Mary Ann Whipple
United States Bankruptcy Judge

Dated: July 31 2006

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re: CONTINENTAL CAPITAL INVESTMENT SERVICES, INC.	)	Bankruptcy Adv. Pro. No. 03-3370
Securities Investor Protection Corp.,	)	Honorable Mary Ann Whipple
Plaintiff,	)	
v.	)	
Continental Capital Investment Services, Inc.,	)	
Defendant.	)	

MEMORANDUM OF DECISION APPROVING COMPROMISE

The court held a hearing on July 28, 2006, on the Trustee's Motion for Approval of Settlement Agreement and Issuance of Permanent Injunction [Doc. # 436]. After hearing the testimony of Trustee Thomas S. Zaremba ("Trustee") and reviewing the exhibits admitted at the hearing, the court will approve the proposed compromise.

The Trustee proposes to settle three adversary proceedings and all related claims involving pre-petition transactions between Debtors and certain of their related entities, on the one hand, and Berthel Fisher & Company ("Berthel Fisher"), on the other hand. The essence of the transactions was the sale of the assets of Debtor Continental Capital Investment Services, Inc. ("CCIS") to Berthel Fisher, with the purchase price consisting of shares of Berthel Fisher common stock, cash and warrants to purchase Berthel Fisher stock. Under the contracts memorializing the parties' transactions, Berthel Fisher was permitted to set-off against the purchase price certain amounts and costs it incurred. Further, the purchase price was to be held in escrow and not released to CCIS until the set-offs were determined.

The deal closed on or about May 29, 2003. The United States District Court for the Northern District of Ohio entered the order for relief against CCIS and Continental Capital Securities, Inc. in this liquidation proceeding under the Securities Investor Protection Act on September 29, 2003. Before the commencement of the liquidation proceeding, Debtors, Berthel Fisher and others were sued in state court in nine lawsuits by customers and creditors of the Debtors. The claims against Berthel Fisher in those lawsuits challenged the sale of CCIS' assets as a fraudulent transfer. After commencement of the liquidation proceeding, the Trustee sued Berthel Fisher in two adversary proceedings, one seeking payment of the purchase price and to enforce the contracts underpinning the parties' transactions and one seeking to avoid the sale of CCIS' assets as a fraudulent transfer. The Trustee also sued First Clearing LLC ("First Clearing") challenging as fraudulent transfers Berthel Fisher's assumption of certain obligations of Continental Capital Corporation to First Clearing and certain payments it made to First Clearing.

The Trustee proposes to settle and dismiss all three adversary proceedings and any related claims for $3 million, less the estate's $18,000 share of the cost of obtaining a fairness opinion. The parties reached their agreement through mediation facilitated by a private neutral engaged by the parties, after their own extensive efforts at resolving their disputes throughout the liquidation proceeding had failed. The parties memorialized their agreement in the executed written Settlement Agreement attached to the Trustee's motion for approval. [Doc. #436, Exhibit 1]. One of the conditions of the Settlement Agreement is that this court enter a permanent injunction enjoining assertion and pursuit of any claims by Debtors and any of their creditors relating to the sale of CCIS' assets to Berthel Fisher, including the claims in the pending state court lawsuits.

Under Bankruptcy Rule 9019, the court may approve a compromise or settlement "[o[n motion by the trustee and after notice and a hearing. . . ." The rule offers no guidance on the criteria to be used in evaluating whether a compromise and settlement should be approved. However, in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968), the Supreme Court addressed the analysis that bankruptcy courts should generally employ in evaluating settlements. The Court instructed that the bankruptcy court must "apprise [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and "should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Id.* at 424. To this end, courts have considered the following factors when asked to approve a compromise:

> (1) the probability of success in litigation;
> (2) the difficulties, if any, to be encountered in collecting any judgments that might be rendered;
> (3) the complexity of the litigation involved, as well as the expense, inconvenience and delay necessarily attendant to the litigation; and
> (4) the paramount interests of creditors with proper deference to their reasonable views.

