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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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HAROLD S. MARENUS, CLERK U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT

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In re:

CAVIC,

DUSKO CAVIC,

DUSKO CAVIC aka DANNY CAVIC,

JOHN M. WOLFE, Chapter 7 Trustee; VESTIN MORTGAGE,

CONNAGHAN; MATTHEW CALLISTER; MICHAEL JOSEPH MONA; EMERALD

QTR., LLC; STAN PACK; COREY B.)

INC.; MICHAEL J. MIGAN; MICHAEL SHUSTEK; PAUL

and LJILIJANA CAVIC aka LILLY

Debtors.

Appellant,

Appellees.²

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BAP Nos. CC-08-1220-PaDC CC-08-1221-PaDC (Consolidated)

Bk. No. SA-04-11921-RK

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Argued and Submitted on February 18, 2009 at Pasadena, California

Filed - March 2, 2009

Appeal from the United States Bankruptcy Court for the Central District of California

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (<u>see</u> Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Of those designated as appellees, Wolfe filed a brief, and Callister, Emerald Qtr. and Mona filed a joint brief. The others have not filed briefs or appeared in this appeal.

Honorable Robert Kwan, Bankruptcy Judge, Presiding

Before: PAPPAS, DUNN and CARLSON, Bankruptcy Judges.

Dusko Cavic ("Cavic") appeals the order of the bankruptcy court approving settlement agreements between the chapter 7 trustee and the other parties listed as appellees in this appeal, and the order denying reconsideration. Perceiving no abuse of discretion in the orders of the bankruptcy court, we AFFIRM.

FACTS

Cavic and his spouse, Ljilijana Cavic (together "Debtors") filed a petition for relief under chapter 7 of the Bankruptcy Code⁴ on March 24, 2004. John M. Wolfe ("Trustee") was appointed to serve as trustee in the case.

On May 26, 2004, Debtors moved to dismiss the case because, they alleged, their financial situation had improved. The bankruptcy court granted voluntary dismissal on July 28, 2004, on condition that Debtors execute a deed of trust on their residence in favor of Trustee and unsecured creditors, and that Debtors

³ Hon. Thomas E. Carlson, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23. References to the Federal Rules of Civil Procedure are designated Civil Rules.

market and sell their residence within 60 days. Debtors did not comply with the terms of the dismissal order, and on February 2, 2005, the bankruptcy court vacated the dismissal order and reopened the case so Trustee could administer assets.

To put subsequent events in Debtors' case in context, it is important to consider some related matters.

The Vieux Carre Bankruptcy

The crux of many of the disputes in this bankruptcy case is a real estate complex in Las Vegas, Nevada, known as French Quarter Suites (the "Property"). Before 2001, the Property was subject to two mortgages. The first mortgage secured a loan from Vestin Mortgage, Inc. ("Vestin") in the amount of approximately \$4.5 million; the second secured a debt for approximately \$1 million owed to Consolidated Mortgage Corporation ("Consolidated").

Sometime in 2001, the former owner of the Property defaulted on the Consolidated mortgage. In lieu of foreclosure, the Property was voluntarily conveyed to Consolidated. Consolidated formed a company named Vieux Carre, LLC ("Vieux Carre"), and conveyed the Property to Vieux Carre as its only asset.

Vieux Carre defaulted on the Vestin mortgage and, allegedly to avoid foreclosure, filed a chapter 11 petition in Nevada on September 19, 2001. Bankr. D. Nev. No. BK-S-01-19775-LBR. According to Cavic, he was approached by representatives of Vestin named Shustek and Connaghan to discuss Cavic's possible purchase of all the membership interests of Vieux Carre. In or about December 2001, Cavic purchased 100 percent of the

membership interests in Vieux Carre for \$500,000 and his assumption of the Vestin mortgage. Cavic alleges that he was informed in the purchase negotiations that the Property, the sole asset of Vieux Carre, was worth \$7 million.

The Nevada bankruptcy court confirmed Vieux Carre's chapter 11 plan on February 20, 2002. One provision of that plan required Vieux Carre to make periodic payments to Vestin while Vieux Carre attempted to sell the Property. However, Vieux Carre failed to pay Vestin as provided in the plan, and Vestin noticed the Property for a foreclosure sale to occur on November 17, 2003. On November 14, 2003, Corey B. Beck ("Beck"), attorney for secured creditor Shirley Wallace (and allegedly also an attorney for Cavic), filed an emergency motion for a stay of the foreclosure, which was denied by the Nevada bankruptcy court on November 18, 2003. On November 19, 2003, the Property was sold through foreclosure.

On January 29, 2004, Vieux Carre's chapter 11 bankruptcy case was converted to a case under chapter 7. Stan Pack ("Pack") was appointed trustee.

The Consolidated Action and the Trustee's Attempted Compromise with Debtor

On September 24, 2003, Cavic filed a complaint in Clark
County District Court, Nevada, against Consolidated, Todd
Parriott, Ann Aaron, Cameron Street LLC, and Aleksandar Hadijski
(the "Consolidated Defendants") asserting causes of action for
fraud, civil conspiracy, concert of action, breach of implied
covenants, and breach of contract. <u>Danny Cavic v. Consolidated</u>
Mortgage Corp., et al., case no. A474040 (the "Consolidated

Action"). Cavic alleged that he suffered damages in excess of \$10 million because of fraudulent misrepresentations by the Consolidated Defendants related to Cavic's purchase of the Property. After Debtors filed their bankruptcy petition, the Consolidated Defendants obtained a judgment on the pleadings in state court, entered on May 5, 2004. There followed a rather confusing flurry of motions and reversals.

Cavic moved for reconsideration of the judgment, and on May 24, 2004, an order was entered setting aside the judgment. The Consolidated Defendants then moved for reconsideration of the order setting aside the judgment, which was granted on July 30, 2004. Although there may have been some dispute whether the original judgment of May 5, 2004, may have been entered in violation of the automatic stay in Debtors' bankruptcy case, the judgment was in effect on July 28, 2004, when Cavic's bankruptcy case was originally dismissed by the bankruptcy court.

Trustee entered settlement negotiations with the Consolidated Defendants. In mid-December 2005, Trustee and the Consolidated Defendants agreed to a settlement by which the Consolidated Defendants would pay the estate a total of \$10,000 in exchange for dismissal of the Consolidated Action with prejudice. Trustee filed a motion to approve the settlement in the bankruptcy case on December 19, 2005.

Cavic objected to this motion and settlement, arguing that there were potentially millions of dollars at stake in the Consolidated Action. Cavic offered to match the \$10,000 settlement offer in exchange for the right to litigate the claims on behalf of the bankruptcy estate.

A hearing was held on Trustee's motion to approve the settlement on February 14, 2006. The bankruptcy court denied Trustee's motion in an order dated March 2, 2006. There is no transcript of the hearing of February 14, 2006 in the record, nor does the bankruptcy court's order or docket entry explain the reasons for the court's ruling.

Trustee apparently engaged in discussions with Cavic, which eventually led to another settlement agreement on September 18, 2006, under the terms of which Cavic would pay \$10,000 to the estate and, in exchange, Cavic would assist special counsel of his choosing in prosecuting the Consolidated Action (the "Agreement"). This Agreement provides that Cavic will assume all costs of the litigation against the Consolidated Defendants, but that he would be entitled to recover all fees and costs he advanced if the litigation resulted in a recovery of money for the estate, after court approval. Trustee submitted an application to employ Michael Migan ("Migan"), Cavic's nominee, as special counsel for Trustee to litigate the Consolidated Action.

The bankruptcy court, at a hearing on October 24, 2006, denied Trustee's motion to approve the Agreement, without prejudice to resubmitting the arrangement for court approval as a \$ 363 sale. However, the court approved the employment of Migan "with compensation and reimbursement of costs to be determined and paid upon further application and approval of this Court pursuant to Bankruptcy Code sections 330 and 331."

The Callister Adversary Proceeding

On November 9, 2006, acting through Migan, Trustee filed an adversary complaint in the Central California bankruptcy court against Matthew Callister ("Callister"); Vestin; Shustek; Connaghan; David A. Riggi; Beck; Pack; Emerald Qtr., LLC; Michael Mona; SM Investments, LLC; Sandy Marr; Candace C. Carylon and Shea & Carylon, Ltd. (together, the "Callister Defendants") for, inter alia, fraud and deceit, negligence, constructive fraud, professional negligence and civil conspiracy. Wolfe v. Callister, et al., Bankr. C.D. Cal. Adv. Proc. no. 06-1527 (the instant "Adversary Proceeding"). 5 On January 26, 2007, most of the Callister Defendants moved to dismiss or transfer the Adversary Proceeding to the Nevada bankruptcy court. They sought transfer on the grounds of forum non conveniens because the claims asserted in the Adversary Proceeding arose from actions allegedly taken by the Callister Defendants during the Vieux Carre bankruptcy case. On April 30, 2007, the bankruptcy court in California transferred the Adversary Proceeding to Nevada. Bankr. D. Nev. Case no. 07-1087-MKN.

After the Adversary Proceeding was transferred, Trustee was unable to secure local counsel in Nevada, and began exploring possible settlements with the Callister Defendants. On May 9,

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⁵ Attorneys Candace C. Carylon and Shea & Carylon, Ltd. represented Consolidated in the formation of Vieux Carre. SM Investments, LLC and Sandy Marr were the purchasers of the Property at the foreclosure sale, and then sellers of the Property to Emerald and Mona. Riggi is an attorney who was engaged by Cavic between March and November 2003. None of these parties are directly involved in this appeal.

2008, Trustee filed a Motion for Order Approving Settlement and Compromise of Disputes Between the Estate and (1) Matthew Callister; (2) Vestin Mortgage, Inc., Michael Shustek and Paul Connaghan; (3) Corey B. Beck; (4) Stan Pack; and (5) Emerald Qtr., LLC and Michael Joseph Mona (the "Compromise Motion"). Compromise Motion included over 100 pages of material pertaining to the five separate proposed settlements of disputes with certain Callister Defendants. In the motion, Trustee argued that the settlements would provide \$52,250 in cash to the bankruptcy estate, and put a prompt end to most of the Adversary Proceeding, thereby avoiding its uncertainty and significant litigation In his submissions, Trustee provided a detailed examination of each settlement agreement, and argued that each compromise satisfied the applicable Ninth Circuit case law criteria for approval by the bankruptcy court. Trustee stated that it was his business judgment that the interests of creditors of the estate would be best served if the bankruptcy court approved the Compromise Motion.

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With the exception of the Beck settlement, all the settlement agreements were subject to overbid procedures. The overbid provisions, except as noted below, included several common requirements, among others: (1) to be considered, an overbid must be in writing and be received by Trustee no later than two business days before the scheduled settlement hearing on June 4, 2008; (2) the overbid must be accompanied by a deposit in certified funds for each overbid; and (3) an overbidder must submit evidence that sufficient funds were available to complete the transaction.

The material details of the five settlement agreements referenced in Trustee's Compromise Motion are described below.

The Callister Settlement

From September through November 2003, Callister served as Cavic's attorney in the Consolidated Action. In the suit, Cavic alleged that Callister had engaged in intentional misrepresentation and suppression of facts, constructive fraud, professional negligence, and civil conspiracy. In response, Callister filed a motion for summary judgment, pleading a statute of limitations defense to the charges of professional negligence and fraud.

Under the proposed Callister Settlement Agreement, Callister agreed to pay the estate \$15,000 in exchange for a dismissal from the Adversary Proceeding and execution by the parties of mutual releases. Trustee's motion provided an overbid procedure to the Callister Settlement. In recognition of the value added to the deal by the mutual releases, and the additional costs to be incurred by local counsel carrying on the litigation, Trustee set the minimum overbid at \$17,500.

The Vestin Defendants Settlement (Vestin, Shustek and Connaghey)

The complaint in the Adversary Proceeding alleged that, among other claims, Vestin, Shustek and Connaghey failed, in negotiating the purchase of the Property, to disclose to Cavic the existence of a \$4.5 million dollar appraisal of the Property when they led him to believe the Property was worth millions more. Among the defenses raised was a statute of limitations

defense. The settlement between the Vestin Defendants and Trustee provided that the three individual defendants would collectively pay Trustee \$21,250 in exchange for dismissal from the Adversary Proceeding and mutual releases. Trustee conceded that the value attributable to the mutual releases and elimination of costs was difficult to quantify, but Trustee and the Vestin Defendants reached agreement that it was worth approximately \$10,000. Consequently, Trustee proposed an overbid on the Vestin settlement set at \$31,000.

The Beck Settlement

In the complaint, Trustee alleged that Beck committed professional negligence by filing an emergency motion on behalf of a creditor at the same time that Beck was representing Cavic. Trustee agreed to settle with Beck for \$1,000 in exchange for dismissal from the Adversary Proceeding and mutual releases. Trustee proposed a minimum overbid of \$1,500.

The Emerald/Mona Settlement

Trustee alleged that Emerald and Mona conspired along with other Callister Defendants to deprive Cavic of substantial equity in the Property. Specifically, a straw man purchased the Property at the foreclosure sale for approximately \$4.55 million, the value of the Vestin mortgage, and Mona and Emerald purchased the Property from the straw man within a few days for \$4,673,025. Then, five days after the foreclosure sale, Vestin loaned Emerald and Mona \$6,073,205, secured by the Property.

Trustee agreed to settle with Emerald and Mona for \$15,000 in exchange for dismissal and mutual releases. In view of the mutual releases and costs associated with continuing litigation, the minimum overbid was set at \$17,500.

The Pack Settlement

Trustee asserts that Pack, the chapter 11 trustee in the Vieux Carre bankruptcy case, breached his fiduciary duty to Cavic by failing to take certain actions relating to the Property. Pack argues that Trustee has no standing, because any claims Trustee may assert are property of the Vieux Carre bankruptcy estate. Under the terms of the Pack settlement, Pack stipulated to assign to Trustee all Vieux Carre claims alleged in the Adversary Proceeding in exchange for mutual releases. In Trustee's view, this would give him standing to pursue those claims, and would defeat the general argument raised by the Callister Defendants that Trustee lacked standing. This settlement was not subject to overbids.

The Compromise Hearing, the Overbid Hearing and the Reconsideration Motion and Hearing

The hearing before the bankruptcy court on the Compromise Motion was set for June 4, 2008. Cavic, acting at this time without an attorney, filed a late Opposition to Trustee's motion on May 30, 2008. The basis for the Opposition is somewhat difficult to discern. In it, Cavic argues that he "owns" the claims at issue in the settlement agreements as a result of his earlier Agreement with Trustee. On the other hand, he suggests that the Agreement was an "unfair and illegal contract" and

should be set aside by the court because it did not give him "equal rights" with Trustee in control of the claims. Also, as an alternative to the settlements, Cavic offered to match the \$52,250 the settling parties had offered to Trustee.

Before the hearing, the bankruptcy court posted a tentative ruling on the Compromise Motion. It proposed to:

Grant trustee's motion approving settlement and compromise of disputes and overbid procedures. Court has reviewed debtors' opposition and concludes that the agreement re: Nevada lawsuit [the Agreement], copy attached to Opposition, relates to parties different than those who are involved in the motion [] before the court. Trustee has shown that the terms of proposed settlement and compromise are a reasonable exercise of trustee's business judgment.

At the hearing, Cavic appeared without counsel. The bankruptcy court noted that Cavic's Opposition did not address the merits of the motion. Rather than argue in opposition, Cavic repeated his offer to match the proposed settlement amounts and pay Trustee a total of \$52,250 in cash, and to grant Trustee a \$50,000 deed of trust secured by his home. Satisfaction of the deed of trust, however, was to be contingent on Cavic's prevailing on the claims in the Adversary Proceeding.

The bankruptcy court ruled that Cavic had not shown that the settlements were unreasonable, and that he had not complied with the overbid procedures. However, because Cavic was acting pro se, the bankruptcy court offered him a further opportunity to comply with the overbid procedures. The court approved the Compromise Motion, advised Cavic to submit an overbid and, assuming he would, continued the hearing to conduct an overbid auction on June 11, 2008. Cavic was cautioned by the court that he would be required to comply with the overbid procedures set

forth in Trustee's motion, including the condition that he provide deposits equal to 10 percent of the amount of his overbids delivered to Trustee's counsel no later than the close of business two days before the June 11, 2008 hearing.

On June 6, 2008, the bankruptcy court entered an order approving the Compromise Motion.

Cavic did not submit any overbids. Rather, the day before the scheduled overbid hearing, now acting through counsel, he filed his declaration in which he claimed that, pursuant to his Agreement with Trustee, he was entitled to reimbursement from the estate for the significant amounts of fees and costs he had incurred in prosecuting the Consolidated Action and Adversary Proceeding. Cavic argued that if his as yet unfiled reimbursement claim exceeded the settlement amount, then the settlement agreements would confer no benefit on creditors and should not be approved by the bankruptcy court.

At the hearing on June 11, 2008, the bankruptcy court ruled that in his declaration, Cavic was attempting to reargue the merits of the Compromise Motion, which the court had already approved. To the extent that Cavic was arguing that he had a right to reimbursement, the court advised that he should submit an administrative claim for court approval at an appropriate time in the future. If Cavic wished to challenge the court's decision approving the settlement agreements, he should file a motion for reconsideration. The court then found that, because there had been no proper overbids, there was no need for the court to conduct an overbid auction. Since there were no valid overbids, the court confirmed the settlement agreements.

On June 27, 2008, the bankruptcy court entered its Order Confirming Approval of the Compromise Motion with no overbids.

On July 7, 2007, Cavic filed a motion for reconsideration. The motion makes two main points. Cavic first suggests, without citation to authority, that he was entitled to a "superpriority" lien on any litigation recovery for the attorney's fees and costs he had advanced. Cavic alleged that he had thus far provided \$55,685.68 in attorney's fees, and if Cavic was "given credit" for those sums, he "could be very competitive in the bidding process." Second, Cavic argued that creditors were not given notice of the effect the settlement may have on the estate.

The hearing on the motion for reconsideration occurred on August 14, 2008. Regarding Cavic's alleged administrative expense, the court ruled that even assuming he held an administrative claim, it had not been allowed, and it could not be used as a credit bid in the auction:

But, reading Judge Ryan's order that authorized employment . . . any fees and costs would have to be reviewed and approved under section 330 of the Bankruptcy Code. So even though Mr. Cavic may have incurred attorneys' fees, those expenses are not allowable as an administrative claim until there's been a fee application that's been approved after review by this court. So he may have an claim for administrative [expenses] but it's not recognized yet because the court hasn't determined whether or not such fees and costs were reasonably incurred so that they should be authorized to be paid. So he has the administrative claim, but he can't use that to credit bid at an overbid auction.

Hr'g Tr. 2:16-3:5 (August 14, 2008).

As to the question of notice to creditors, the court ruled:

He argues that there's . . . lack of notice to the other creditors. Well, he lacks standing to assert the interests of the other creditors. And then secondly

with respect to the impact on the estate, that's something that can be handled . . . when Mr. Cavic files a proper request for administrative expenses and that's litigated. But right now that controversy is not [ripe]. And so notice that went out to creditors was adequate. It did go to the proper parties. It did tell them about the compromise and they can evaluate for themselves their impact of that.

Id. at 4:8-16.

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In sum, the bankruptcy court concluded that Cavic's motion for reconsideration should be denied because "[Cavic's] arguments don't really go to the merits of the [compromise] motion and he hasn't shown that the granting of the motion was legally incorrect or erroneous." <u>Id.</u> at 4:5-6.

Cavic filed a timely appeal of the Order Confirming Approval of the Compromise Motion and the order denying the motion for reconsideration.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. \$\$ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. \$ 158.

ISSUES

- 1. Did the bankruptcy court abuse its discretion in approving the settlement agreements?
- 2. Did the bankruptcy court abuse its discretion in denying Cavic's motion for reconsideration?

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STANDARDS OF REVIEW

The bankruptcy court's approval of a compromise or settlement agreement is reviewed for abuse of discretion. <u>Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp., Inc. (In reDebbie Reynolds Hotel & Casino, Inc.)</u>, 255 F.3d 1061, 1065 (9th Cir. 2001).

A bankruptcy court's denial of a motion for reconsideration is reviewed for abuse of discretion. <u>In re Kaypro</u>, 218 F.3d 1070, 1073 (9th Cir. 2000).

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DISCUSSION

I

The bankruptcy court did not abuse its discretion in approving the settlement agreements.

Rule 9019(a) provides that, "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. . . ." The bankruptcy court is vested with considerable discretion in approving compromises and settlements. Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988). To approve a compromise, the bankruptcy court must be satisfied that its terms are "fair, reasonable and equitable." Martin v. Kane (In re A&C Props.), 784 F.2d 1377, 1382 (9th Cir. 1986). To determine the reasonableness of a compromise proposed by a trustee, the bankruptcy court should consider:

(a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Id.

The bankruptcy court in this case was given abundant information by Trustee about the five proposed settlements, including over 100 pages of background data and analysis.

Following receipt of Cavic's Opposition, Trustee and Vestin provided detailed reply briefs, further addressing application of the case law factors for approval of compromises. A summary of the Trustee's analysis of these factors follows:

- 1. The probability of success in litigation.
- a. The Callister Settlement. Callister is a practicing attorney and, as such, Trustee expressed serious questions whether he would participate in the fraudulent and unprofessional conduct alleged in Cavic's complaint.

 Nevertheless, there was some competent evidence supporting the claim. However, Trustee expressed apprehension that the claims may be barred by the statute of limitations, as asserted in Callister's motion for summary judgment pending at the time the settlement agreement was reached. There was also a motion to dismiss filed by Callister that Trustee would be required to oppose. While Trustee believed that he might prevail on the summary judgment and dismissal motions, he was concerned about the cost and delay in doing so.
- b. The Vestin Settlement. The representation made by Vestin to Cavic that there was substantial equity in the Property, when there had been an appraisal valuing the Property at an amount equal to the mortgage balance, together with its later representation to the bankruptcy court that there was no equity in the Property when Vestin had loaned an insider over

\$1.5 million in excess of that value secured by the Property, all militate in favor of a recovery on Cavic's claims against Vestin and the individuals. On the other hand, some of Cavic's fraud claims may be barred by the statute of limitations.

Additionally, Cavic may have executed documents indicating that he knew that the value of the Property he was purchasing was not nearly as high as he claimed Vestin represented to him. In short, Vestin may have viable defenses to Cavic's claims, including the statute of limitations and judicial estoppel.

c. The Beck Settlement. Trustee alleged that Beck committed professional negligence by filing the emergency motion on behalf of Shirley Wallace despite having been hired by Cavic to stop the foreclosure sale. Moreover, Trustee alleged that Beck's conduct resulted in the dismissal of Cavic's appeal of that foreclosure sale order in the Nevada higher courts.

Like the Callister Settlement, Trustee could assume that Beck, an attorney, would vigorously resist a challenge to his professional services. Also, like Callister, Beck may have had a statute of limitations defense. All these suggest that prosecuting a fraud and professional liability case against Beck would be very expensive. Prosecuting this claim would be an especially questionable investment of estate resources since Trustee only valued this claim at \$1,000.

d. The Pack Settlement. Trustee asserted that Pack, the trustee in the Vieux Carre bankruptcy, failed to take certain actions relating to the Property. Although Pack countered that Trustee has no standing since all claims that Trustee could bring are claims of the Vieux Carre estate, not Cavic's estate, Trustee

suggested that recent changes in Nevada's limited liability company law vest him with standing.

Trustee attached no monetary value to this settlement, but it is the legal lynchpin of all the settlement agreements. Pack agreed to assign to Trustee the claims in exchange for dismissal with prejudice from the Adversary Proceeding. While the other settlement agreements can be examined for their relative probability of success in litigation, this settlement agreement is linked to the probability of success of all the other claims.

- e. The Emerald/Mona Settlement. Trustee argues that Emerald and Mona were key figures in a civil conspiracy involving all the Callister Defendants. On the surface, this claim would seem to have good prospects, in that a property sold for \$4.55 million, resold a few days later for \$4.67 million, and then was used as security for a \$6.07 million loan, all within the space of two weeks and involving a related cast of characters, is highly suspicious. However, prosecution of the claim is logically conditioned on success in prosecuting the claim against the Vestin Defendants. Thus, it will likely have the longest delay in reaching final resolution.
 - 2. The difficulties in collection.

Although Vestin is a large mortgage company with substantial assets, Trustee did not consider the other defendants to be "deep pockets." In other words, there may be some uncertainty attached to collection from the settling parties.

3. The complexity, expense, inconvenience and delay of litigation.

Trustee's submissions show that although the Adversary

Proceeding does not appear to be exceptionally complex — it is, basically, a fraud action — it is factually intensive, and the events surrounding the various alleged frauds occurred five years earlier. There are multiple defendants and witnesses to be deposed. To pursue the Adversary Proceeding, Trustee would have to hire Nevada special counsel, and feared such would be a very expensive proposition. At that point, Trustee had access to few funds, and the estate was verging on administrative insolvency. Finally, in Trustee's view, it would likely take years to finally litigate and resolve the Adversary Proceeding through trial and possible appeals. In short, in Trustee's opinion, it would be very expensive, and there would be a substantial delay in closing a case that was already four years old, if he were required to litigate rather than settle these claims.

4. The interests of creditors.

Trustee determined, in the exercise of his judgment, that the fees and costs of litigation would likely exceed any additional benefit to the estate. Approval of the settlements would provide certainty and prevent the accrual of continuing litigation costs to the estate. Trustee observed that the creditors in the case were provided notice and full details concerning the settlement agreements, and that none of them had objected to Trustee's motion.

Given this showing, it is clear that the bankruptcy court had sufficient information available to make an informed decision consistent with the factors enumerated in <u>A&C Props.</u> Beyond considering the record and Trustee's submissions, the bankruptcy court also took a very active role at the hearing on the

Compromise Motion to inquire about the details and consequences of the Trustee's proposals. After doing so, the court questioned the estate's ability to prosecute the claims in Nevada if they were not settled. The court was also concerned about the expenses to be incurred in litigating, and the lack of cash on hand in the estate. In sum, the record amply demonstrates that the bankruptcy court went beyond mere "boilerplate approval." The bankruptcy court made an informed and independent decision to approve the settlement agreements after it apprised itself of all the relevant facts, consistent with the analysis required in the Ninth Circuit by A&C Props. and Woodson. Simply put, the bankruptcy court did not abuse its discretion in approving the settlements.

In his opening brief, Cavic makes essentially three arguments to show the bankruptcy court erred in approving the settlement agreements. First, according to Cavic, the court failed to consider the consequences to the estate if Cavic successfully overbid the settlements. Second, the court abused its discretion by indicating that Cavic's failure to timely oppose the Compromise Motion constituted "consent" to the motion. And third, the bankruptcy court failed to make an independent analysis and simply relied on the Trustee's business judgment. None of these arguments has merit.

Cavic argues in his opening brief that the bankruptcy court did not take "into account whether overbids would affect the settlement." But to the contrary, the court did indeed consider the effect of an overbid by Cavic, and concluded that if he did so, there would be no settlement. That the court did not

consider this a significant concern is evidenced by the court's decision to continue the hearing to consider overbids. In retrospect, the bankruptcy court cannot be criticized for not rejecting the settlements simply because there was some possibility that Cavic would submit an overbid.

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Cavic's second objection is that the court abused its discretion when "it determined that Appellant's failure to timely oppose the motion to approve the compromise is deemed consent to the granting of the motion." The bankruptcy court's conclusion was based upon Bankr. C.D. Cal Local Rule 9013-1(a)(11), which provides "papers not timely filed and served may be deemed by the court to be consent to the granting or denial of the motion, as the case may be." Both the Ninth Circuit and this Panel have confirmed that "courts have broad discretion to interpret their local rules. Only in rare cases will an appellate court question the exercise of discretion in connection with the application of the local rules." Qualls by and Through Qualls v. Blue Cross, 22 F.3d 839, 842 (9th Cir. 1994); Katz v. Pike (In re Pike), 243 B.R. 66, 69 (9th Cir. BAP 1999) ("The bankruptcy court has broad discretion to apply its local rules."). Although there has been no appellate review of Bankr. C.D. Cal. Local Rule 9013-1(a)(11), the court of appeals has favorably reviewed the similar C.D. Cal. (District) Local Rule 7.9 (now Local Rule 7-12). Yusov v. Yusuf, 892 F.2d 784, 787 (9th Cir. 1989) (in affirming magistrate's ruling under Local Rule 7.9, which provided that "papers not timely filed . . . will not be considered . . . ," the court held that, "The magistrate acted as required by law. There was no abuse of discretion.").

As can be seen, the bankruptcy court did not abuse its discretion in, consistent with its local rules, treating Cavic's late opposition to Trustee's motion as, effectively, a consent to approval of the motion. This is not that sort of "rare case" that justifies the Panel's reversal of that decision.

However, Cavic's argument in this regard is of no moment. As explained above, it appears the bankruptcy court did indeed consider the matters raised in Cavic's opposition in ruling on Trustee's motion. While the bankruptcy court declined to reject the settlement based upon Cavic's late opposition, he suffered no prejudice when the bankruptcy court treated it as late-filed.

Finally, Cavic contends that "the record fails to evidence any type of independent analysis the bankruptcy court conducted." Again, we disagree. As discussed above, the record shows that the bankruptcy court was given an adequate record, and through its comments, it is clear that the bankruptcy court considered the information submitted and, as evidenced by its active and critical involvement in the hearings, exercised independent judgment.

In his Reply Brief, Cavic adopts a new strategy. He indicates that "significant new developments" have occurred in the bankruptcy case which provide a basis to reverse the bankruptcy court's approval of the settlements. Specifically, he represents that Cavic has, since the bankruptcy court ruled on Trustee's motion, filed a motion seeking reimbursement of the litigation expenses he has incurred, and that on August 1, 2008, the bankruptcy court held a hearing on Cavic's motion, and that the court took his motion under advisement. According to Cavic,

Migan testified at the hearing that it was Trustee's idea to split the Nevada lawsuit into two separate lawsuits (one against the Consolidated Defendants and one against the Callister Defendants). Cavic argues that this "new development" allows him to be compensated under the terms of the Agreement. Cavic then makes a leap of logic that if Cavic can recover compensation under the Agreement, he should be entitled to a credit that he could add to his \$52,250 cash, which would allow him to place a dominant overbid.

Cavic fails to understand that, with respect to approval of the settlements, the ship has sailed. Contrary to Cavic's suggestion, the bankruptcy court did not ignore the Agreement between Cavic and Trustee in assessing whether to approve the Compromise Motion; it simply considered the Agreement, or the existence of Cavic's alleged administrative claim, immaterial. The court rejected Cavic's concerns because he had no present entitlement to any administrative expense at the time of the Compromise Motion. Lacking an allowed administrative claim, Cavic's suggestion that he be able to "credit bid" his claim as part of the overbid procedure is unavailing.

⁶ In his reply, Cavic also requests that we allow him to supplement the record to provide copies of the transcript of his reimbursement hearing and of the court's ruling. We deem this a motion to supplement the record. The motion is DENIED. The existence, or even results, of Cavic's request for allowance of an administrative expense simply do not bear on whether the bankruptcy court abused its discretion in approving the Trustee's proposed compromises.

⁷ Section 363(k) provides that the holder of an allowed claim secured by property to be sold by a trustee may credit bid (continued...)

At oral argument, Cavic's counsel argued that the bankruptcy court did not adequately take into account the Agreement, and possible consequences to the estate of a Cavic overbid. But the record shows that the court considered the Agreement at all three hearings.

At the initial, June 4, hearing, the court noted that because the Agreement concerned parties other than those involved in the settlement agreements before the court, it was not relevant.

At the June 11 hearing, Cavic's attorney urged that Cavic's right to recover from the proceeds of the settlements may wipe out any recovery to the estate: "If those costs exceed the amount of settlement then there's nothing for the estate there. This does not benefit the estate." Hr'g Tr. 4:12-15 (June 11, 2008). The bankruptcy court noted that, since it had already approved the compromises, this discussion was not proper at a hearing on overbids and that Cavic should pursue a reconsideration motion if he wanted the court to revisit this topic.

Finally, at the August reconsideration hearing, the court directly addressed the "impact on the estate" of Cavic's proposed administrative claim: "[W]ith respect to the impact on the

^{7(...}continued)

the amount of the claim at the sale. As noted, here, Cavic's claim for reimbursement has not yet been allowed, nor is there any indication that his claim is "secured" by the property being "sold" by Trustee (the estate's claims against the various defendants). We can find no case law that authorizes the holder of an inchoate administrative expense claim to credit bid that claim at a trustee's sale.

estate, that's something that can be handled when Mr. Cavic files a proper request for administrative expenses and that's litigated." Hr'g Tr. 4:11-14 (June 11, 2008). The court also commented that, in light of the possible (by then, certain) administrative insolvency of this estate, even if Cavic held an allowed administrative claim, that claim would be treated pro rata with the other administrative claims. Hr'g Tr. 3:24-25. And lastly, the court directly considered the financial consequences of allowing Cavic to overbid his contingent administrative claim:

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THE COURT: [If Cavic won the overbid proceeding], any benefit from the litigation would go to Cavic personally and not to the estate. . . . So it doesn't help the estate.

CAVIC'S COUNSEL: The help to the estate is the difference between \$52,500 and 60 or 70 or 80,000 that it ultimately sells for. I'm not saying it's going to be millions of dollars of difference but it would be more money to the estate.

THE COURT: But the estate didn't want to incur the additional expense and risk of the litigation if it did not prevail in the litigation. And that's why the trustee exercised its business judgment. . . .

COUNSEL: This carries out their business judgment. Mr Cavic would be the buyer instead of the defendants. And there would be more money to the estate.

THE COURT: But the problem is that it was exposed to the marketplace through the competitive bidding process and it didn't realize any value. And maybe it's a situation of a bird in the hand and the trustee being the bird in the hand is better than two in the bush.

COUNSEL: I agree. But the Trustee --

THE COURT: And that's within the reasonable business judgment of the Trustee.

COUNSEL: That I agree with you. But the trustee put him there that's our problem.

Hr'g Tr. 15:6-16:12 (August 11, 2008) (emphasis added).

In summary, the bankruptcy court repeatedly considered the various possible implications of Cavic's administrative claim.

The bankruptcy court did not abuse its discretion in denying Cavic's motion for reconsideration.

Cavic moved for reconsideration of the bankruptcy court's order approving the settlement agreements. Cavic based his motion on Civil Rule 60(b)(6). However, "[a] 'motion for reconsideration' is treated as a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e) if it is filed within ten days of entry of judgment. Otherwise, it is treated as a Rule 60(b) motion for relief from a judgment or order."

Am. Ironworks & Erectors Inc. v. N. Am. Constr. Corp., 248 F.3d 892, 898-99 (9th Cir. 2001) (citation omitted). Cavic's motion for reconsideration was filed on July 7, 2008, within ten days of entry of judgment on June 27, 2008. Rule 9006.

Disposition of the motion was therefore governed by Civil Rule 59(e).

Amendment or alteration of judgment is appropriate under Rule 59(e) only if the court (1) is presented with newly discovered evidence, (2) committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law. Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001).

Cavic submitted no new evidence, nor did he claim to have new evidence, in his motion for reconsideration. Attached to his declaration submitted with the motion were fifteen exhibits, all

of which were copies of documents filed in the bankruptcy case before the Compromise Motion.

The bankruptcy court, in approving the compromises, also did not commit clear error or make a decision that was manifestly unjust. The only reference to possible error in Cavic's reconsideration motion was his objection to the notice given to the parties of the Compromise Motion:

Movant does not dispute that the Trustee gave notice to all creditors of the proposed settlement. The problem is creditors were never notified of the effect the settlement may have on the estate. There is no mention of what funds are already on hand and what costs will be incurred if the settlement were consummated. Nowhere is the Trustee's agreement to reimburse Mr. Cavic for the attorney's fees and costs he has advanced ever mentioned.

