

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

FRED C. ARKO, JR.,

No. 03-13010

Debtor(s).

\_\_\_\_\_ /

Memorandum on Motion to Establish Rights in Claim

Movant Farella Braun + Martel LLP (“FBM”) is the former attorney for creditor RAF Enterprises and Robert Freeman (“RAF”). RAF has a large claim in this case based on a judgment it obtained when FBM was its counsel.<sup>1</sup> FBM claims it has an attorneys’ lien on any recovery of RAF. In this motion, it seeks a determination that it has a valid lien, is entitled to satisfaction from any dividend of RAF, is entitled to payment ahead of RAF, that the lien is \$2,525,487.30, and that it is entitled to vote RAF’s claim as to any proposed plan.

As to all except the voting rights, the court’s jurisdiction is dubious. Even if jurisdiction was clear the court has little interest in injecting itself into a dispute between two parties which does not affect the bankruptcy estate or the debtor’s rights. Accordingly, the court will abstain from deciding if FBM has a valid lien, whether it has priority over RAF’s interest, and what its amount is. If these

\_\_\_\_\_

<sup>1</sup>It does not appear that RAF has filed a proof of claim. The debtor has scheduled it as having a disputed claim for \$8,932,000.00. The claims filed by FBM , in its own name and not on behalf of RAF, are only for the lower amount of its claimed fees.

1 matters have not been resolved in another forum and RAF and FBM cannot agree on another treatment,  
2 the debtor in possession, trustee, or other entity responsible for distributions under the Bankruptcy Code  
3 or a confirmed plan shall be directed to commence an interpleader action in a court of proper  
4 jurisdiction other than this court.

5 As to voting on a plan, the court feels compelled to point out to FBM that it holds a security  
6 interest; it is not an owner or co-owner of the claim.<sup>2</sup> The claim remains RAF's to vote so long as its  
7 vote is in good faith and in RAF's best financial interests, which is a call for RAF to make, not its  
8 former counsel. The good faith requirement means only that RAF cannot enter into a collusive agreement  
9 with the debtor to prejudice FBM's security interest. Other than fundamental fairness, the court has no  
10 interest in wading into this issue unless it threatens to delay the confirmation process.<sup>3</sup>

11 The court notes that the FBM and RAF contemplated the possibility that RAF would have a non-  
12 cash recovery, in which case the value of the recovery would be arbitrated. This issue has nothing  
13 whatsoever to do with voting the claim or plan confirmation, so the court will make no order in relation  
14 to arbitration.

15 Pursuant to FRBP 2002(b), RAF will have at least 25 days to decide how to vote on any  
16 proposed plan.<sup>4</sup> It shall give FBM at least 10 days' notice, by fax or e-mail, of how it intends to vote. If  
17 FBM can make a *prima facie* showing that the vote is in bad faith, it may request an expedited hearing on  
18

---

19  
20 <sup>2</sup>RAF's claim (if it ever files one) is for about \$9 million, far more than FBM's claimed security  
21 interest. This fact alone distinguishes this case from *In re Governor's Island*, 39 B.R. 417 (Bkrcty.  
22 E.D.N.C. 1984), upon which FBM relies heavily. That court's unsupported assumption that the  
23 assignee's security interest gives it priority over the rights of the claimant appears just plain wrong; the  
24 court appears to have forgotten that the assignment was for security purposes and not an outright  
25 assignment.

24 <sup>3</sup>At present, no plan has even been filed.

25 <sup>4</sup>Assuming, of course, RAF has a right to vote. Even if it gets around to filing a proof of claim,  
26 which appears necessary since its claim was scheduled as disputed, it may need to seek estimation for  
voting purposes if there is an objection to it.

1 its dispute over voting the claim.<sup>5</sup> The court will decide at that time whether FBM has made a sufficient  
2 showing to justify further proceedings.<sup>6</sup>

3 Counsel for RAF shall submit an appropriate form of order consistent with this memorandum  
4 which counsel for FMB has approved as to form.

5 Dated: September 22, 2004

6   
7 Alan Jaroslovsky  
8 U.S. Bankruptcy Judge

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22 \_\_\_\_\_  
23 <sup>5</sup>FBM has based its motion on FRBP 3001(e)(3), which the court is by no means convinced is  
24 applicable. The rule is intended to address the “evils that may arise out of post-bankruptcy traffic in  
25 claims against a bankrupt estate.” *In re Burnett*, 306 B.R. 313, 318-19 (9<sup>th</sup> Cir. 2004). Nonetheless, the  
26 court will make its order regardless of the applicability of Rule 3001(e)(3).

<sup>6</sup>The court will not permit any such dispute to delay or derail the confirmation process.  
Discovery will be allowed only if conducted very swiftly and with the utmost diligence.