UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

SIR-TECH SOFTWARE, INC., Chapter 7
Case No.: 01-16683

Debtor.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

By motion filed February 13, 2004, the Chapter 7 Trustee, Paul A. Levine, Esq. ("Trustee"), seeks authority on behalf of the bankruptcy estate of Sir-tech Software, Inc. ("Debtor") to settle certain claims

against 1259190 Ontario, Inc., 1259191 Ontario, Inc., Sir-tech Canada Ltd., Frederick Sirotek, Norman Sirotek, Robert Sirotek, and Linda Currie (collectively referred to herein as the "Settling Parties") pursuant to Rule 9019(a) of the Federal Rules of Bankruptcy Procedure ("Rules") or, in the alternative, to sell certain claims pursuant to United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), § 363(b) (the "Settlement Motion"). The Trustee is supported by Hancock & Estabrook, LLP (Stephen A. Donato, Esq.), attorneys for the Debtor, and Nixon Peabody LLP (William S. Thomas, Esq.), attorneys for the Settling Parties. Andrew Greenberg, Inc. ("AGI") and Robert J. Woodhead ("Woodhead"), creditors and parties in interest, object to the proposed settlement. The hearing on this matter was originally scheduled for March 24, 2004, but was repeatedly adjourned until April 29, 2004. Following oral argument at the April 2004 hearing, the court agreed to take the matter under submission and provided the parties with an opportunity to file memoranda of law. The matter was submitted for decision on June 10, 2004.

JURISDICTION

This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A). The court has jurisdiction over the parties and subject matter of the Settlement Motion pursuant to 28 U.S.C. §§ 157 and 1334.

FACTUAL BACKGROUND[1]

The following constitute the court's findings of fact pursuant to Federal Rule of Civil Procedure 52, as made applicable here by Rule 7052. Unless otherwise indicated, all material facts in this case are undisputed.

On October 25, 2001, the Debtor filed a voluntary petition for Chapter 11 relief in this court. By Order dated July 24, 2003, the case was voluntarily converted from Chapter 11 to Chapter 7. Since its inception in 1981, and until conversion to Chapter 7, the Debtor operated a computer software business for the purpose of selling and licensing computer games to domestic and foreign companies. This bankruptcy

[1] The Trustee seeks to settle certain claims related to complex state court litigation dating back to 1992. While the parties have submitted various pleadings and documents, including decisions and orders, from the on-going state court litigation, the court can only summarize its procedural and factual history. Several documents are referred to in the parties' submissions, but are not part of the record here because they were not offered as exhibits or attachments thereto.

proceeding is another chapter in the long litigation history resulting from the Debtor, AGI, and Woodhead's August 21, 1981 agreement (the "Agreement"), whereby AGI and Woodhead granted the Debtor an exclusive license to develop, manufacture, and market the "Wizardry" computer game and related products that they had conceived of and programmed, respectively. (AGI's Opp'n to Mot. to Approve Settlement and/or Sell Assets, Ex. A, Doc. No. 135.)

Beginning approximately a decade before – and continuing during the pendency of – the bankruptcy filing, AGI, the Debtor, and the Settling Parties have been involved in multi-count, state court litigation.[2] In 1992 and 2001, AGI commenced two separate actions in the Sullivan County Supreme Court: the first, Index No. 2311/92, alleged breach of contract, tortious interference with contract, and disclosure and misappropriation of trade secrets against the Debtor, Svane, Inc., Sir-tech Canada, Ltd., and 1259190 Ontario, Inc.; and the second, Index No. 1886/01, alleged identical causes of action against Robert Sirotek, Frederick Sirotek, and Norman Sirotek (collectively referred to herein as the "State Court Actions"). Those actions arose out of the Debtor's assignment in December 1997 of license rights granted under the Agreement to its subsidiaries or related corporations allegedly for the sole purpose of defrauding AGI. In exchange for the transfer of assets, the Debtor received $50,000 from the Settling Parties. In the State Court Actions, AGI contends that the Agreement specifically provided for the Debtor's assignment of licensing rights, but that the Debtor intentionally failed to comply with the pertinent contractual provisions.

