

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:)	Case No. 10-50494
)	
FAIR FINANCE COMPANY)	Chapter 7
)	
Debtor.)	Judge Marilyn Shea-Stonum
)	

MOTION OF TRUSTEE TO APPROVE COMPROMISE
WITH SOMERSET CPAs, P.C.

Brian A. Bash (the “**Trustee**”), the duly appointed Chapter 7 Trustee for Fair Finance Company (the “**Debtor**”) in the above-captioned case, hereby moves for entry of an order, in substantially the form attached hereto as **Exhibit A**, approving the compromise of claims against Somerset CPAs, P.C., for the reasons more fully set forth in the attached memorandum of law. The proposed Settlement Agreement, executed by the parties, is attached to this Motion as **Exhibit B**.

Date: October 31, 2012

Respectfully submitted,

/s/ David Proaño

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:)	Case No. 10-50494
)	
FAIR FINANCE COMPANY)	Chapter 7
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Debtor.)	Judge Marilyn Shea-Stonum
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**MEMORANDUM IN SUPPORT OF MOTION OF TRUSTEE TO APPROVE
COMPROMISE WITH SOMERSET CPAs, P.C.**

In support of the Motion of Trustee to Approve Compromise With Somerset CPAs, P.C. (the “**Motion**”),¹ the Trustee states as follows:

I. INTRODUCTION AND SUMMARY:

The Trustee filed litigation against Somerset CPAs, P.C. (“**Somerset**”), assigned adversary proceeding number 12-05108 and now pending in the United States District Court for the Northern District of Ohio as Case No. 5:12-cv-00992, to recover certain monetary transfers to Somerset totaling **\$760,454.90** that the Trustee alleges were made by the Debtor through affiliated entities, including Fair Holdings, Inc., DC Investments, LLC, Obsidian Enterprises, Inc., and certain subsidiaries of Obsidian Enterprises, Inc. The Trustee filed the litigation to recover those payments as fraudulent transfers from the Debtor under 11 U.S.C. §§ 544 & 550.

Following settlement discussions between the parties, Somerset has agreed to pay **\$500,000.00** to settle the litigation, and the Trustee has agreed to accept this settlement payment subject to this Court’s approval. Somerset has made the settlement payment to the Trustee, and the funds are being held in trust pending this Court’s approval of the present motion.

The Trustee considered the following factors in determining to compromise the claims at issue in exchange for the payment by Somerset of \$500,000.00:

¹ Terms capitalized but not defined herein shall have the meanings ascribed to them in the Motion.

(1) The substantial cost of litigating the claims against Somerset to conclusion in view of the number of transfers at issue and the underlying facts;

(2) The fact that Somerset has agreed to settle the Trustee's claims at an early stage of the litigation, the timing of which avoids the cost, expense and delay associated with protracted discovery;

(3) The substantial amount of the payment in relation to the claims at issue in the litigation;

(4) The fact that the payment to the estate has been made in lump sum; and

(5) The benefit to the estate of obtaining a cash settlement at this early stage of the litigation without further delay.

Accordingly, as addressed in detail below, and for these reasons, the Trustee submits that this proposed compromise is fair and reasonable, and in the best interests of the estate.

II. PROPOSED FINDINGS OF FACT:

A. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and Rule 9019 of the Federal Rules of Bankruptcy Procedure. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

B. On February 8, 2010 (the "Petition Date"), creditor-investors (the "**Petitioning Creditors**") filed a petition for involuntary bankruptcy against the Debtor.

C. Attorney Bash is the duly appointed, qualified and acting trustee (the "**Trustee**") in the within proceedings.

D. Somerset CPAs, P.C. (“**Somerset**”) is an Indiana Professional Corporation. Somerset provides tax and accounting services, as described more fully at Somerset’s website: <http://www.somersetcpas.com/>.

E. The Trustee claims that the Debtor made transfers to Somerset through affiliated entities, including DC Investments, LLC, Fair Holdings, Inc., Obsidian Enterprises, Inc., and certain subsidiaries of Obsidian Enterprises, Inc., totaling **\$760,454.90** (the “**Payments**”). The Trustee claims that the Payments were effectively made by the Debtor, and that the Payments constituted fraudulent transfers under 11 U.S.C. §§ 544 & 550.

F. To recover the Payments the Trustee filed an adversary proceeding against Somerset in the Bankruptcy Court as adversary proceeding no. 12-05108 (the “**Litigation**”). The bankruptcy reference was withdrawn for the Litigation, and the case is currently pending in the United States District Court for the Northern District of Ohio as Case No. 5:12-cv-00992.

G. Somerset disputes liability and certain of the factual allegations asserted by the Trustee regarding the Payments and the claims in the Litigation.

H. In recognition of the expense, risks and uncertainties of litigation, the parties have agreed to provide for settlement and discharge of the claims the Trustee may assert against Somerset arising from the Payments on the terms set forth in the Settlement Agreement attached to this Motion as **Exhibit B**.

III. PROPOSED CONCLUSIONS OF LAW:

A. The Applicable Standard Under Rule 9019.

A. Rule 9019(a) of the Federal Rules of Bankruptcy Procedure provides that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”

B. Compromises are favored in bankruptcy cases. *In re Leeway Holding Co.*, 120 B.R. 881, 891 (Bankr. S.D. Ohio 1990); *Magill v. Springfield Marine Bank*, 67 B.R. 378, 383 (C.D. Ill. 1986). The decision to approve a settlement or compromise lies within the discretion of the Court and is warranted where the settlement is found to be reasonable and fair in light of the particular circumstances of the case. *Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson (In re TMT Trailer Ferry, Inc.)*, 390 U.S. 414, 424-25 (1968); *International Distrib. Centers, Inc. v. Talcott, Inc.*, 103 B.R. 420, 422 (S.D.N.Y. 1989); *In re Texaco*, 84 B.R. 893, 901 (Bankr. S.D.N.Y. 1988); *In re Albert-Harris, Inc.*, 313 F.2d 447, 449 (6th Cir. 1963); *In re Parkview Hospital-Osteopathic Medical Center*, 211 B.R. 603 (Bankr. N.D. Ohio 1996); *In re Victoria Alloys, Inc.*, 261 B.R. 918, 920 (Bankr. N.D. Ohio 2001); *In re SIS Corp.*, 108 B.R. 608, 612 (Bankr. N.D. Ohio 1989).

C. In determining whether a settlement is reasonable, a court should consider the following factors:

- a. The probability of success in litigation;
- b. The difficulty in collecting any judgment which may be obtained;
- c. The complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attendant to it; and
- d. The interests of creditors and equity holders and a proper deference to their reasonable views of the settlement.

See In re Martin, 91 F.3d 389, 393 (3d Cir. 1996); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *TMT Trailer*, 390 U.S. at 424-25; *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Swallen's, Inc.*, 210 B.R. 128 (Bankr. S.D. Ohio 1997); *In*

re McLean Indus., Inc., 84 B.R. 340, 344 (Bankr. S.D.N.Y. 1988); *In re Carla Leather, Inc.*, 44 B.R. 457, 466 (Bankr. S.D.N.Y. 1985).

D. Bankruptcy courts should approve a proposed settlement, after an independent review and evaluation of the applicable principles of bankruptcy law, unless it “fall[s] below the lowest point in the range of reasonableness.” *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied*, 464 U.S. 822 (1983) (citations omitted) (*quoting Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)); *see also In re Tennol Energy Co.*, 127 B.R. 820 (Bankr. E.D. Tenn. 1991); *In the Matter of Energy Cooperative, Inc.*, 886 F.2d 921 (7th Cir. 1989); *In re Dow Corning Corp.*, 198 B.R. 214 (Bankr. E.D. Mich. 1996). Under *TMT Trailer*, courts should seek to balance the probable benefit and potential cost of pursuing a claim or defense against the costs of the proposed settlement. The Court is not required to conduct a “mini-trial” on the merits of the underlying causes of action being settled. *In re Blair*, 538 F.2d 849 (9th Cir. 1976); *see also In re Walsh Construction, Inc.*, 669 F.2d 1325 (9th Cir. 1982).

E. Accordingly, courts generally give considerable deference to a trustee’s recommendation of a proposed compromise and settlement. *See Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 604 (5th Cir. 1980) (affirming district court’s reliance on trustee’s evaluation of merits of claim); *In re Blair*, 538 F.2d at 851, n.1 (affirming district court’s reliance on trustee’s conclusory statements in recommending settlement). Indeed, the Court should give weight to a trustee’s informed judgment that a compromise is fair and equitable to the estate. *See International Distrib. Centers, Inc.*, 103 B.R. at 423; and *In re Carla Leather, Inc.*, 44 B.R. at 465.

B. The Proposed Compromise Satisfies the Rule 9019 Standard.

A. The Trustee respectfully submits that the compromise to be achieved by the proposed Settlement Agreement satisfies the standards for approval and, therefore, should be approved under Rule 9019.

B. The proposed compromise is reasonable and in the best interests of the estate and creditors. As set forth in the Settlement Agreement attached hereto as **Exhibit B**, the settlement provides for a payment by Somerset of **\$500,000.00** to the estate. In addition, under the Settlement Agreement, Somerset has agreed to pay the estate \$500,000.00 in a lump sum payment within seven (7) calendar days of the full execution of the Settlement Agreement. Prior to the filing of the present motion, Somerset made the settlement payment to the Trustee, and the funds are being held in trust pending this Court's approval of the present motion.

C. The Trustee took a number of factors into account in determining to compromise the claims at issue in exchange for the payment by Somerset of \$500,000.00. First, the complaint at issue concerns dozens of transfers that were made through 11 different entities for tax and accounting services by Somerset. The Trustee believes and has alleged that these payments to Somerset were in reality paid by the Debtor through a series of interlocking loan transactions, and that the Debtor did not receive any value in exchange for the fees because the intermediate entities were insolvent and relied entirely on the Debtor for financial support. In view of the facts at issue in these transactions and the involvement of multiple entities, the cost to the estate of establishing these claims could be substantial.

D. Second, the Trustee considered the fact that Somerset agreed to settle the Trustee's claims at an early stage of the litigation and prior to the commencement of deposition

discovery. An early settlement avoids the cost, expense and delay associated with additional discovery.

E. Third, in relation to the amounts at issue in the Litigation (\$760,454.90), the Trustee considered the payment by Somerset of \$500,000.00 a fair and reasonable amount in view of the potential cost and expense to the estate of continued litigation.

F. Fourth, the Trustee considered that the settlement payment would be paid in lump sum, and in fact Somerset has already wired the money to the Trustee to be held in trust pending approval of this Motion.

G. Finally, the Trustee considered the benefit to the estate of obtaining a cash settlement at this early stage of the litigation without further delay.

H. In view of the substantial recovery by the Trustee (\$500,000.00), the amounts at issue in the litigation, and the expense of continued litigation, the costs and risks of continued litigation outweigh the possibility of further benefit to the estate.

I. Having provided notice of the Motion to (a) the Office of the United States Trustee, (b) counsel to the Petitioning Creditors, (c) Somerset, and (d) all parties who have requested notice, the Trustee requests and submits that, under the circumstances, no other or further notice need be given.

WHEREFORE, the Trustee respectfully requests that this Court enter an Order, in substantially the form attached hereto as **Exhibit A**, (i) granting the Motion; (ii) approving the compromise on the terms set forth in the Settlement Agreement; and (iii) authorizing and directing the parties to take all actions necessary or incidental to performance under the Settlement Agreement.

Date: October 31, 2012

Respectfully submitted,

/s/ David Proaño

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David Proaño (0078838)
Joseph M. Esmont (0084322)
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Counsel for the Trustee

EXHIBIT A
PROPOSED ORDER

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:)	Case No. 10-50494
)	
FAIR FINANCE COMPANY)	Chapter 7
)	
Debtor.)	Judge Marilyn Shea-Stonum
)	

**ORDER APPROVING COMPROMISE OF CLAIMS BY THE TRUSTEE
AGAINST SOMERSET CPAs, P.C.**

This matter having been presented to the Court upon the Motion of Trustee to Approve Compromise With Somerset CPAs, P.C. (the “**Motion**”),¹ and upon the Memorandum of Law In Support of the Motion; and the Court having considered the Motion, and it appearing that the compromise is in the best interest of the Debtor’s estate and creditors, and after due deliberation and consideration of the facts and circumstances therein:

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The Motion is **GRANTED** in its entirety.
2. The notice of the Motion was adequate and sufficient under the circumstances.

¹ Terms capitalized but not defined herein shall have the meanings ascribed to them in the Motion and the Memorandum of Law in Support of the Motion.

3. The compromise is hereby approved in accordance with the terms and conditions set forth in the Settlement Agreement attached to the Motion.

4. The parties are hereby authorized and directed, without further order of this Court, to take all actions necessary or incidental to performance under the Settlement Agreement and to implement and effectuate this Order.

5. The Court shall retain jurisdiction with respect to all matters arising from or related to the Settlement Agreement and the implementation of this Order.

IT IS SO ORDERED.

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Submitted by,

/s/ David Proaño

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David Proaño (0078838)
Joseph M. Esmont (0084322)
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Counsel for the Trustee

EXHIBIT B
SETTLEMENT AGREEMENT AND RELEASE

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "**Settlement Agreement**") is made and entered into this 17 day of October, 2012, by and between Brian A. Bash, in his capacity as the Chapter 7 Trustee (the "**Trustee**") for Fair Finance Company ("**Fair Finance**" or the "**Debtor**") in a Chapter 7 Bankruptcy Proceeding pending in the United States Bankruptcy Court for the Northern District of Ohio (the "**Bankruptcy Court**") as case no. 10-50494, and Somerset CPAs, P.C., an Indiana Professional Corporation ("**Somerset**").

WHEREAS, the Trustee is seeking to recover certain payments that the Trustee alleges were made by the Debtor to Somerset totaling \$760,454.90 (the "**Payments**"); and

WHEREAS, the Trustee has demanded the return of those Payments as fraudulent transfers under state law, and to recover the Payments the Trustee filed an adversary proceeding against Somerset in the Bankruptcy Court as adversary proceeding no. 12-05108 (the "**Litigation**"), and the Payments are outlined in Exhibit A attached to the Amended Complaint filed in the Litigation; and

WHEREAS, the bankruptcy reference was withdrawn for the Litigation, and the case is currently pending in the United States District Court for the Northern District of Ohio as Case No. 5:12-cv-00992; and

WHEREAS, Somerset disputes liability and the factual allegations asserted by the Trustee regarding the Payments and the claims in the Litigation; and

WHEREAS, the parties desire to enter into this Settlement Agreement in order to provide for certain payment in full settlement and discharge of the claims that the Trustee has or may have against Somerset regarding the Payments.

NOW, THEREFORE, in consideration of the covenants set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned agree as follows:

1. **Settlement Payment.** Within seven (7) calendar days of the full execution of this Settlement Agreement, Somerset shall pay to the Trustee the total sum of Five Hundred Thousand Dollars and Zero Cents (\$500,000.00) (the "**Settlement Payment**") by certified or cashier's checks, payable to "Brian A. Bash, Trustee for Fair Finance Company" and delivered to David F. Proaño, Baker & Hostetler LLP, 1900 East 9th Street, Suite 3200, Cleveland, Ohio 44114, to be held by the Trustee in trust pending the entry by the Bankruptcy Court of an order approving this Settlement Agreement.
2. **Effectiveness Upon Final Approval.** Within seven (7) calendar days after the Trustee's timely receipt of the Settlement Payment, the Trustee shall file an appropriate motion with the Bankruptcy Court for authority to compromise the claims and causes of action in the Litigation on the terms set forth in this Settlement Agreement. This Settlement Agreement shall become effective and be binding if: (a) a final order is entered by the Bankruptcy Court in the records of the Debtor's bankruptcy case

approving the compromise on the terms set forth in this Settlement Agreement; and (b) (i) the period within which any person or entity timely may appeal from such final order shall have expired and no appeal shall have been timely commenced or, if an appeal is timely commenced, such appeal shall have been ordered dismissed by the highest court of competent jurisdiction to which such appeal is taken, and (ii) the period within which any person or entity timely may seek reconsideration of, or seek to alter or amend, or seek a new hearing or trial regarding such final order shall have expired and no such motion for reconsideration of, or to alter or amend, or to have a new hearing or trial regarding such final order shall have been timely filed or, if any such motion is timely filed, such motion shall have been denied by a final order of the Bankruptcy Court or another court of competent jurisdiction (the occurrence of (a) and (b) shall constitute "Final Approval").

3. **Mutual Releases.** The following mutual releases shall be effective only upon Final Approval of this Settlement Agreement:

- (a) Release by the Trustee of Somerset: Except for claims arising out of this Settlement Agreement, the Trustee, on behalf of himself, the Debtor and its estate (the "**Trustee Releasing Parties**"), hereby fully, finally and forever releases, acquits and discharges Somerset and its directors, shareholders, employees, agents, assigns and successors (the "**Somerset Released Parties**") from any and all claims, demands, obligations, judgments, actions, causes of action and/or liabilities for injuries, losses, damages and/or compensation of any nature, kind or description whatsoever, known or unknown, foreseen or unforeseen, which the Trustee Releasing Parties ever had, now have, or may have against the Somerset Released Parties arising from or relating to the Payments. Any claims and causes of action not expressly released herein are hereby deemed preserved.
- (b) Release by Somerset of the Trustee: Except for claims arising out of this Settlement Agreement, Somerset and its directors, shareholders, employees, agents, assigns and successors (the "**Somerset Releasing Parties**") hereby fully, finally and forever release, acquit and discharge the Trustee and the Trustee's agents, representatives, attorneys, employees and professionals, and the Debtor and its estate (the "**Trustee Released Parties**") from any and all claims, demands, obligations, judgments, actions, causes of action and/or liabilities for injuries, losses, damages and/or compensation of any nature, kind or description whatsoever, known or unknown, foreseen or unforeseen, which the Somerset Releasing Parties ever had, now have, or may have against the Trustee Released Parties arising from or relating to the Payments. In addition, Somerset is hereby deemed to have waived any right that it otherwise may or would have to file a claim in the Debtor's bankruptcy case pursuant to 11 U.S.C. § 502 arising from the payment of the Settlement Sum. Any claims and causes of action not expressly released herein are hereby deemed preserved.

4. **Dismissal of Litigation.** Within seven (7) calendar days of Final Approval, the Trustee shall take such action as is necessary to dismiss the Litigation with prejudice.

5. **No Admissions.** It is understood that this settlement is a compromise of disputed claims and that the payment of the Settlement Sum made hereunder is not to be construed as an admission of any liability for any alleged transfers. This Settlement Agreement is intended to fully resolve and settle all claims for the avoidance and recovery of the Payments.
6. **Tolling Agreement.** In the event this Settlement Agreement is vacated or set aside for any reason, or in the event that Somerset does not timely pay the Settlement Sum as required by Paragraph 1 of this Settlement Agreement, the parties agree that all statutes of limitations applicable to any and all claims arising from or related to the Payments, and that were not expired at the time of the filing of the Litigation, shall be tolled from the date of this Settlement Agreement and shall remain tolled for one hundred eighty (180) days from the date on which the Settlement Agreement is vacated or set aside or from the date the Settlement Sum was due and payable. Nothing in this provision shall be construed as an admission by any party that any claims have or have not been barred, or are about to be barred, by any applicable statute of limitations.
7. **Acknowledgment and Authority.** The parties to this Settlement Agreement acknowledge that each has read this Settlement Agreement and that the execution hereof is not induced by any representation other than as expressly contained herein, that the person executing this Settlement Agreement on behalf of the respective party has been duly authorized to execute and deliver this Settlement Agreement and that this Settlement Agreement is the legally binding obligation of such party.
8. **Choice of Law and Venue.** This Settlement Agreement shall be governed by the laws of the State of Ohio as applicable to agreements made and to be performed in Ohio, without regard to conflict of law principles. The parties further agree that the United States Bankruptcy Court for the Northern District of Ohio has jurisdiction over any disputes arising out of this Settlement Agreement, including, without limitation, disputes regarding its enforcement, construction and interpretation.
9. **Integration.** This Settlement Agreement constitutes the entire agreement of the parties with respect to the subject matter of this agreement and supersedes and extinguishes any and all prior oral and/or written agreements between the parties concerning the subject matter of this agreement.
10. **Written Modifications Only.** This Settlement Agreement may only be modified or amended through a written document signed by both parties to this Settlement Agreement.
11. **Construction.** No provision of this Settlement Agreement shall be interpreted or construed against any party hereto because such party or its legal representative drafted such provision. The terms of this Settlement Agreement are contractual and are not mere recitals.

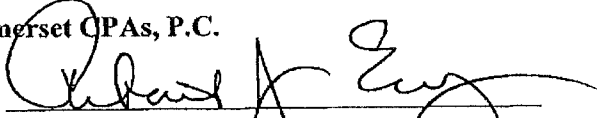
12. **Survivability.** If any provision of this Settlement Agreement is determined to be unlawful, invalid or unenforceable for any reason, the remaining provisions shall continue to be binding upon all the parties.

13. **Successors, heirs and assigns.** This Settlement Agreement is binding on the successors, heirs and assigns of the parties to this Agreement.

14. **Counterparts.** This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original regardless of the date of its execution and delivery. All such counterparts together shall constitute one and the same document.

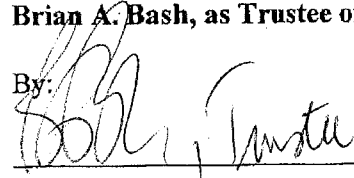
IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date set forth above.

Somerset CPAs, P.C.

By: 

Its: 

Brian A. Bash, as Trustee of the Fair Finance Company

By:  Trustee

CERTIFICATE OF SERVICE

A copy of the foregoing has been served via ECF or regular, U.S. Mail, on October 31, 2012, on the attached service list.

/s/ David Proaño

David Proaño

Counsel for the Trustee

SERVICE LIST

Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive e-mail notice/service for this case.

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