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Counsel for Shelley D. Krohn, Chapter 7 Trustee

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”.

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”), Valassis Direct Mail, Inc.
 9 (“Valassis”)³ received transfers in the approximate amount of \$143,975.88 (collectively, the
 10 “Transfers”) from the Debtor. The Trustee contends that the Transfers can be avoided and
 11 recovered for the benefit of creditors pursuant to Sections 544(b) and 548 and applicable state
 12 law. Valassis disputes the Trustee’s allegations and the Parties have entered into a settlement
 13 agreement (the “Settlement Agreement”) whereby Valassis will pay the Trustee the sum of
 14 \$35,000 (the “Settlement Sum”). The Settlement Sum is approximately twenty-four percent
 15 (24%) of the total amount of Transfers prior to the commencement of litigation. This Motion
 16 seeks to approve the Settlement Agreement pursuant to FRBP 9019.

17 **II. JURISDICTION AND VENUE**

18 The Court has jurisdiction over the bankruptcy case and the subject matter of this Motion
 19 pursuant to 28 U.S.C. §§ 157 and 1334. The Motion is a core proceeding under 28 U.S.C. §
 20 157(b)(2). Pursuant to Local Rule 9014.2, if the Court determines that absent consent of the
 21 parties the Court cannot enter final orders or judgment regarding the Motion consistent with
 22 Article III of the United States Constitution, the Trustee consents to entry of final orders and
 23 judgment by this Court. Venue before this Court is appropriate under 28 U.S.C. §§ 1408 and
 24 1409. The statutory predicate for the relief requested in the Motion is FRBP 9019.

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
 Evidence 201, incorporated by reference by FRBP 9017.

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

III. STATEMENT OF FACTS

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

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

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

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

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

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

7. The Trustee has investigated the Debtor’s financial affairs and determined that Valassis received transfers from the Debtor prior to the Petition Date in the approximate amount of \$143,975.88 (collectively, the “Transfers”). See Trustee Declaration.

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

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.

Compromise and settlement agreements have long been an inherent component of the bankruptcy process. The Ninth Circuit recognized that “[t]he bankruptcy court has great latitude in approving compromise agreements.” *See Woodson v. Fireman’s Fund Ins. Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir. 1988). Accordingly, in approving a settlement, the Court need not conduct an exhaustive investigation of the claims sought to be compromised. *See United States v. Alaska National Bank (In re Walsh Constr., Inc.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). Rather, it is sufficient that the Court find that the settlement was negotiated in good faith and is reasonable, fair, and equitable. *See Martin v. Kane (In re A & C Properties)*, 784 F.2d 1377, 1381 (9th Cir. 1986), *cert. denied*, 479 U.S. 854 (1986). The proponent of the settlement must also persuade the court that the settlement is in the best interests of the estate. *See Goodwin v. Mickey Thompson Entertainment Group. (In re Mickey Thompson Entertainment Group, Inc.)*, 292 B.R. 415, 420–21 (B.A.P. 9th Cir. 2003). It is within the sound discretion of the bankruptcy court whether to accept or reject a compromise. *See In re Carson*, 82 B.R. 847 (Bankr. S.D. Ohio 1987).

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

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

In re A & C Properties, 784 F.2d at 1381. The moving party is not required to satisfy each of these factors as long as the factors as a whole favor approving the settlement. *See In re Pacific Gas & Electric Co.*, 304 B.R. 395, 416 (Bankr. N.D. Cal. 2004). In considering the factors, “a precise determination of the likely outcome is not required, since an exact judicial determination of the values at issue would defeat the purpose of compromising the claim.” *In re Telesphere Comm’s, Inc.*, 179 B.R. 544, 553 (Bankr. N.D. Ill. 1994) (internal quotations omitted). Thus, rather than determining various issues of fact and law, the Court should “canvass the issues and

1 see whether the settlement fall[s] below the lowest point in the range of reasonableness.” *In re*
 2 *Lion Capital Group*, 49 B.R. 163, 175 (Bankr. S.D.N.Y. 1985) (internal quotations omitted).

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

4 1. The Probability of Success in the Litigation

5 The Trustee believes that she would be successful in litigation against Valassis. The
 6 Trustee has employed a forensic accountant that has conducted an extensive analysis of the
 7 Debtor’s financial accounts and has determined that the Debtor was effectively operating a Ponzi
 8 Scheme by using trust funds owed to certain clients to pay the claims of other clients. The Debtor
 9 also commingled corporate funds with client funds that he was required to hold in trust. The
 10 Trustee believes that the Ponzi Scheme allows her to recover the Transfers because they were
 11 made in the furtherance of Graham’s scheme that defrauded the Debtor’s creditors. *Bear Stearns*
 12 *Secs. Corp. v. Gredd (In re Manhattan Inv. Fund Ltd.)*, 397 B.R. 1, 8 (S.D.N.Y.
 13 2007) (quoting *Gredd v. Bear Stearns Secs. Corp. (In re Manhattan Fund Ltd.)*, 359 B.R. 510,
 14 517–18 (Bankr. S.D.N.Y. 2007)); *see also Picard v. Merkin (In re Bernard L. Madoff Inv. Secs.*
 15 *LLC)*, 440 B.R. 243, 255 (Bankr. S.D.N.Y. 2010) (“It is now well-recognized that the existence
 16 of a Ponzi scheme establishes that transfers were made with the intent to hinder, delay and
 17 defraud investors.”) (citing cases); *Rieser v. Hayslip (In re Canyon Sys. Corp.)*, 343 B.R. 615, 637
 18 (Bankr. S.D. Ohio 2006) (stating that “bankruptcy [and other] courts nationwide have recognized
 19 that establishing the existence of a Ponzi scheme is sufficient to prove a Debtor’s actual intent to
 20 defraud”) (citation omitted). “If the Ponzi scheme presumption applies, actual intent for purposes
 21 of section 548(a)(1)(A) is established as a matter of law.” *McHale v. Boulder Capital LLC (In re*
 22 *The 1031 Tax Grp.)*, 439 B.R. 47, 72 (Bankr. S.D.N.Y. 2010) (citation and internal quotation
 23 marks omitted).

24 That said, the outcome of litigation is never certain and Valassis has asserted a series of
 25 affirmative defenses. Principally, Valassis contends that it received transfers from the Debtor in
 26 good faith and provided reasonably equivalent value to the Debtor. Valassis also disputes the
 27 Trustee’s contention that the Ponzi Scheme Presumption would permit her to avoid and recover
 28

1 the Transfers. The Settlement Agreement avoids the uncertainty that would be attendant to
 2 litigation and results in a payment of \$35,000 to the Debtor's bankruptcy estate.

3 2. The Difficulties in Matter of Collection

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

7 3. The Complexity of the Litigation Involved and the Expense, Inconvenience and
 8 Delay

9 Any litigation concerning the Transfers would be fact-intensive and require a trial on the
 10 merits and result in the Debtor's bankruptcy estate incurring significant attorneys' fees and cost,
 11 which would reduce any ultimate recovery for the Debtor's creditors. In addition to factual
 12 issues, the dispute with Valassis involves nuanced legal theories that would likely be the subject
 13 of multiple appeals if the Trustee was successful, which would only serve to increase
 14 administrative expenses. Administrative expenses would only reduce the ultimate recovery for
 15 the Debtor's unsecured creditors. The Settlement Agreement avoids these expenses and results in
 16 guaranteed payment to the Debtor's bankruptcy estate that is a sizable portion of the Transfers
 17 that the Trustee would seek to recover in any litigation.

18 4. The Paramount Interest of the Creditors

19 The Settlement Agreement is in the best interests of creditors because it will result in the
 20 payment of \$35,000 to the Debtor's bankruptcy estate prior to the commencement of litigation.
 21 The Settlement Sum represents approximately twenty-four percent (24%) of the total amount of
 22 the Transfers that were received by Valassis from the Debtor. The payment of the Settlement
 23 Sum also avoids the uncertainty and expense that would be associated with protracted litigation.
 24 As a result, this factor weighs in favor of approval of the Settlement Agreement.

25 ...

26 ...

27 ...

28 ...

1 **V. CONCLUSION**

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

5 Dated this 27th day of June, 2019.

6 **HOUMAND LAW FIRM, LTD.**

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