McGraw v. Yelverton (In re Bell & Beckwith), 87 B.R. 476, 478 (N.D. Ohio 1988) (citing *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986)); *see also Waldschmidt v. Commerce Union Bank (In re Bauer)*, 859 F.2d 438, 441 (6th Cir. 1988) (explaining that "the court is obligated to weigh all conflicting interests in deciding whether the compromise is 'fair and equitable,' considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors").

In considering these factors, the court does not resolve disputed factual and legal issues, nor should it substitute its judgment for that of the trustee. *Id*. It should, however, canvass the issues and determine whether the proposed settlement "'falls below the lowest point in the range of reasonableness.'" *Id.* at 479 (citation omitted). In the end, the essential inquiry the court must make is whether the compromise is in the best interests of the estate. *Id.* at 478. The trustee, as the proponent of the compromise, has the burden of persuasion on that issue. *Id.* at 478; *Martin v. Kane (In re A & C Properties)*, 784 F.2d 1377, 1381 (9th Cir. 1986).

The Trustee's lawsuits represent a two pronged attack on the Berthel Fisher transactions: enforcement of the contracts or undoing the transfers that were part of the deal. Were he to prevail on the fraudulent transfer claim, the Trustee thought the recovery would be approximately $700,000. Enforcing the contract, however, presents some unique issues in evaluating probabilities of success on the merits and whether the $3 million recovery falls within the range of reasonableness. "Success" is more difficult to measure when winning will not necessarily result in a money judgment. Because a substantial part of the purchase price of the CCIS assets is a minority interest in the stock of a closely held corporation and warrants to acquire such stock, the chimeric value of the stock is obviously a pivotal part of the analysis.

Due to the unusual nature of the consideration involved, the fairness opinion issued by Cordes & Company [Hearing Exhibit 13, under seal] is of paramount importance in supporting the Trustee's decision to settle the estate's claims for approximately $3 million. The opinion determines a value of $.41/share for Berthel Fisher's common stock at May 31, 2006, finds that the Trustee's arguments against the Berthel Fisher setoffs lack economic value and therefore affords deference to Berthel Fisher's claimed setoffs. The opinion further finds that the Trustee could expect to recover based on that valuation and set of circumstances approximately $3,055,293 in stock and cash. The ultimate conclusion of the opinion is as follows:

> Based upon, and subject to the foregoing, we are of the opinion that, as of the date hereof, the $3,000,000 consideration for the Transaction is fair from the financial point of view to the Trustee.

The court finds that the Cordes & Company opinion, given the qualifications of the professionals involved in the engagement and the comprehensive analysis undertaken, is highly persuasive support that $3 million represents a reasonable balancing of the risks and rewards of pursuing the multi-faceted litigation to conclusion. Moreover, the $3 million figure was the product of an arms length negotiation, occurring after already extensive court proceedings and discovery, under the auspices of a professional mediator and thorough, highly competent counsel on both sides of the table.

Similar considerations arise in evaluating the difficulties of collection should the Trustee prevail in his lawsuits. Victory will result in recovery of a minority interest in a closely held corporation. Marketability of that interest is highly uncertain, and figured prominently in the Cordes & Company valuation. As the Trustee aptly testified at the hearing, stuff happens and the estate is therefore vulnerable until any stock is actually recovered and turned into cash. The proposed settlement accomplishes that on a basis deemed fair by the retained and qualified experts. Looking at collectability from a somewhat different angle than is perhaps contemplated by the case law, the manner in which the $3 million will be paid likewise does not put the estate at any collection risk. The settlement consideration will be paid by Berthel Fisher in a lump sum, and it has provided a loan commitment demonstrating the availability of the funds it will need to close this transaction. [Hearing Exhibit 15]. The Cordes & Company fairness opinion should also provide some protection to the estate should any creditors of Berthel Fisher attempt to challenge this transaction. Collectability considerations strongly support the Trustee's settlement.

