NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. CC-06-1259-MoPaD CC-06-1289-MoPaD
AMERICAN BUILDING STORAGE, LLC,	
Debtor.	Bk. No. LA 03-17465-AA
REDWOOD TRUST,	Adv. No. LA 04-01412-AA
Appellant,	
v.	**M E M O R A N D U M**[1]
AMERICAN BUILDING STORAGE, LLC; ALFRED SIEGEL, Chapter 7 Trustee; UNITED STATES TRUSTEE; GERALD S. RUBIN; EDWARD DEASON,	
Appellees.	

Argued and Submitted on March 22, 2007
at Pasadena, California

Filed - April 2, 2007

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding.

Before: MONTALI, PAPPAS and DUNN, Bankruptcy Judges.

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

Just prior to trial, the chapter 7[2] trustee and the defendant in an action commenced by the trustee reached a compromise. The bankruptcy court entered an order approving the compromise and an order dismissing the adversary proceeding. A purported equity interest holder in the debtor company has appealed both orders. We AFFIRM.

I. FACTS

A. The Parties

American Building Storage, LLC[3] ("Debtor") filed its chapter 7 petition in 2003. Appellee Alfred Siegel ("Trustee") was appointed to serve as the trustee. Trustee filed an adversary proceeding against appellee Gerald Rubin ("Rubin") seeking an accounting and a judgment dissolving a partnership that purportedly existed between Debtor and Rubin. Among his many defenses, Rubin asserted that no such partnership existed. Shortly before the first phase of the trial commenced, Trustee and Rubin reached a compromise.

An entity called the "Redwood Trust" (the "Trust") filed an opposition to the proposed compromise. Several creditors filed joinders to the opposition. The Trust identified itself as an

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[2]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 of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

[3]The notices of appeal identified the debtor as "American Budget Storage, LLC" but the bankruptcy court docket and the chapter 7 petition identify the debtor as "American Building Storage, LLC." We have therefore corrected the debtor's name on our docket and include this footnote to explain the correction.

"Equity Holder and Creditor" on its objection. Appellees contend that the Trust, the sole appellant, lacks standing to prosecute the appeals.

The Trust has never filed a proof of claim or a proof of equity interest in Debtor's case.[4] The Trust was not on Debtor's list of unsecured creditors. In his "Statement Regarding Authority to Sign and File Petition," Debtor's managing member Thomas Davidson ("Davidson") stated that he was "the sole general partner of American Building Storage, LLC, a Delaware limited partnership." In addition, the initial List of Equity Security Holders showed Davidson as the only member of Debtor. Debtor later amended the List of Equity Security Holders to show that Redwood Trust was a 99 percent equity holder.

The Trust was created in 2001 by Davidson. The trust agreement reflects Davidson and "ABS, LLC" as the grantors, and assigns to the trustee of the Trust a 99% interest in ABS, LLC. The signature page of the trust agreement identifies "ABS, LLC" as "American Budget Storage, LLC" and not as Debtor (i.e., American Building Storage).[5]

B. The Underlying Adversary Proceeding

Trustee filed an adversary proceeding against Rubin for dissolution of a partnership, the ABS-190 Partnership ("ABS-

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[4]On August 4, 2003, the clerk of court issued a notice of possible dividends and fixing deadlines to file claims. The notice directs creditors to file proofs of claim before November 3, 2003. It does not direct equity interest holders to file proofs of interest.

[5]Davidson was one of two initial members of American Budget Storage, LLC, when it was formed in 1998. Davidson later amended the certificate of formation to reflect that he was the sole initial member of American Budget Storage, LLC.

190"), between Debtor and Rubin. ABS-190 was allegedly formed to develop real property located on West 190th Street in Los Angeles (the "Property"). Trustee sought an accounting of the estate's interest in the Property.

In response to the Trustee's complaint, Rubin contended that he never formed a partnership with Debtor, that he alone purchased, owned and maintained the Property,[6] and that he had offsetting claims against Davidson and Debtor. Rubin filed a motion to dismiss and two motions for summary judgment, all of which were denied.

Trustee opposed the various motions, noting that even though the Property was legally titled in Rubin's name, Rubin and American Budget Storage had formed a partnership to purchase and develop the Property. In support of his position, Trustee cited a letter of intent between (1) Rubin on behalf of Rubin Management Company and Rubin Development Company and (2) Davidson on behalf of "ABS, LLC." This letter is not a partnership agreement, but an expression of an intent to form a partnership in the future; moreover, the signatory is "ABS, LLC," a separate entity from Debtor with its own tax identification number.[7] The letter of intent was amended to state that it was "the intent of

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[6]Rubin cited California Corporations Code section 16204(d) which states: "Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes."

