UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC. Debtors	CASE NO. 96-61376 Chapter 11 Substantively Consolidated

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RICHARD C. BREEDEN, as Trustee for THE BENNETT FUNDING GROUP, INC., and THE PROCESSING CENTER, INC.

Plaintiff

vs.

SPHERE DRAKE INSURANCE PLC, SPHERE DRAKE UNDERWRITING MANAGEMENT (BERMUDA) LTD. et al

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APPEARANCES:

SIMPSON THACHER & BARTLETT Attorneys for § 1104 Trustee 425 Lexington Avenue New York, New York 10017	KATHRINE MCLENDON, ESQ. MICHELLE CHERANDE, ESQ. Of Counsel
WASSERMAN, JURISTA & STOLZ Attorneys for Unsecured Creditors Committee 225 Millburn Avenue Millburn, New Jersey 07041	HARRY GUTFLEISH, ESQ. Of Counsel
PAUL, WEISS, RIFKIND, WHARTON & GARRISON 1285 Avenue of the Americas New York, New York 10019	STEVEN B. ROSENFELD, ESQ. Of Counsel
COSTIGAN & COMPANY, P.C. Attorneys for the Ades and Berg Group Investors 305 Broadway - 7th Floor New York, New York 10007	WILLIAM F. COSTIGAN, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion ("Motion") filed by Richard C. Breeden, chapter 11 trustee ("Trustee") of The Bennett Funding Group, Inc. ("BFG"), and other substantively consolidated debtors[1] (the "Debtors") in the above-captioned case on March 13, 2003, seeking an Order pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") authorizing him to enter into a settlement with Sphere Drake Insurance, PLC, Sphere Drake Underwriting Management (Bermuda) Limited (collectively, "Sphere Drake"); Triangle Insurance Management, Limited ("Triangle"); Janice Witkowski; Lloyd Thompson Limited, now JLT Risk Solutions Limited ("Lloyd Thompson"); Sherwood Insurance Services, Inc. ("Sherwood"); and Ivan Small ("Small") (collectively the "Settling Defendants"); the Settlement Class[2]; Dollar Capital Corporation and its bankruptcy estate; Charles Forman, as Chapter 11 Trustee for Halpert and Company; and Capital Insurance Limited - in Liquidation, by the Official Receiver of Bermuda ("Capital"). Under the terms of the Settlement, the Trustee and the Settlement Class have agreed to release the claims they have been prosecuting against

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[1] On March 29, 1996, BFG, along with Bennett Receivables Corporation, Bennett Receivables Corporation II, and Bennett Management & Development Corporation, filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101-1330 ("Code"). On April 19, 1996, American Marine International, Ltd. and Resort Service Company, Inc. filed voluntary petitions pursuant to chapter 11 and on April 25, 1996, an involuntary case was commenced against Aloha Capital Corporation. On April 26, 1996, The Processing Center ("TPC") also filed a chapter 11 petition. By Order dated July 25, 1997, the Court substantively consolidated the Debtors' estates.

[2] According to the Stipulation and Settlement Agreement (the "Settlement"), the "Settlement Class" is comprised of all persons who purchased or invested in BFG Securities, or who "rolled over' investments into BFG Securities during the period from January 1, 1990 through March 29, 1996, with certain exceptions defined therein. *See* Exhibit 1 of Trustee's Motion. The Trustee alleges in his Motion that "[a]ll of the Settlement Class members are creditors of the Estate and virtually all of the unsecured creditors are members of the Settlement Class. *See* Trustee's Motion at ¶ 8.

the Settling Defendants in the United States District Court for the Southern District of New York (the "District Court") in exchange for a payment by the Settling Defendants of $27,500,000, plus accrued interest from October 6, 2000. The Trustee also seeks approval of a *pro rata* plan of allocation and authorization to hold in reserve any distribution of the Settlement to any creditors who are members of the Settlement Class and who opt out of the Settlement Class.

Opposition to the Trustee's Motion was filed on March 26, 2003, by William F. Costigan, Esq. ("Costigan") on behalf of the Ades and Berg Group Investors ("Costigan Oppostion").[3][4] Opposition was also filed by Co-Counsel to the Settlement Class, Kirby McInerney & Squire, LLP ("KM&S") on April 9, 2003. KM&S expresses support for the approval of the Settlement; however, it objects to the proposed allocation of the net settlement proceeds. On April 25, 2003, a statement of Dollar Capital Corporation and Charles Forman as Chapter 11 Trustee for Halpert and Company was filed in opposition to a *pro rata* distribution to all unsecured creditors of the Debtors.