The underlying litigation has already been complicated and expensive, involving many hearings and pretrial conferences, substantial motion practice, extensive discovery and a number of discovery disputes. The court is very familiar with the underlying claims and litigation because the Trustee' s lawsuits are pending in this court. If the Settlement Agreement is not approved, much more of all the same will occur over a period likely to extend for at least another year in this court alone. While the court has not attempted to quantify the fees expended to date on the Berthel Fisher litigation, suffice to say they are substantial as a matter of public record and familiarity to the court through the fee applications for the Trustee and his counsel approved to date. The fees to be incurred should the settlement not be approved cannot reasonably be quantified, but will likewise be substantial. In a SIPA liquidation proceeding, the Securities Investor Protection Corporation must advance those fees and costs where the estate lacks the assets to pay them. The court thus notes on this point SIPC's support of the settlement as evidenced by its lack of objection. Thus, the factor of the complexity, expense and delay attendant to proceeding with the litigation strongly mitigates in favor of approval of the Trustee's settlement.

The paramount interests of the other creditors also present some unique considerations, primarily because of the permanent injunction prohibiting further actions against non-debtor Berthel Fisher that is a condition of the Settlement Agreement. The court finds that it has the authority to enter such an injunction under 11 U.S.C. § 105(a). *In re Mrs. Weinberg's Kosher Foods, Inc,* 278 B.R. 358 (Bankr. S.D.N.Y. 2002); *see In re Dow Corning Corporation,* 280 F.3d 648, 658-59 (6th Cir. 2002)(enjoining a non-consenting creditor's claim against a non-debtor is "not inconsistent" with the Bankruptcy Code and is not precluded by the Supreme Court decision in *Grupo Mexicano de Sarrollo* *v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999)); *In re Artra Group, Inc.*, 300 B.R. 699 (Bankr. N.D. Ill. 2003). Such injunctions are unusual in liquidation cases, however, the following factors support the entry of the requested injunction in this case.

First, all of the known parties to the claims sought to be permanently enjoined have been given clear and proper notice of the fact and scope of the proposed injunction as part of the settlement, through service both on them and on their attorneys. Significantly none of those parties have objected or responded in any way to the proposed settlement or to the injunction. Indeed no customer or other creditor has objected to the proposed settlement.

Second, as shown by the state court complaints admitted in support of the settlement, the parties sought to be enjoined have asserted fraudulent transfer claims against Berthel Fisher aimed directly at avoiding the same set of transactions at issue in the Trustee's lawsuits. Once the liquidation proceeding commenced and the Trustee commenced his adversary proceedings involving the Berthel Fisher transactions, including challenging them as fraudulent transfers, the standing of any of these parties to pursue these claims any further became questionable at best even without an injunction. *See Nat'l American Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999) (finding that creditors' claims that required a showing of fraud, although not identical, were so similar in object and purpose to the trustee's fraudulent conveyance claim that they lacked standing to pursue the claim); *Barnett v. Stern*, 93 B.R. 962, 969 (N.D. Ill. 1988), *rev'd on other grounds* 909 F.2d 973 (7th Cir. 1990) (finding that creditors lack standing to sue third parties for property which may become property of the bankruptcy estate since the trustee alone is vested with such rights of action). Moreover, the Trustee has so far obtained assignment of the state court claims from three of the litigants as part of the process of paying SIPC advances on customer claims in this liquidation proceeding. So the parties being enjoined actually appear to be losing minimal if any rights or avenues of recovery.

Third, the language of the proposed injunction is carefully tailored and limited in scope to injuries suffered by the enjoined parties based upon or derivative of injuries to CCIS and Continental Capital Securities, Inc. *See Artra Group, Inc.*, 300 B.R. at 706-07. The primary victim of any fraudulent transfer of CCIS' assets to Berthel Fisher was transferor CCIS whose assets were conveyed away. The state court claimants suffered only as potential claimants to those assets, which the Trustee is in essence now recovering and liquidating for the benefit of the entire estate.[1] So even though this is not a reorganization proceeding, the injunction will support the equally important bankruptcy objectives of orderly and equitable liquidation, administration and distribution of limited estate assets in accordance with both SIPA and the Bankruptcy Code.

Based on all of the foregoing reasons and authorities, the court finds that the Settlement Agreement is in the best interests of the estate. The court will separately enter the form of order agreed upon by the parties and submitted to the court. [Exhibit A to Settlement Agreement, Exhibit 1 to Doc. # 436].

[1] The Trustee testified that SIPC has represented to him that it will support treatment of the recovery from Berthel Fisher as customer property under SIPA.