In the latter of the State Court Actions, AGI moved to amend its Second Amended Complaint, in part, to add 1259190 Ontario, Ltd. and Sir-tech Canada, Ltd. as defendants, to add a cause of action alleging fraudulent conveyance of the Debtor's assets to the Canadian corporations that were allegedly insiders of the Debtor, and requesting injunctive relief or receivership. By Decision and Order dated April 5, 2002, Acting

[2] The bankruptcy filing stayed the litigation against the Debtor only. AGI was therefore able to proceed against the other Settling Parties. *See* 11 U.S.C. § 362.

Supreme Court Justice Burton Ledina granted the first request,[3] but denied the others (the "Ledina Decision"). (Ledina Decision at 9, attached to the Settlement Mot. as Ex. B.) Notably, Judge Ledina denied AGI's request to amend its Second Amended Complaint to add a fifth cause of action under the New York Debtor and Creditor Law "as being violative of the bankruptcy stay." Specifically, Judge Ledina wrote:

> The basis for the invocation of the various provisions of the Debtor and Creditor Law is that there was a fraudulent conveyance from Sir-tech Software, Inc. to the Canadian corporations. If such is the case, the items so fraudulently conveyed are in the province of the trustee in bankruptcy to collect, and the plaintiff may not pursue a separate action in conflict with the bankruptcy estate.

Id. at 6 (citation omitted).

Pursuant to the Agreement, the Debtor had rights to the Wizardry assets that became part of the bankruptcy estate under Code § 541(a) upon the commencement of the Chapter 11 case. The Trustee now seeks to recover and collect those assets by settling avoidance and fraudulent conveyance claims under Code §§ 544 and 548 and derivative claims asserted against the Settling Parties.[4] In addition to the Wizardry related claims, the Trustee also seeks to settle the estate's avoidance and fraudulent conveyance claims against the Settling Parties arising from the Debtor's 1997 transfer of copyrights to other computer programs identified as Jagged Alliance and Jagged Alliance Deadly Games, and of the trademarks to Jagged Alliance, Realm of Arkania, and miscellaneous other computer game programs to 1259191 Ontario, Inc. (all claims subject to settlement are collectively referred to herein as the "Avoidance Claims"). The Settlement Agreement embodies two essential terms: (1) within 10 days of the entry of a final order by the court approving the settlement, the Settling Parties shall pay a total collective sum of $40,000 in full settlement of

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[3] The Canadian domiciliaries successfully appealed on the basis that the state court lacked personal jurisdiction, and the appellate division reversed in part by Memorandum and Order dated September 5, 2002.

[4] Code § 544 gives the trustee or debtor-in-possession strong-arm powers to avoid any transfer that would otherwise be voidable by an existing unsecured creditor under applicable state law. 11 U.S.C. § 544(b). In this case, the applicable state law is New York Debtor and Creditor Law §§ 273 through 276.

By comparison, Code § 548 enables the trustee to avoid any transfer of an interest in the debtor that was made within one year prior to the date of filing if the debtor made the transfer with the actual intent to hinder, delay, or defraud a creditor or potential creditor, 11 U.S.C. § 548(a)(1)(A), or if the debtor received less than "reasonably equivalent value" for the transfer and he or she was either insolvent at the time of the transfer or became insolvent as a result of the transfer. 11 U.S.C. § 548(a)(1)(B).

These statutes will be discussed in greater detail *infra*.

any and all claims which may be asserted by the Debtor against the Settling parties including, but not limited to, the claims related to the Avoidance Claims and the State Court Actions; and (2) each party shall fully and forever waive, release, discharge, and relinquish any and all claims, actions, causes of action, suits, debts, claims and demands whatsoever that it may have against the other. (Settlement Agreement at 3-4, attached as Ex. A to the Settlement Mot.)

The Trustee advises the court that, if it were to approve the settlement, the anticipated distribution of estate assets would yield "a very substantial distribution to creditors after Chapter 7 administration expenses." (Trustee's Reply to Opp'n of AGI to Trustee's Mot. For Order Approving Settlement and/or Sale of Assets at 3, Doc. No. 136.) Excluding the claim of AGI, priority claims total $750, administrative costs other than those of the Trustee total $21,730.06, and unsecured claims total $254,290.43. *Id.* By obtaining releases from the Settling Parties, the Trustee seeks to reduce the total unsecured claims by approximately $35,000.[5]

This is not the first time a proposed settlement of the Avoidance Claims has been presented to the court. In November 2002, during the pendency of the Debtor's prior Chapter 11 case, the then Debtor-in-Possession filed a motion seeking approval for settlement of the Avoidance Claims for $25,000. The motion was opposed by AGI, but supported by creditors Computer Games Magazine (01/08/03 Letter, Doc. No. 48), Banfield-Seguin, Ltd. (01/08/03 Letter, Doc. No. 49), and Ziff David Media Inc. (01/15/03 Letter, Doc. No. 51), who collectively represented that they preferred an immediate distribution from the settlement proceeds over a future share of the speculative return from the State Court Actions. The motion was adjourned seven times and ultimately mooted out by the July 24, 2003 conversion order. Creditors other than AGI and Woodhead have not taken a position on the Settlement Motion *sub judice*.

As of the date of filing of the Settlement Motion, the Trustee held $114,000 in escrow. The Final

[5] This assumes that certain claims filed by Norman Sirotek are valid. Norman Sirotek filed four claims, but the latter two claims appear to be duplicates of the earlier filed claims. Notwithstanding, at a minimum, the proposed settlement would alleviate the need, if any, for the Trustee to file and litigate an objection to the claims in the normal course of administration.

Notice of Deadline to File Proofs of Claim was mailed to creditors by the Bankruptcy Court Clerk's Office on July 29, 2004, noticing the deadline for non-governmental creditors as October 27, 2004. (Doc. No. 149). At present, the Claims Register shows fourteen claims filed, including, but not limited to, those of Banfield-Seguin, Ltd., Robert Woodhead, Inc., AGI, and Norman Sirotek.

ARGUMENTS

Generally, AGI argues that the Settlement Motion should be denied because it falls below the lowest threshold of reasonableness and is at odds with the paramount interest of creditors. AGI's arguments originate largely from its counterproposal to the Trustee that: (1) AGI would subordinate its interest to the remaining creditors with respect to an immediate distribution of the $114,000 in cash assets on hand; and (2) AGI would pursue avoidance actions against three related insiders of the Debtor and the Settling Parties on behalf of the estate at AGI's sole expense with respect to all costs, legal and expert fees. (AGI's Opp'n to Mot. to Approve Settlement and/or Sell Assets at 4.) AGI states that its counterproposal is more favorable than the $40,000 offer of the Settling Parties because it would provide creditors with a significantly greater immediate distribution and an opportunity to obtain a substantially greater return upon their claims, if successful. AGI further argues that the Settlement Motion should be denied because the record has not been substantially developed since the Chapter 11 proceeding, and the court refused to grant the prior settlement motion under similar circumstances.[6] Alternatively, AGI argues that the Settlement Motion should be further adjourned because the court cannot make a determination of reasonableness based upon the present record. At a minimum, AGI requests that the court allow it to conduct further discovery against the Settling Parties so that it may ascertain "the measure and timing of benefits" the Settling Parties derived from the transfer of

[6] In its opposition papers, AGI repeatedly asserts that the court denied the prior settlement motion because the Debtor-in-Possession could not overcome the threshold inquiry of reasonableness under Rule 9019(a). While the court formerly expressed concerns over the impartiality and objectivity of the Debtor-in-Possession, the court never ruled on the motion because it was mooted out by the Chapter 7 conversion. In addition, any such concerns have been alleviated by the addition of the Trustee, who bargains at arms-length and exercises independent business judgment when considering a settlement proposal. For these reasons, the court dismisses AGI's argument on this point without further discussion.

the Wizardry assets.[7] (*Id.* at 1-2.)

Woodhead's opposition, which is contained within a single submission, mirrors that of AGI. Woodhead supports the counterproposal made by AGI and, if the court deems the same unacceptable, would support "other approaches [that would allow for] a fair and diligent prosecution of the fraudulent transfer claims against the Settling Parties." (Decl. of Robert J. Woodhead in Opp'n to Mot. to Compromise ¶ 1, Doc. No. 138.) At a minimum, Woodhead requests that the court permit discovery by the objecting parties so that they may ascertain the value of the transferred assets and reach the merits of the Avoidance Actions. (*Id.* ¶¶ 4, 7.)

The Trustee responds that his business judgment is sound based upon his review of the voluminous pleadings and documents from the State Court Actions and the Chapter 11 proceeding. The Trustee states that he has thoroughly reviewed complaints, discovery requests, the Ledina Decision, contracts, accounting records, and operating reports. In addition, the Trustee represents that he has conducted the § 341 Meeting of Creditors, and he has engaged in extensive discussions with attorneys, insiders, and officers of the Debtor, the principal of AGI, and AGI's attorneys. The Trustee emphasizes that the only opposition to the proposed Settlement is driven by AGI, and that no arms-length creditors have objected to the Settlement Motion. He suggests that AGI is in effect seeking a mini-trial of the Avoidance Claims, which is outside the scope of a motion for settlement or compromise under Rule 9019(a).

With respect to AGI's counterproposal, the Trustee argues that the same is illusory because it is prohibited by the ethical rules binding the Trustee, Andrew Greenberg, attorney and principal of AGI, and Matthew Weiss, Esq., counsel for AGI. The Trustee argues that, even if he were to retain Mr. Weiss' law firm upon a contingency basis, the estate would remain ultimately liable for any litigation expenses advanced

[7] The court notes that the parties dispute the value of the transferred assets. Before accepting the Settling Parties offer, the Trustee considered the valuation on record of Pinto, Mucenski & Watson (offered as evidence in the Chapter 11 proceeding), which determined the worth of the Wizardry assets to be $50,000 (the "Pinto Valuation"). AGI, on the other hand, attributes a much higher, but unsubstantiated, value to the assets.

by AGI under New York Disciplinary Rule 5-103(B)(1),[8] regardless of the outcome. The Trustee therefore states that AGI's counterproposal would prohibit any immediate distribution from the funds on hand and, more importantly, that it could unfavorably tip the scales and subject the estate to liability in excess of its current assets of $114,000. Further, the Trustee discredits AGI's counterproposal because it includes the subordination of AGI's claim, which the Trustee classifies as unliquidated and potentially objectionable.

As the primary justification for his business judgment, the Trustee point to two factors: (1) the fact that the Avoidance Claims are not airtight, and the probability of success in litigation is unknown; and (2) even if litigation were successful, the Trustee believes the value of the transferred assets to be no more than $50,000, thus the estate's recovery would be capped at that amount. The Trustee reminds the court that the Debtor, prior to filing for bankruptcy, retained the New York City business brokerage firm of Veronis, Suhler & Associates to market the Debtor's business as a going concern or to market its trademark and copyright assets, but no offer was ever received (Sett. Mot. ¶¶ 27-28), and that the Pinto Valuation appraised the Debtor's Wizardry assets and its other copyright and trademark assets for a total sum of $50,000 (*Id.* ¶ 29).

The Trustee also directs the court's attention to the fact that the Settlement Motion seeks to resolve only claims of the Debtor, leaving AGI free to pursue whatever claims it may have against the defendants in the State Court Actions. Finally, the Trustee suggests that if AGI truly believes that the Avoidance Claims are worth substantially more than $40,000, it could offer to purchase the Avoidance Claims under Code § 363(b). The Trustee emphasizes that AGI has not done so despite a lengthy battle over the proposed settlement.

DISCUSSION

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[8] DR 5-103, which is entitled "Avoiding Acquisition of Interest in Litigation," provides in pertinent part that:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
>
> A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

DR 5-103(B)(1).

The court makes the following conclusions of law pursuant to Federal Rule of Civil Procedure 52, as made applicable here by Rule 7052.

I. Settlement Standards

Compromises are generally favored in bankruptcy because they minimize litigation and expedite the administration of a bankruptcy estate. *In re Coram Healthcare Corp.*, 315 B.R. 321, 329 (Bankr. D. Del. 2004). Bankruptcy courts have a fair amount of discretion in determining whether to approve or disapprove a proposed settlement or compromise entered into by a trustee, *see In re Trism, Inc.*, 292 B.R. 662, 666 (B.A.P. 8th Cir. 2002), since neither the Code nor the Rules provide a list of factors by which settlements are to be evaluated, *In re Bennett Funding Group., Inc.,* 1999 LEXIS 1859, at *24 (Bankr. N.D.N.Y. Mar. 18, 1999). Rule 9019(a) allows the court to approve a compromise or settlement proposed by the Trustee provided that it meets two general requirements: (1) the settlement must be fair and equitable, *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968), and (2) it must be in the best economic interests of the bankruptcy estate, *In re Drexel Burnham Lambert Group, Inc.,* 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991) (citing *In re Energy Coop., Inc.*, 886 F.2d 921 (7th Cir. 1989)). Bankruptcy courts within the Second Circuit may approve a proposed compromise or settlement provided that it "does not fall below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (internal quotation marks and citation omitted); *In re Altman*, 302 B.R. 424, 425 (Bankr. D. Conn. 2003) (citing *In re Best Prods. Co.*, 177 B.R. 791 (S.D.N.Y. 1995), *aff'd*, 68 F.3d 26 (2d Cir. 1995); *In re Raytech Corp.*, 261 B.R. 350, 359-60 (Bankr. D. Conn. 2001)).

That inquiry requires the court to evaluate the terms of the compromise and to "form an educated estimate of the complexity, expense, and likely duration of litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a fair and full assessment of the wisdom of the proposed compromise." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. at 424-45. Such other factors include, but are not limited to, the probability of success in the litigation, the paramount interests of creditors, the balance between the likelihood of success compared

to the present and future benefits offered by the settlement, the prospect of complex and protracted litigation if settlement is not approved, the nature and breadth of releases to be obtained by officers and directors, and the extent to which settlement is the product of arm's length bargaining. *Nellis v. Shugrue*, 165 B.R. 115, 122 (S.D.N.Y. 1994) (citing cases).

In applying that standard, the court is not required to conduct a trial or mini-trial on the merits of the claims subject to compromise, *In re Int'l Distribution Ctrs., Inc.,* 103 B.R. 420, 423 (S.D.N.Y. 1989), because any virtue which may result from a compromise is based upon avoiding litigation, *In re Apollo Steel Co.,* 1994 WL 713697, at *4 (Bankr. N.D. Ill. Dec. 19, 1994). "On the other hand, the court must do more than note that the trustee 'considered' particular claims." *In re Commercial Loan Corp.*, 316 B.R. 690, 697 (Bankr. N.D. Ill. 2004). The court's role therefore lies between these extremes. *Id.* at 698. The court should "canvass the issues," *In re W.T. Grant*, 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied*, 464 U.S. 822 (1983) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972), *cert. denied*, 409 U.S. 1039 (1972)), to evaluate the fairness of the compromise.

While the court must independently exercise its discretion in evaluating the reasonableness of a settlement, *In re Appollo Steel Co.*, 1994 WL 713697, at *4 (the court cannot simply "rubber stamp" a proposal), it may consider the competency and experience of counsel who support the compromise, *Nellis v. Shugrue,* 165 B.R. at 122 (citing *In re Texaco*, 84 B.R. 893 (Bankr. S.D.N.Y. 1983)), and give weight to the informed judgments of the case trustee or the debtor and their counsel that a compromise is fair and equitable, *id.* (citing *In re Carla Leather, Inc.,* 44 B.R. 457 (Bankr. S.D.N.Y. 1994), *aff'd,* 50 B.R. 764 (S.D.N.Y. 1985)). It should also consider the creditors' objections to the proposed settlement, although their views are by no means controlling. *In re Appollo Steel Co.*, 1994 WL 713697, at *3 (citing *American Reserve Corp.,* 841 F.2d 159, 161-62 (7th Cir. 1987)).

II. The Proposed Settlement

The Settlement Motion and the Trustee's supplemental submissions specifically discuss each of the factors articulated by the court in *Shugrue*. *See Nellis v. Shugrue*, 165 B.R. 115. The parties are, by now,

intimately familiar with the Trustee's conclusions contained therein and, for the sake of brevity, the court will not reiterate them *in toto* here. The Trustee's main points can be summarized as follows: any probability of success in litigating the Avoidance Claims is clearly outweighed by the potential dissipation of assets that may result from protracted litigation; collection of a judgment is, at best, uncertain against Canadian domiciliaries and/or insiders of the Debtor; the nature of the controversy is complex and, based upon the history of the State Court Actions and the parties prior dealings, there is no reason to believe that continued litigation would not substantially delay the administration of the case and indefinitely forestall a distribution to creditors; the estate does not wish to bear the risks and expenses of litigation; and, creditors other than AGI and Woodhead have in the past expressed a preference for money in hand versus the promise of a larger distribution in the future. Notwithstanding AGI's assertions to the contrary, the Trustee has demonstrated that he examined the estate's available courses of action with utmost diligence before recommending the settlement to the court.

A. The Proposed Settlement is in the Best Interests of the Estate

In this case, it is apparent that the proposed settlement exceeds the lowest point in the range of reasonableness. While the court finds the Trustee's arguments to be compelling and persuasive in their entirety, two factors in particular, the balance between the settlement's terms and the litigation's probable benefits and the paramount interests of creditors, dominate the court's review and prove to be decisive.

1. Potential Recovery if Litigated Versus the Proposed Settlement Amount

As noted *supra*, it is not the court's role to adjudicate the merits of the Avoidance Claims when all that is presently before it is a request to settle the same; however, for the court to decide whether settlement is in the best interests of the estate, it must review the substantive law and assess the relative strengths or weaknesses of the underlying claims to determine what, if any, benefit may accrue to the estate if the Trustee were compelled to proceed to trial. Under either claim for relief that the Trustee may have, he would have to prove either actual or constructive fraud. Following his investigation, the Trustee was "very uncertain" whether he could meet this difficult burden of proof, and he was unwilling to assume this risk of non-

persuasion for fear of wastefully depleting estate assets in the process. (Settlement Mot. ¶ 44.j.)

To prevail on a fraudulent conveyance claim under New York Debtor and Creditor Law § 276,[9] the Trustee must establish that the transfer was done with actual intent to defraud. *In re The Cassandra Group*, 312 B.R. 491, 497 (Bankr. S.D.N.Y. 2004) (citing *In re Flutie N.Y. Corp.*, 310 B.R. 31, 38 (Bankr. S.D.N.Y. 2004)). Because actual intent is difficult to establish through direct evidence, fraudulent intent may be inferred from the facts and circumstances surrounding the transfer. *Id.* (citing *Cadle Co. v. Newhouse*, 2002 WL 1888716, at *6 (S.D.N.Y. August 16, 2002)). "Such facts and circumstances, otherwise known as 'badges of fraud,' include transfers made without adequate consideration." *Id.* (citing *Salomon v. Kaiser (In re Kaiser)*, 722 F.2d 1574, 1582-83 (2d Cir. 1983)). The same principles apply to a claim for actual fraud under Code § 548(a)(1)(A). Likewise, to prevail on a claim for constructive fraud under New York Debtor and Creditor Law §§ 273-275, the Trustee would have to show that the transfer by the Debtor to the Settling Parties was made without "fair consideration."[10]

For purposes of Code § 548(a), the Trustee would have to establish that the estate received "less than reasonably equivalent value." 11 U.S.C. § 548(a)(1)(B)(I). With respect to that claim, if the Settling Parties'

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[9] **§ 276. Conveyance made with intent to defraud**
Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

N.Y. DEBT. & CRED. LAW § 276.

[10] **§ 273. Conveyances by insolvent**
Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without fair consideration.

§ 274. Conveyances by persons in business
Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

§ 275. Conveyances by a person about to incur debts
Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

N.Y. DEBT. & CRED. LAW §§ 273-275.

only liability to the Trustee were under this section and they could show that they took for value and in good faith, then they would be afforded the defense and protection of Code § 548(c).[11]

At least arguably, therefore, a valuation greatly in excess of the Pinto valuation as urged by the objecting parties could successfully challenge the settlement. If the fair market value of the transferred assets were not within range of the settlement amount, *see In re Mrs. Weinberg's Kosher Foods, Inc.*, 278 B.R. 358, 361 (Bankr. S.D.N.Y. 2002) ("At a minimum, the proposed settlement amount must be supported by adequate consideration . . . ."), it would be incumbent upon the objecting parties to go forward with evidence to rebut the Trustee's *prima facie* case. *In re North American Dealer Group, Inc.*, 62 B.R. 423, 428-29 (Bankr. E.D.N.Y. 1986). In the court's view, however, any material issue of fact concerning the fairness of consideration received by the estate from the Settling Parties, *see Id.* at 429 ("Fairness of consideration is generally a question of fact.") (citing *Klein v. Tabatchnick*, 610 F.2d 1043, 1047 (2d Cir. 1979)), must be resolved in favor of the Settling Parties because of the Pinto Valuation. While AGI and Woodhead contend that the amount of the settlement is criminally low, they fail to offer evidence that greater recovery is possible despite the fact that they are the creators of the transferred assets and, as such, they are or should be intimately familiar with the worth of those assets. Moreover, their objection with respect to valuation and potential recovery is further weakened by their deafening silence when given the opportunity to purchase the Avoidance Claims from the estate for a better and higher price than that offered by the Settling Parties to resolve the litigation. AGI has proven to be a skilled litigant, and the court is unconvinced that AGI would be unable to independently pursue the Avoidance Claims, particularly in light of its proposal to the Trustee to assume the litigation and prosecute those claims under the umbrella of the estate.

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[11] That subsection provides:

> Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

11 U.S.C. § 548(c).

According to the Pinto Valuation, which has not been discredited, the worth of the transferred assets is $50,000, a mere $10,000 higher than the settlement amount. Thus, the court can find with little difficulty that the estate will receive "fair consideration" or "reasonably equivalent value" upon approval of the settlement. On that basis, there is no reason to conclude that the estate would benefit more from litigation than from settlement. In fact, the opposite is true when the expense of litigation, which could easily exceed $10,000, is taken into account.

At the end of the day, even if the Trustee were to prevail on all claims, the estate would be only $50,000 richer. This finding alone obviates the need for the court to consider any of the other issues raised by the parties.

2. Paramount Interests of Creditors

Notwithstanding the court's prior justification for approving the settlement, the court deems equally important the paramount interests of creditors in this case.

In analyzing the proposed settlement, the court gives added weight to the fact that Andrew Greenberg, unlike other creditors, has no incentive to accept the same; as the court noted earlier, the Settling Parties, or some combination thereof, and AGI have been involved in highly contentious litigation for a number of years; no sense of urgency on the part of AGI can be gleaned from what knowledge the court has of the State Court Action. The court can only infer that AGI and Woodhead's position therefore appears to be one of principle first and foremost. While AGI's grievances against the Debtor may ultimately prove to be legitimate, this court must consider the consequences that continued, protracted litigation would have on the creditor body as a whole. It cannot allow a two-party dispute to frustrate the recovery of other creditors.

Moreover, even with the court's approval of the settlement, AGI and Andrew Greenberg will still find themselves entangled in a legal battle with the Settling Parties under the jurisdiction of the state court. Thus, any expense, delay, and inconvenience that would arise as a result of prolonged litigation in this court would unfairly and unduly prejudice other creditors who have a greater interest in the speedy resolution of this case, including those that have formerly expressed a preference for finality with respect to administration of the

estate so that they may receive an immediate distribution. While AGI and Woodhead may wish to gamble on the outcome of litigation of the Avoidance Claims, the court need not and will not impose this fate on the entire creditor body.

CONCLUSION

For the foregoing reasons, the court concludes that the settlement is well beyond the lowest point or reasonableness and that it is in the best interests of the estate. Accordingly,

It is hereby ORDERED that the Settlement Motion is granted, over the opposition of AGI and Woodhead.

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge