

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re:

TELEXFREE, LLC,
TELEXFREE, INC. and
TELEXFREE FINANCIAL, INC.,

Debtors.

STEPHEN DARR, AS HE IS THE TRUSTEE
OF THE CHAPTER 11 ESTATES OF EACH
OF THE DEBTORS,

Plaintiff,

v.

ATW TRAINING & CONSULTING, INC.,

Defendant.

Chapter 11 Cases

14-40987-MSH
14-40988-MSH
14-40989-MSH

Jointly Administered

Adversary Proceeding
No. 16-4027

**MOTION BY TRUSTEE TO APPROVE STIPULATION OF SETTLEMENT BETWEEN
CHAPTER 11 TRUSTEE AND ATW TRAINING & CONSULTING, INC.**

Stephen B. Darr, the duly appointed Chapter 11 Trustee (the "Trustee") of the bankruptcy estates ("Estates") of TelexFree, LLC, TelexFree, Inc., and TelexFree Financial, Inc. (collectively, the "Debtors"), respectfully requests that the Court approve the stipulation ("Stipulation") filed herewith by and between the Trustee and ATW Training & Consulting, Inc. ("ATW"), pursuant to Federal Rule of Bankruptcy Procedure 9019. The Stipulation provides for a payment into the Estates of \$7,500 and a mutual release by the parties. In support of this motion, the Trustee states as follows:



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BACKGROUND

1. On April 13, 2014 (the "Petition Date"), the Debtors filed voluntary Chapter 11 petitions with the United States Bankruptcy Court for the District of Nevada.
2. By order dated May 6, 2014, the Nevada Bankruptcy Court approved a motion to change venue filed by the Securities and Exchange Commission. The cases were transferred to this Court on May 9, 2014.
3. On May 30, 2014, this Court approved the motion of the Office of the United States Trustee to appoint a Chapter 11 trustee, and the Trustee was appointed on June 6, 2014.
4. The Debtors ostensibly operated a multi-level marketing company engaged in the sale of voice over internet service. On November 25, 2015, the Court, on motion by the Trustee and after notice, entered an Order, as amended on December 21, 2015, that the Debtors were engaged in a Ponzi scheme and that this ruling was the law of the case in each of the jointly administered cases.
5. The Defendant provides employee sales force manuals.
6. Days before the Petition Date, the Debtors paid the sum of \$20,000 to the Defendant (the "Transfer") as a nonrefundable advance.
7. On or about April 4, 2016, the Trustee commenced this action against ATW seeking avoidance of the Transfer as a fraudulent and/or preferential transfer and for preservation of such transfer for the benefit of the Estates pursuant to 11 U.S.C. §§547, 548, 550, 551.
8. ATW has provided informal discovery indicating that ATW prepared employee manuals for the Debtors during the period from February to mid-April 2016. ATW billed the Debtors \$20,000 for the manuals, payable on receipt. Payment was made promptly, and the manual was then delivered to the Debtors.

9. The Trustee has disputed the value of the services rendered by ATW.

10. The Parties have since had discussions and exchanged information regarding the merits of the Trustee's claims and any defenses. As a result of these discussions, and in order to avoid the costs, delays and uncertainty of litigation, the Parties have entered into the Stipulation, which provides that upon Court approval:

(i) ATW shall pay the sum of \$7,500 to the Trustee;

(ii) The Trustee, for himself and on behalf of the Debtors' bankruptcy estates, shall release and forever discharge ATW from any and all claims and liabilities that the Trustee or the Debtors' bankruptcy estates have or may have against ATW;

(iii) ATW shall release and forever discharge the Trustee and the Debtors' bankruptcy estates from any and all claims and liabilities that ATW may have;

(iv) The releases provided herein shall be self-executing;

(v) While the Trustee shall retain no causes of action against ATW, nothing contained in the Stipulation shall impair, release, or discharge claims that have been or could be asserted, whether or not such claims have to date been asserted, by the plaintiffs in the multi-district litigation pending in the United States District Court for the District of Massachusetts, *captioned* In re TelexFree Securities Litigation, MDL No. 4:14-md-2566- TSH. For the avoidance of doubt, the Trustee agrees he shall not attempt to assert any claims or causes of action against ATW in this multi-district litigation or otherwise. Nothing in this release grants the plaintiffs in the multi-district litigation any claims or causes of action that they would otherwise not have absent the Stipulation.

Basis for Approval of Stipulation

11. Bankruptcy Rule 9019(a) provides, in relevant part, that "On the motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Settlements and compromises are normal parts of the process of reorganization. While the decision to approve a particular settlement lies within the sound discretion of the Bankruptcy Court, the Court should give some deference to the business judgment of the estate representative. Jeffrey v. Desmond, 70 F.3d 183 (1st Cir. 1995).

12. The Court of Appeals has described the test to be used by Bankruptcy Courts called upon to approve or reject proposed compromises and settlements as follows:

The bankruptcy judge has the authority to approve a compromise of a claim pursuant to Bankruptcy Rule 9019(a). The ultimate issue on appeal is whether the bankruptcy court abused its discretion when it approved the compromise, which is a process requiring the bankruptcy court to “assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal.” In re GHR Cos., 50 B.R. 925, 931 (Bankr. D. Mass. 1985) (quoting In re Boston & Providence R.R., 673 F.2d 11, 12 (1st Cir. 1982)). The specific factors which a bankruptcy court considers when making this determination include: (i) the probability of success in the litigation being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise. In re Anolik, 107 B.R. 427, 429 (D. Mass. 1989).

Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995).

13. In determining whether the proposed settlement is fair and equitable, two principles should guide the court. First, “[c]ompromises are favored in bankruptcy[.]” 10 Lawrence P. King, *Collier on Bankruptcy*, ¶ 9019.01, at 9019-2 (15th ed. Rev. 1997) (citing *Marandas v. Bishop (In re Sassales)*, 160 B.R. 646, 653 (D. Ore. 1993)). See also *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986) (“The law favors compromise and not litigation[.]”). Second, settlements should be approved if they fall above the lowest point on the continuum of reasonableness. “[The] responsibility of the bankruptcy judge . . . is not to decide the numerous questions of law and fact raised . . . but rather to canvass the issues and see whether the settlement fall[s] below the lowest point in the range of reasonableness.” *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2nd Cir. 1983); *In re Planned Protective Services, Inc.*, 130 B.R. 94, 99 n.7 (Bankr. C.D. Cal. 1991). Thus, the question is not whether a better settlement might have been achieved, or a better result reached if litigation pursued. Instead, the court should approve settlements that meet a minimal threshold of reasonableness.

Nellis v. Shugrue, 165 B.R. 115, 123 (S.D.N.Y. 1994); 10 *Collier on Bankruptcy*, ¶ 9019.02, at 9019-4.

14. The Trustee asserts that the Stipulation is fair and reasonable and should be approved by the Court. Based upon the timing of the invoice, payment, and delivery of the finished product, the Trustee believes that it is unlikely that he could demonstrate that the Transfer is avoidable as a preference. The Trustee has raised concerns respecting the value of the services rendered by ATW. ATW was, however, a third party vendor not directly involved in the Ponzi scheme and does not appear to have had knowledge of the scheme. The settlement results in a payment to the Estates of \$7,500, or nearly forty percent (40%) of the amount of the Transfer, without incurring any additional costs or risks associated with litigation. Under the circumstances, the Trustee has concluded that the settlement is favorable to the Estates and should be approved.

Wherefore, the Trustee prays that this Court:

1. Approve the Stipulation for the reasons set forth; and
2. Grant such other relief as is just and proper.

STEPHEN DARR AS HE IS THE
TRUSTEE OF THE CHAPTER 11
ESTATES OF EACH OF THE DEBTORS
By his attorneys,

/s/ Andrew G. Lizotte
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Dated: July20, 2016
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