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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:
ROBERT C. GRAHAM, LTD. fdba ROB
GRAHAM & ASSOCIATES fdba
LAWYERS WEST,

Debtor.

Case No. BK-S-16-16655-BTB
Chapter 7

**MOTION TO APPROVE COMPROMISE
PURSUANT TO FEDERAL RULE OF
BANKRUPTCY PROCEDURE 9019**

Date of Hearing: July 30, 2019
Time of Hearing: 1:30 p.m.
Place: Courtroom No. 4, Second Floor
Foley Federal Building
300 Las Vegas Blvd., S.
Las Vegas, NV 89101

Judge: Honorable Bruce T. Beesley¹

Shelley D. Krohn, the duly appointed Chapter 7 Trustee in the above-captioned bankruptcy case (the “Trustee”), by and through her counsel Jacob L. Houmand, Esq. and Kyle J. Ortiz, Esq. of the Houmand Law Firm, Ltd., hereby submits this *Motion to Approve Compromise Pursuant to Federal Rule of Bankruptcy Procedure 9019* (the “Motion”).

The Motion is based on the following Memorandum of Points and Authorities, the *Declaration of Shelley D. Krohn In Support of the Motion to Approve Compromise Pursuant to*

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure will be referred to as “FRCP” and the Federal Rules of Bankruptcy Procedure will be referred to as “FRBP.” The Local Rules of Practice for the United States Bankruptcy Court for the District of Nevada shall be referred to as the “Local Rules”.

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1 *Federal Rule of Bankruptcy Procedure 9019* (the “Trustee Declaration”), which is filed separately
2 and concurrently with this Court pursuant to Local Rule 9014(c)(2). The Motion is also based on
3 the pleadings and papers on file herein, and any argument that may be entertained at the hearing
4 on the Motion.²

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 Prior to the filing of an involuntary bankruptcy petition against Robert C. Graham, Ltd.
8 fdba Rob Graham & Associates fdba Lawyerswest (the “Debtor”), American Express Company,
9 American Express Travel Related Services Company, Inc. and/or American Express National Bank,
10 f/k/a American Express Centurion Bank and successor by merger to American Express Bank FSB
11 (collectively, “AMEX”)³ received transfers in the approximate amount of \$2,711,028.73
12 (collectively, the “Transfers”) from the Debtor. The Transfers were payments made by the
13 Debtor for credit cards issued to the Debtor and to Robert C. Graham (“Graham”), the Debtor’s
14 principal.

15 The Trustee contends that the Transfers can be avoided and recovered for the benefit of
16 creditors pursuant to Sections 544(b) and 548 and applicable state law. AMEX disputes the
17 Trustee’s allegations and the Parties have entered into a settlement agreement (the “Settlement
18 Agreement”) whereby AMEX will pay the Trustee the sum of \$250,000 (the “Settlement Sum”).
19 The Settlement Sum is equal to one hundred percent (100%) of the payments that were made by
20 the Debtor for Graham’s personal credit card and approximately twenty-four percent (24%) of the
21 payments that were made for the Debtor’s credit card that were related to personal expenses of
22 Graham. This Motion seeks to approve the Settlement Agreement pursuant to FRBP 9019.

23 ...

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25 _____
26 ² The Trustee also requests that the Court take judicial notice of all pleadings filed in the above-
27 referenced bankruptcy case, including adversary proceedings, pursuant to Federal Rule of
28 Evidence 201, incorporated by reference by FRBP 9017.

³ The Trustee and AMEX shall collectively be referred to as the “Parties”.

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1 **II. JURISDICTION AND VENUE**

2 The Court has jurisdiction over the bankruptcy case and the subject matter of this Motion
 3 pursuant to 28 U.S.C. §§ 157 and 1334. The Motion is a core proceeding under 28 U.S.C. §
 4 157(b)(2). Pursuant to Local Rule 9014.2, if the Court determines that absent consent of the
 5 parties the Court cannot enter final orders or judgment regarding the Motion consistent with
 6 Article III of the United States Constitution, the Trustee consents to entry of final orders and
 7 judgment by this Court. Venue before this Court is appropriate under 28 U.S.C. §§ 1408 and
 8 1409. The statutory predicate for the relief requested in the Motion is FRBP 9019.

9 **III. STATEMENT OF FACTS**

10 1. On December 15, 2016, an *Involuntary Bankruptcy Petition* [ECF No. 1]⁴ (the
 11 “Involuntary Petition”) was filed against the Debtor pursuant to 11 U.S.C. § 303. The Involuntary
 12 Petition was filed by the Estate of Michael B. Macknin, the Sharona Dagani Trust, and the
 13 Margueritte Owens Revocable Trust (collectively, the “Petitioning Creditors”). See Trustee
 14 Declaration.

15 2. On December 16, 2016, the Petitioning Creditors filed a *Motion to Appoint Interim*
 16 *Trustee in Involuntary Case* [ECF No. 3] (the “Interim Trustee Motion”), which sought authority
 17 to appoint an interim trustee to take possession of property and to manage the business operations
 18 and assets of the Debtor. See Trustee Declaration.

19 3. On December 21, 2016, the Bankruptcy Court entered an *Order on Trustee Motion*
 20 *and Order for Relief Under Chapter 7* [ECF No. 21] (the “Order for Relief”). The Order for
 21 Relief provided that the Debtor had consented to the filing of a bankruptcy petition and that the
 22 filing of the bankruptcy case was effective as of December 15, 2016 (the “Petition Date”). The
 23 Order for Relief further required that the Office of the United States Trustee (the “U.S. Trustee”)
 24 appoint an Interim Chapter 7 Trustee pursuant to 11 U.S.C. § 701. See Trustee Declaration.

25 4. On December 22, 2016, Victoria L. Nelson (“Trustee Nelson”) was appointed as
 26 the Chapter 7 Trustee in the Debtor’s bankruptcy case [ECF No. 22]. See Trustee Declaration.

27
 28 ⁴ All references to “ECF No.” are to the numbers assigned to the documents filed in the above-
 referenced case as they appear on the docket maintained by the clerk of the court.

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1 5. On January 13, 2018, Trustee Nelson died. *See* Trustee Declaration.

2 6. On January 19, 2018, the Trustee was appointed as the successor Chapter 7 Trustee
3 in the Debtor’s bankruptcy case. *See* Trustee Declaration.

4 7. The Trustee has investigated the Debtor’s financial affairs and determined that
5 AMEX received transfers from the Debtor prior to the Petition Date in the approximate amount of
6 \$2,711,028.73. *See* Trustee Declaration.

7 8. The Transfers consist of the following: (a) approximately \$115,000 that was paid
8 towards a personal credit card in the name of Graham; (b) approximately \$573,000 that was paid
9 towards the Debtor’s corporate credit card for the personal expenses of Graham; and (c)
10 approximately \$2,023,028.73 that was paid towards the Debtor’s credit card for the Debtor’s
11 business expenses. *See* Trustee Declaration.

12 9. The Trustee believes that there is a basis to avoid and recover the Transfers
13 pursuant to Sections 544(b) and 548 and applicable state law. *See* Trustee Declaration.

14 10. AMEX disputes the Trustee’s contention that the Transfers can be avoided and
15 recovered for the benefit of the Debtor’s creditors. *See* Trustee Declaration.

16 11. The Trustee and AMEX have entered into the Settlement Agreement that resolves
17 the dispute concerning the Transfers. A true and correct copy of the Settlement Agreement is
18 attached to the Trustee Declaration as **Exhibit “1”**.

19 12. The principal terms of the Settlement Agreement are outlined below⁵:

20 a. In consideration of a resolution of the dispute concerning the Transfers,
21 AMEX shall pay the Trustee the Settlement Sum no later than thirty (30) calendar days after the
22 later to occur of: (a) delivery to counsel for AMEX of a current IRS Form W-9 completed by the
23 payee of the Settlement Sum; and (b) receipt by AMEX’s counsel of the fully executed
24 Agreement.

25 _____

26 ⁵ The description of the Settlement Agreement set forth herein and in the Trustee Declaration is a
27 summary only and does not modify or otherwise affect the terms of the Settlement Agreement.
28 To the extent of any conflict between the Settlement Agreement and the description set forth
herein, the Settlement Agreement shall control. Capitalized terms used but not defined herein
shall have the meaning set forth in the Settlement Agreement.

1 whether to accept or reject a compromise. *See In re Carson*, 82 B.R. 847 (Bankr. S.D. Ohio
2 1987).

3 The Ninth Circuit has identified the following factors for consideration in determining
4 whether a settlement is reasonable, fair, and equitable:

5 (a) the probability of success in the litigation; (b) the difficulties, if
6 any, to be encountered in the matter of collection; (c) the
7 complexity of the litigation involved, and the expense,
8 inconvenience and delay necessarily attending it; (d) the paramount
interest of the creditors and a proper deference to their reasonable
views in the premises.

9 *In re A & C Properties*, 784 F.2d at 1381. The moving party is not required to satisfy each of
10 these factors as long as the factors as a whole favor approving the settlement. *See In re Pacific*
11 *Gas & Electric Co.*, 304 B.R. 395, 416 (Bankr. N.D. Cal. 2004). In considering the factors, “a
12 precise determination of the likely outcome is not required, since an exact judicial determination
13 of the values at issue would defeat the purpose of compromising the claim.” *In re Telesphere*
14 *Comm’s, Inc.*, 179 B.R. 544, 553 (Bankr. N.D. Ill. 1994) (internal quotations omitted). Thus,
15 rather than determining various issues of fact and law, the Court should “canvass the issues and
16 see whether the settlement fall[s] below the lowest point in the range of reasonableness.” *In re*
17 *Lion Capital Group*, 49 B.R. 163, 175 (Bankr. S.D.N.Y. 1985) (internal quotations omitted).

18 **B. The Settlement Agreement Is Fair and Equitable**

19 1. The Probability of Success in the Litigation

20 The Trustee believes that she would be successful in litigation against AMEX. The
21 Trustee has employed a forensic accountant that has conducted an extensive analysis of the
22 Debtor’s financial accounts and has determined that the Debtor was effectively operating a Ponzi
23 Scheme by using trust funds owed to certain clients to pay the claims of other clients. The Debtor
24 also commingled corporate funds with client funds that he was required to hold in trust. The
25 Trustee believes that the Ponzi Scheme allows her to recover the Transfers because they were
26 made in the furtherance of Graham’s scheme that defrauded the Debtor’s creditors. *Bear Stearns*
27 *Secs. Corp. v. Gredd (In re Manhattan Inv. Fund Ltd.)*, 397 B.R. 1, 8 (S.D.N.Y.
28 2007) (quoting *Gredd v. Bear Stearns Secs. Corp. (In re Manhattan Fund Ltd.)*, 359 B.R. 510,

1 517–18 (Bankr. S.D.N.Y. 2007)); *see also* *Picard v. Merkin (In re Bernard L. Madoff Inv. Secs.*
2 *LLC*), 440 B.R. 243, 255 (Bankr. S.D.N.Y. 2010) (“It is now well-recognized that the existence
3 of a Ponzi scheme establishes that transfers were made with the intent to hinder, delay and
4 defraud investors.”) (citing cases); *Rieser v. Hayslip (In re Canyon Sys. Corp.)*, 343 B.R. 615, 637
5 (Bankr. S.D. Ohio 2006) (stating that “bankruptcy [and other] courts nationwide have recognized
6 that establishing the existence of a Ponzi scheme is sufficient to prove a Debtor’s actual intent to
7 defraud”) (citation omitted). “If the Ponzi scheme presumption applies, actual intent for purposes
8 of section 548(a)(1)(A) is established as a matter of law.” *McHale v. Boulder Capital LLC (In re*
9 *The 1031 Tax Grp.)*, 439 B.R. 47, 72 (Bankr. S.D.N.Y. 2010) (citation and internal quotation
10 marks omitted).

11 The Trustee also contends that the payments made by the Debtor towards the Debtor’s
12 personal credit card can be avoided notwithstanding the Ponzi Scheme presumption because they
13 constitute the use of corporate funds to pay the debts of Graham. As a result, the Debtor did not
14 receive any value for payments that were on account of Graham’s personal credit card. *Wyle v.*
15 *C.H. Rider & Family, et al. (In re United Energy Corp.)*, 944 F.2d 589, 597 (9th Cir. 1991); *see*
16 *also* Nev. Rev. Stat. § 112.170 (“Value is given for a transfer . . . if, in exchange for the transfer . .
17 . . , property is transferred or an antecedent debt is secured or satisfied . . .”). Bankruptcy courts
18 have routinely held that a debtor does not receive “reasonably equivalent value” for payments
19 made on behalf of other individuals or corporate entities for debts which the debtor is not
20 personally liable. *See In re Pajaro Dunes Rental Agency, Inc.*, 174 B.R. 557 (Bankr. N.D. Cal.
21 1994) (holding that a Chapter 11 debtor did not receive reasonably equivalent value for its
22 obligation to a lender on a promissory note through delivery of funds to the debtor’s corporate
23 parent). Likewise, the Trustee contends that the Debtor did not receive any value for payments on
24 its corporate card related to the personal expenses of Graham. *Krudy v. Chase Bank, N.A. (In re*
25 *Rainmaker Group, Inc.)*, 2013 WL 1440182 (Bankr. S.D. Ind. 2013); *see also In re Moll Group,*
26 *LLC*, 2005 WL 6506459 (Bankr. E.D. Penn. 2005) (holding that the individual charges on a
27 corporate credit card would need to be analyzed in order to determine if there was reasonably
28 equivalent value for the various transfers).

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1 AMEX has asserted several affirmative defenses and vigorously disputes the Trustee’s
2 contention that the Ponzi Scheme presumption applies in the Debtor’s bankruptcy case and would
3 allow the Trustee to avoid the transfers made by the Debtor towards its credit card. AMEX also
4 contends that there was a reasonable exchange for payments made on the Debtor’s corporate
5 credit card even if they related to the personal expenses of Graham because the cardholder
6 agreement for the corporate credit provided that Debtor was liable for all charges on its credit
7 card regardless of whether they were the personal expenses of Graham. *See* 11 U.S.C. §
8 548(d)(2)(A).

9 Approval of the Settlement Agreement will allow the Debtor’s bankruptcy estate to
10 receive a sizable recovery prior to the commencement of litigation and avoid extensive litigation
11 concerning these nuanced legal issues. As a result, this factor supports approval of the Settlement
12 Agreement.

13 2. The Difficulties in Matter of Collection

14 AMEX is a well-capitalized company and, as a result, the Trustee does not anticipate any
15 difficulty in collecting upon a favorable judgment if she was successful in litigation concerning
16 the Transfers. Accordingly, this factor is neutral.

17 3. The Complexity of the Litigation Involved and the Expense, Inconvenience and
18 Delay

19 Any litigation against AMEX regarding the Transfers would involve complex facts that
20 would require expert testimony and a determination from this Court following a trial on the
21 merits. The dispute concerning the Transfers also involves nuanced legal issues that would be
22 matters of first impression in the Ninth Circuit. As a result, it is likely that there would be several
23 appeals if the Trustee was successful in the litigation against AMEX. Such protracted litigation
24 would result in the Trustee incurring significant administrative expenses that would reduce the
25 amount of funds that are ultimately available for payment to the Debtor’s creditors. Accordingly,
26 this factor militates in favor of approval of the Settlement Agreement.

27 ...
28 ...

4. The Paramount Interest of the Creditors

The Settlement Agreement is in the best interests of creditors because it will result in the payment of \$250,000 to the Debtor’s bankruptcy estate prior to the commencement of litigation. The Settlement Sum is equal to one hundred percent (100%) of the payments that were made by the Debtor for Graham’s personal credit card and approximately twenty-four percent (24%) of the payments that were made for the Debtor’s credit card that were related to personal expenses of Graham. The payment of the Settlement Sum also avoids the uncertainty and expense that would be associated with protracted litigation. As a result, this factor weighs in favor of approval of the Settlement Agreement.

V. CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court enter an order (i) approving the Settlement Agreement attached as **Exhibit “1”** to the Trustee Declaration pursuant to FRBP 9019 and (ii) for such other and further relief as is just and proper.

Dated this 27th day of June, 2019.

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