

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

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In re:

Case No. 13-23165-JKO

OCEAN 4660, LLC,¹

Chapter 11

Debtor.

**TRUSTEE YIP'S MOTION (1) TO COMPROMISE
CONTROVERSY WITH COMERICA BANK PURSUANT TO
BANKRUPTCY RULE 9019 AND (2) FOR ENTRY OF A CHANNELING
INJUNCTION AND BAR ORDER PURSUANT TO 11 U.S.C. § 105(a)**

The proposed settlement provides for a carve-out of approximately \$450,000 from the lien and claim of Comerica Bank, which funds will provide a material benefit for creditors and this estate. A condition of the settlement requires Bankruptcy Court approval on or before June 27, 2014. Trustee Yip believes that one alleged creditor, Ken Frank, may object to the proposed settlement. As a result, Trustee Yip requests that this matter be scheduled as an evidentiary hearing on June 12, 2014, at 2:30 p.m. (a date and time that the settled matters are currently set for hearing). Trustee Yip reasonably believes that the evidentiary presentation will take approximately 30 – 60 minutes

Maria M. Yip, the duly appointed, qualified, and acting chapter 11 bankruptcy trustee ("Trustee Yip") for the bankruptcy estate of Ocean 4660, LLC ("Debtor"), pursuant to 11 U.S.C. § 105, Fed. R. Bankr. P. 9019 and Local Rule 9013-1, by and through undersigned counsel, moves this Court ("Motion") for entry of an Order: (1) approving the compromise (the "Compromise") of the controversies with Comerica Bank ("Comerica"); and (2) entering a channeling injunction and bar order in connection with the Compromise ("Bar Order"). In support of this Motion, Trustee Yip states as follows:

¹ The Debtor's address is 55 E. Long Lake Road, #204, Troy, MI 48085, and the last four digits of the Debtor's tax identification number are 4883. See 11 U.S.C. § 342(c)(1).

Jurisdiction and Venue

1. This Court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to sections 28 U.S.C §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The statutory basis for this Motion is Section 105 of the Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (“Bankruptcy Code”). The procedural predicate for the requested relief is Rule 9019 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rule or Rules”).

Background

2. This case was commenced on June 2, 2013 (“Petition Date”), by the filing of a voluntary Chapter 11 petition [ECF No. 1]. On July 12, 2013, Trustee Yip was appointed as the Chapter 11 Trustee [ECF No. 57].

3. The estate was primarily comprised of beachfront real property located at 4660 N. Ocean Drive, Lauderdale-by-the-Sea, Florida 33308 (sometimes referred to as 4660 El Mar Drive and the “Property”).

4. Prior to the Petition Date, Comerica made a loan (the “Secured Loan”) to the Debtor in connection with the Debtor’s acquisition of the Property. The Secured Loan made by Comerica to Debtor was secured by a first priority mortgage lien and encumbrance against the Property. As of the Petition Date, Comerica was foreclosing its first priority mortgage lien and encumbrance against the Property in state court litigation pending in Broward County, Florida. As of the Petition Date, the Debtor owed Comerica the sum of \$14,002,108.10 in principal, interest, default interest, attorney’s fees and costs under the terms of the Secured Loan as more particularly set forth in proof of claim 13-1 filed in this case.

5. After her appointment, Trustee Yip marketed the Property for sale. The Property eventually sold for the sum of \$17.0 million by Order [ECF No. 178] (the “Sale Order”) (A) Approving the Sale of Substantially All of the Debtor’s Assets Free and Clear of liens, Claims, Encumbrances and Interests and (B) Approving the Assumption and Assignment of Contracts and Leases dated December 12, 2013.

6. In connection with closing, the Sale Order authorized Trustee Yip to disburse the sum of \$11,941,376.29 to Comerica which sum satisfied the principal amount due on the Secured Loan along with other amounts advanced by Comerica to protect and preserve its interest in the Property as allowable under the Secured Loan documents. After payment of the foregoing sums to Comerica, as well as other claims and expenses relating to the sale, the estate retained approximately \$3.6 million (the “Net Sale Proceeds”) in net proceeds from the sale of the Property.

7. Presently, Trustee Yip is in the process of reconciling claims against the estate as well as investigating whether there are any viable avoidance actions to pursue for the benefit of the estate. Through this Motion, Trustee Yip seeks to compromise and pay any and all remaining claims asserted by Comerica in this case.

Comerica’s Amended Claim and Pending Disputes

8. On February 23, 2014, Comerica filed amended proof of claim 13-2 (the “Amended Claim”) in the amount of \$2,238,988.01 which Amended Claim (a) took into account the payment by Trustee Yip authorized in the Sale Order as described above and (b) included updated interest, default interest, and attorney’s fees and costs accruing post-petition through December 17, 2013. The Amended Claim reserved the right to increase the amount of the claim for additional accruing attorney’s fees and costs incurred in this case. The Amended Claim is

asserted as a first priority lien and claim against the Net Sale Proceeds. Based upon discussions with counsel to Comerica, Trustee Yip estimates that as of the date of this Motion, Comerica's secured claim is approximately \$2,300,000 as a result of attorney's fees and costs incurred from December 17, 2013 through May 13, 2014.

9. Thereafter, on February 28, 2014, Comerica filed its *Motion to Value and Determine Secured Status of Lien of Comerica Bank on Real Property* [ECF No. 228] (the "Motion to Value"). In the Motion to Value, Comerica asserts that, as a result of the sale of the Property as described above, it is an over-secured creditor entitled recover as a first priority lien and claim from the Net Sale Proceeds all of its post-petition interest, default interest, attorney's fees and costs in this case as set forth in the Amended Claim.

10. On March 28, 2014, Trustee Yip filed her preliminary response [ECF No. 243] (the "Response") to the Motion to Value. In her Response, Trustee Yip asserted three alternative objections to the relief requested by Comerica. First, Trustee Yip contends that if Comerica's secured claim is valued at the Petition Date, as opposed to the sale date, under Section 506(a) of the Bankruptcy Code, then Comerica's claim for post-petition interest, attorney's fees and costs would either be disallowed or treated as an unsecured claim in this case (and have no lien against the Net Sale Proceeds). Alternatively, in the event that the Court agrees that Comerica's secured claim is determined as of the sale date, thus rendering Comerica an over-secured creditor entitled to a first priority lien and claim against the Net Sale Proceeds, then the Court nevertheless has the power and authority to either (a) reduce the amount of default interest and attorneys fees recovered by Comerica based upon the equities of the case or (b) limit the amount of Comerica's post-petition secured claim under the equity exception set forth in Section 552(b) of the

Bankruptcy Code so that a greater amount of the Net Sale Proceeds is available for other creditors in this case.

11. On the same date, alleged unsecured creditors El Mar Associates, Inc., Oceanside Lauderdale, and Ken Frank (the “Ken Frank Interests”) also opposed [ECF No. 244] (the “Frank Response”) the Motion to Value. In the Frank Response, the Ken Frank Interests argue similar, although not identical, theories of law as Trustee Yip in opposition to the Motion to Value.

12. On March 31, 2014, Comerica filed its Omnibus Reply to the Response and Frank Response [ECF No. 245] (the “Reply”).

13. The Court held a preliminary hearing on the Motion to Value, Response, Frank Response and Reply on April 1, 2014. At the preliminary hearing, the parties agreed to engage in mediation prior to a final evidentiary hearing on the matter.

14. On May 13, 2014, the parties engaged in an all-day mediation presided over by the Honorable Herbert Stettin. In connection with the mediation, Trustee Yip and Comerica reached a settlement agreement to resolve the pending disputes between Comerica and the bankruptcy estate concerning the Amended Claim, a copy of which is attached hereto as Exhibit "A" (the “Settlement Agreement”). The Ken Frank Interests did not join in the Settlement Agreement.

Proposed Settlement

15. Pursuant to the Settlement Agreement, Comerica’s Amended Claim will be bifurcated and allowed (a) as a first priority lien and secured claim against the Net Sale Proceeds in the amount of \$1,850,000 (the “Secured Claim”) and (b) as a subordinated general unsecured claim in the amount of \$400,000 (the “Unsecured Claim”) entitled to payment only after payment of general unsecured creditors in this case. Payment of the Secured Claim must be

made on the 15th calendar day after the date of the Order approving the Settlement Agreement, unless that Order is stayed by the Court. Pursuant to the Settlement Agreement, Comerica shall have no other claim in this bankruptcy case and shall receive a release of any and all claims held by the estate against it. The Settlement Agreement further provides that unless otherwise agreed by the parties “if the Settlement Payment is stayed or delayed longer than forty-five (45) days from the date [of the Settlement Agreement], then the Settlement Agreement shall be null and void and shall have no force or effect and shall not be enforceable by or against the parties hereto and the parties shall be restored to their prior position without any prejudice.”

16. As a further material condition of the Settlement Agreement, and in consideration of the lengthy and costly litigation endured by Comerica in connection with the Secured Loan, Comerica requires the entry of the Bar Order preventing any party in interest, including creditors and equity holders of the Debtor, from suing Comerica, its officers, directors, and attorneys (collectively, the “Released Parties”) for any matter arising from or relating to the Bankruptcy Case, Secured Loan, or Amended Claim.

