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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP Nos. EC-07-1086-JuMkPa
7) EC-07-1087-JuMkPa
8 GOLDEN EMPIRE AIR RESCUE,)
9 INC.) Bk. Nos. 05-18746
10) 05-19955
11 Debtor,)

10 In re:)
11)
12 GOLDEN EMPIRE AMBULANCE,)
13 INC.)
14)
15 Debtor,)

13 PETER MOSESIAN; NEVADA)
14 BUSINESS CREDIT, LLC,)
15)
16 Appellants,)

15 v.)
16)
17 PATRICK KAVANAGH, Chapter 7)
18 Trustee; ROGERS HELICOPTERS,)
19 INC.,)
20 Appellees.)

19 PETER MOSESIAN; NEVADA)
20 BUSINESS CREDIT, LLC.,)
21)
22 Appellants,)

21 v.)
22)
23 ROSSANA A. ZUBRZYCKI-BLANCO,)
24 Chapter 7 Trustee; ROGERS)
25 HELICOPTERS, INC.,)
26)
27 Appellees.)

MEMORANDUM¹

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

1 Argued and Submitted on September 21, 2007
2 at Pasadena, California

3 Filed - October 25, 2005

4 Appeal from the United States Bankruptcy Court
5 for the Eastern District of California

6 Honorable Whitney Rimel, Bankruptcy Judge, Presiding

7 Before: JURY, MARKELL and PAPPAS, Bankruptcy Judges.

8
9 **I. INTRODUCTION**

10 The Chapter 7² trustees of the related debtors sought
11 approval of a compromise between the bankruptcy estates and
12 Rogers Helicopters, Inc. Peter Mosesian and Nevada Business
13 Credit, LLC ("NBC") objected on the grounds that the compromise
14 was a "disguised sale" subject to overbids and the record
15 contained no evidence that Rogers gave reasonable value. The
16 bankruptcy court approved the compromise over their objections.

17 Mosesian filed a motion for reconsideration under Rule
18 9023.³ On reconsideration, the bankruptcy court found that, even
19

20 ² Unless otherwise indicated, all chapter, section and rule
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
23 enacted and promulgated prior to the effective date of The
24 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
25 Pub. L. 109-8, 119 Stat. 23, because the cases from which this
26 appeal arises were filed before its effective date (generally
27 October 17, 2005).

28 ³ NBC filed a motion requesting the bankruptcy court to
amend its Findings of Fact and Conclusions of Law under Rule
7052. The bankruptcy court granted the motion to clarify that
Rogers could pursue the estates' causes of action only against
Mosesian, John Penrose ("Penrose") and any entity owned or
controlled by them. In other words, Rogers could not pursue any
other third party.

1 if the compromise was a sale, the requirements under § 363 were
2 met and overbids were not required. Mosesian and NBC timely
3 appealed.

4 We find that some of the claims that the trustees sought to
5 settle were decided by the bankruptcy court prior to the time the
6 motion for compromise was heard. Thus, these claims were no
7 longer in dispute. Further, the trustees failed to submit any
8 evidence in support of their motion to approve the compromise
9 with Rogers. The record contains only conclusory statements with
10 respect to the factors set forth in Martin v. Kane (In re A & C
11 Props.), 784 F.2d 1377, 1380 (9th Cir. 1986). Finally, because
12 the compromise disposes of property which belongs to the
13 bankruptcy estates, the sale provisions of § 363 are implicated.
14 We find that the possibility of overbids from Mosesian and NBC
15 triggered the prospect of an auction and, therefore, procedures
16 for overbids should have been established. We REVERSE and
17 REMAND.

18 II. FACTS

19 Golden Empire Air Rescue, Inc. ("GEAR") filed its Chapter 7
20 petition on October 7, 2005, and Patrick M. Kavanah was appointed
21 trustee. Golden Empire Ambulance, Inc. ("GEA") filed its Chapter
22 7 petition on October 13, 2005, and Rossana A. Zubrzycki-Blanco
23 was appointed trustee.⁴ The debtors are closely-held
24 corporations owned and controlled by Mosesian or related
25 entities. NBC is also owned by Mosesian or his family trust.

