

1 POSTED ON WEB SITE  
2 THIS DECISION IS NOT FOR PUBLICATION OR CITATION  
3  
4

5  
6 UNITED STATES BANKRUPTCY COURT  
7 EASTERN DISTRICT OF CALIFORNIA

8 In re Case No. 05-18746-A-7  
9 GOLDEN EMPIRE AIR RESCUE, INC. DC No. WLG-2

10 Debtor.  
11 \_\_\_\_\_/

12 In re Case No. 05-19955-A-7  
13 GOLDEN EMPIRE AMBULANCE, INC. DC No. WLG-2

14 Debtor.  
15 \_\_\_\_\_/

16 FINDINGS OF FACT AND CONCLUSIONS OF LAW  
17 REGARDING MOTIONS FOR AUTHORITY TO COMPROMISE

18 The chapter 7 trustees in Golden Empire Ambulance, Inc.  
19 ("GEA") and Golden Empire Air Rescue, Inc. ("GEAR") have moved  
20 the court to approve compromises they have entered into with  
21 Rogers Helicopter, Inc. ("Rogers"). Peter Mosesian ("Mosesian")  
22 opposed the motions. Hearings were held on August 30, 2006,  
23 following which the court took the motions under submission.<sup>1</sup>  
24 This memorandum contains findings of fact and conclusions of law  
25

26 \_\_\_\_\_  
27 <sup>1</sup>Rogers filed a Further Brief on August 24, 2006. Mosesian  
28 moved to strike it as not in compliance with the court's  
scheduling order, and sought sanctions. The motion to strike  
will be granted. The request for sanctions will be denied.

1 required by Federal Rule of Bankruptcy Procedure 7052 and Federal  
2 Rule of Civil Procedure 52. This is a core proceeding as defined  
3 in 28 U.S.C. §157(b)(2)(A) and (O).

4 The legal requirements for approval of compromises.

5 Federal Rule of Bankruptcy Procedure 9019(a) states "on  
6 motion by the trustee and after notice and a hearing, the court  
7 may approve a compromise or settlement." The Ninth Circuit Court  
8 of Appeals has outlined the factors a bankruptcy court should  
9 consider in deciding whether to approve a settlement. In re  
10 Woodson, 839 F.2d 610 (1988); In re A & C Properties, 784 F.2d  
11 1377 (1986). Although the A & C Properties case was decided  
12 under the Bankruptcy Act of 1898, its reasoning is still  
13 applicable to the Bankruptcy Code that governs these cases.

14 Although a bankruptcy court has great latitude in approving  
15 compromises, its discretion is not unlimited. The court may  
16 approve a compromise only when that compromise is "fair and  
17 equitable." In re Woodson at 620; In re A & C Properties at  
18 1380-81. The moving party has the burden of persuading the  
19 bankruptcy court that the compromise is fair and equitable and  
20 that the court should approve it. In re A & C Properties at  
21 1381.

22 The two decisions agree that in determining whether a  
23 compromise is fair and equitable, a bankruptcy court must  
24 consider four factors. These factors are:

- 25 (a) The probability of success in the litigation;  
26 (b) The difficulties, if any, to be encountered in the  
27 matter of collection;  
28 (c) The complexity of the litigation involved, and the  
expense, inconvenience and delay necessarily attending it;

1 [and]

2 (d) The paramount interest of the creditors and a proper  
3 deference to their reasonable views in the premises.

4 While the bankruptcy court should give "due deference" to  
5 objections by creditors, such objections are not controlling. In  
6 re A & C Properties at 1832.

7 In deciding whether to approve a proposed compromise, a  
8 bankruptcy court should not substitute its judgment for that of  
9 the trustee as the settling party. In re 110 Beaver Street  
10 Partnership, 244 B.R. 185, 187 (Bankr. D. Mass. 2000). That  
11 Massachusetts bankruptcy court phrased the court's job as  
12 follows:

13 "In sum, the Court will defer to the trustee's judgment and  
14 approve the compromise, provided the trustee demonstrates  
15 that the proposed compromise falls within the 'range of  
16 reasonableness' and thus is not an abuse of his or her  
17 discretion."