[7]Debtor's voluntary petition reflects that its tax identification number is 95-4720382 while W2s issued by "ABS, LLC" reflect a tax identification number of 95-4848001.

the partners that this [P]roperty will be partnership property though Gerald Rubin may hold it in title as personal property."

Rubin retained Davidson to manage the Property. Rubin managed the Property through an entity named ABS-190. All expenses were paid through an account in Rubin's name; Davidson had signatory authority on the account. Davidson also acknowledged in documents filed with the California Secretary of State that another one of his companies (First Los Angeles Group) "collects rents for the property owner, Mr. Gerald Rubin . . . for the [Property]."

In 2002, Rubin discovered that Davidson had embezzled funds belonging to Rubin; he obtained a judgment against Davidson. He also learned that Davidson held multiple identities and aliases and multiple companies purportedly for obtaining bank loans under false pretenses. He found out that Davidson had been charged with identity theft, perjury and receiving money and credit under a false name, and had been convicted on one count. Rubin then entered into an agreement with Davidson curtailing Davidson's ability to use Property funds; in the preface, that letter agreement refers to Davidson and Rubin as "partners." Rubin declared that he did not notice the word "partners" in the letter, especially as it was not a part of any covenant.

In opposing the various motions filed by Rubin, Trustee depended on the declarations of Davidson. Trustee, however, admitted that Davidson had testified that the Property was owned by Rubin and that a partnership was never formed. Rather, according to Davidson's testimony, he only had an expectation that there "would be a partnership at some future date" but "[w]e

never got to that." Trustee also admitted that Davidson had conceded that the Debtor had no ownership interest in the Property.

A bifurcated trial was set in the action; the bankruptcy court was to decide whether a partnership existed between Debtor and Rubin before proceeding to a separate trial on damages.[8] The parties filed their evidentiary declarations and trial briefs. Shortly before the commencement of the first phase of the trial, Trustee and Rubin reached a settlement.

C. Approval of the Compromise

On June 9, 2006, Trustee filed a motion to approve compromise of controversy. Trustee stated that Rubin had agreed to pay the estate $600,000 to settle the adversary proceeding.[9] In his memorandum of points and authorities in support of the compromise, Trustee noted that (1) the litigation was hotly contested with substantial conflicts in testimony and with the credibility of its witnesses being questioned, (2) the estate would recover nothing if the court found against it in the first

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[8]Rubin asserts that even if the court found that a partnership existed, the estate would receive nothing in an accounting as he contributed approximately $7,500,000 in capital and Debtor contributed nothing. Contending that partners are entitled to be repaid the amount of capital contributed on a pro rata basis, Rubin notes that the net value of the Property after payment of secured debt and other costs and return of his capital investment is not sufficient for the estate to recover anything in an accounting. Rubin's Opening Brief at 10-13. The Trust values the Property as being worth between $7,500,000 and $9,000,000. Appellant's Opening Brief at 6.

[9]In January 2006, Trustee had filed a motion for approval of a compromise in which Rubin would pay $100,000 to the estate. That motion was opposed by the Trust and was denied.

phase of trial (i.e., if it found that no partnership existed), (3) even if Trustee prevailed in the first phase of the trial, he faced a second contested phase regarding damages and accounting, and the estate could still recover nothing after partnership contributions and offsets were considered, (4) in contrast, the settlement provided $600,000, which would be sufficient to pay undisputed unsecured claims in full. Rubin joined the motion, analyzing the respective evidence and positions of the parties to demonstrate the likelihood that the estate would not prevail at trial (on either the partnership or the accounting issues).

The Trust opposed the settlement, but never offered to purchase the estate's claim against Rubin. The Trust did not demonstrate that anyone would be willing to bid on the claim. Rather, the Trust argued that the case should go to trial, stating that "[i]f the trustee's case is unsuccessful, all interested parties will know that immediately." Several creditors joined the Trust's opposition to the settlement.[10]

At the hearing on the motion to approve compromise, the bankruptcy court noted that it had "actually reviewed all the direct evidence, which is unusual . . . for a motion to compromise, for the Court having actually read all the direct evidence [which] will be presented at the trial in connection therewith." After reviewing all of the direct testimony and evidence, the court was "still not clear how [it] would rule on

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[10]It appears as though the Trust's counsel was instrumental in the preparation and filing of the joinders. With one exception, all of the joinders were served by the same party, Marilyn Alvarado, who also signed the proofs of service of various pleadings filed by the Trust.

this matter," but nonetheless noted that "[t]here is a significant possibility that, at trial, the Trustee would lose and get absolutely zero, and so I cannot second-guess [the decision of the Trustee to settle], especially in light of the credibility issues that would accompany the trial." The court therefore granted the Trustee's motion.