The bankruptcy court directly addressed Cavic's notice objection:

[Cavic] argues that there's lack of . . . notice to the other creditors. . . . With respect to the impact of [reimbursement of his attorney's fees] on the estate, that's something that can be handled in terms of when Mr. Cavic files a proper request for administrative expenses and that's litigated. But right now that controversy is not [ripe]. And so the notice that went out to creditors was adequate. It did go to the proper parties. It did tell them about the compromise and they can evaluate for themselves the[] impact of that.

Hr'q Tr. 4:8-18 (August 14, 2008).

As discussed above, the bankruptcy court correctly determined that Cavic had, at most, a possible administrative expense claim that had not yet been allowed by the court, and that could not be credit bid at the overbid hearing. Trustee was under no duty to notify creditors of Cavic's inchoate, amorphous claim. Due process requires adequate notice; it does not require notice of all possible arguments concerning the matter before the

court. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (holding that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection"); Espinosa v. United Student Aid Funds, 545 F.3d 1113, 1122 (9th Cir. 2008).

In his reconsideration motion, Cavic proposed for the first time that he had an administrative claim that has super-priority status and that, if given credit, he could have participated in the overbid process. Cavic provides no authority for such an audacious statement, nor are we aware of any law that allows super-priority to an administrative claim under these circumstances. And even if there were such law, a bankruptcy court "does not abuse its discretion when it disregards legal arguments made for the first time on a motion to amend."

Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 811 (9th Cir. 1995).

Finally, Cavic does not suggest, nor have we determined, that there was any change in controlling law between the approval of the Compromise Motion by the bankruptcy court and the submission of the reconsideration motion (or, indeed, since then).

We conclude that, in his reconsideration motion, Cavic did not submit any new evidence, establish that the bankruptcy court had erred or that its decision was manifestly unjust. There was no change in controlling law. Thus, it was not an abuse of discretion to deny Cavic's motion for reconsideration under Civil Rule 59(e).

Although the bankruptcy court appears to have ruled under Rule 9024, incorporating Civil Rule 60(b)(6), 8 it was harmless error because the bankruptcy court's findings and the record support denial of reconsideration under either Rules 9023 (incorporating Civil Rule 59(e)) or 9024. Indeed, Cavic provides no citation to authority whatsoever or reasoned argument why reconsideration should be allowed under either Rule.

Moreover, even if Cavic's motion were considered under the standards applicable to Civil Rule 60(b)(6), it would not pass muster. "Relief [under Rule 60(b)] may be permitted in the interests of justice if the relief will not affect the substantial rights of the parties." Gonzalez v. Crosby, 545 U.S. 524, 535 (2000). This catch-all provision is reserved for extraordinary circumstances. Delay v. Gordon, 475 F.3d 1039, 1044-49 (9th Cir. 2007). Extraordinary circumstances occur when the risk of injustice to parties, the risk that denial will produce injustice in other cases and the risk of undermining the public's confidence in judicial process, is high. Liljeberg v. Health Servs. Corp., 486 U.S. 847, 863 (1988). Seeking relief under Civil Rule § 60(b)(6) usually requires a showing of actual injury and the presence of circumstances beyond the movant's control that prevented timely action to preserve his or her interests. Delay, 475 F.3d at 1044.

[&]quot;THE COURT: But there really aren't any grounds under Rule 9024, the Federal Rule of Bankruptcy Procedure [incorporating] Rule 60(b)(6) of the Federal Rules of Civil Procedure, to set aside the judgment in this case." Hr'g Tr. 14:14-17 (August 14, 2008).

It is simply not clear from either the motion for reconsideration or the hearing on that motion what extraordinary circumstances are present here that would justify relief under Civil Rule § 60(b)(6). Cavic's attorney argued:

I guess my closing argument, if you want, is the extraordinary circumstances are really the way this was And it's set up to create failure for the debtor. He's already lost his homestead exemptions through an extremely creative means. That was \$75,000. He was then lured into an agreement where he expected to get all his money back when he was advancing costs and that seems to be at risk. And then at a point when he's out of money he can't bid on the purchase of these claims because he [doesn't] have money. If he had a credit for what he had already advanced, which has been his contribution to this case, he could competitively bid against the defendants. And I guess my closing statement is the only ones that win by this agreement being approved are the defendants because the estate gets more money if they reopen the bidding process.

Hr'g Tr. 13:11-25 (August 14, 2008).

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None of these circumstances can be considered extraordinary within the meaning of Civil Rule 60(b)(6). There is no evidence in the record to support an argument that Trustee "lured" Cavic into the Agreement. On the contrary, Cavic himself proposed the terms ultimately incorporated in the Agreement in his Opposition to Trustee's proposed settlement with the Consolidated Defendants. A more likely explanation proposed by Trustee was that Cavic engaged six attorneys in the four years of the bankruptcy case, terminating five, and was without counsel in the critical months leading up to the Compromise Motion. Although Cavic's circumstances may be characterized as unfortunate, they were not extraordinary.

We conclude that the bankruptcy court did not abuse its discretion in denying Cavic's motion for reconsideration.

CONCLUSION

We AFFIRM the bankruptcy court in all respects.