18 Id.

19 The Settlement Agreement.

20 The Settlement Agreement here is between the chapter 7  
21 trustees of each estate and Rogers. The Recitals portion of the  
22 Settlement Agreement describes the events that led to this motion  
23 and to other contested and litigated matters in this court.  
24 Those facts will be repeated here briefly as necessary.

25 Rogers is the plaintiff in a Kern County Superior Court  
26 action (the "Kern County Action"), and GEA, GEAR, Mosesian, and  
27 John Penrose are defendants. Mosesian caused the Kern County  
28 Action to be removed to bankruptcy court after the two chapter 7  
cases were filed. This court ordered the Kern County Action  
remanded to Kern County Superior Court upon Rogers' motion.

1       Rogers filed a motion for relief from stay to allow the Kern  
2 County Action to proceed, which motion the court has granted.

3       Mosesian prepared a "Settlement Agreement" before the two  
4 chapter 7 cases were filed (the "Mosesian Settlement Agreement").  
5 Under the Mosesian Settlement Agreement, Mosesian agreed to pay  
6 the two chapter 7 estates \$145,000 if certain conditions were  
7 met. These conditions included the dismissal of the Kern County  
8 Action against Mosesian and Penrose and a finding by a court of  
9 competent jurisdiction that all causes of action of GEA, GEAR and  
10 Rogers against Mosesian and Penrose were settled and resolved  
11 upon the payment of the \$145,000.

12       Mosesian, as plaintiff, also filed an adversary proceeding  
13 in each of the two chapter 7 cases seeking declaratory relief  
14 that all causes of action based on alter ego or any claim  
15 asserted in the Kern County Action against Mosesian and Penrose  
16 were property of the two bankruptcy estates and were thereby  
17 settled upon the payment of \$145,000. The defendants in those  
18 adversary actions filed motions to dismiss, which the court has  
19 granted without leave to amend.

20       GEA and GEAR on the one hand and Rogers on the other hand  
21 were two joint venture partners in RAGE. RAGE operated an air  
22 ambulance service in Kern County. Rogers filed the Kern County  
23 Action in 2002 seeking a partnership accounting and alleging  
24 fraud, breach of fiduciary duty, and conversion by all  
25 defendants. The Kern County Action was bifurcated with a trial  
26 on the partnership accounting taking place in December 2003. The  
27 trial resulted in a determination that GEA and GEAR were  
28 obligated to Rogers based only on the partnership accounting in

1 an amount of over \$700,000. The remaining issue in the Kern  
2 County Action is the liability of Mosesian and Penrose. Rogers  
3 alleges that it has the exclusive right to all causes of action  
4 to pursue Mosesian, Penrose, and other entities related to GEA  
5 and GEAR for their actions involving RAGE, GEA, and GEAR. The  
6 chapter 7 trustees assert that GEA and GEAR have certain causes  
7 of action that belong exclusively to the chapter 7 estates.

8 Therefore, the Settlement Agreement states at Recital H  
9 that:

10 "A dispute exists between [Rogers] and the Chapter 7 estates  
11 of GEA and GEAR over the appropriate plaintiff to pursue all  
12 of the causes of action against Peter Mosesian and John  
13 Penrose. Rather than expend judicial resources and estate  
14 funds, the parties to this Settlement Agreement have agreed  
15 to resolve their dispute upon the terms and conditions set  
16 forth below. The parties believe that the two adversary  
17 proceedings filed by Peter Mosesian will be dismissed and  
18 chose by this agreement to resolve all issues between  
19 [Rogers] and the two Chapter 7 estates."

20 Under the Settlement Agreement, Rogers is to pay \$30,000 to  
21 each of the chapter 7 estates within ten days of entry of an  
22 order approving the Settlement Agreement. Also, Rogers agrees to  
23 assign five percent (5%) of the gross recovery from any judgment  
24 in the Kern County Action to the two chapter 7 estates to be  
25 divided equally between them. The \$30,000 is a nonrefundable  
26 deposit on the 5% of the gross recovery.

27 The Settlement Agreement goes on to say:

28 "The parties agree that except for a cause of action arising  
only as a result of the filing of the two chapter 7 cases,  
all other possible causes of action against Peter Mosesian,  
John Penrose and any other entities related to GEA and GEAR  
or related to or controlled by Peter Mosesian and John  
Penrose are particular to [Rogers] and the two estates do  
not have any right, title or interest in such causes of  
action. . . ."

1 However, the Settlement Agreement makes it clear that causes of  
2 action that arose upon the filing and as a result of the  
3 bankruptcy cases such as preferential or fraudulent transfers are  
4 general causes of action belonging to the two bankruptcy estates.

5 The only party objecting to this agreement is Mosesian.  
6 Peter Mosesian has filed timely proofs of claim in each case.  
7 Therefore, he has standing to object to the court approving the  
8 Settlement Agreement.

9 In support of the motion in each case, the trustees have  
10 filed declarations of the trustees and excerpts of the transcript  
11 of the 341(a) meetings of creditors in each case. Rogers has  
12 also filed a brief and a request for judicial notice in support  
13 of the motion in each case.

14 According to Mosesian, the court does not have enough facts  
15 to enable it to make a reasoned decision that the compromise is  
16 in the best interest of each bankruptcy estate. He says that the  
17 trustees have failed to evaluate what they are likely to recover  
18 above and beyond the initial cash payment. Therefore, according  
19 to Mosesian, the court cannot evaluate the reasonableness of the  
20 settlement.

21 Also, Mosesian says that this is really a sale and as such  
22 other bidders should be allowed. Mosesian also argues that the  
23 Settlement Agreement includes a sale of avoidance rights. (The  
24 Settlement Agreement itself says otherwise.)

25 Analysis.

26 In granting the motions to dismiss the adversary proceedings  
27 that Mosesian filed in these cases, the court concluded that the  
28 claims for relief asserted in the Kern County Action are claims

1 that do not belong to the bankruptcy estates. The court has,  
2 therefore, already concluded that the probability of the  
3 trustee's succeeding in arguing that the claims do belong to the  
4 estate is low. This court has already ruled that the claims do  
5 not belong to the estate. It is, of course, always possible that  
6 a state court would come to a different conclusion. Nonetheless,  
7 the first factor is met. The trustees have a low probability of  
8 success in litigation over who owns the causes of action.

9 The second factor is the difficulties to be encountered in  
10 the matter of collection. This factor does not appear relevant  
11 here. Rogers has already paid the cash down payment. The  
12 trustees can monitor the Kern County Action and take appropriate  
13 steps to collect their share. If Rogers prevails in the Kern  
14 County Action, the trustees will be able to obtain any amount to  
15 which they are entitled.

16 The next factor is the complexity of the litigation  
17 involved. Again, this court has already ruled that the claims in  
18 question belong to Rogers and not to the bankruptcy estates. In  
19 the court's findings of fact and conclusions of law in those  
20 adversary proceedings, the court observed that litigation about  
21 alter ego claims is complex. Certainly, if the trustees were to  
22 litigate this matter in the Kern County Superior Court, one could  
23 expect it to continue to be complex.

24 Finally, the court must consider the paramount interest of  
25 the creditors. Both Rogers and Mosesian are not simply  
26 creditors. They each have litigation interests in this matter.  
27 Both wish to use the bankruptcy court proceedings to gain an  
28 advantage in the Kern County Action.

1 For the foregoing reasons, the motions to approve the  
2 settlement agreement will be granted. Counsel for the trustees  
3 in the respective cases may submit appropriate forms of orders.

4 DATED: September 25, 2006

5  
6 /S/\_\_\_\_\_  
7 WHITNEY RIMEL, Judge  
8 United States Bankruptcy Court  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28