UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

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

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

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

On March 29, 1996, The Bennett Funding Group, Inc. and four related companies (collectively, the "Bennett companies" or the "Bennetts") filed petitions under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code").[1] The financial collapse of the Bennett companies has subsequently given rise to extensive multidistrict litigation between Chapter 11 Trustee, Richard C. Breeden ("Trustee"), individual Bennett investors or lenders (collectively, the "Investors"), institutional lenders which had entered into financing arrangements with the Bennetts and which have not previously settled with the Trustee (collectively, the "Banks"), various insurance companies and underwriters which had allegedly

[1] In an order dated July 25, 1997, this Court substantively consolidated the estates of those Bennett entities that had filed for bankruptcy on March 29, 1996, along with those of four Bennett entities that filed for bankruptcy in April and May of 1996. The consolidated estate is comprised of The Bennett Funding Group, Inc. ("BFG"), Bennett Receivables Corporation, Bennett Receivables Corporation II, Bennett Management & Development Corporation ("BMDC"), The Processing Center, Inc., Resort Service International, Ltd., American Marine International, Ltd., and Aloha Capital Corporation.

guaranteed certain Bennett investments, including Assicurazioni Generali S.p.A., Generali U.S. Branch, Generali Underwriters, Inc. (collectively, "Generali"), and various brokers and underwriters (collectively, "Brokers"), including Halpert and Company, Inc. ("Halpert").

In a motion filed on December 23, 1998, the Trustee seeks approval pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") of three separate settlement agreements. These include: (1) an agreement between Generali, the Trustee, and certain Investor classes (the "Generali Settlement"), which resolves substantially all disputes between Generali and the Trustee and between Generali and the Investors, as well as certain disputes between the Trustee and the Investors; (2) an agreement between the Trustee and counsel for certain Investors (the "Cooperation Agreement"), which is primarily concerned with a proposed fee request to be made by the Investors' counsel in related litigation before the United States District Court for the Southern District of New York; and (3) a settlement and release resolving all controversies between Generali, the Trustee, and Halpert (the "Halpert Settlement") (collectively, the "Settlements").

The Court held argument on the Trustee's motion on January 28, 1999 (the "January Hearing"), at which time numerous objections were heard. The motion was then adjourned and re-argued on February 25, 1999 (the "February Hearing"), after which the Court reserved the matter for decision.

On March 12, 1999, the Trustee filed with the Court an Amended Motion of Settlement ("Amended Settlement"). Attached to the Amended Settlement as Exhibit A was a purported modification of the Cooperation Agreement, which consisted of a photocopy of the original document, unaltered except for the deletion of a single half-sentence, which was manually obscured by means of Liquid Paper or some similar product. This deletion is neither signed nor initialed by any party to the Cooperation Agreement. Exhibit B to the Amended Settlement is an Agreement Modifying Settlement ("Modifying Agreement") that modifies and replaces certain provisions of the Generali Settlement. The Modifying Agreement is signed by all parties that had signed the original Settlements, including counsel for the Trustee, Generali and counsel for the principal Investor classes. The Halpert Settlement is not affected.

FACTUAL STATEMENT

1. The Alleged Fraud.

The litigation at issue in the proposed Settlements arises out of what the Trustee has elsewhere described as "the largest Ponzi scheme ever carried out against individual investors and financial institutions in U.S. history." *Breeden v. Bennett (In re The Bennett Funding Group, Inc.)*, 220 B.R. 743, 747 (Bankr. N.D.N.Y. 1997).[2] The details of this Ponzi scheme, according to the Trustee, were as follows: prior to filing for bankruptcy, the Bennett companies had been engaged in the apparent business of small equipment lease financing. In a typical transaction, the Bennetts would purchase office equipment from a retailer on behalf of a consumer, or end-user, who would in turn promise to make lease payments to the Bennetts in exchange for use of the equipment. After obtaining a number of leases in this manner, the Bennetts would transfer their right to the future payments to individual Investors, although they typically retained the

[2] While the Trustee's factual allegations are set out here for purposes of clarification only, the Court emphasizes that it makes no finding of fact regarding the existence of a Ponzi scheme, the mechanics of any insurance arrangement, or the culpability of any insurer or underwriter.

obligation to collect payments on, or "service," the leases. Alternately, the Bennetts would assemble the leases into portfolios, which would be pledged as collateral on debt instruments issued to both Banks and individual Investors. Under either scenario, the total transaction effectively created two income streams– one running from the consumer end-user to the Bennetts, and another from the Bennetts to the Investors or Banks. In theory, at least, the effective rate of return on the payments made to the Bennetts would exceed the interest rate on their obligations to the Banks and Investors, creating a spread that would be retained by the Bennetts as profit. *See* Report of Richard C. Breeden, Trustee, Submitted Pursuant to 11 U.S.C. § 1106 at 11-15 (December 31, 1998) ("§ 1106 Report").

