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efile@alversontaylor.com*Attorneys for Defendant**Penske Truck Leasing Co., L.P.***UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

IN RE:

RED ROSE, INC., et al.,

Debtors.

ACF FINCO I, LP,

Plaintiff,

v.

PENSKE TRUCK LEASING CO., L.P. and
PTL, GP, LLC,

Defendants.

Chapter 11

Jointly Administered in the United States
Bankruptcy Court for the District of Nevada

Case No: BK-S-20-12814-mkn

Adv. Pro. No. 21-ap-01097-mkn

DEFENDANT'S MOTION TO DISMISS

Defendants Penske Truck Leasing Co., L.P. and PTL, GP, LLC (collectively "Penske" or "Defendants") respectfully move this Court for an order dismissing ACF Finco I, LP's ("Plaintiff") Complaint (Docket No. 1). In support of their motion the Defendants submit this Memorandum of Points and Authorities.

Memorandum of Points and Authorities

Plaintiff claims to have been assigned the Debtors' right to recover preferential transfers as part of a settlement agreement between the Debtor and the Plaintiff. In vigorous pursuit of all funds it could possibly find, the Plaintiff filed seventeen (17) nearly identical adversary complaints on the

1 same day. (See Docket). Each of these complaints is virtually identical with the only discernable
 2 difference being the identities of the defendants, the amount demanded from each defendant and the
 3 date the Plaintiff sent a demand letter to each defendant.

4 Tellingly, none of the complaints appear to contain a discussion of the Plaintiff's efforts to
 5 fulfill its duties under 11 U.S.C. § 547(b) other than a rote statement in each complaint that Plaintiff
 6 "after reviewing Debtor's records and evaluating the likelihood of potential defenses under 11 U.S.C
 7 547(c)" demanded each and every defendant return every payment made to them during the
 8 preference period. It is indeed remarkable that Plaintiff, in its "evaluation of likely defenses" for
 9 each complaint, failed to identify a single instance of subsequent new value, reasonably equivalent
 10 value, ordinary course payments or post-petition value given to the Debtor, or other defenses under
 11 11 U.S.C. § 547(c) despite allegedly "reviewing the Debtor's records and evaluating the likelihood
 12 of potential defenses". While the other preference defendants will be required to argue their own
 13 cases, Penske asserts that the Plaintiff has utterly failed to discharge its statutory duty to truly
 14 evaluate the "known or reasonably knowable potential defenses" and is using the preference
 15 complaints as a weapon to extract a so-called "nuisance" settlement from Penske. This Court should
 16 find that Plaintiff has failed to discharge the statutory prerequisites to filing a preference complaint
 17 and dismiss the complaint filed against Penske.

18 Legal Argument

19 1. Plaintiff's duty of due diligence

20 The Small Business Reorganization Act of 2019 made two changes to preference actions. Of
 21 relevance to this matter is the requirement that the trustee (or Plaintiff in this case) must consider the
 22 defenses of a potential preference transferee before initiating a preference complaint. Specifically
 23 the new section states that a trustee may bring a preference complaint only after demonstrating
 24 "reasonable due diligence in the circumstances of the case and taking into account a party's known
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1 or reasonably knowable affirmative defenses under subsection (c)” (11 U.S.C. § 547(b)
 2 (emphasis added).

3 While the legislative history does not explain the reason for this change, a fair reading of the
 4 amendment is that Congress sought to curb what it perceived as the improper use of preference
 5 actions in some instances. *See 5 Collier on Bankruptcy* ¶ 547.02A (Alan N. Resnick & Henry J
 6 Sommer eds., 16th ed 2020)(describing “preference mills” which are law firms employed on a
 7 contingent basis, who file adversary proceedings with little—or no—evaluation of the merits, solely
 8 to force nuisance value settlements); *see also* American Bankruptcy Institute, *Commission to study*
 9 *the Reform of Chapter 11*, 148-151 (2014), <https://abiworld/app.box.com/s/vvircv5xv83aavl4dp4h>
 10 (as cited in *Husted v. Taggart et. al., In re ECS Refining, Inc.*, 625 B.R. 425 (2020)(hereinafter *ECS*
 11 *Refining*)(documenting preference action abuse, i.e., failure of merits consideration before
 12 commencement of an action, and recommending curative provisions, i.e. adding a due diligence
 13 requirement and particularity in preference pleadings).

14 In one of the first cases to test the effect of these legislative changes, the Court in *ECS*
 15 *Refining* was called upon to consider whether the trustee satisfied its burden of proof with respect to
 16 the due diligence component of a preference case. After a lengthy review of the changes to the
 17 Bankruptcy Code and utilizing Supreme Court precedent in determining whether the due diligence
 18 requirement was a condition precedent (i.e. an element of the trustee’s case in chief or rather an
 19 affirmative defense), the bankruptcy court concluded that the proof of due diligence on the part of
 20 the trustee was “a condition precedent, i.e., due diligence and consideration of affirmative defenses
 21 is an element of the trustee’s prima facie case.” (Id. at 454)(emphasis added).
 22

23 The Court noted that its conclusion aligned with Congress’ explicit mandate that the trustee
 24 is charged with burden of proof on the issue of due diligence. Specifically, the court cited 11 U.S.C.
 25 § 547(g) which states:
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1 For the purposes of this section, the trustee has the burden of proving the avoidability
 2 of a transfer under subsection (b) of this section, and a creditor or party in interest
 3 against whom recovery or avoidance is sought has the burden of proving the
 nonavoidability of a transfer under subsection (c) of this section.

4 Thus, the *ECF Refining* court concluded, the failure of the trustee (or Plaintiff in this case) to
 5 demonstrate that it took into account the known and reasonably knowable defenses to the Complaint
 6 renders the complaint fatally flawed.

7 2. The failure of the Plaintiff to state a prima facie case of due diligence

8 In the *ECF Refining* case the court considered whether a bare recital of the statutory elements
 9 of due diligence fulfilled the trustee's duty of due diligence. The Court held it did not. The Court
 10 noted that the trustee had access to the debtor's records and was "fairly charged with the knowledge
 11 of the facts that those records would reveal." (Id. at 458). Notwithstanding the trustee's access to
 12 those records, the court concluded that the complaint failed because it:

13 did not expressly recite the efforts [the trustee] undertook to evaluate the merits of a
 14 prima facie case or reasonably knowable affirmative defenses. [The trustee's] use of
 15 pre-*Iqbal/Twombly* notice style pleadings and a very general nature of the allegations
 16 in the First Amended Complaint suggest a lack of pre-filing due diligence.
 17 Reasonable inferences do not suggest that trustee Husted considered whether the debt
 18 was antecedent, whether those transfers improved defendant's position, nor the
inapplicability of all affirmative defenses, known or reasonably knowable.

19 (*Id.*)(emphases added, citations omitted).

20 The *ECF Refining* court's description of the complaint in that action is strikingly similar to
 21 the general allegations in the present complaint. In the present case, the Plaintiff merely recites that
 22 "after reviewing Debtor's records and evaluating the likelihood of potential defenses under 11 U.S.C
 23 547(c)" it then demanded return of every payment made during the preference period. Penske
 24 submits that this general statement demonstrates "a lack of pre-filing due diligence" on the part of
 25 the Plaintiff.

26 For example, the Plaintiff apparently did not give any weight to the subsequent new value of
 27 the goods and services provided by Penske *after* the alleged preferential payments as reflected on the
 28

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1 invoices attached to Penske's proof of claim filed ten months ago (see Claim No. 0000020383, filed
2 10/2/2020). Nor did Plaintiff disclose any efforts on its part to consider, much less refute, the fact
3 that the payments were made in the ordinary course of business between the Debtor and Penske.
4 Finally, Plaintiff apparently gave zero weight to the fact that Penske has paid post-petition
5 obligations owed by the Debtor, and on the Debtors behalf, despite the Plaintiff claiming to have
6 "examined" the Debtor's books and records.
7

8 In short, this complaint has all the hallmarks of an extorsive attempt by the Plaintiff to utilize
9 a preference complaint to cudgel Penske into giving plaintiff a nuisance settlement on its very shaky
10 claim.
11

12 Conclusion

13 For the foregoing reasons, Penske respectfully request that this Court find that Plaintiff has
14 failed to meet its burden under 11 U.S.C. § 547(b) to demonstrate its pre-filing due diligence and
15 dismiss the Plaintiff's complaint in his matter.
16

17 DATED this 16th day of August, 2021.

18 ALVERSON TAYLOR & SANDERS

19 /s/ Kurt R. Bonds

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26 *Attorneys for Defendant*

27 *Penske Truck Leasing Co., L.P.*
28

29 CERTIFICATE OF SERVICE VIA CM/ECF

30 I hereby certify that on this 16th day of August, 2021, I did serve, via Case
31 Management/Electronic Case Filing, a copy of the above **DEFENDANT'S MOTION TO**
32 **DISMISS** and foregoing addressed to:
33
34

1 Talitha Gray Kozlowski, Esq.
2 Garrett Nye, Esq.
3 BANKRUPTCY RECOVERY GROUP, LLC
4 7251 Amigo Street, Suite 210
5 Las Vegas, NV 89119

/s/ Teri Jenks
An Employee of ALVERSON
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