The Motion was heard at the Court's regular motion term in Binghamton, New York, on March 27, 2003, and following oral argument was adjourned to April 24, 2003. At that time, the

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[3] According to the papers filed in opposition to the Trustee's Motion, the "'Ades Investor Group' comprises 355 Bennett investors with over $16.5 M in Sphere Drake-insured investments." The "Berg Investor Group" is comprised of "21 Bennett investors with $1,765,000 in Sphere Drake-insured instruments." It has been reported to the Court that the Ades and Berg Investors are members of the Class Action Plaintiffs unless they opt out.

[4] In his opposition, Costigan contends that his clients were not afforded proper notice of the Settlement terms, particularly with respect to the amount to be distributed to unsecured creditors in the event that the Trustee's proposed *pro rata* distribution is approved by the Court. The Court finds no merit in this assertion given the notice Costigan acknowledges was received by his clients from counsel for the Settlement Class, which clearly sets out the amount of the proposed distribution. *See* Class Action Settlement, attached as Exhibit I to Costigan's Opposition.

Court indicated that it would render a decision on that portion of the Trustee's Motion seeking authorization to enter into the Settlement. The Court adjourned that part of the Motion requesting approval of a *pro rata* distribution of the net settlement proceeds to all general unsecured creditors to May 29, 2003, for further argument.[5]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A) and (O).

BACKGROUND

For purposes of this Decision and as background for the Court's discussion, the Court will incorporate the information set forth in the Notice of Pendency of Proposed Class Certification, Settlement of Class Action, Application for Attorneys' Fees and Expenses provided to the Class Action Plaintiffs by Class Counsel in the action they commenced in the District Court in April 1996. *See* Exhibit "I" of Costigan Declaration in Support of Ades and Berg Group Investors' Objection, filed March 26, 2003 ("Settlement of Class Action"). The Court will assume a familiarity with its prior decisions in this matter, as well.

BFG is or was a Syracuse-based group of companies in the

[5] A settlement hearing before the Hon. John E. Sprizzo is scheduled to be held in the District Court for the Southern District of New York ("District Court") on May 23, 2003, to determine whether the Settlement is fair, reasonable and adequate and in the best interests of the Settlement Class.

purported business of financing-office equipment through sales or pledges of leases and other financial instruments to investors and to banking institutions. On March 29, 1996, the United States Securities and Exchange Commission filed suit against BFG, asserting that BFG was being operated as a Ponzi scheme. BFG then filed for Chapter 11 bankruptcy protection in the Bankruptcy Court for the Northern District of New York ("Bankruptcy Court"). Thereafter, the Bankruptcy Court approved the appointment of Richard C. Breeden as Trustee for the Estate.

In April 1996, [Class Action] Plaintiffs filed numerous class action complaints in the District Court against BFG, its employees and third parties, including Capital Insurance Company ("Capital"), a Bermuda-based captive insurer of BFG's whose obligations were reinsured by Sphere Drake. In December 1997, Plaintiffs filed a complaint in *Becker et al. v. Sphere Drake PLC et al.*, naming as defendants Sphere Drake, Capital and Triangle Insurance Management, Ltd. ("Triangle"), which subsequently was amended to name additional defendants Lloyd Thompson, Ltd. ("Lloyd Thompson") and Janice E. Witkowski ("Witkowski"), a Triangle employee. *Becker* was consolidated for pre-trial purposes into the *Consolidated Action* in the District Court. In *Becker* Plaintiffs alleged that the Settling Defendants assisted and maintained the BFG Ponzi scheme by providing insurance and reinsurance that BFG used to entice investors to continue purchasing BFG Securities. Plaintiffs alleged that Sphere Drake issued misleading reinsurance confirmation certificates that accompanied personalized insurance certificates issued by Capital and signed by Triangle (the "Certificates"). Plaintiffs also alleged that the insurance issued by Capital and reinsurance issued by Sphere Drake, along with supporting Certificates, constituted an unregistered security in violation of Section 12(a)(1) and Section 5 of the Securities Act of 1933. Plaintiffs alleged that Capital was liable as issuer of the security and that Triangle, Witkowski and Lloyd Thompson were liable as 'control persons' of Capital under Section 15 of the 1933 Act. Finally, Plaintiffs alleged that they were direct or intended beneficiaries under the insurance and reinsurance contracts issued by Capital and Sphere Drake, respectively, and under an October 1, 1994 Claims Paying Agent Agreement among Capital, Sphere Drake and Triangle (hereinafter referred to as the 'Insurance Contracts').