Unfortunately, the end-users approved by the Bennetts tended to have a high rate of default on their obligations, and as a result the effective rate of return for the loans made by the Bennetts was actually less than the interest rate it paid to Banks and Investors. *Id.* at 10. But while the Bennett companies thus lost money on nearly every one of their transactions, they managed to stay afloat (and even report a fictitious profit) through a number of fraudulent practices. Genuine leases were pledged multiple times over to different Investors and Banks; still other Investors were assigned purported leases that never actually existed. *Id.* at 29. At the same time, all funds received from end-users, new investors and lenders were commingled in a single account known as the "honeypot," which enabled the Bennetts to effectively meet their obligations to old Investors by diverting to them the funds obtained from new Investors and Banks. *Id.* at 20. Since every false and double-pledged lease increased the Debtor's obligations, the fraud required an exponentially-increasing number of new investors to survive. As a result of these fraudulent practices, the Bennett leasing operations took on the characteristics of a

Ponzi-type scheme, which becomes more and more insolvent with each successive transaction, and draws in a larger and larger number of victims until its inevitable collapse.

2. The Generali Insurance Policies.

Unlike the garden-variety Ponzi scheme, which typically draws in its victims by promising quick, astronomical profits, the Bennett leasing program was marketed to individuals seeking conservative, low-risk, and long-term investments. *See* § 1106 Report at 16. To a considerable degree, these investors were attracted to Bennett by the fact that many of their notes and leases were purportedly backed by reputable insurance companies. *Id.*

Among the insurance companies involved in the Bennett investment programs was Generali, which issued 11 Bennett-related insurance policies between 1990 and 1994 (the "Policies"). *Id.* at 59. The exact nature and effect of the Policies is disputed by the parties to these Settlements. According to the Trustee's analysis of the Policies, which is disputed in most respects by Generali, the protection offered to Investors by the Generali insurance was non-existent, the effective monetary exposure of Generali under the Policies was zero, and the sole function of the insurance arrangement was to mislead Investors into believing that the Bennett investments were low-risk. Although the Investors were allegedly told that the Policies insured individual investments, under which Generali would pay each Investor an amount equal to the shortfall if the end-user defaulted on his lease obligations, the Policies only actually insured the Bennetts' cash flow. In other words, Generali would only become liable on the policies if there was a net shortfall in some aggregate pool of leases assembled by the Bennetts, and should this have happened, payment under the policies would have been made to the Bennett companies, and not to any individual Investors. *Id.* at 60. The Trustee further alleges that the policies were specifically designed so that no matter how poorly the leases performed, Generali would not be under any obligation to pay claims as long as the Ponzi scheme remained in existence. This was done through a "double trigger" provision, allegedly added to the policies at Generali's request, which provided that Generali would not become obligated under the policies unless there was both a shortfall in lease performance, and a failure by the Bennett companies to pay the Investors. The Trustee argues that this double trigger was "highly significant" in light of the Bennetts' fraud, since Ponzi schemes by definition manage to make payments to their investors up until the moment of collapse. *Id*. Finally, the Trustee notes that Generali's actual exposure was further reduced by a hold-harmless provision, under which the Bennetts were required to reimburse Generali for any payments made to the Bennetts by Generali arising out of the Bennetts' fraud. *Id.* at 61.

The Trustee's findings regarding the Generali policies are disputed on certain points by the Investors. Although the policies listed only The Processing Center, Inc., a Bennett affiliate, as the loss payee, a number of the Investors have alleged that they were issued purported "certificates of insurance" signed by Generali, and accordingly have argued that they (and not the Estate) are entitled to payment under the policies, either as intended third-party beneficiaries or under a theory of constructive trust. *See* Answer of Diane Abatemarco et al. to First Amended Adversary Complaint, Counterclaim and Crossclaim, Adv. No. 96-70195A (May 6, 1998); *Answer of Defendants Ann Fein and Michael S. Balkin to First Amended Adversary Complaint of Trustee Richard C. Breeden*, Adv. No. 96-70195A (May 8, 1998). The Trustee, however, asserts that these certificates have no legal significance.

Also asserting an interest under these Policies are various Banks and Brokers. It is alleged that at least some of these Banks and Brokers are listed as loss payees on the applicable Master Declarations and Certificates of Insurance, thus placing their claims on an arguably different legal footing than the Investors, who are generally listed only as "certificate holders." *See* First Amended Adversary Complaint of Trustee Richard C. Breeden, Adv. No. 96-70195A at ¶ 67 (January 8, 1998) ("Amended Complaint").

These and other conflicting claims to the Policies are addressed in an adversary complaint filed by the Trustee on July 26, 1996 and amended on January 8, 1998. In pertinent part, the Trustee's Amended Complaint alleges that the Bennett companies are both the direct and intended beneficiaries of the Policies, and seeks a declaratory determination of his rights under the Policies against Generali, all certificate-holder Investors, and various Banks and Brokers. In addition, the Amended Complaint asserts various causes of action for monetary damages against Generali under both contract and tort theories.

Generali filed an Answer to the Amended Complaint on May 5, 1998. Noting that it faced a risk of double liability from the competing claims asserted against it under the Policies, Generali additionally filed a Counterclaim/Crossclaim which sought a determination and declaration of its liability in respect of the Policies to the Trustee, the loss payee Banks and Brokers, and all other persons and institutions who claimed an interest under the Policies.

3. Halpert

Halpert is a New Jersey-based securities brokerage that had purchased Bennett leases and notes purportedly backed by Generali. As with the majority of individual investors, Halpert was issued a certificate of insurance listing itself as the loss payee of the policies; however, the Trustee has alleged that the only loss payee listed on the insurance declaration for Halpert's policies was a Bennett company.

Subsequent to the commencement of this case, Halpert filed a Chapter 7 bankruptcy petition in the District of New Jersey. The Trustee has asserted that approximately $10 million in commissions and other payments made to Halpert by the Bennetts are avoidable as fraudulent transfers or preferences, and has accordingly filed a proof of claim for that amount in the Halpert bankruptcy. Conversely, the Halpert Trustee has filed a proof of claim in the Bennett bankruptcy, asserting a right to collect payment under the Generali policies. It is believed that a majority of Halpert's creditors are also creditors of the Bennett estate. *See* Motion of Richard C. Breeden, as Trustee, pursuant to Federal Rule of Bankruptcy Procedure 9019 for an Order Authorizing the Consolidated Estate to Enter into Settlements with and among Generali, Halpert and Company, Inc., and Investor Classes, Case No. 96-61376 at ¶ 70 (December 23, 1998) ("Settlement Motion").

4. The Southern District Litigation

In a series of actions currently pending before the Honorable John E. Sprizzo of the United States District Court for the Southern District of New York, a number of former Bennett Investors have filed suit against (among others) Generali, the former officers and directors of the Bennett companies and Halpert. In an order dated April 29, 1997, Judge Sprizzo granted a motion to certify the Investor-plaintiffs as a non-mandatory class ("Plaintiff Class") under Rule 23(b)(3) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."). *In re Bennett Funding*

Group, Inc. Securities Litigation (No. II), M.D.L. No. 96-CIV-2583 (S.D.N.Y. April 29, 1997) (the "Bennett Securities" litigation). Under the terms of the Plaintiff's Motion for Class Certification, incorporated by reference in Judge Sprizzo's order, the class was certified on behalf of "[a]ll persons and entities (other than defendants, members of their immediate families, heirs, affiliates, successors and assigns) who purchased Bennett Securities or `rolled over' investments into Bennett Securities during the period from March 29, 1992 through March 29, 1996."

Because the Plaintiff Class was certified as a non-mandatory class action under Fed.R.Civ.P. 23(b)(3), individual investors were permitted to opt out of the Plaintiff Class. It appears that although a majority of the Investors have consented to pursue their claims through the Plaintiff Class, at least some Investors have executed requests for exclusion which had not been rescinded by the time the Trustee's Settlement Motion was submitted for decision.

The allegations raised against Generali by the Plaintiff Class in the Southern District litigation are substantially similar to those raised by the Trustee, although the parties disagree (as noted above) on the question of the ultimate entitlement to the insurance proceeds. The Plaintiff Class has asserted causes of action against Generali including breach of contract and the common law tort of aiding and abetting fraud. In addition, the Plaintiff Class has sued Halpert and other brokers on theories including securities fraud and negligent misrepresentation.

5. The Defendant Class

On November 6, 1996, Investors Michael C. Balkin and Ann Fein filed a motion in this Court seeking class certification pursuant to Fed.R.Bankr.P. 7023 and Fed.R.Civ.P. 23(b)(1) and (2) of those Investors who had been listed as defendants in the declaratory actions asserted by the

Trustee and Generali (the "Defendant Class"). This motion was granted by an order of the Court dated May 30, 1997. Pursuant to the Court's Order for Certification, the Defendant Class was defined as:

> All creditors of the Debtors who assert claims against Generali in connection with their transactions with the Debtors, except the following: (1) persons or entities who are named as loss payees on certificates of insurance issued with respect to policies issued by Generali to The Bennett Funding Group, Inc. and Resort Services Company, Inc.; and (2) persons or entities who are not named as loss payees but who are banks, bank and trust companies, trust companies, savings and loan associations or other financial institutions (collectively "non-loss payee financial institutions"), provided that such non-loss payee financial institutions appear and answer the Adversary Complaint in this proceeding no later than May 30, 1997 (unless such date is extended by the Court). Such exceptions include, without limitation, all Crossclaim Defendants listed in Paragraph 6 of Generali's Amended Answer And Amended Counterclaim/Crossclaim dated December 18, 1996.

Because of the declaratory nature of the causes of action asserted against it, the Defendant Class was certified as a mandatory class action pursuant to Fed.R.Civ.P. 23(b)(1) and (2), and individual Investors were consequently not afforded an opportunity to opt out. There is thus a substantial, but not complete, overlap between the composition of the Plaintiff Class and the Defendant Class: while all members of the Plaintiff Class who assert rights under the Policies are members of the Defendant Class, not all members of the Defendant Class are members of the Plaintiff Class.

TERMS OF THE SETTLEMENTS

If nothing else, the purported amendments to the Settlements (which were presented to this Court subsequent to the date on which the Trustee's original Settlement Motion was submitted for decision) have complicated the question of what, if anything, the Court need now decide. As a further complication, the original Settlement Motion does not clearly specify whether the compromises submitted within constitute one settlement (which must be rejected or approved as a whole) or three settlements (which may be considered separately and independently of one another).

Regarding the second of these issues, the Court determines that it will treat each of the three Settlements as a separate and severable compromise for purposes of Fed.R.Bankr.P. 9019. While no signatory party appears to have addressed this issue directly on the record, the text of the Settlement Motion does not indicate any intention that the individual Settlements are in any way conditioned on the approval of the others. As discussed more fully below, the Settlements are also logically independent of each other as well; each would retain the greater part of its effectiveness even if forced to stand alone. Accordingly, the Court finds no reason to constrain itself to an all-or-nothing analysis of the three Settlements.

The Modifying Agreement attached as Exhibit B of the Amended Settlement affects only the Generali portion of the original Settlements. Every party that was a signatory to the original Generali Settlement has signed the Modifying Agreement, and as such, the Court regards the amendment as effective. However, while the Modifying Agreement appears to be directed at particular objections raised by various creditors at the January and February Hearings, these creditors have not yet had an opportunity to be heard on the amended Generali Settlement as required by Fed.R.Bankr.P. 9019. *See Saccurato v. Masters, Inc. (In re Masters, Inc.)*, 149 B.R. 289, 292 (E.D.N.Y. 1992). The Court notes that the amended Generali Settlement has been noticed for a hearing on March 25, 1999, and accordingly reserves its decision on the Generali portion of the settlement until such time as the notice requirements of Fed.R.Bankr.P. 9019 have been fully met.

The purported amendment to the Cooperation Agreement is considerably more problematic. As noted, even assuming that the manual deletion of a single line (a deletion made not on the original, ink-signed copy of the document, but on a photocopy) is somehow valid, the modified agreement which was submitted to the Court is neither signed nor initialed by any representative of the Class Counsel. Although several Class Counsel attorneys appeared at a chambers conference in which this deletion was discussed without raising any objection to it, the Court cannot believe that this modification is binding on them. Moreover, a debtor may not unilaterally withdraw from a settlement that has been presented to the Bankruptcy Court under Fed.R.Bankr.P. 9019 without the consent of all parties or leave of the Court. *See In re Frye*, 216 B.R. 166, 173 (Bankr. E.D. Va. 1997). Accordingly, the Court will treat the attempted amendment of the Cooperation Agreement as ineffective, and will issue its decision with regard to both the Cooperation Agreement and the Halpert Settlement, which is also unaffected by the Amended Settlement.