The bankruptcy court entered its order approving the compromise on July 13, 2006, and the Trust filed its timely notice of appeal on July 19, 2006, giving rise to BAP No. CC-06-1259. The bankruptcy court entered an order dismissing the Trustee's adversary proceeding against Rubin on August 4, 2006, and the Trust filed its second notice of appeal on August 11, 2006, giving rise to BAP No. CC-06-1289. On October 3, 2006, the panel entered an order allowing the parties to file consolidated briefs for both appeals.

II. ISSUES

(A) Whether the Trust has standing to appeal.

(B) Whether the bankruptcy court abused its discretion in granting Trustee's motion for approval of compromise pursuant to Rule 9019 and in dismissing the adversary proceeding.

III. STANDARD OF REVIEW

The bankruptcy court's decision to approve a compromise is reviewed for abuse of discretion. Martin v. Kane (In re A & C Properties), 784 F.2d 1377, 1380 (9th Cir. 1986). As noted by the Ninth Circuit in A & C Properties:

> The law favors compromise and not litigation for its own sake (citation omitted), and as long as the bankruptcy court amply considered the reasonableness of the compromise, the court's decision must be affirmed (citation omitted).

Id. at 1381. "Approving a proposed compromise is an exercise of discretion that should not be overturned except in cases of abuse leading to a result that is neither in the best interests of the estate nor fair and equitable for the creditors." CAM/RPC Electronics v. Robertson (In re MGS Marketing), 111 B.R. 264, 266-67 (9th Cir. BAP 1990).

Under the abuse of discretion standard, we cannot reverse the bankruptcy court's ruling unless we have a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. Marx v. Loral Corp., 87 F.3d 1049, 1054 (9th Cir. 1996).

IV. JURISDICTION

The bankruptcy court had jurisdiction to review and approve the settlement under 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(A), (H) and (K). We have jurisdiction over this matter pursuant to 28 U.S.C. § 158.

The Trustee and Rubin both contend that the Trust lacks standing to appeal because it has not filed a proof of claim or interest in this case. The Trust responds by stating that the appellees have waived this issue. Standing, however, is jurisdictional and cannot be waived. United States v. Hays, 515 U.S. 737, 742 (1995).

That said, the Trust's failure to file a proof of interest is not sufficient to deprive it of standing. The Ninth Circuit has adopted the "person aggrieved" test as the standard for determining whether a party possesses standing in a bankruptcy appeal. See e.g., Fondiller v. Robertson (In re Fondiller), 707

F.2d 441, 442-43 (9th Cir. 1983). The test limits standing to "those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court." Id. Here, the Trust contends that successful prosecution of the lawsuit could lead to significant recovery for the equity interest holders in Debtor, and that the settlement cuts off this potential financial recovery. As such, an equity interest holder has standing to object to the compromise.

Trustee and Rubin contend that we should not consider the Trust as an equity interest holder because it did not file a proof of interest by the deadline for filing proofs of claim. The notice setting the deadline for "creditors" to file "proofs of claim" did not mention or set a deadline for "proofs of interest." Moreover, while Rule 3002(c) sets a deadline for filing "proofs of claims," it does not set a similar deadline for filing "proofs of interest" although Rule 3002(a) states that a proof of interest "must" be filed for it to be allowed.[11] Because the Trust could still file a proof of interest, the amended schedules reflect that it holds an equity interest in Debtor, and no court has yet invalidated its purported equity interest,[12] we conclude that the Trust does have standing to oppose the compromise and prosecute these appeals.

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[11]Section 726 makes no provision for distribution to holders of filed proofs of interest; rather, the section states that the debtor shall receive any surplus after the payment of claims with interest. 11 U.S.C. § 726(a)(6).

[12]While Trustee and Rubin have set forth facts indicating that the Trust may not possess a legitimate equity interest in Debtor, we are not fact finders and cannot resolve this dispute in an appellate setting.

In a short paragraph on the final page of his brief, Rubin argues that the appeals are moot since he has paid the settlement amount ($600,000) and has taken steps to manage and improve the property. Rubin's argument is not well-taken. A "mootness inquiry focuses upon whether we can still grant relief between the parties." I.R.S. v. Pattullo (In re Pattullo), 271 F.3d 898, 901 (9th Cir. 2001). "If an event occurs while a case is still pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal is moot and must be dismissed. . . . However, while a court may not be able to return the parties to the status quo ante . . ., an appeal is not moot if the court can fashion some form of meaningful relief." Id. (quoting United States v. Arkison (In re Cascade Rds.), 34 F.3d 756, 759 (9th Cir. 1994)(ellipses and emphasis in original)).

Here, if we were to reverse, the Trustee could return the settlement funds to Rubin. Any improvements Rubin has made to the Property post-settlement are irrelevant, given that his contention throughout the pendency of the underlying litigation has been that he owns the Property (and thus any improvement inures to his benefit). In any event, should we reverse and the bankruptcy court ultimately rule against Rubin in the adversary proceeding, any such funds expended would be considered and included in any accounting.

V. DISCUSSION

"The bankruptcy court has great latitude in approving compromise agreements." Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 619 (9th Cir. 1987). The court's

discretion, however, is not unlimited; the compromise must be "fair and equitable" and "reasonable." Id.; A & C Properties, 784 F.2d at 1381. In determining the fairness and reasonableness of a proposed settlement, the court must 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.

A & C Properties, 784 F.2d at 1381. While creditors' objections to a compromise must be afforded due deference, such objections are not controlling. Id. "The opposition of the creditors of the estate to approval of a compromise may be considered by the court, but is not controlling and will not prevent approval of the compromise where it is evident that the litigation would be unsuccessful and costly." Official Unsecured Creditors' Comm. v. Beverly Almont Co. (In re The General Store of Beverly Hills), 11 B.R. 539, 541 (9th Cir. BAP 1981).

The court may give weight to the opinions of the trustee, the parties and their attorneys. A & C Properties, 784 F.2d at 1384. "Rather than conducting a detailed evaluation of the merits of the state court action," the bankruptcy court's function is "to examine the proposed settlement to determine if it falls below the lowest point in the range of reasonableness." In re Hydronic Enterprise, Inc., 58 B.R. 363, 366 (Bankr. D. R.I. 1986).

In this case, we affirm the bankruptcy court's approval of the settlement; the record before the bankruptcy court was sufficient to support the court's approval of the settlement and

its conclusion that it was "fair and equitable." While the court did not explicitly check off each of the "fair and equitable" factors set forth in A & C Properties, it did make general findings supporting the settlement and the record clearly reflects that application of these factors weighs in favor of the settlement.[13] Even though creditors opposed the compromise, the court's approval was appropriate where the record demonstrated that continued litigation would not necessarily benefit the estate. General Store of Beverly Hills, 11 B.R. at 541.

A & C Properties requires a bankruptcy court to consider the probability of success in litigation when evaluating a proposed settlement and determining whether it is "fair and equitable." It further requires the court to consider the difficulties of collection and the complexity, expense and delay attendant to the litigation. Further, as this panel has stated:

> The function of compromise is to avoid litigation involving delay and expense unless there appears to be a sound legal basis for the litigation and a likelihood of substantial benefit to the estate (citation omitted). Approval of compromise is appropriate if the court finds that the outcome of the litigation is doubtful, but even when a compromised dispute was based on a substantial foundation and was not clearly invalid as a matter of law, approval of compromise is not an abuse of the court's discretion.

General Store of Beverly Hills, 11 B.R. at 541 (emphasis added).

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[13]While the record would have been much clearer had the bankruptcy court identified, analyzed, and announced how it weighed each of the A & C Properties factors, we will not overturn the approval of the compromise merely because the court did not articulate its consideration of each factor. Rather, "where the record supports approval of the compromise, the bankruptcy court should be affirmed," even if the bankruptcy court has made only general findings supporting the compromise. A & C Properties, 784 F.2d at 1383.

Here, the bankruptcy court had been exposed many times to the claims asserted against Rubin, having ruled on several motions for summary judgment. Furthermore, the court was able to and did review the direct evidence to be presented in the first phase of the trial. Given its familiarity with the issues and the direct evidence, we give great weight to the court's opinion that "there is a significant possibility that, at trial, the Trustee would lose and get absolutely zero."[14] The court clearly considered the estate's probability of success in the litigation and found that this factor weighed in favor of the compromise.[15]

The record demonstrates that the second factor -- the difficulties to be encountered in the matter of collection -- weighs in favor of the settlement. As argued by Trustee and Rubin in their memoranda and at the hearing, a ruling in favor of the Trustee in the first phase of trial would not necessarily

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[14]The evidence in the record supports the bankruptcy court's conclusion that zero recovery by the estate was significantly possible. The documentary evidence consists of letters of intent, and not of partnership agreements. The person who purportedly entered into the partnership on behalf of Debtor has admitted under oath that the partnership was never formed. No partnership accounts exist, and Rubin holds title to the Property. Trustee faced a considerable challenge in overcoming the weight of this evidence against his case.

[15]Disregarding the bankruptcy court's finding regarding the significant possibility of a zero recovery, counsel for the Trust insisted at oral argument that approval of the settlement was inappropriate because the bankruptcy court had stated that it was "still not clear how [it] would rule" in the adversary proceeding. Counsel believes that this statement somehow reinforces its position that Trustee must proceed to trial instead of settling. Counsel is incorrect. The court's uncertainty about the eventual outcome actually weighs in favor of settlement. "Approval of compromise is appropriate if the court finds that the outcome of the litigation is doubtful[.]" General Store of Beverly Hills, 11 B.R. at 541.

result in the recovery of damages in the second phase. Even if the court found that a partnership existed between Debtor and Rubin, the estate would not recover all of the assets of that partnership.

Rather, Rubin argued that he would be entitled to a return of his capital contributions (as would Debtor, who made no financial contribution) before any division of profits or income would occur. Tiffany v. Short, 22 Cal.2d 531 (1943); Cal. Corp. Code § 16807. Given the Trust's concession that the Property was worth $7,500,000 to $9,000,000 and Rubin's contention that he had contributed in excess of $7,500,000 to the Property, it was possible that the estate would recover nothing even if it prevailed on the partnership issue. This is particularly true if the estate had to incur the expense of litigating the second phase of the trial. Thus, the $600,000 settlement appears "fair and equitable" when considering the possibility of the estate collecting nothing on a favorable partnership ruling.

Likewise, the factor of "complexity" and "expense" of litigation weighs in favor of the settlement. The record shows that the litigation was highly contentious, and the second phase of the trial had not even been set yet. The bankruptcy court acknowledged the complexity of the case when he noted the "credibility issues that would accompany the trial."

Finally, consideration of the paramount interest of creditors favors the compromise. Both the Trustee and the court concluded that a significant possibility existed that the Trustee would recover nothing, thus depriving creditors of any recovery. The chances of succeeding in two separate phases (partnership and

accounting) were not sufficient to justify risking a sure $600,000 recovery, which would be sufficient to pay undisputed, liquidated claims in full.[16] That amount would also provide more recovery to the disputed claims than would the "significant[ly]" possible zero recovery at trial.

The Trust argues that the bankruptcy court erred by not hearing the testimony of rebuttal witnesses or by viewing the witnesses' live testimony. The parties had agreed, however, to present direct testimony through declarations. Therefore, any objection to the form of the testimony presented to the bankruptcy court is waived. In any event, a full evidentiary hearing is not necessary when approval of a settlement is sought. Depoister v. Mary M. Holloway Foundation, 36 F.3d 582, 585-86 (7th Cir. 1994) ("we believe that the bankruptcy court was not obligated to conduct an evidentiary hearing as a prerequisite to approving the compromise"). This is particularly true in a case such as this, where the court is already highly acquainted with the litigation being settled and the merits of that litigation. Here, the bankruptcy court was in possession of sufficient facts "to form an educated estimate of the complexity, expense, and likely duration of such litigation" and was in a prime position to "compare the terms of the compromise with the likely rewards

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[16]The Trust argues that the settlement does not provide sufficient recovery for equity holders, and that the matter should go to trial to maximize the chances of equity holders getting some recovery. The Trust prefers that the unsecured creditors forego a significant recovery so that it (as a purported equity holder) may increase its chances of receiving something. In other words, the Trust wants to gamble with a stake provided by the unsecured creditors.

of the litigation." Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968).

Therefore, applying all of the A & C Properties factors, the compromise was fair, reasonable, and equitable. These factors are the same factors that we applied in Goodwin v. Mickey Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.), 292 B.R. 415 (9th Cir. BAP 2003), and Simantob v. Claims Prosecutor, L.L.C. (In re Lahijani), 325 B.R. 282 (9th Cir. 2005).[17] We consequently conclude that the bankruptcy court did not abuse its discretion in approving the compromise. And because we AFFIRM the decision to approve the compromise, we similarly AFFIRM the dismissal of the adversary proceeding as provided in the compromise.

V. CONCLUSION

The record demonstrates that the compromise satisfies the requirements of A & C Properties. The bankruptcy court did not abuse its discretion in granting the Settlement Motion and in dismissing the adversary proceeding. We therefore AFFIRM in both appeals.

[17]In those cases, other parties had such significant faith in the probability of success on the merits of the estate's litigation that they were willing to bid against the defendants to purchase the causes of action. No one here has made any such offer, despite having the opportunity to do so in objecting to the compromise.