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Meanwhile, the Trustee had filed an adversary proceeding (the "Adversary Proceeding") [on February 24, 1997] against Sphere

> Drake in the Bankruptcy Court, alleging among other things, that the BFG Estate should be paid all the proceeds of the Insurance Contracts directly. In addition to Sphere Drake, the Trustee named as defendants in the Adversary Proceeding certain banks and broker-dealers that were named as loss payees ("Loss Payees") on the Certificates. The Trustee also named as "John Doe" defendants the investors to whom the Certificates or other evidence of insurance were issued. The Adversary Proceeding sought a declaration that all of the proceeds of the Insurance Contracts should be paid only to the BFG Estate for distribution to BFG Creditors and not directly to the Loss Payees or investors. Later, the Trustee amended his Adversary Proceeding to allege, *inter alia*, that Sphere Drake, Lloyd Thompson and Triangle aided and abetted Patrick Bennett and others in committing fraud against BFG. Thereafter, the Adversary Proceeding was withdrawn from the Bankruptcy Court and transferred to the District Court . . . ."

In his Complaint, the Trustee sought more than $400 million in compensatory damages on both contract and tort theories. The Trustee points out that "although the Settlement Class and the Trustee have asserted claims against the Settling Defendants under some different theories, they are, to a degree, seeking overlapping recoveries." *See* Trustee's Motion at ¶ 8. As a result, the Trustee and the Settlement Class determined that it was in the best interest of all concerned to take a cooperative approach to the pending litigation. This allowed them "to share information and resources and to coordinate discovery in an efficient manner . . . ." *Id.* at ¶ 9.

According to the Settlement, the Trustee and Class Counsel have conducted formal and informal discovery and "have expended considerable time, effort and expense to prosecute the claims of the Settlement Class and Estate against the Settling Defendants." *See* Exhibit 1 of Trustee's Motion at 10. This included reviewing thousands of pages of documents and the preparation of extensive briefs, as well as argument of several motions in both the District Court and this Court. Following extensive negotiations and intensive mediation, the Trustee, the Settlement Class and the Settling Defendants reached an agreement in principle on October 6,

2000. *See* Trustee's Motion at ¶ 13. The Trustee describes the Settlement as complex, resolving a "myriad of interconnected issues." *Id.* at ¶ 15.

Under the terms of the Settlement, the Settling Defendants have agreed to pay the Trustee $27,500,000, plus accrued interest from October 6, 2000 ("Gross Settlement Fund" or "Fund"). From said Fund there is to be established a Settling Defendants Special Litigation Reserve Account ("Reserve Account") from which the Settling Defendants may seek reimbursement of any payments made to resolve any liabilities to claimants not bound by the Settlement. A payment of $400,000 is to be made from the Reserve Account to the bankruptcy estates of Halpert and Dollar Capital in exchange for a release of their claims, as well as to reimburse them for attorneys' fees. There is also an amount not to exceed $75,000 to be paid from the Reserve Account to Capital in satisfaction of its claims against the Settling Defendants. Class Counsel will also be seeking approval of its fees and expenses from the District Court, which also are to be paid from the Fund.

In support of the Settlement, the Trustee acknowledges the complexity of the issues and that any litigation is likely to be protracted and expensive, requiring the testimony of dozens of witnesses, including that of experts. Under the best case scenario, it is the Trustee's position that the maximum recovery on his contract cause of action is estimated to be approximately $30 million. The Settling Defendants have asserted a number of defenses. In addition, a very real question exists as to whether the Trustee has standing to maintain the tort causes of action on behalf of the Debtors' Estates or whether those remain causes of action which can only be asserted by the individual investors. Trustee points out that as with any litigation there are uncertainties and risks that the parties have considered in entering into the Settlement. In addition, the argument is made that any trial would be followed by appeals and any payment to

creditors would be delayed for years.