26
27 ⁴ Hereinafter, GEA and GEAR are collectively referred to as
28 the "debtors" and Kavanah and Blanco are collectively referred to
as the "trustees."

1 Mosesian and NBC filed claims in both bankruptcy cases.⁵
2 Mosesian's claims are unsecured, while NBC's claims are secured.⁶
3 Rogers filed an unsecured claim in both cases for almost \$1
4 million.⁷

5 Mosesian and Rogers have a history of litigation that began
6 in 2002. Their dispute arose out of a joint venture formed by
7 Rogers and GEA in 1994 to operate an air ambulance service. GEA
8 thereafter created GEAR to carry out its obligations under the
9 joint venture agreement. Debtors and Rogers were to split the
10 profits. In 1999, Rogers asked for an accounting. Debtors
11 either failed to provide one or produced an accounting that did
12 not satisfy Rogers.⁸

13 The State Court Lawsuit

14 In 2002, Rogers sued the debtors, Mosesian and Penrose⁹ in
15 superior court, seeking an accounting and alleging fraud, breach

16
17 ⁵ There is no indication in the record that the trustees
18 filed objections to the claims. Therefore, the claims are
19 "deemed allowed" pursuant to § 502(a).

20 ⁶ NBC attached a UCC-1 filing to its proof of claims that
21 shows it holds a security interest in all of the debtors' assets,
22 including general intangibles.

23 ⁷ The claims registers for both cases show other creditors
24 besides Mosesian, NBC and Rogers. Those creditors include the
25 Franchise Tax Board, IRS, John Wright and Richard Monje. In
26 essence, though, these bankruptcy cases are a two party dispute.

27 ⁸ In 1999, GEA sold its ambulance permit. In 2001, GEAR sold
28 its air permit. The trustees were investigating how the proceeds
of these two sales were used or disbursed. The debtors have not
conducted any business since 2001.

⁹ Penrose was the debtors' president and has not appeared in
these matters. Although he may remain a defendant in the Kern
County Action, there are no further references to Penrose herein.

1 of fiduciary duty and conversion by all defendants (the "Kern
2 County Action").¹⁰ The superior court found debtors liable to
3 Rogers for more than \$700,000 in connection with the accounting.
4 The remaining causes of action¹¹ were set for trial on October
5 17, 2005, which did not commence due to debtors' Chapter 7
6 filings. GEAR also asserted a counterclaim that is still
7 pending.

8 Because the alter ego claims against Mosesian were
9 unresolved, Mosesian began to take steps to minimize his
10 liability to Rogers.

11 The Pre-Petition Settlements With the Debtors

12 Mosesian first entered into settlement agreements with the
13 debtors prior to their Chapter 7 filings. Mosesian believed, or
14 at least hoped, that the alter ego claims would be property of
15 the prospective bankruptcy estates. Mosesian agreed to pay the
16 debtors \$145,000 in return for settlement of any and all of their
17 claims against him. A condition to consummation, however, was
18 the entry of a court order finding that the releases contained in
19 the settlements would protect Mosesian.

20

21 ¹⁰ Rogers also sued Williams & Brown, the accountant for
22 debtors and their joint venture. After debtors filed their
23 chapter 7 petitions, Rogers settled the action and was paid
24 \$500,000 by Camico Mutual Insurance Co., Williams & Brown's
25 insurance carrier. Camico received a first-position lien on the
26 Kern County Action. Camico then commenced an action against the
27 debtors, Mosesian, and Penrose for indemnity and asserted alter-
28 ego causes of action against Mosesian and Penrose.

27 ¹¹ The remaining causes of action against Mosesian include
28 fraud, breach of fiduciary duty, conversion and form alter ego
allegations. Hereinafter, collectively referred to as the "alter
ego claims."

1 **The Removal of the Kern County Action**

2 After the bankruptcies were filed, Mosesian sought to
3 enforce the settlements with the debtors by removing the Kern
4 County Action to the bankruptcy court. However, the court
5 remanded the action to state court and granted Rogers' motion for
6 relief from stay to allow the Kern County Action to proceed.

7 **The Adversary Proceedings**

8 Mosesian also commenced an adversary proceeding in each of
9 the two bankruptcy cases, against Rogers, the trustees, and
10 others seeking declaratory relief that the alter ego claims
11 asserted in the Kern County Action against him were property of
12 the two bankruptcy estates and were settled upon the payment of
13 \$145,000. Thus, the issue of whether the alter ego claims were
14 property of the bankruptcy estates was squarely before the
15 bankruptcy court. The defendants moved to dismiss.

16 At a hearing on July 26, 2006, the bankruptcy court examined
17 the complaint in the Kern County Action and found that "the
18 claims that Rogers asserts in its state court action are
19 individual, particular, and specific to Rogers" and granted its
20 motions to dismiss. The bankruptcy court further noted that even
21 if its ruling was incorrect, the alter ego claims were not
22 brought by the proper party which would be the bankruptcy
23 trustees. Therefore, the court also granted the trustees'
24 motions to dismiss.

25 **The Compromise**

26 Prior to the bankruptcy court's hearing and decision on the
27 motions to dismiss, the trustees and Rogers disputed whether the
28

1 alter ego claims and "other claims"¹² were property of the
2 bankruptcy estates. The trustees and Rogers were also wary of
3 duplicating efforts if they each pursued their respective claims
4 against Mosesian. Specifically, the trustees were concerned that
5 they would be collecting money that would in large part go right
6 back to Rogers, which had asserted a substantial claim in both
7 estates.

8 Rather than litigate over ownership of the various claims,
9 the trustees agreed that Rogers would pursue Mosesian on all
10 claims, including those that arose because of the filings
11 (defined in the settlement agreement as the "Trustees' Causes of
12 Action"). In exchange, Rogers agreed to pay an immediate deposit
13 of \$30,000 to each estate and 5% of the gross recovery that
14 exceeded \$1.2 million from any judgment obtained in any court, to
15 be equally divided between the two estates.¹³

16 The trustees moved for authority to enter into the
17 compromise.¹⁴ Mosesian and NBC objected to the compromise,
18 contending it was a sale disguised as a compromise for the
19 purpose of preventing overbids. NBC maintained that it had a
20 security interest in the estates' causes of action and,
21 therefore, was entitled to credit bid under § 363(k).
22 Mosesian and NBC also objected on the ground that there was no

23
24 ¹² As discussed infra the record does not provide much
guidance as to what the "other claims" may be.

25 ¹³ The Settlement Agreement reflects the date of "May__,
26 2006," but was not signed by the parties.

27 ¹⁴ The motion was noticed for June 21, 2006, on shortened
28 time. A hearing was held and the bankruptcy court authorized
further briefing and continued the hearing until August 30, 2006.

1 evidence before the court that demonstrated the value offered by
2 Rogers was reasonable.

3 After hearing oral argument, the bankruptcy court took the
4 matter under submission and issued Findings of Fact and
5 Conclusions of Law approving the compromise. On reconsideration,
6 the court found that even if the compromise was a sale, the
7 requirements under § 363 were met.

8 **III. JURISDICTION**

9 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
10 §§ 1334 and 157(b) (1). We have jurisdiction under 28 U.S.C.
11 § 158.

12 **IV. ISSUES**

- 13 1. Whether the court erred in finding that the assignment of
14 the Trustees' Causes of Action did not constitute a sale?
- 15 2. Whether the court erred in finding that even if the
16 compromise was a sale, all the requirements of a sale were met
17 and no overbidding was required?
- 18 3. Whether the court abused its discretion in approving the
19 trustees' settlement with Rogers pursuant to Rule 9019?

20 **V. STANDARDS OF REVIEW**

21 The panel reviews a bankruptcy court's order approving a
22 trustee's application to compromise a controversy for abuse of
23 discretion. In re A & C Props., 784 F.2d at 1380. The reviewing
24 court must "determine whether the settlement entered into by the
25 trustee was reasonable, given the particular circumstances of the
26 case." Id. at 1381.

27 Sales under § 363 are reviewed for abuse of discretion.
28 Moldo v. Clark (In re Clark), 266 B.R. 163, 168 (9th Cir. BAP

1 2001).

2 We review the denial of a motion for reconsideration for
3 abuse of discretion. In re Weiner, 161 F.3d 1216, 1217 (9th Cir.
4 1998).

5 VI. DISCUSSION

6 This appeal involves the overlap of § 363 and Rules 6004 and
7 9019(a).

8 When examining a compromise pursuant to Rule 9019, it is
9 necessary to distinguish between a true settlement and the sale
10 of estate property. "[T]he disposition by way of 'compromise' of
11 a claim that is an asset of the estate is the equivalent of a
12 sale of the intangible property represented by the claim, which
13 transaction simultaneously implicates the 'sale' provisions under
14 section 363 as implemented by Rule 6004 and the 'compromise'
15 procedure of Rule 9019(a)." Goodwin v. Mickey Thompson Entm't
16 Group, Inc. (In re Mickey Thompson Entm't Group, Inc.), 292 B.R.
17 415, 421 (9th Cir. BAP 2003) (citations omitted). However, not
18 "every compromise of a bona fide controversy presented to a
19 bankruptcy court under Rule 9019 must pass muster as a sale under
20 § 363." Id. at 422 n.7.

21 The standards for approving a compromise are well settled.
22 "In determining the fairness, reasonableness and adequacy of a
23 proposed compromise, a bankruptcy court must consider: (a) the
24 probability of success in the litigation; (b) the difficulties,
25 if any, to be encountered in the matter of collection; (c) the
26 complexity of the litigation involved, and the expenses,
27 inconvenience and delay necessarily attending it; [and] (d) the
28 paramount interest of the creditors and a proper deference to

1 their reasonable views in the premise[s]." Id. at 420. (citation
2 omitted). Additionally, "a bankruptcy court is obliged to
3 consider, as part of the 'fair and equitable' analysis, whether
4 any property of the estate that would be disposed of in
5 connection with the settlement might draw a higher price through
6 a competitive process and be the proper subject of a section 363
7 sale." Id. at 422.

8 **A. Analysis of the Compromise: True Settlement or Sale?**

9 "By its very nature, a settlement resolves adversarial
10 claims prior to their definitive determination by the court,
11 whereas a 'sale' effects a '[t]ransfer of ['the title...'] [to]
12 property for a consideration." See Hicks, Muse & Co., Inc. v.
13 Brandt (In re Healthco Int'l, Inc.), 136 F.3d 45, 49 (1st Cir.
14 1998) (emphasis in original). The settlement of conflicting
15 claims to property is not the equivalent of a sale when there has
16 been no determination of whether the property was property of the
17 estate. In re Fidelity Am. Fin. Corp., 43 B.R. 74, 77 (Bankr.
18 E.D. Pa. 1984). On the other hand, causes of action owned by the
19 trustee are intangible items of property of the estate that may
20 be sold. Lahijani v. Claims Prosecutor, LLC (In re Lahijani),
21 325 B.R. 282, 287 (9th Cir. BAP 2005).

22 **1. The Alter Ego Claims: No Dispute over Whether they**
23 **Were Property of the Estates After Court Ruled On the**
Motions to Dismiss

24 Any dispute over whether the alter ego claims were property
25 of the estates was resolved on July 26, 2006, prior to the
26 hearing on the compromise. When ruling on Rogers' motions to
27 dismiss, the bankruptcy court found that the claims Rogers
28 asserts in its state court action are individual, particular, and

1 specific to Rogers. When ruling on the trustees' motions to
2 dismiss, the bankruptcy court found "as the court has concluded
3 that the state court claims are not property of the bankruptcy
4 estate, it must, therefore, lack jurisdiction." The bankruptcy
5 court granted all motions to dismiss without leave to amend.

6 Generally, an order granting a motion to dismiss without
7 leave to amend is a final order. Lopez v. City of Needles, Cal.,
8 95 F.3d 20, 22 (9th Cir. 1996) (a dismissal without leave to amend
9 is final); Grover v. Riggsby (In re Riggsby), 745 F.2d 1153, 1154
10 (7th Cir. 1984) (a bankruptcy court's grant of a motion to dismiss
11 an adversary proceeding is a final order). Although the orders
12 on the motions to dismiss were not part of the record on appeal,
13 at minimum, the law of the case doctrine would apply. Under this
14 doctrine, when the court decides upon a rule of law - for
15 example, that the alter ego claims were not property of the
16 estates - that decision should continue to govern the same issues
17 in subsequent stages of the same case. "[A] court is ordinarily
18 precluded from reexamining an issue previously decided by the
19 same court...in the same case." Wiersma v. Bank of the W. (In re
20 Wiersma), 483 F.3d 933, 941 (9th Cir. 2007).

21 On reconsideration, the bankruptcy court essentially
22 acknowledged that there was no longer a dispute over the
23 ownership of the alter ego claims in light of its prior ruling.
24 Thus, at the time the hearing on the compromise took place, there
25 was nothing for Rogers and the trustees to settle in connection
26 with the alter ego claims. Cf. Mickey Thompson, 292 B.R. at 421
27 n.5 (noting that while the settlement might have met the
28 standards of A & C Properties when it was agreed upon and when

1 the motion was filed, the trustee's post-agreement departure from
2 the overbid procedures meant the compromise failed to meet the
3 fair and equitable standards); Myers v. Martin (In re Martin), 91
4 F.3d 389, 395 (3rd Cir. 1996) (finding that a trustee did not
5 breach settlement agreement by informing the court of changed
6 circumstances that would warrant withdrawal of trustee's
7 support).

8 **2. "Other Claims:" No Evidence They Were Property of the**
9 **Estates**

10 After acknowledging that it had already decided whether the
11 alter ego claims were estate property, the bankruptcy court noted
12 at the hearing on reconsideration that the trustees may hold
13 other claims. The court further stated that because the estates
14 and Rogers agreed that Rogers may pursue these claims, this
15 resolves a dispute between Rogers and the estates about who owns
16 the claims. The record does not support this conclusion.

17 The record does not provide much guidance as to what the
18 "other claims" may be. If the "other claims" were those involved
19 in the Kern County Action, any dispute over whether they were
20 property of the estates was resolved in the context of the
21 motions to dismiss. Moreover, at the hearing for the approval of
22 the compromise, Rogers' attorney characterized the so-called
23 dispute with the trustees over the "other claims" as a battle
24 over how to define, or characterize, certain claims. For
25 example, the attorney expressed concern that in the Kern County
26 Action, Mosesian would take the position that the fraud,
27 conversion or breach of fiduciary duty claim cannot be pursued by
28 Rogers because it is "really a fraudulent transfer." He further

1 argued that the trustees and Rogers don't want to "argue over how
2 to define - not who owns, but who wants to define the cause of
3 action that is being asserted in the Kern County trial. And
4 that's what's being compromised[.]" (emphasis added). How to
5 "define" a breach of fiduciary duty claim versus a fraudulent
6 transfer claim is well settled and cannot properly be
7 characterized as a bona fide controversy.

8 Accordingly, the record before us raises more questions than
9 it answers in connection with the "other claims" because the
10 trustees neither identify the "other claims" nor evaluate them
11 pursuant to the factors set forth in A & C Properties. We remand
12 to the bankruptcy court to determine what the "other claims" are
13 and whether settlement of them is in the best interests of the
14 estate.

15 **3. The Assignment of the Trustees' Causes of Action**
16 **Constitutes a Sale**

17 The trustees assign the Trustees' Causes of Action in
18 paragraph 3 of the settlement.¹⁵ The Ninth Circuit does not
19

20 ¹⁵ Paragraph 3 provides: "Blanco and Kavanagh on behalf of
21 the Chapter 7 estate [sic] of GEA and GEAR shall assign the
22 Trustees' Causes of Action held by the two Chapter 7 estates
23 against Peter Mosesian ..., and other entities related to GEA and
24 GEAR or related to or controlled by Peter Mosesian.... This
25 assignment is to be treated in its broadest possible sense to
26 include any and all causes of action held by either of the two
27 bankruptcy estates against any entity that arise only upon the
28 filing and as a result of the filing of the two Chapter 7 cases
of GEA and GEAR."

26 The trustees also purport to assign general causes of action
27 (in paragraph 4) of the agreement in the event any court
28 determines that a Rogers' Cause of Action is not particular, but
general. However, this assignment appears unnecessary in light
of the bankruptcy court's ruling on the motions to dismiss.

1 prohibit such assignments. Spradling & Metzger v. Baum Trust (In
2 re P.R.T.C., Inc.), 177 F.3d 774 (9th Cir. 1999). It is
3 undisputed that the Trustees' Causes of Action are property of
4 the estates and the bankruptcy court acknowledged that the
5 settlement agreement made clear that causes of action that arose
6 upon the filing, such as preferential or fraudulent transfers,
7 are general causes of action belonging to the two bankruptcy
8 estates.

9 A review of the agreement also demonstrates that the
10 assignment of the Trustees' Causes of Action is the equivalent of
11 a sale. Not only are the Trustees' Causes of Action property of
12 the estates, but the trustees relinquished all control over those
13 causes of action to Rogers. Healthco Int'l, Inc., 136 F.3d at 49
14 (holding that "a 'sale' effects a '[t]ransfer of ['the title...']
15 [to] property for a consideration.") (citation omitted). At the
16 same time, Rogers took all the risks of ownership because the
17 trustees made no representations regarding the existence or
18 validity of any such causes of action, yet Rogers was willing to
19 pay for them. Notably, Rogers is also not giving up any portion
20 of its claim against the estates. Thus, this aspect of the
21 compromise involves a sale subject to § 363(b). See Lahijani, 325
22 B.R. at 287 (noting that causes of action owned by the trustee
23 are intangible items of property of the estate that may be sold);
24 see also In re Telesphere Commc'ns, Inc., 179 B.R. 544 (Bankr.
25 N.D. Ill. 1994) (settlement of cause of action held by bankruptcy
26 estate is plainly equivalent of "sale" of that claim under
27 § 363(b) subject to judicial approval where there is objection to
28 settlement; there is no difference in effect on bankruptcy estate

1 between sale of claim by way of assignment to third party and
2 settlement of claim with adverse party).

3 **B. The Fair and Equitable Analysis**

4 The bankruptcy court could only approve or deny the
5 compromise as a whole. "The court must find that the compromise
6 is fair and equitable." A&C Props., 784 F.2d at 1381. "[W]hile
7 a court generally gives deference to a trustee's business
8 judgment in deciding whether to settle a matter, the trustee 'has
9 the burden of persuading the bankruptcy court that the compromise
10 is fair and equitable and should be approved.'" Id. The
11 trustees failed to carry their burden in these cases.

12 **1. Issues Regarding the Compromise**

13 The bankruptcy court's analysis of the factors set forth in
14 A&C Properties only pertained to the dispute over whether the
15 alter ego claims in the Kern County Action were property of the
16 estates. The trustees apparently were content to rest upon the
17 conclusory statements in their declarations and supplemental
18 declarations, filed in support of the compromise, rather than
19 submit any evidence.

20 The record contains no evidence regarding the Trustees'
21 Causes of Action or a discussion of the A&C Properties factors in
22 relation to those claims, which is required under Mickey
23 Thompson, 292 B.R. at 420-21. The evidence in the record did not
24 identify the Trustees' Causes of Action which were being assigned
25 nor weigh the likelihood of recovery. There was no cost-benefit
26 analysis of the merits of pursuing or assigning the Trustees'
27 Causes of Action. In short, there was no evaluation at all,
28 making it impossible to determine whether the price to be paid by

1 Rogers for the opportunity to pursue the Trustees' Causes of
2 Action was reasonable under the circumstances.

3 Moreover, the potential value of the 5% premium was not
4 analyzed by the trustees. Rogers is not giving up any portion of
5 its claims against these estates. More troubling is the lack of
6 any evidence regarding GEAR's counterclaim against Rogers in the
7 Kern County Action which is an asset of GEAR's estate and
8 possibly an offset to Rogers' claims.

9 There was also no evidence regarding the probability of
10 Rogers obtaining a judgment(s) in excess of \$1.2 million or, more
11 importantly, collecting such a judgment(s) in order to place a
12 value on the 5% premium offered by Rogers.¹⁶ Although Mosesian
13 may have assets, the trustees presented no analysis of what those
14 assets might be or the likely recovery.

15 The aspect of delay should also have been considered. No
16 evidence was offered to show how long the estates would remain
17 open before receiving the 5% premium.

18 Lastly, the interests of the creditors, although possibly
19 hard to ascertain in these cases, was not discussed. The hand-
20 full of creditors that exist -- save Rogers, NBC and Mosesian --
21 have remained silent. Although Rogers has large claims in both
22 estates, its support cannot predominate over the interests of the
23 creditors as a whole.

24 The trustees failed to present any evidence to substantiate
25 their argument that the compromise was in the best interests of

26
27 ¹⁶ Since the accounting award to Rogers, even with accrued
28 interest, was only worth about \$1 million, an argument could be
made that the 5% premium was worthless.

1 the estates. Therefore, the bankruptcy court abused its
2 discretion in approving the compromise.

3 **2. Issues Regarding the Sale**

4 The bankruptcy court found that if the compromise was a
5 sale, the sale requirements under § 363(b) were met, notice was
6 adequate, and no overbidding was required.

7 **a. Notice**

8 Mosesian and NBC challenge the notice given by the trustees
9 because it did not mention the assets being sold. Mosesian and
10 NBC received adequate notice of the compromise and the merits of
11 their objections were heard by the bankruptcy court. Assuming
12 the trustees mislabeled the motion, there is no resulting harm
13 because the requirements of notice and a hearing pursuant to
14 Rules 6004 and 9019 are the same.

15 **b. Bidding**

16 The main issue with respect to the sale of estate assets is
17 whether the trustees obtained the best possible price in light of
18 their fiduciary duty to maximize the value to the estates. A
19 sale that is well advertised and subject to overbids is usually
20 the preferred method to achieve the best possible price.
21 However, the guiding principle is that the "court's obligation in
22 section 363(b) sales is to assure that optimal value is realized
23 by the estate under the circumstances." Lahijani, 325 B.R. at
24 288-89 (emphasis added).

25 The bankruptcy court concluded that even if the compromise
26 did involve the sale of estate property, no overbidding was
27 required under the circumstances since Mosesian would not be
28 bidding on the same thing as Rogers. However, the bankruptcy

1 court did not recognize that assignment of the Trustees' Causes
2 of Action involved a sale of estate property. Whether sold to
3 creditors such as NBC or Rogers, or a defendant such as Mosesian,
4 the rights sold would have been identical. Compare Lahijani, 325
5 B.R. 282 (cause of action was being sold to present/potential
6 defendant over creditors' objection). Thus, although the
7 bankruptcy court considered the possibility of overbids and found
8 that they were not required, its analysis did not recognize that
9 the compromise involved the sale of estate property, which had a
10 value that could be maximized by overbid. Mickey Thompson, 292
11 B.R. at 422 ("The possibility that someone else may be willing to
12 pay a higher price triggers the prospect of an auction that could
13 yield an even higher price.").

14 Although the bankruptcy court has discretion whether to
15 impose formal sale procedures, it abused its discretion under the
16 circumstances. Mosesian was interested in bidding on the
17 avoidance actions. Setting up formal bidding procedures and
18 allowing the bidding process to play out would have helped assure
19 that the highest and best price was received for the benefit of
20 the silent creditors.

21 **c. NBC's Rights, if any, to Credit Bid Under 363(k)**

22 NBC argued that it had the right to credit bid. The
23 bankruptcy court did not acknowledge NBC as an objecting party
24 and did not discuss or determine what rights, if any, NBC had to
25 credit bid. On remand, the bankruptcy should determine whether
26 NBC has any right to credit bid and, if so, what impact that
27 right has on the compromise. In re Hung Tan Pham, 250 B.R. 93,
28 99 (9th Cir. BAP 2000) (finding that an appellate court may remand

1 when there is an absence of findings of fact and conclusions of
2 law that prevents review on appeal) (citation omitted).

3 **VII. CONCLUSION**

4 In sum, the bankruptcy court abused its discretion by
5 approving the compromise without any evidence to establish, at
6 minimum, the factors set forth in A & C Properties.

7 The court also did not properly analyze the settlement as a sale
8 of estate assets. On this record, the trustees failed to meet
9 their burden of showing that the compromise was "fair and
10 equitable." On remand, the bankruptcy court should review the
11 compromise in light of the relevant criteria enumerated above in
12 order to determine whether the compromise is in the best interest
13 of the estates or sale criteria should be imposed.

14 The order of the bankruptcy court approving the compromise
15 is REVERSED. REVERSED AND REMANDED for further proceedings
16 consistent with this memorandum decision.

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