I. TERMS OF THE COOPERATION AGREEMENT

The Cooperation Agreement presented for approval in the Trustee's Settlement Motion is a document dated May 15, 1998 and signed by counsel for the Trustee and counsel for the Plaintiff and the Defendant Classes ("Class Counsel"). As described by the Trustee, the Cooperation Agreement was designed to accomplish two primary goals: (1) the establishment of a "common front" for litigation, in order to maximize the joint recoveries of the Estate and the

Plaintiff Class against certain defendants; and (2) the establishment of a cap on the percentage of fees which the Class Counsel would request from the resulting settlements.

In addition to the Generali defendants whose settlement is presently before the Court, the Cooperation Agreement anticipates a joint litigation strategy against several additional defendants who have not yet settled, including Sphere Drake Insurance, P.L.C.; Sphere Drake Underwriting Management (Bermuda) Ltd.; Triangle Management Ltd.; Lloyd Thompson Ltd.; and Mahoney Cohen & Co., C.P.A., P.C.[3] The anticipated recoveries from most of these defendants have not yet been determined, although counsel for Trustee has stated that the estimated total recovery would be in the "tens of millions range."

In pertinent part, the Cooperation Agreement provides that neither the Trustee nor the Investors represented by Class Counsel will make a separate peace with any of the above defendants unless that defendant agrees to settle with both. The Cooperation Agreement further provides that upon approval by the Bankruptcy Court and the District Court of any settlement against the above-listed defendants, the settlement proceeds would be placed in a joint account out of which Class Counsel would draw its fees, subject to the approval of the District Court only. The remaining amount would be paid to individual creditors through the Estate.

Under the terms of the Cooperation Agreement relating to fee requests, Class Counsel agrees not to seek fees from the District Court exceeding 23% of the first $75 million of recoveries from all jointly-pursued defendants, or 21% of the next $40 million, or 18% of any remaining amount. In return, the Trustee agrees not to object to any fee request within the above

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[3] It appears that all of these defendants have been sued both in adversary proceedings before this Court and in the Bennett Securities litigation before the District Court.

parameters, and further stipulates that "the substantial role played by Class Counsel in achieving the Joint Recoveries on behalf of the Investor Classes and the Estate justifies an attorney fee application not in excess of the amounts set forth in this paragraph and that such percentages and amounts are fair and reasonable to the Estate and all creditors of the Estate and the Investor Classes."[4] (Coop. Ag. at ¶ 2).

Class Counsel have stated that they intend to request the maximum award of fees allowable under the Cooperation Agreement. Under the sliding-scale arrangement described above, this would lead to a fee request of approximately 22% of the total Generali settlement amount,[5] and exactly 18% of any amount recovered from any of the other defendants.

II. TERMS OF THE HALPERT SETTLEMENT

Under the Halpert Settlement, Generali will pay the Halpert estate $275,000 in full satisfaction of its contract and tort claims. Most of this settlement appears to settle rights among Generali, the Plaintiff Class, and Halpert, parties over whom this Court has no supervision. In the one provision of the Halpert Settlement that appears to relate directly to the administration of the estate, however, the Bennett estate and the Halpert estate agree to release their mutual proofs of claim. Because of the extremely limited assets of the Halpert estate, the Trustee has

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[4] The purported amendment submitted by the Trustee on March 12, 1999 deleted the words, "and that such percentages and amounts are fair and reasonable to the Estate and all creditors of the Estate and the Investor Classes."

[5] In both its original and amended forms, the Generali Settlement provides for a total recovery of $125 million. If this settlement amount were to be approved (a determination that the Court does not make at this time), the maximum fee that Plaintiff Class counsel would be permitted to request under the Cooperation Agreement would be approximately $27.5 million.

asserted that the Bennett estate will benefit from this mutual release.

DISCUSSION

Although Fed.R.Bankr.P. 9019 authorizes the bankruptcy court to approve settlements and compromises entered into by a trustee, neither the Code nor the Bankruptcy Rules provide a list of factors by which such settlements are to be evaluated. Under the standard employed by most bankruptcy courts, however, a settlement may be approved if and only if it is: (1) fair and reasonable, (2) in the best economic interests of the estate, and (3) compatible with the court's responsibility to the public. *See Ehre v. New York (In re Adirondack Railway Corp.)*, 95 B.R. 9, 11 (Bankr. N.D.N.Y. 1988). In addition, a bankruptcy court may not approve a settlement under Fed.R.Bankr.P. 9019 if doing so would require the court to exceed the bounds of its jurisdiction under Title 28 of the United States Code. *See In re Continental Airlines, Inc. v. Air Line Pilots Association (In re Continental Airlines Corp.)*, 907 F.2d 1500, 1509 (5th Cir. 1990) (holding that the bankruptcy court could not issue a settlement order conditioned on the modification of a labor agreement otherwise unrelated to the bankruptcy case).

In considering a settlement motion under Fed.R.Bankr.P. 9019, the court will generally defer to the professional opinion of the Trustee and the express wishes of the creditors regarding the impact of the proposed settlement on the Estate. *See Rivercity v. Herpel (In the Matter of Jackson Brewing Company)*, 624 F.2d 599, 604 (5th Cir. 1980). Such deference is not absolute, however, and the court has the discretion to reject a settlement supported by both the Trustee and the creditors if it "falls below the lowest point in the range of reasonableness." *In re Bell &*

Beckwith, 93 B.R. 569, 574 (Bankr. N.D. Ohio 1988).

I. THE COOPERATION AGREEMENT

At its heart, the Cooperation Agreement is a straightforward *quid pro quo*. The Plaintiff Class Counsel agrees not to request fees above a certain sliding percentage amount; in return, the Trustee agrees not to oppose their request and further stipulates that their role in the settlement negotiations "justifies" an award not in excess of the maximum request amount , which is stated to be "fair and reasonable to the Estate and all creditors of the Estate."

These provisions of the Cooperation Agreement have provoked a firestorm of protest from various Bennett creditors, the United States Trustee, and the Official Committee of Unsecured Creditors. In large part, these objections attack the substance of Class Counsel's anticipated fee request, asserting that in light of the work actually performed so far by the Plaintiff Class Counsel, the projected 22% maximum fee request would be excessive and unwarranted under controlling Second Circuit case law. The Court will not consider any argument along these lines, for two reasons: first, because the Court has not yet approved the Generali Settlement or any total settlement amount against which to apply the fee-request formula, any discussion of actual dollar figures or hours under the current Cooperation Agreement is largely speculative. Secondly, the issue of Plaintiff Class Counsel's fees is a matter reserved solely for Judge Sprizzo. It is the belief of this Court that any substantive ruling on the Class Counsel's entitlement to fees would be an unwarranted interference in the work of the District Court, and the Court accordingly declines to insert itself in the adjudication of this issue.

But while this Court will not directly address the question of whether a fee representing potentially 22% of the Generali recovery is justified, it may properly consider the slightly narrower question of whether the course of action to which the Trustee has committed himself is in the best interests of the Estate. *See Adirondack Railway Corp.*, 95 B.R. at 11.

It is undisputed that, absent the Cooperation Agreement, the Plaintiff Class Counsel would request fees in excess of 22%, and that the Trustee would argue for a Class Counsel fee award less than 22%. In this context, the main part of the Cooperation Agreement might be understood as a hedging strategy on the part of the Trustee: the risk that the Plaintiff Class Counsel fees would consume more than 22% of the recovery is completely eliminated, at the expense of a slight increase in the risk that the District Court would award fees at a level above that at which the Trustee would otherwise object, but in any case less than or equal to 22%. There is nothing unusual or inequitable per se about this type of risk management. In addition, the practical impact of the Trustee's waiver of his right to object may be lessened in light of the fact that counsel for the Official Committee of Unsecured Creditors apparently intends to object to the Plaintiff Class Counsel's anticipated fee request before Judge Sprizzo.[6] Based on the entire record before it, the Court is convinced that the basic framework and non-objection clause of the Cooperation Agreement represents a reasonable exercise of the Trustee's business judgment.