The Settlement has the support of the Official Committee of Unsecured Creditors ("Creditors' Committee"). The only opposition to the entirety of the Settlement has been asserted by Costigan on behalf of his clients. At the hearing on March 27, 2003, Costigan argued that his clients had anticipated recovering the full amount of their investments, less a deductible, plus years of postpetition interest. Instead, it is estimated that they will receive $.03 on the dollar if the Court approves the Trustee's proposed *pro rata* distribution. He points out that the Trustee sued for over $400 million in damages and that the proposed settlement of $27,500,000 and the possibility of a $.03 on the dollar distribution to his clients is "just not worth it." He asserts that the Trustee has failed to provide any sort of evaluation to justify his position that the Settlement is reasonable. He also alludes to a possible conflict that Trustee may have given that TPC, as loss payee, wants to maximize its recovery from the defendants, while BFG wants to minimize its liabilities insofar as it had an obligation to indemnify Sphere Drake for any payments it was required to make. It is on that basis that Costigan argues that the Trustee has opted to accept a small recovery. The Committee takes issue with this argument since the estates of TPC and BFG have been substantively consolidated by Order of this Court, dated July 25, 1996.

In support of the Settlement, counsel for the Settling Defendants, Steven B. Rosenfeld, Esq. ("Rosenfeld"), makes the argument that there is a good possibility that the Trustee would not have had standing to pursue the $400 million in tort claims. With respect to Costigan's arguments, Rosenfeld asserts that Costigan's clients never received the insurance they were promised and, therefore, have no contract claims. He takes the position that their investments were never subject to a declaration under the policy and none of those investors have any certificates of insurance which entitle them to coverage. Indeed, he points out that the United

States Court of Appeals for the Second Circuit recently found that Costigan's clients "lack standing under the Sphere Drake policy, because 'a reinsurance contract operates solely between the reinsurer and the ceding company [the insurer]; it confers no rights on the insured.'" (citations omitted)). *See Breeden v. Ades Investor Group*, No. 02-5021, Summary Order at 3 (2d Cir. March 13, 2003). Furthermore, Rosenfeld estimates that the contract claims asserted by Costigan's clients represent only approximately 22% of the total contract claims, which the Settling Defendants contend to be in range of between $4.6 and $9.4 million.

DISCUSSION

Settlements in bankruptcy cases are viewed with favor by the courts. *See Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y. 1994) (citations omitted). Whether to approve a settlement is a matter of the Court's discretion. *See In re Ashford Hotels, Ltd.*, 226 B.R. 797, 802 (Bankr. S.D.N.Y. 1998); *In re Rinsat, Ltd.*, 224 B.R. 685, 688 (Bankr. N.D. Ind. 1997). In applying its discretion, the Court should approve the settlement if it is determined to be "right and equitable under the circumstances and the law, and dictated by the reason and conscience of the judge to a just result." *Ashford Hotels*, 226 B.R. at 802, quoting *Langnes v. Green*, 282 U.S. 531, 541 (1931). Furthermore,

> [t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge 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.

Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968).

In considering whether to approve a settlement or compromise pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), the Court must consider whether it is fair and reasonable and in the best interest of the estate. *See id*. To this end, the Court must balance:

> a) the likelihood of success compared to the present and future benefits offered by the settlement; (b) the prospect of complex and protracted litigation if settlement is not approved; (c) the proportion of the class members who do not object or who affirmatively support the proposed settlement; (d) the competency and experience of counsel who support settlement; (e) the relative benefits to be received by individuals or groups within the class; (f) the nature and breadth of releases to be obtained by officers and directors; and (g) the extent to which settlement is the product of arm's length bargaining.

In re Drexel Burnham Lambert Group, Inc., 134 B.R. 493, 497 (Bankr. S.D.N.Y. 1991) (citations omitted).

a) Likelihood of Success Compared to Benefits Offered by the Settlement

The Trustee expresses confidence that he will succeed on the merits with respect to his claims against the Settling Defendants, particularly with regard to the contract claims for which the Second Circuit Court of Appeals has acknowledged his standing to proceed. There is a dispute among the parties as to the amount of recovery possible on the contract claims. The Trustee alleges that the claim amounts to approximately $30 million; whereas, the Settling Defendants assert that it is actually between $4.6 and $9.4 million.

With respect to the Trustee's tort claims and allegations that the Settling Defendants aided

and abetted the Debtors in their fraudulent activities, there is a serious question whether the Trustee has standing. That question was resolved unfavorably to the Trustee by the District Court and is currently on appeal to the Second Circuit Court of Appeals in related litigation in the case. *See Breeden v. Kirkpatrick & Lockhart, LLP, et al.*, 268 B.R. 704 (S.D.N.Y. 2001) (D.J. Sprizzo). In addition, the Settling Defendants have asserted numerous defenses and make the argument that in order to succeed, the Trustee is going to have to establish that they had actual knowledge of the fraud, not simply constructive knowledge. Thus, it appears that the likelihood of success on those particular causes of action may not be as strong as that on the contract claims.

From the perspective of the overall unsecured creditor body, there is a clear benefit to having the matters, which have been pending for over six years, settled now with some relative certainty to the outcome in terms of amount and the likelihood of payment in the not too distant future.

b) Prospect of Complex and Protracted Litigation

The Trustee's Third Amended Adversary Complaint seeks the entry of judgment:

> (a) awarding Plaintiff compensatory damages for breach of a reinsurance cover note (the "Reinsurance Cover Note") brokered and drafted by Lloyd Thompson Limited ("Lloyd Thompson") and issued by Sphere Drake Insurance plc ("Sphere Drake") and Sphere Drake Underwriting Management (Bermuda) Limited ("Sphere Drake Underwriting," collectively the "Sphere Drake Defendants") with respect to an insurance policy issued to The Bennett Funding Group, Inc. ("BFG") by Capital Insurance Company, Ltd. ("Capital Insurance"), formerly known as Bennett Insurance Company ("BIC"), a captive insurer managed by Triangle Insurance Management Limited ("Triangle"); (b) declaring that Plaintiff has the sole interest in, and right to, the proceeds of the Reinsurance Cover Note and that the Sphere Drake Defendants are obligated to pay all deficiencies between the obligation to pay and the lease payments received; (c) avoiding, as preferential transfers, the designation of defendants Dollar Capital Corporation ("Dollar Capital") and The Commercial Bank

> ("Commercial Bank") as loss payees under the insurance policy issued by Capital Insurance as loss payees under the insurance policy issued by Capital Insurance to BFG, and ordering the turnover of the transferred property to the Trustee; (d) awarding Plaintiff compensatory damages as a result of the actions of Lloyd Thompson, Triangle, the Sphere Drake Defendants, Sherwood Insurance Services, Inc. ("Sherwood") and Ivan Richard Small ("Small") in aiding and abetting the fraud perpetrated on BFG by Patrick R. Bennett ("Patrick Bennett") and others; (e) awarding Plaintiff compensatory damages as a result of the actions of Lloyd Thompson, Triangle, the Sphere Drake Defendants, Sherwood and Small in aiding and abetting the breach of the fiduciary duty owed by Patrick Bennett to BFG; (f) awarding Plaintiff compensatory damages as a result of the Sphere Drake Defendants' negligence in failing, during their audits and inspections of BFG's books and records, to detect the fraud and other wrongdoing committed by Patrick Bennett and his aiders and abettors, and/or in concealing their knowledge of the fraudulent activities; and (g) granting such other and further relief as the Court deems just.

See Trustee's Third Amended Adversary Complaint at ¶ 1.

In addition to the above-referenced defendants, the Trustee names various "banks, broker-dealers and other entities which are listed as loss payees on Declarations and Certificates of Insurance for the insurance policy issued by Capital Insurance to BFG.." *See id.* at ¶ 13. The Trustee also lists as defendants "John Does 1 through 10,000," indicating that they are "parties who are not listed as loss payees on Declarations and Certificates of Insurance, but who may claim an interest in, and/or a right to, the insurance policy issued by Capital Insurance to BFG." *Id.* at ¶ 14. Many of the parties have asserted counterclaims and cross-claims. In addition, there are issues that may require consideration of Bermuda law, in addition to state law and, in the matter originally commenced in the District Court, securities law. The proponents of the Settlement indicate that they have reviewed thousands of pages of documents and have yet to complete discovery. In *sua sponte* recommending the withdrawal of the reference of the adversary proceeding to the District Court, this Court previously found that the proceeding was

likely to involve complex issues. *See Breeden v. Sphere Drake Insurance plc, et al. (In re Bennett Funding Group, Inc.)*, Case No. 96-61376, Adv. Pro. No. 97-70049, slip op. at 18 (Bankr. N.D.N.Y. June 20, 2000), *recommendations approved and adopted* (N.D.N.Y. Jan. 25, 2001) (Kahn, D.J.). There has been nothing presented to date that would convince the Court to alter that finding.

c) Proportion of Class Members who do not Object to the Proposed Settlement

Counsel for the Settlement Class, as well as counsel for the Creditors Committee, who represents the unsecured creditor body in the Debtors' cases, have expressed support for the Settlement. Allegedly, 95% of the creditors' claims are held by the Settlement Class. Costigan, who has expressed opposition to the amount and proposed *pro rata* distribution of the settlement proceeds, represents approximately 376 investors who allegedly hold claims totaling approximately $1.8 million based on their investments with the Debtors. Early on in this case, it was alleged that there were 10,000 investors that were impacted by the Debtors' bankruptcy filing and prepetition activities. Certainly, Costigan's clients are clearly in the minority in terms of actual number. According to counsel for the Settling Defendants, Costigan's clients hold approximately 22% of the estimated total contract claims. This is clearly a minority when compared to the persons holding 78% of the total contract claims who are represented by counsel for the Settlement Class and counsel for the Creditors Committee.

d) Competency and Experience of Counsel Supporting the Settlement

There can be no dispute concerning the competency and experience of counsel, identified in the caption above, who have appeared before this Court on numerous occasions and who now support the Settlement.

e) Relative Benefits to be Received by Creditors

The exact monetary benefit to the unsecured creditors is unknown at this time. The $27.5 million in settlement proceeds is a gross amount from which the Reserve Account, as well as certain attorneys' fees and costs must be deducted. It has been estimated that unsecured creditors will receive $.03 on the dollar if the Court accepts the Trustee's proposal for a *pro rata* distribution to all such creditors, rather than a distribution only to those claimants able to establish that they hold certificates of insurance. Just as important a benefit, in the Court's view, is that to be derived from the termination of the litigation in that it will put an end ultimately to the drain on the Estates in terms of attorneys' fees, experts' fees and costs. The Court has not had an opportunity to assess the amount of attorneys' fees and experts' fees that have been incurred thus far on behalf of the Trustee in connection with the adversary proceeding, but based on the Court's familiarity with the case and the motions heard prior to the withdrawal of the reference of the proceeding in early 2001, it has no doubt that they are substantial. In addition, there is the fact that the litigation, which arguably could continue for months, and even years given the likelihood of appeals, will in large part be over for the Trustee should the Settlement be approved.[6]

f) Nature and Breadth of Releases to Officers and Directors

The Settlement does not provide for releases to the officers and directors of the Debtors, who in some cases it is alleged were responsible for the fraud. It does provide for mutual releases by the Trustee, the Settlement Class and the Settling Defendants of claims they might have against one another, including various counterclaims and cross-claims asserted against the

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[6] There is a provision in the Settlement whereby any funds remaining in the Reserve Account as of December 31, 2010, shall be paid to the Debtors' Estate, less payment to Class Counsel of any fees to which is entitled under the terms of the agreement.`

Settling Defendants.

g) Extent to which the Settlement is the Product of Arm's Length Bargaining

It has been represented to the Court that the Settlement was reached after months of negotiations and mediation. Costigan argues that in negotiating the Settlement, the Trustee had a conflict of interest insofar as the insurance contract with Sphere Drake allows it to seek indemnification from BFG for any monies it has to pay out to TPC. Thus, Costigan argues that the Trustee has an incentive to settle for a lower amount from Sphere Drake, thereby reducing the liability BFG would have to Sphere Drake under the indemnification provision of the contract.

Under the terms of the Settlement, any claim Sphere Drake might have against BFG has been waived. Furthermore, it has been represented to the Court that the amount of the Settlement approximates the maximum amount that could have been recovered under the reinsurance contract if there had been no settlement. In addition, any indemnification claim Sphere Drake might have against BFG would arguably constitute an unsecured claim for which Sphere Drake could only recover a percentage of any monies it might have paid to TPC. Thus, the Trustee would have the incentive to recover as much money as possible under the contract as any monies TPC would receive would be more than the monies BFG would have had to pay in indemnifying Sphere Drake. Accordingly, this argument does not convince the Court that the Settlement was anything but the product of arm's length bargaining.

Conclusion

Having reviewed the above-referenced factors and having listened to the oral argument and after a review of the Settlement, it is the conclusion of this Court that the Settlement is fair

and reasonable and in the best interest of the Debtors' Estates. Accordingly, the Court will authorize the Trustee to enter into said Settlement on behalf of the Debtors' Estates.

Based on the foregoing, it is hereby

ORDERED that pursuant to Fed.R.Bankr.P. 9019, the Trustee is authorized to enter into the Settlement as being fair and reasonable and in the best interest of the Estate, and it is further

ORDERED that to the extent the Motion seeks to approve a *pro rata* distribution of the settlement proceeds, it is adjourned to the Court's motion calendar on May 29, 2003, for further argument.

Dated at Utica, New York

this 22nd day of May 2003

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge