear as you see fit.

Dated: December 16, 2010

Respectfully submitted,

WILLIAM A. BRANDT, JR. acting in his capacity as the Plan Administrator for Equipment Acquisition Resources, Inc.

By: /s/ George P. Apostolides
One of its attorneys

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CERTIFICATE OF SERVICE

I, George P. Apostolides, an attorney, certify that I caused a copy of the attached Notice of Motion and Motion to be served on the parties listed on the attached electronic mail notice list by the CM/ECF System and on the attached U.S. Mail Service List by U.S. Mail with proper postage prepaid on December 16, 2010.

/s/ George P. Apostolides

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	CHAPTER 11
	)	
EQUIPMENT ACQUISITION RESOURCES, INC.	)	Case No. 09 B 39937
	)	
	)	Hon. John H. Squires
Debtor.	)	

PLAN ADMINISTRATOR'S MOTION TO APPROVE SETTLEMENT PURSUANT TO RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE WITH THE UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE AND TO BIND SHELDON PLAYER, DONNA MALONE, AND MARK AND MARTHA ANSTETT AND TO EXTEND THE DISPOSITVE MOTION CUTOFF DATE

William A. Brandt, Jr. ("**Brandt**"), acting solely in his capacity as the Plan Administrator for Equipment Acquisition Resources, Inc. ("**EAR**" or "**Debtor**"), by his attorneys, Barry A. Chatz and George P. Apostolides of Arnstein & Lehr LLP, hereby moves this Court pursuant to Federal Rule of Bankruptcy Procedure 9019 for an order approving the Settlement Agreement (the "**Settlement Agreement**") between EAR and the United States of America (the "**USA**"), a copy of which is attached as Exhibit A, resolving the adversary proceeding pending between those parties (case no. 10 A 99), and binding the other parties to that adversary proceeding to the avoidance of certain transfers thereby satisfying a condition of the Settlement Agreement. In support of this motion (the "**Motion**"), Brandt states as follows.

I. JURISDICTION AND VENUE

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

28 U.S.C. §§ 1408 and 1409. Relief can be granted to the Debtors under 11 U.S.C. § 105 and Rule 9019.

II. BACKGROUND

A. The Debtor

2. On October 23, 2009, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in this Court (the "**Petition Date**"). This Court approved the Debtor's Second Amended Plan of Liquidation (the "**Plan**") by Order dated July 15, 2010 [#322]. Pursuant to the terms of the Plan, the Debtor executed the Plan Administrator Agreement, naming Brandt as Plan Administrator of the Debtor.

3. The Plan expressly retained the Debtor's Litigation Claims, as defined in Plan ¶1.43. Under the terms of the Plan and the Plan Administrator Agreement, Brandt has the responsibility and right to pursue litigation claims on behalf of the Debtor, including the Debtor's claims against the United States of America, Internal Revenue Service.

B. Payments to the United States of America, Internal Revenue Service

4. On nine occasions from October 15, 2007 until December 3, 2008, the Debtor made transfers (the "Transfers") directly to the United States Treasury to pay the taxes of individual owners and officers of the Debtor, particularly Sheldon Player ("Player"), Donna Malone ("Malone"), and Mark Anstett ("Mark"), who filed joint tax returns with his wife Martha Anstett ("Martha"). The aggregate amount of the payments was $4,737,261.36. EAR made eight payments totaling $2,412,973.36 within the two year period prior to the October 23, 2009 bankruptcy filing. One payment in the amount of $2,324,288.00 was outside the two year period prior to the bankruptcy filing but within the four year period prior to the bankruptcy filing.

5. On January 20, 2010, EAR filed its action for the avoidance and recovery of the Transfers case no. 10 A 99 (the "**IRS Adversary Proceeding**"). Count I seeks to recover the eight payments in the amount of $2,412,973.36 within the two year period prior to the bankruptcy filing pursuant to 11 U.S.C. §§ 548 and 550. Count II seeks to recover all of the payments in Count I as well as the payment in the amount of $2,324,288.00 made within the four year period prior to the bankruptcy filing pursuant to 11 U.S.C. §§ 544 and 550.

6. On April 5, 2010, the USA filed a Third-Party Complaint against Sheldon, Donna, Mark, and Martha. The Court expressed reservations regarding whether it has jurisdiction over the IRS claim against Player, Malone, Mark, and Martha. Thus, EAR sought, and was granted, leave to file a First Amended Complaint which named Player, Malone, Mark, and Martha as direct defendants as the persons for whose benefit the transfers were made within the meaning of 11 U.S.C. § 550(a)(1). The First Amended Complaint was filed on December 1, 2010, naming the USA as well as Player, Malone, Mark, and Martha as direct defendants.

III. TERMS OF SETTLEMENT

7. With a view toward maximizing the recoverable value of the Debtor's claims, in furtherance of broader efforts to facilitate the estate's distribution of funds, and to otherwise avoid the time, expense, and uncertainty of litigation, Brandt—subject to this Court's approval—has agreed to a settlement with the USA. The essential terms of the settlement are as follows:

a. As to Count I, the USA will pay $1,568,432.68, or 65% of the claim asserted in Count I.

b. As to Count II, the USA will pay $871,608.00, or 37.5% of the claim asserted in Count II, contingent upon EAR prevailing on the USA's "Second Defense" asserted in its amended answer to EAR's Complaint, which is a sovereign immunity defense explicitly reserved by the USA. Thus, the settlement contemplates that EAR and the USA will litigate the USA's sovereign immunity defense. If the USA prevails on that defense, whether in the bankruptcy court or on appeal, then EAR will receive $0 for Count II, but if EAR prevails on that

defense, the USA will pay $871,608.00 for Count II. The USA waives all other substantive defenses pursuant to this aspect of the settlement.

c. The order approving the settlement contains language that (1) the settlement on Count I is lawful and reasonable so that the disgorgement by the IRS of 65% of the transfers shall not be grounds upon which the individual taxpayers may claim that the settlement payment released the individual taxpayers from liability for any tax they would owe without crediting their tax accounts with the disgorged portions of the payments, and (2) the United States may reverse the payment credits to the tax accounts of Player, Malone, Mark, and Martha in amounts corresponding to the amounts to be disgorged to EAR under the settlement agreement. This is without prejudice to the right of Player, Malone, Mark, or Martha to contend that their tax liabilities should be reduced or eliminated on any ground other than disputing the reversal of the payment credits.

d. As part of the settlement, as to Count I the USA will reverse credits on the tax accounts of Player, Malone, Mark, and Martha as set forth in the following table:

Tax year	**Taxpayer Account**	**Amount of Transfer**	**Amount to be removed as a credit on the tax account (65% of Amount of Transfer)**
2007	Player & Malone	$446,750.96	$290,388.12
2007	Anstetts	$97,293.87	$63,241.02
2007	Player & Malone	$1,652,646.00	$1,074,219.90
2007	Anstetts	$136,280.95	$88,582.62
2007	Anstetts	$7,707.71	$5,010.01
2008	Anstetts	$22,293.87	$14,491.02
2008	Anstetts	$25,000.00	$16,250.00
2008	Anstetts	$25,000.00	$16,250.00
		$2,412,973.36	**$1,568,432.68**

As to Count II, the reversal of the creditors will be $871,608.00 on the account of Player & Malone for 2006 (37.5% of the payment), assuming the USA's Second Defense is overruled.

e. It is understood that this settlement still requires the approval of different levels within the United States Department of Justice and the Internal Revenue Service. As stated therein, the USA will inform the Debtor of progress in the approval process which, due to the sums involved, requires multiple levels of review within the Department of Justice. The USA has already informed the Debtor that the IRS has concurred with the positive recommendation of the Tax Division's Civil Trial Section for the Northern Region.

8. The Court should note that Brandt attempted to obtain the consent of Player, Malone, Mark, and Martha to the reversal of the credits. To date, they have not consented. In

the event they consent, then Brandt and the USA agree, in the Settlement Agreement, that (a) such agreement shall not constitute an admission of wrongdoing; (b) no failure to pay tax penalties or interest shall be asserted for the period between each of the EAR payments that is partially disgorged and the date of such disgorgement by the United States; and (c) EAR waives claims to recover, as personal liabilities, the remainder of the tax payments from Player, Malone, Mark, and Martha. In light of the possibility of their consent, the Settlement Agreement contains signature lines for them, but is intended to be approved without their agreement or over any objection and bind them to the extent described in the Settlement Agreement as summarized above. Accordingly, the Motion is partly directed at Player, Malone, Mark and Martha and is being served on them directly.

IV. ARGUMENT

A. The 9019 Order

i. The Standard for Approval of Settlement Agreements

9. Compromise and settlement have long been an inherent component of the bankruptcy process. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1958) (citing *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 130 (1939)). Rule 9019 provides:

> (a) COMPROMISE. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States Trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the Court may direct.

10. Compromises are favored in bankruptcy and public policy favors compromise because litigation "can occupy a court's docket for years on end, depleting resources of the parties and the taxpayers while rendering meaningful relief elusive." *In re Grau*, 267 B.R. 896,

899 (Bankr. S.D. Fla. 2001) (quoting *Matter of Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996). "Approval of a settlement is committed to the court's sound discretion." *In re Commercial Loan Corp.*, 316 B.R. 690, 697 (Bankr. N.D. Ill. 2004). Brandt asks the Court to exercise its authority and discretion and, based on the standards for the approval of compromises under Rule 9019, approve the Settlement Agreement.

11. The paramount question in approving a bankruptcy settlement is whether the compromise is in the best interests of the estate. *E.g.*, *In re Andreuccetti*, 975 F.2d 413, 421 (7th Cir. 1992). The "linchpin" of this examination is "a comparison of the value of the settlement with the probable costs and benefits of litigating. *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007). Factors that the Court should consider include "the litigation's probability of success, complexity, expense, inconvenience, and delay, including the possibility that disapproving the settlement will cause wasting of assets." *Id.* (internal quotations omitted).

12. In conducting such an analysis, "a precise determination of likely outcomes is not required, since 'an exact judicial determination of the values in issue would defeat the purpose of compromising the claim.'" *In re Telesphere Communications, Inc.*, 179 B.R. 544, 553 (Bankr. N.D. Ill. 1994)(quoting *In re Energy Coop, Inc.*, 886 F.2d 921, 927 (7th Cir. 1989)). Instead, the court must determine if the "settlement falls within the reasonable range of possible litigation outcomes." *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d at 426. The standard is not met "only if a settlement falls below the low end of possible litigations outcomes." *Id.*

ii. The Settlement Agreement is Fair and Equitable

13. Brandt has analyzed the claims against the IRS believes that the Settlement Agreement is reasonable and equitable in light of all of the relevant factors. In reaching the terms of the proposed settlement, Brandt compared the value of the settlement with the costs and

benefits of litigating, and based on this analysis, Brandt believes that the Settlement Agreement is in the best interest of the Estate.

1. Probability of Success in the Litigation

14. Considering the uncertainty and contingency involved in potential litigation against the USA, the Settlement Agreement properly considers the probability of success for the Brandt in litigation.

15. There is no guarantee that Brandt would succeed if the parties litigated the dispute that is the subject of the Settlement Agreement. There are factual issues relating to the solvency of EAR on the dates of the transfers in question, and there is some legal dispute regarding the ability of a party to recover pass-through tax payments made for the benefit of shareholders and officers of a company.

16. Should this matter proceed to litigation, there is no doubt that it would be expensive to litigate as all parties appear intent on vigorously backing their allegations. Furthermore, there is no guarantee or certainty that Brandt would ultimately be successful in prosecuting the claims against the USA. Therefore, Brandt has concluded that accepting payment under the Settlement Agreement is fair, reasonable, and in the interest of the Debtor after weighing all relevant and material factors, including the strengths of the asserted claims and defenses.

2. The Complexity of the Litigation Involved and the Expense, Inconvenience, and Delay Necessarily Attending It.

17. Though the IRS Adversary Proceeding currently has a trial date of February 28, 2011 on EAR's claim against the USA, the parties have been negotiating this settlement for some time and thus have not engaged in substantial discovery. For EAR to take this case to trial will involve substantial litigation costs over the next two months. In addition, there is the very real

possibility that even if EAR prevails in the bankruptcy court, the USA will appeal not only to the United States District Court but also to the United States Court of Appeals for the Seventh Circuit, if not the United States Supreme Court. In this regard, other than the sovereign immunity issue under § 544(b), the USA has maintained in this and other similar actions under § 548 that when a shareholder of a subchapter S corporation or partnership causes the entity to pay the tax incurred by the shareholder on income that flows through to that shareholder from income realized by the entity, the substance of the payment is a distribution to the shareholder and from that shareholder to the IRS notwithstanding that the payment reflects a direct transfer in form so that, accordingly, the USA is not the initial transferee. The USA has won that argument in at least one case and has lost it in more than one case, and notes that the United States Court of Appeals for the Seventh Circuit has not resolved this issue. The disparity in the USA's win/loss record on that issue, among other issues, is reflected in the USA's 65% settlement figure on Count I. The lower percentage concession on Count II that takes effect only if the sovereign immunity argument is rejected reflects that the USA may have additional defenses under state law respecting the merits.

18. The Settlement Agreement will facilitate a prompt and meaningful recovery for the Estate. Even if Brandt's prosecution of an adversary proceeding were ultimately successful after litigation, creditors would face a long wait for a recovery from the case. Any judgment could face protracted appeals and collection delays, particularly when considering the complexity of this case. The need to adjudicate the sovereign immunity issue is not expected to engender substantial litigation expense as there are expected to be no factual issues regarding that argument.

19. Brandt requests that the Court approve the Settlement Agreement even though final approval by the USA has not yet been obtained. Brandt believes that the approval of the Settlement Agreement will help facilitate and expedite final ratification by an authorized delegate of the Attorney General in part by assuring officials within the Department of Justice that Player, Malone, Mark, and Martha will be bound as described above.

B. The Payment Credit Reversal Language

20. By its terms, the Settlement Agreement is conditioned on the Bankruptcy Court's entry of the an order which contains language (the "Payment Credit Reversal Language") that (1) the settlement on Count I is lawful and reasonable so that the disgorgement by the IRS of 65% of the transfers shall not be grounds upon which the individual taxpayers may claim that the settlement payment released the individual taxpayers from liability for any tax they would owe without crediting their tax accounts with the disgorged portions of the payments, and (2) the United States may reverse the payment credits to the tax accounts of Player, Malone, and the Anstetts in amounts corresponding to the amounts to be disgorged to EAR under the settlement agreement, without prejudice of the right of Player, Malone, and the Anstetts to contend that their tax liabilities should be reduced or eliminated on any ground other than disputing the reversal of the payment credits.

21. The Payment Credit Reversal Language addresses the USA's concern that Player, Malone, Mark, or Martha could take the position that the settlement was not reasonable and thus they are released from liability for any tax they would owe without crediting their tax accounts with the disgorged portions of the payments and the unwillingness of the USA to risk a "whipsaw" even though it maintains that it is absolutely entitled to settle as long as the settlement is made in good faith. *Cf. United States v. Blais*, 612 F.Supp. 700, 704 (D. Mass

1985) (the IRS' settlement under which it refunded one half of tax to one taxpayer who had paid in full and claimed a refund, and thereby rendered another taxpayer liable for the refunded amount, did not release the latter from tax liability where settlement was not the result of invidious discrimination or other legally improper criteria). The Court has authority to bind the individuals under § 105(a), regardless of whether it has jurisdiction over the USA's third-party complaint against them, in light of the fact that (1) it has the jurisdiction to set aside or avoid the transfers as part of a fully litigated judgment, which would necessarily enable the USA to treat the payments as not having been made; and (2) it has the jurisdiction to hold the individual taxpayers directly liable to the Estate under § 550(a)(1) as the persons for whose benefit the transfers were made as an alternative to requiring the USA to disgorge the payments.

22. Further, the Payment Credit Reversal Language allows the USA to account for the settlement payment in its internal records. The Payment Credit Reversal Language does not adjudicate the correct amount of tax liabilities for Player, Malone, Mark, or Martha, and does not prevent or preclude them from filing amended returns for the years at issue and asserting that their tax liabilities are less than assessed.

C. The Timing and Procedure on Count II

23. With regard to Count II, the USA will not waive the sovereign immunity defense and must litigate that issue. Thus, in connection with the settlement, the USA agrees to waive all of its defenses as to Count II except sovereign immunity as described in its Second Defense to the Complaint. The USA will then file a dispositive motion on that defense. In light of the February 28, 2011 trial date, Brandt and the USA request that the Court extend the December 30, 2010 date by which all dispositive motion briefing must be completed in order to accomplish the briefing on the sovereign immunity issue prior to trial.

24. In connection with the settlement on Count II, Brandt requests that this Court extend the dispositive motion cutoff date in the adversary proceeding, which is currently December 30, 2010. In the even of the approval of the Settlement Agreement, the parties will then engage in briefing on the sovereign immunity issue on a schedule to be set by the Court.

V. CONCLUSION

25. After weighing all relevant and material factors, including the settlement amount, the strengths of the asserted claims and defenses, the costs and burdens of litigation, and the general uncertainty and risk of litigation, Brandt believes the Settlement Agreement with the United States is in the best interests of the Estate.

WHEREFORE, Plaintiff, William A. Brandt, acting solely in his capacity as the Plan Administrator for Equipment Acquisition Resources, Inc., respectfully requests that this Court approve the Settlement Agreement on the terms set forth above, enter the proposed Rule 9019 order, extend the dispositive motion cutoff date, and provide such other and further relief as the Court deems appropriate.

DATED: December 16, 2010

Respectfully Submitted,
William A. Brandt, Jr., acting solely in his capacity as the Plan Administrator for Equipment Acquisition Resources, Inc.

By: /s/ George P. Apostolides
One of its attorneys

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