The Court is troubled, however, by the inclusion of an apparent stipulation by which the Trustee states that the Plaintiff Class Counsel played a "substantial role" in achieving the

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[6] At the January hearing, there was some uncertainty as to whether the Unsecured Creditors Committee would have standing to object to the Plaintiff Class Counsel fees in the Southern District. However, pursuant to an order of this Court dated March 5, 1999, counsel for the Unsecured Creditors Committee has been permitted to appear on the fee motion on behalf of individual committee members, which presumably would eliminate any standing issue that might arise.

recovery from Generali, and that a 22% fee award would be "fair and reasonable" to the Estate. (¶ 2). In an affidavit filed with this Court on February 22, 1999, the Trustee stated that both the amount and the very existence of the Generali settlement were still undetermined at the time that the Cooperation Agreement was signed. In addition, the Trustee did not receive or examine the Plaintiff Class Counsel's time records until long after the present Settlement Motion was filed.[7]

It is clear that at the time the Cooperation Agreement was entered into, the "justifies" and the "fair and reasonable" clauses were assertions that, while not necessarily false, were stipulated to by the Trustee without any apparent basis in fact. Nor is there any more basis to believe that the clauses are true at the present time, or that they will be true when the final Generali Settlement is presented to the District Court. The Trustee does not know, and cannot know, what work will be performed by Plaintiff Class Counsel between now and then, or what role they will play in whatever settlement is ultimately approved by the Courts. In short, the Court finds that insofar as these clauses purport to express opinions of the Trustee that are well-grounded in fact, they are false and misleading.

It is not entirely clear what use, if any, the parties to the Cooperation Agreement intend to make of this language. According to ¶ 9 of the Cooperation Agreement, "[n]othing contained herein may be deemed as an admission by any party hereto and this Agreement may not be used for any purpose by anyone not a party hereto." However, based on remarks made on the record during the Court's hearing of February 25, 1999, it appears that at a minimum, the Plaintiff Class

[7] The Trustee further indicates that if fees were calculated on a pure hourly-rate basis (the so-called "lodestar" approach), the time records submitted by Plaintiff Class Counsel would support an award of no more than $10 to 13 million, or approximately half that which may be requested under the Cooperation Agreement.

Counsel intends to use this stipulation to rebut the anticipated opposition to their fee request from the Official Committee of Unsecured Creditors.[8]

Fed.R.Civ.P. 11 provides in part that:

> (b) REPRESENTATIONS TO COURT. By presenting to the court (whether by signing, filing submitting or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> . . . (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

If counsel for the Trustee chooses to risk sanctions in another forum, it would normally be no concern of this Court. In the present case, however, this Court is being asked to place its stamp of approval on a misleading representation of fact that will be presented to another federal judge. For reasons that should not require elaboration, the Court declines to do so.

The Court reiterates that it is comfortable with the general framework of the Cooperation Agreement, as well as with the Trustee's waiver of his own right to object to the Plaintiff Class Counsel's fee request. But the Cooperation Agreement's unsupportable stipulations as to the justification, fairness, and reasonableness of the eventual fee request simply go too far. As counsel for the Plaintiff Class has conceded, this stipulation will operate to the prejudice of the

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[8] Arguing on behalf of the Plaintiff Class Counsel, attorney Edward A. Grossman noted that:

> One other thing you asked, I guess . . . whether Mr. Stolz [counsel for the Committee] was disadvantaged by the Trustee having made the statement he did. . . . Because we thought the Trustee, and especially Simpson, Thacher, was more knowledgeable about the work we did in connection with the litigation and the settlement than Your Honor, with no disrespect, or Mr. Stolz. And it is certainly our hope that Judge Sprizzo is more impressed by that statement than by all of the criticism that we're going to get from the Unsecured Creditors Committee.

(Transcript of February 25, 1999 hearing at 47).

Committee and any individual class members who voice an objection to the fee request, and it moreover constitutes a latently false representation to the District Court. Accordingly, the Court is unable to approve the Cooperation Agreement.

II. THE HALPERT SETTLEMENT

In contrast to the often-contentious argument over the first two thirds of the Settlement Motion, not a single interested party objected to the Halpert Settlement. In light of the apparently universal consent of the creditors of the Estate, the Court will accept the Trustee's business judgment that the Halpert Settlement is fair, reasonable and in the best interests of the Estate.

Based on the foregoing, the Trustee's Amended Motion of Settlement Pursuant to Fed.R.Bankr.P. 9019 is hereby

DENIED with respect to the Cooperation Agreement; and

GRANTED with respect to the Halpert Settlement.

Dated at Utica, New York

this 18th day of March 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge