Mary Ann Whipple
United States Bankruptcy Judge

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 February 3, 2009, on the Trustee's Motion for Authority to Approve Settlement Agreement and Release with William Faulkner [Doc. # 1225]. After hearing the testimony of Trustee Thomas S. Zaremba ("Trustee") and reviewing the terms of the proposed compromise, the court will grant the motion.

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 sued Faulkner in 2005 in Adv. Pro. No. 05-3318. The complaint is lengthy and asserts eight claims, including conversion, fraud, negligence, breach of various duties and Ohio Securities Act Violations arising out of the fraud perpetuated by Debtors' principal William Davis. The prayer for relief seeks declaratory relief and money damages of at least $10 million. The Trustee proposes to settle the complaint without any receipt of monetary consideration, instead obtaining an agreement to cooperate and testify in connection with the ongoing liquidation proceeding of Debtors. Under the compromise, the Trustee retains a right to re-file the claims under certain defined circumstances, including in the event Faulkner acquires any property worth $25,000 or more. Faulkner also assumes under the agreement certain ongoing financial reporting obligations.

The basis for the settlement is that Faulkner is, quite simply, uncollectible. In the Trustee's opinion, the complexity and expense of the litigation that would be required to proceed to judgment on the complaint simply cannot be justified as in the best interests of the estate at this juncture in the liquidation proceeding, regardless of the probability of success on the claims asserted. Under the circumstances shown by the evidence at the hearing, the probability of success as a factor in evaluating the settlement is of little relevance in this case The Trustee's testimony convincingly described the extensive due diligence undertaken to confirm Faulkner's uncollectible status. The estate is protected from a change in that circumstance by the terms of the agreement and the right to re-file the claims. And with Faulkner at 66 years of age, retired and drawing social security, the estate is essentially hedging against the Defendant winning the lottery. Notwithstanding that the estate is not being paid any money as part of the compromise, the primary consideration received-Faulkner's ongoing cooperation–is valuable. The Trustee is prosecuting other significant claims against other collectible defendants in which Faulkner's assistance given his status as former CFO of the Debtor entities may prove critical. Although there was one objection filed, which is addressed below, no creditors opposed the compromise.

After postponing the hearing to consider approval of the compromise to enable him an opportunity to do so, William Davis filed an objection. It appears that Davis misunderstands the compromise as involving Faulkner settling something in a representative capacity other than just the claims directly against him. The agreement does not, however, purport to resolve anything other than the claims against Faulkner. None of the matters otherwise addressed in Davis' filing appear to pertain to the factors describe above and the overall standard for approval under Bankruptcy Rule

9019. Accordingly, the objection is overruled.

Based on all of the foregoing reasons and authorities, the court finds that the Trustee's settlement agreement with William Faulkner is in the best interests of the estate. The court will separately enter the form of order of approval submitted by the Trustee.