

FILED

JUN 10 2005

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

GRANT PRICE
CLERK, U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA
DEPUTY

In re:
B & B WORM FARMS, INC.,
Debtor.

Case Number 03-14379-~~EM~~
(Chapter 7)

**MOTION FOR ORDER APPROVING A COMPROMISE OF CONTROVERSY,
COMBINED WITH BRIEF IN SUPPORT AND NOTICE OF HEARING**

Janice D. Loyd, Trustee for the Estate of the B & B Worm Farms, Inc. ("Trustee"), and James Kent Busch ("Defendant") by and through counsel of record, pursuant to Fed.R.Bankr.P. 9019(a), move for an order approving a compromise of controversy between them. Trustee alleges as follows in support of this motion:

MATERIAL FACTS

1. The above-styled bankruptcy case (the "Case") was filed and an order for relief under Chapter 7 of Title 11, United States Code (the "Bankruptcy Code"), was entered on April 22, 2003 (the "Filing Date").
2. Janice D. Loyd is a member of the panel of private trustees established under 28 U.S.C. § 586(a)(1). On April 22, 2003, Janice D. Loyd was appointed by the United States Trustee as the Chapter 7 trustee in the Case. As Trustee being duly qualified and has acted as trustee in the Case since her appointment and qualification.
3. Trustee filed adversary proceedings entitled *Janice D. Loyd, Trustee of the Estate of B & B Worm Farms, Inc., Plaintiff, v. James Kent Busch, Defendant*, adversary number 04-1208 in which she sought, pursuant to one or more of the following: 11 U.S.C. §§ 542, 544, 547, 548, and 550, to recover alleged avoidable transfers of money and property made by the Debtor to the Defendants.

4. To avoid the inherent costs, delays, and uncertainties of continued litigation the Trustee and Defendants have reached a compromise . A separate "Settlement Agreement" memorializes the Trustee and Defendant's terms and conditions and will be made available by request of the undersigned counsel to any party. In summary, that compromise is as follows:

- (a) The Trustee sued James Kent Busch for avoidable transfers totaling \$280,816.96.
- (b) The intended purpose of this compromise is to resolve all of the claims that Janice Loyd, in her capacity as "Trustee" of the Estate of B&B Worm Farms has against James Kent Busch.
- (c) Agree to an entry of judgment in the amount of Two-Hundred Eighty Thousand, Eight-Hundred Sixteen Dollars (\$280,816.00).
- (d) Pay to the Trustee the sum of Fifteen Thousand Dollars (\$15,000.00) to be paid as follows: \$5,000 by no later than May 13, 2005, and the balance to be paid in equal installments of \$ 1,666.67 in the form of a cashier's check over Six (6) months on the 1st of each month until paid in full. ("the Forbearance Amount")
- (e) In the event that Defendant fails to timely perform his obligations to the Trustee pursuant to the terms and conditions of this Agreement, all amounts paid hereunder shall be applied to the Judgment, the Forbearance Amount shall be of no force or effect, and Trustee shall be permitted to immediately proceed with any and all collection efforts and claims against Defendant pursuant to this Agreement and otherwise, without notice, except as may be required by law, and without demand, to collect and recover the Judgment amount plus costs and interest as allowed by law.

5. Trustee believes the amount James Kent Busch has agreed to pay appears to approximate the benefits of successfully prosecuting those claims, without the delays, costs, and uncertainties of litigation. The Trustee believes that the compromise is in the best interests of the estate and parties in interest to this case.

BRIEF IN SUPPORT

Approval of a compromise of controversy in a bankruptcy case is governed by Fed.R.Bankr.P. 9019, which states in pertinent part:

(a) **Compromise**

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

The factors to be considered when determining whether to approve a compromise are set forth in *American Employers' Insurance Company v. King Resources Company*, 556 F.2d 471 (10th Cir. 1977). The factors identified in *King Resources* that are pertinent here are:

- 1) The balance between the likelihood of plaintiff's or defendants' success should this case go to trial vis a vis the "concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures."
- 2) The prospect of complex and protracted litigation if the settlement is not approved.
- 3) The proportion . . . who do not object or affirmatively support the proposed settlement.
- 4) The competency and experience of counsel who support the settlement.
- 5) The ratio between *total* benefits . . . provided by the settlement in comparison to the maximum dollar limits [that could be recovered without it].
- 6) The relative benefits to be received [from the settlement].
- 7) The capacity . . . to pay a judgment up to the maximum [amount that could be recoverable in the absence of a settlement] but more than the dollar value it would give by virtue of the settlement.

* * *

- 9) The nature and breadth of releases to be obtained . . . as a result of the settlement.
- 10) The extent to which the settlement is truly the product of "arms-length" bargaining, and not of fraud or collusion.

Id. at 475. (Internal citations omitted.) *See also Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968), in which the Supreme Court stated:

[T]he judge should form an educated estimate of the complexity, expense, and likely direction 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. Basic to this process in every instance, of course, is the need to compare the terms of the compromise and likely rewards of litigation.

88 S.Ct. at 1168.

In considering whether to approve a compromise of controversy, the bankruptcy court is given great latitude. *In Re: Woodson*, 839 F.2d 610, 620 (9th Cir. 1988). In applying the above criteria, the bankruptcy court's paramount concern is that the compromise in question is both fair and equitable. *Citibank N.A. v. Baer*, 561 F.2d 1341, 1345-46 (10th Cir. 1980). The bankruptcy court's inquiry is not intended to substitute its judgment for that of the Trustee or to attempt to decide the numerous questions of law and fact raised by any party who might object to the approval of the proposed compromise. Rather, the court's objective is to canvass the issues and see whether the settlement "falls below the lowest point in the range of reasonableness." *In re W. T. Grant Co.*, 669 F.2d 599, 608 (2nd Cir. 1983).

The Tenth Circuit Court of Appeals has concluded that the bankruptcy court's obligation to canvass the issues in the context of a motion to approve a compromise of controversy is satisfied by the bankruptcy court's determination that parties to the proposed compromise and settlement have:

- (a) conducted a reasonable investigation to establish a sufficient factual foundation for the bankruptcy court to approve the compromise proposed;
- (b) developed facts upon which to base an objective evaluation of the claims in question;
- (c) conducted legal research regarding the relative merits of the claims in question;
- (d) made a good faith effort to properly separate the issues of law and fact; and,
- (e) evaluated the facts relating to the claims which are the subject of the proposed compromise and controversy.

Reiss v. Hagmann, 881 F.2d 890, 891-892 (10th Cir. 1989).

The movant submits that an application of the above criteria to the proposed compromise indicates that the proposed compromise between them is well above the lowest point in the range of reasonableness and is fair and equitable to all parties concerned. Further, the movant will be prepared to satisfy the requirements of *Reiss v. Hagmann*, supra, at any hearing on the Motion.

The movant believes that the compromise as set out herein is in the best interest of the estate and its creditors and is a fair and equitable disposition of the issues involved. The movant therefore, urges the bankruptcy court to enter an order approving the compromise as set forth herein.

Based upon the factors identified above, the movant believes the proposed compromise is in the best interest of the estate and parties in interest to this case.

- A. Success at trial vs. present benefit of settlement; the ratio between *total* benefits . . . provided by the settlement in comparison to the maximum dollar limits [the could be recovered without it]; the relative benefits to be received [from the settlement]; and the capacity . . . to pay a judgment up to the maximum [amount that could be recoverable in the absence of a settlement] but more than the dollar value it would give by virtue of the settlement.**

It appears that the proposed compromise would result in the estate receiving almost immediately the approximate value equivalent of what they would receive within a reasonable time if the Trustee prevailed on all issues.

- B. Prospect of protracted litigation if settlement not approved.**

Litigation in this matter has just begun and all the trial preparation, and the associated expense remains to be incurred. The proposed compromise will avoid extended litigation and the costs and risks inherent in litigation.

C. The competency and experience of counsel who support the settlement.

Counsel for the Trustee and Defendants is experienced in bankruptcy/adversary matters.

D. The extent to which the settlement is truly the product of "arms-length" bargaining, and not of fraud or collusion.

This settlement is the result of arm's length negotiations between the Trustee and Defendants.

Consequently, the proposed settlement is not the result of fraud or collusion, but is truly a the product of arm's length bargaining.

NOTICE OF HEARING

A hearing on the foregoing Motion has been scheduled for the 12 day of July, 2005, at ~~9:30~~^{10:00} a.m., before the Honorable Richard L. Bohanon, United States Bankruptcy Judge. If no objection is filed within 18 days of the service of the foregoing Motion, the hearing will be stricken, the Motion will be deemed confessed and an order granting the relief requested will be entered forthwith. If an objection is timely filed, the objecting party must comply with applicable local rules and must appear and present the objection at the hearing.

You are further notified that any objection must be labeled "Objection to Motion for Order Approving Compromise of Controversy" between the Trustee and James Kent Busch and must contain a certificate of service indicating that copies of the objection and brief have been served upon counsel for the Trustee, counsel for James Kent Busch and the Office of the United States Trustee, and to all other interested parties.

WHEREFORE, Janice D. Loyd, Trustee for the Estate of B & B Worm Farms, Inc. and James Kent Busch, request this Court enter an order approving the compromise of controversy between them as set forth above and such other and further relief as the Court deems just and proper.

Submitted this 10th day of June, 2005



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ATTORNEYS FOR Janice D. Loyd, Trustee
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CERTIFICATE OF SERVICE

This is to certify that on the 10th day of June, 2005, a true and correct copy of the above and foregoing document was mailed by first class mail, postage prepaid, to the persons set forth on the mailing matrix attached to the original hereof and the following:

P. David Newsome, Jr.
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