THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-15045
	)	
GLIATECH, INC., et al.,	)	Chapter 11
	)	Jointly Administered
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**
	)	**REGARDING CONFIRMATION**

The debtors Gliatech, Inc., Gliatech Medical Inc., and GIC, Inc. (collectively, debtors) filed an amended liquidating chapter 11 plan which is supported by the official committee of unsecured creditors (committee). Shareholder Riverside Contracting LLC and creditor United States of America object that the plan does not provide a fair and equitable distribution because a secured creditor will be paid more than it is owed. The United States further objects that the plan violates the absolute priority rule and unfairly discriminates against it.[1] For the reasons stated below, the objections are overruled and the plan is confirmed.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

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[1] *See* Docket 1050, 1216, 1219, 1222, 1223, 1225, 1226, 1229, and 1251.

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FACTS[2]

I.

These findings of fact reflect the court's weighing of the evidence, including determining the credibility of the witnesses. In doing so, the court considered the witnesses' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52 (applied to contested matters under FED. R. BANKR. P. 9014). When the court finds that a witness's explanation was satisfactory or unsatisfactory–believable or not believable–, it is using this definition:

> The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation–he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

United States v. Trogden (*In re Trogden)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

II.

Gliatech, Inc. was engaged in research and development of biosurgery and pharmaceutical products. As part of this effort, Gliatech developed ADCON products which are

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[2] The court held a confirmation hearing on April 2, 2004. The debtors and the committee presented their case through the testimony of Steven Basta, former President of Gliatech, and Lionel Leventhal, a partner in Paul Capital Partners. Riverside presented its case through cross-examination. Riverside and the debtors also presented their case through exhibits. The United States presented its case through cross-examination.

used to reduce scarring connected with surgery. The basic ADCON products are ADCON gel and ADCON solution. ADCON gel is marketed as ADCON-L for lumbar surgeries.

ADCON-L was initially approved for sale in both Europe and the United States. In December 2000, however, the United States Food and Drug Administration (FDA) placed Gliatech on Application Integrity Policy (AIP) status due to violations of good clinical practices in the conduct, analysis, and reporting of data relating to ADCON-L's clinical trials and lack of reporting of events under medical device reporting regulations. The FDA will not review product submissions of a company that is on AIP. This meant that Gliatech was unable to move forward with relaunching ADCON-L in the U.S. until it resolved the AIP status. To complicate matters, in January 2001 Gliatech learned that a raw material used in ADCON products was being recalled by the supplier. Gliatech then voluntarily recalled and discontinued production of these products.

In early 2001, under Steven Basta's new management, Gliatech decided it would relaunch ADCON-L outside the U.S. in the second half of 2001. At the same time, Gliatech determined it would run out of cash in July 2001. Gliatech evaluated several financing options, ultimately deciding to enter into a financing agreement with Paul Capital Royalty Acquisition Fund (Paul Capital). Under the agreement, Paul Capital agreed to provide Gliatech with $5 million at the closing, an additional $2.5 million when ADCON-L was relaunched in Europe, and $7.5 million if Gliatech succeeded in relaunching ADCON-L in the United States by an agreed date. In exchange, Gliatech agreed to make royalty payments to Paul Capital related to the ADCON products for the life of the patents (with a minimum agreed payment), gave Paul Capital a security interest in the ADCON products and technology, and agreed to repurchase Paul Capital's rights under certain circumstances. The parties referred informally to the repurchase right as the "put." Gliatech viewed the deal as favorable because it gave Gliatech a rapid cash infusion without diluting shareholder equity. Paul Capital paid Gliatech $7.5 million under this agreement based on the first two benchmarks.

The perceived benefits to Gliatech did not prove sufficient to overcome either its financial or regulatory problems. The FDA had referred its concerns to the Department of Justice, which brought a criminal complaint against Gliatech on behalf of the United States.[3] On April 18, 2002, Gliatech pleaded guilty to six misdemeanor violations of the Federal Food, Drug, and Cosmetic Act relating to the same acts that had caused the FDA to place Gliatech on AIP status. Under the plea agreement, Gliatech agreed to a five year probation period and a $1.2 million fine payable in six equal annual installments, with the first installment due May 17, 2002. The fine was a punishment and not compensation for any pecuniary loss suffered by the United States. The United States did not file a notice of lien with respect to the fine.

In the meantime, Paul Capital's obligation to fund ended when ADCON-L was not relaunched in the U.S. by the agreed date. Gliatech tried unsuccessfully to find venture capital financing for the additional clinical trials needed for the relaunch. On May 2, 2002, Paul Capital exercised its put. Gliatech filed its liquidating chapter 11 case on May 9, 2002.

III.

With court approval, the debtors retained the investment bankers Adams, Harkness & Hill to help sell their assets. The primary asset was the ADCON program, which included ADCON

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[3] *United States of America v. Gliatech, Inc.*, Case 1:02mj2014, United States District Court for the Northern District of Ohio.

solution and ADCON gel, together with related intellectual property.

A. Sale to Wright Medical Technology, Inc.

After an auction, and without objection, the court authorized the debtors to sell to Wright Medical Technology, Inc. the ADCON Assets (as defined in the purchase agreement) which included ADCON gel, but did not include ADCON solution although it did include the intellectual property associated with ADCON solution.[4] The purchase agreement provided that Wright would license back to Gliatech certain technology and intellectual property associated with ADCON solution. In exchange, Wright agreed to pay the debtors $8.4 million in cash plus a 5% royalty (limited to $30 million through the patent expiration date of 2012) on worldwide Net Sales of Products and Reformulated Products, again as defined in the purchase agreement. (Wright royalty) (Debtors' Exhs. 23, 24). Paul Capital's lien attached to these sale proceeds. As of January 2004, Wright has paid the debtors approximately $39,000.00 in royalties based on $1 million in European sales.

B. Sale to European Medical Contract Manufacturing

The debtors, again after an open process and with court approval, sold the remaining ADCON solution products and assets to European Medical Contract Manufacturing (EMCM) for $500,000.00 plus a 10% royalty on sales of ADCON solution products capped at $2 million. (ECMC royalty).[5] Paul Capital's lien also attached to these proceeds.

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[4] Docket 415, 532.

[5] Docket 666, 686, 695.

IV.

The plan anticipates these distributions, among others:

> Class 1 Paul Capital claim: $7.3 million plus assignment of the Wright royalty in full satisfaction of its secured and unsecured claim;
>
> Class 4 General unsecured creditors: a dividend in the range of 68-100%;
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> Class 6 Subordinated claim of the United States: a dividend in the range of 0-29%; and
>
> Class 7 Equity interests: no recovery.

Class 4 and class 5 (both impaired) accepted the plan. Class 6 and class 7 rejected it.[6]

Additional facts are set forth below.

DISCUSSION

The debtors, as the plan proponents, have the burden of proving that the plan meets the requirements for confirmation. *See, for example, In re Byrd Foods, Inc.*, 253 B.R. 196, 199 (Bankr. E.D. Va. 2000).

I.

Settlement of Paul Capital Claim in the Plan

Paul Capital filed a proof of claim based on the put that it exercised. Paul Capital's position is that the financing agreement gave it the right to have Gliatech buy back its rights at an amount that would provide Paul Capital with a 30% return on its investment as of the date the payment is made. By Paul Capital's calculation, this amount was $9,750,000.00 as of the petition date, $12,675,000.00 as of April 26, 2003, and approximately $15 million at the time of

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[6] Docket 1252.

the hearing. The amount continues to increase because the payment is linked to the payment date, rather than a date certain.

Before proposing a plan, the debtors determined that they would have to resolve the Paul Capital claim. The debtors and the committee concluded that Paul Capital has a claim of at least $10 million that is secured by a first security interest in the proceeds of the Wright and ECMC sales ($8.9 million cash plus the Wright royalty and ECMC royalty). They denied, however, that the claim had escalated to the amount claimed by Paul Capital. The disputed issues included whether Paul Capital was entitled to postpetition accruals of its put price, the value of the Wright royalty, and the extent to which the debtors were entitled to recover the costs of preserving and disposing of the ADCON Assets.[7]

The committee took primary responsibility for negotiating with Paul Capital. After extensive discussions over a period of months, the debtors, the committee, and Paul Capital propose to settle the claim through the plan by giving Paul Capital $7.3 million cash and the Wright royalty.

Riverside objects to the proposed settlement on the ground that the settlement is not fair and equitable under bankruptcy code § 1129(b) because it will distribute more to Paul Capital than it is owed.[8] Specifically, Riverside argues that the settlement does not cap the amount that Paul Capital will receive from the Wright royalty. The obligation of Wright to pay royalties to the debtors under the sales agreement is capped at $30 million. As a result, Riverside contends it

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[7] Response of debtors at 6 (Docket 1222).

[8] The United States joined in this objection without separate argument. For ease of reading, the court will refer only to Riverside as the objector.

is possible that over time Paul Capital will end up with $37.3 million, far in excess of its claim.

The debtors did not file a separate motion to compromise this claim. *See* FED. R. BANKR. P. 9019(a). Nevertheless, the standards used to evaluate such motions logically also apply here where a debtor proposes a compromise as part of a plan. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). To be approved, a compromise must be determined by the court to be fair and equitable.[9] *See Reynolds v. Comm'r of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988). "In considering a proposed compromise, the bankruptcy court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. The court is not permitted to act as a mere rubber stamp or to rely on the [debtors' or committee's] word that the compromise is 'reasonable'." *Id.* (citing *In re American Reserve Corp.*, 841 F.2d 159, 162-63 (7th Cir. 1987)). "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." *Anderson,* 390 U.S. at 425. However, when considering a proposed settlement the bankruptcy court "is not to decide the numerous questions of law and fact raised . . . but rather to canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness'[.]" *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

In making these decisions, courts consider "the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be

[9] This "fair and equitable" test is different than the "fair and equitable" test of 11 U.S.C. § 1129(b).

obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Anderson*, 390 U.S. at 424. More specifically, the factors to be examined include: (1) the probability of success in the litigation; (2) the difficulty of collection; (3) the complexity of the litigation, including any attendant expense, inconvenience, and delay; and (4) the paramount interest of creditors. *Fishell v. Soltow (In re Fischell),* 47 F.3d 1168 (6th Cir. 1995).

The probability of success on the merits and the complexity of the litigation are best discussed together. The debtors' upside in this dispute is that Paul Capital's claim would be allowed as a secured claim for $10 million. Paul Capital's upside is that the claim would be allowed as a secured claim for at least $15 million. Any litigation would, therefore, result in a secured claim of at least $10 million. Riverside did not dispute the debtors' and committee's contention that litigation would be lengthy and complicated, focusing on whether accrual of a put price is appropriate as post-petition interest. There does not seem to be any controlling law on this issue. If so, it is likely that the losing party would appeal, thus increasing delay, expense, and uncertainty for the other creditors.

To avoid that, the committee and the debtors propose to settle the claim by giving Paul Capital $7.3 million cash (less than the minimum amount admittedly due) and the Wright royalty. In turn, Paul Capital would give up any claim to the remaining proceeds from the secured asset sale (i.e. the $1.6 million and the EMCM royalty) and any right to an unsecured claim. The Wright royalty is a contingent right to receive up to $30 million depending on future sales of ADCON gel. The Riverside objection is based on the present value of that right. The debtors valued the royalty at $1.5 million in their disclosure statement; Steven Basta testified that the value is between $1 to $2 million, with a possibility that it is now lower because of the risk factors discussed below; and Lionel Leventhal of Paul Capital Partners testified that he valued it at $1.5 million. Riverside questions the accuracy of these calculations and argues that the valuation should be significantly higher, but does not offer any alternative number. If the valuation is higher, then the cash to Paul Capital might be lower, thus increasing the dividend to unsecured creditors and potentially leaving funds available for Riverside and the other equity holders.

The court found the testimony of both Messrs. Basta and Leventhal on valuation to be entirely believable. Basta, Gliatech's former president, has an undergraduate degree in biomedical engineering. He also holds an MBA from Kellogg School of Management where he studied investment opportunities and financing. He spent several years with an investment banking firm analyzing companies and projects for purposes of financing. His analyses included both risky ventures and ones with a high degree of certainty. Since then, Basta has been with younger companies with uncertainty as to risk. His activities have included working with public and private investors to evaluate technologies.

When a product such as ADCON gel does not have regulatory approval in the U.S., he considers these risk factors in valuing the product: the timing of any product launch in the U.S.; the possibility that the product will never launch in the U.S.; the existing competitors and potential competitors; potential changes in surgical procedures that would reduce the demand for the product; and the impact of product liability claims on a surgeon's willingness to use the product. After considering these factors, he concluded that the Wright royalty is valued at between $1 million and $2 million.

Lionel Leventhal is one of nine partners at Paul Capital Partners, the second largest health care investment fund in the world, managing $9 billion. He is experienced in valuing and buying royalty interests. In valuing the Wright royalty at $1.5 million, he considered these risk factors: ADCON-L is a "hard sell" to surgeons because it requires a surgeon to admit that he or she may jostle organs during surgery which would cause them to stick together; there are numerous product liability claims against the product that make surgeons reluctant to use it; and the product still is not FDA approved for sale in the U.S. Leventhal also assessed the possibility that the product may never be approved for sale; that if approved, when that approval would come; and various scenarios of likely future sales. In developing his different scenarios, Leventhal used a discount rate consistent with that used by venture capitalists; i.e. 40-50%. On the issue of FDA approval, Leventhal explained that Wright is in a "feedback loop" awaiting a product evaluation by an FDA panel. That panel might approve, disapprove, or send the product back for more work. According to Leventhal, the FDA's commissioner is about to leave office, a circumstance that in the past has delayed product approval.

Based on this testimony, the value of the Wright royalty is between $1 and $2 million. Riverside did not provide any alternative valuation. Instead, Riverside questioned parts of the method used by the debtors and Paul Capital to arrive at their valuations. The court remains convinced by the Basta and Leventhal testimony.

Considering all of the above, the probability of success and complexity of litigation factors both favor approval of the settlement. The third factor, difficulty of collection, is not relevant. The fourth factor is the interests of creditors. The parties identified three possible dispositions of the Wright royalty: sell it to a third party, keep it and distribute any royalties to the creditors over time, or transfer it to Paul Capital as part of this settlement. As a practical matter, the Wright royalty cannot be sold to a third party because all of the proprietary information belongs to Wright and Wright would have no motivation to share it with a third party. If the estate keeps the royalty, the case will have to remain open for years until the patents expire and the royalties are no longer owed. Payments to creditors based on this potential revenue stream would be delayed over those years. The proposed settlement, on the other hand, frees up cash in the estate (that is, the funds over and above the settlement amount) and permits an immediate distribution to creditors. This is undoubtedly why the committee supports the settlement. This factor favors approving the settlement.

On consideration of the relevant factors, the court finds that the settlement falls within the range of reasonableness. If a $1 million royalty value is used, adding that to the $7.3 million cash results in a settlement of $8.3 million. If a $2 million value is used, the settlement is $9.3 million. Both settlement numbers are less than the $10 million claim that all parties agree is the minimum amount due to Paul Capital. There simply was no testimony that the settlement will exceed the $15 million maximum amount of this claim. Overall, the settlement is fair and equitable as that term is used in evaluating settlement proposals.

As a corollary, the court also finds that the plan treatment of classes 6 and 7 is fair and equitable under bankruptcy code § 1129. A plan can be confirmed over the objection of an impaired class if at least one impaired class accepts the plan and the plan "does not discriminate unfairly . . . and is fair and equitable," with respect to each rejecting, impaired class. 11 U.S.C. § 1129(b). A plan discriminates unfairly if a creditor is paid more than it is owed. *See In re P.J. Keating Co.*, 168 B.R. 464, 469 (Bankr. D. Mass. 1994). Here, more than one impaired class has accepted the plan and there was no credible evidence that the settlement will exceed the amount of Paul Capital's claim. The argument that Paul Capital will receive more under the plan than it is owed is, therefore, without merit.

The objections of Riverside and the United States are overruled.

II.

Treatment of the Claim of the United States

The United States filed a claim for $1.2 million based on the fine imposed as part of the plea agreement. On November 18, 2003, the debtors filed their first omnibus objection to claims.[10] The objection is broken out into categories. Under the relevant paragraph, the debtors state that the United States's claim, as a criminal fine, should be subordinated to the claims of general unsecured creditors and the amount should be reduced to its net present value as of May 9, 2002. The debtors cited bankruptcy code § 726(a)(4) in support of their position. The objection required any party objecting to the relief to respond in writing by December 11, 2003 in which case a hearing would be held on December 18, 2003.

The United States was properly served with the objection and did not file anything in response. As a result, the court entered an order on January 28, 2004 finding that the claim is subordinated to the claims of general unsecured creditors (subordination order).[11] The United States did not appeal the subordination order or file a motion to vacate it. At no time has the United States moved to reconsider the claim treatment. *See* 11 U.S.C. § 502(j).

Relying on this resolution of the issue, the debtors filed an amended chapter 11 liquidating plan and disclosure statement. The plan puts the United States in its own class, class

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[10] Proof of Claim 1; Docket 1018, 1019.

[11] Docket 1141.

6, and states that the claim is subordinated to other unsecured claims. Again, the United States had the opportunity to appear and object to this treatment at the disclosure statement hearing, but it did not.[12] After approving the disclosure statement, the court set a confirmation hearing for April 2, 2004 with a deadline for filing objections of March 4, 2004.[13]

The United States filed an objection one day after the deadline.[14] In the late filing, it asserts that its claim cannot be subordinated because it did not consent to that treatment.[15] Alternatively, it argues that the plan violates the absolute priority rule because the United States should be treated as a secured creditor based on its 18 U.S.C. § 3613 statutory tax lien even

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[12] At the confirmation hearing, counsel for the United States stated that improper classification is a confirmation issue, not a disclosure statement issue. Even if this is so, in this district the United States routinely raises at the earliest possible time any issues of substance so that the parties may attempt to resolve them amicably. Counsel did not explain the departure from this practice. Nor did he say that the United States consciously decided not to object until the confirmation hearing.

[13] Docket 1159.

[14] The debtors and committee object to the untimely filing. The decision whether to consider the untimely objection depends on whether the late filing resulted from excusable neglect. *See, for example, Agate Holdings, Inc. v. Ceresota Mill Ltd. (In re Ceresota Mill Ltd.),* 211 B.R. 315, 318 (B.A.P. 8th Cir. 1997); *In re Kidd,* 142 B.R. 238, 240 (Bankr. S.D. Ohio 1992). As the *Kidd* court stated, the failure must "be due to something more than ordinary negligence; it must be something that could not have been prevented by diligence." Here, the United States offers as an excuse that its counsel calendered the wrong due date; while he found his mistake in time to make a timely electronic filing, counsel does not know how to do so and relies on support staff. All such staff had gone home by the time counsel discovered his dilemma. This is perilously close to being an unacceptable explanation for the delayed filing, particularly given the United States's history of apparent inattention in this case. Since the delay did not cause any prejudice, however, the court will accept the explanation and consider the objection. *See* Docket 1219.

[15] There is yet another timeliness issue. The United States did not file a witness list for the confirmation hearing as required by this court's order. Despite this, at the hearing it attempted to examine Mr. Basta on substantive areas not covered in his direct examination. The debtors and committee objected that they were unfairly surprised by the proposed examination. Although the United States did not provide a satisfactory explanation for why it did not comply with the order, the court adjourned the hearing briefly to permit the debtors to confer with their witness and then allowed the testimony.

though it did not file the notice required to perfect its lien. If it is found to be unsecured, the United States argues that the plan unfairly discriminates by placing it in a separate class from other unsecured creditors. In response, the debtors and the committee contend that this issue was decided by the subordination order. They deny that the United States is a secured creditor.

A. Subordination

The issue is whether the subordination order is binding in this confirmation proceeding. The United States argues that it may not be subordinated under the plan because § 510 of the bankruptcy code (rather than § 726(a)(4)) governs subordination of claims in chapter 11 cases and because it has not consented to subordination. This argument, however, ignores the validity and effect of the subordination order.[16] The United States admits it had notice and an opportunity to respond to the claim objection and did not do so. The United States did not appeal from the subordination order or request reconsideration. That order is, therefore, binding. The United States did not present any law that requires a contrary result.

Moreover, even if the court were to consider the plan objection as a request to reconsider, the argument would still fail.[17] *See* FED. R. BANKR. P. 3008 (providing that requests for reconsideration of claims determinations are to be made by motion). The bankruptcy code

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[16] Although this court would not necessarily have sustained the debtors' objection in a decision on the merits, there is case law to support the debtors' request for subordination under bankruptcy code § 726(a)(4), which applies to both secured and unsecured claims. *See, for example, In re Quality Sign Co.,* 51 B.R. 351 (Bankr. S.D. Ind. 1985). *See also Thompson v. Kentucky Lumber Co. (In re Kentucky Lumber Co.),* 860 F.2d 674, 678 (6th Cir. 1988) (noting that § 726(a)(4) applies indirectly to chapter 11 cases through the § 1129(a)(7) best interests of creditors test).

[17] And query whether a court should fill in procedural gaps for a sophisticated party such as the United States.

allows a creditor to move for reconsideration of a claim for cause; on reconsideration, a claim may be "allowed or disallowed according to the equities of the case." 11 U.S.C. § 502(j). The moving party has the burden of bringing itself within the rule. *See State of Ohio v. H.R.P. Auto Center, Inc. (In re HRP Auto Center, Inc.),* 130 B.R. 247, 255 (Bankr. N.D. Ohio 1991). *See also, Miller v. Owsianowski (In re Salem Mortgage* Co.), 791 F.2d 456, 459 (6th Cir. 1986) (noting that a Rule 60(b) movant bears the burden of establishing a right to relief).

The United States has not established cause for reconsideration. In fact, the United States has not made any effort to explain why it failed to respond to the claim objection or seek timely relief from the subordination order. Moreover, the equities of this case do not weigh in favor of reconsideration. The United States did not respond to the objection, did not request relief from the subordination order, and did not object to the disclosure statement that plainly detailed the plan to subordinate the United States's claim to unsecured creditors. The debtors established that they would not have spent the time or money to propose the amended plan without the subordination order because the plan could not be confirmed otherwise. The United States argues generally in its brief that all of this should be disregarded because the issue had been pending since June 2002, at which point the court determined that it should be resolved at the confirmation hearing.[18] This is simply untrue.[19] All things considered, the United States's lack of diligence and the equities militate against reconsidering the subordination order.

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[18] Docket 1229.

[19] *See* transcript of August 29, 2002 hearing on the debtors' notice of intention to make payment to the United States. (Docket 1272).

B. Other United States Objections

The United States raised three other objections. The first is that this court lacks authority to alter the judgment of the United States District Court imposing the criminal fine. When asked at oral argument what this court might do that would have such an effect, however, counsel replied that he was just stating a general principle rather than suggesting that any action here would have the effect of overruling a district court judgment. No more need be said on this point then.

The second objection is that the plan "attempts to limit the police or regulatory power of the United States to enforce the judgment entered in the criminal case or attempts to limit the IRS from assessing trust fund penalties on responsible officers."[20] As the United States did not further brief this point and did not address it at the hearing, the court deems it waived.

The third objection is that the United States should be treated as a secured creditor by virtue of 18 U.S.C. § 3613(c). Under that statute, a fine imposed under various sections of title 18 is a lien in favor of the United States on all property or rights in property of the person fined. *See* 18 U.S.C. § 3613(c). Counsel acknowledged at the hearing, however, that the United States did not file the notice required to perfect its lien under § 3613(d).[21] The objection is, therefore, without merit.

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[20] United States Objection at 5-6. Docket 1219.

[21] A debtor would usually file a complaint to avoid the lien. In this case, however, that is not necessary because the United States admits that its lien is unperfected.

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CONCLUSION

For the reasons stated, the debtors' amended liquidating chapter 11 plan is confirmed and the objections are overruled.

Date: 21 April 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Sean Malloy, Esq.
Claudia FitzGerald, Esq.
Richard French, Esq.
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-15045
	)	
GLIATECH, INC., et al.,	)	Chapter 11
	)	Jointly Administered
Debtors.	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion filed this same date,

IT IS, THEREFORE, ORDERED that confirmation of the debtors' amended liquidating chapter 11 plan is granted and the objections to confirmation filed by Riverside Contracting LLC and the United States of America are overruled. (Docket 1050, 1216, 1219).

Date: 21 April 2006

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Sean Malloy, Esq.
Claudia FitzGerald, Esq.
Richard French, Esq.
James Lawniczak, Esq.