17. Trustee Yip entered into the Settlement Agreement after carefully evaluating the merits of the Amended Claim, the Motion to Value, Response, Frank Response and Reply. Trustee Yip also considered the lack of merit in many (if not all) of the claims asserted by the Ken Frank Interests and the lack of objection of any other creditor in this case to the Motion to Value. As a result of the Settlement Agreement, the estate will approximately retain an additional \$450,000 of the Net Sale Proceeds for the benefit of the estate and its other creditors. Using her objective business judgment, Trustee Yip believes that the Settlement Agreement is in the best interests of the estate and should be approved.

Standard of Review & Analysis

18. “It is generally recognized that the law favors settlement of disputes over litigation for litigation sake.” *In re Bicoastal Corp.*, 164 B.R. 1009, 1016 (Bankr. M.D. Fla. 1993). Bankruptcy Rule 9019(a) grants the bankruptcy court the power to approve settlements and compromises. *GMGRSST, Ltd. v. Menotte (In re Air Safety Int’l, L.C.)*, 336 B.R. 843, 852 (S.D. Fla. 2005). Specifically, Bankruptcy Rule 9019 states:

(a) **Compromise.** On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019. Accordingly, it is within the scope of this Court’s authority to grant the Motion.

19. When considering compromises or settlements for approval, the bankruptcy court is to “determine whether the proposed settlement is fair and equitable.” *In re Air Safety Int’l, L.C.*, 336 B.R. at 852. The United States Court of Appeals for the Eleventh Circuit has set forth factors to assist bankruptcy courts in determining whether a settlement proposal meets the appropriate standard. *Id.* These factors are as follows: (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 and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises (“Justice Oaks Factors”). *See Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1549 (11th Cir. 1990); *see also Romagosa v. Thomas (In re Van Diepen, P.A.)*, 236 Fed. Appx. 498, 504 (11th Cir. 2007) (setting forth *Justice Oaks Factors* and affirming bankruptcy court’s approval of settlement agreement).

20. In Trustee Yip's assessment, litigating the disputes with Comerica to conclusion at best would only eliminate that portion of the Amended Claim that accrued post-petition, which Trustee Yip estimates at approximately \$630,000. Under prevailing law, that portion of the Amended Claim that accrued prior to the Petition Date (estimated at \$1.6 million) could only be re-characterized as a general unsecured claim, thereby substantially diluting the ratable interest of other unsecured creditors in whatever funds might be available for distribution in this case. Moreover, while there is no binding precedent concerning the legal theories advanced in the Motion to Value, Response, Frank Response, and Reply, the majority of cases support the arguments advanced by Comerica in support of treating the full amount of the Amended Claim (and accruing attorneys fees) as a first priority lien and claim against the Net Sale Proceeds. Finally, litigating the disputes to conclusion would require a substantial investment of funds and would delay the progress of this case for a material period of time. As a result, Trustee Yip determined that compromising the disputes at the outset, and increasing the amount of funds for other creditors by approximately \$450,000 without incurring the substantial risk, expense, and delay of litigation is clearly in the best interests of creditors and the estate.

Bar Order

21. Trustee Yip submits that the Bar Order is appropriate under the circumstances and should be entered by this Court in order to achieve the finality and repose that is contemplated by the Settlement Agreement.

22. Section 105(a) of the Bankruptcy Code provides this Court with the inherent power to issue any order necessary or appropriate to carry out the provisions of the Bankruptcy Code. *See* 11 U.S.C. § 105(a); *Munford v. Munford, Inc. (In re Munford)*, 97 F.3d 449 (11th Cir. 1996); *Wald v. Wolfson (In re U.S. Oil & Gas Litig.)*, 967 F.2d 489 (11th Cir. 1992).

23. When considering the power under Section 105 of the Bankruptcy Code in connection with compromises and bar orders, the Eleventh Circuit Court of Appeals has determined that: (i) public policy favors settlements; (ii) the cost of litigation can be burdensome on a bankruptcy estate, and (iii) bar orders play an integral role in facilitating settlements. *See In re Munford*, 97 F.3d at 455; *In re U.S. Oil & Gas Litig.*, 967 F.2d at 493-94.

24. Whether the bar order is integral to the settlement or compromise is a key factor. *See In re Munford*, 97 F.3d at 455; *In re U.S. Oil & Gas Litig.*, 967 F.2d at 494. This is because “settlement bar orders allow settling parties to put a limit on the risks of settlement.” *In re U.S. Oil & Gas Litig.*, 967 F.2d at 494.

25. Courts in this district have approved bar orders based upon Section 105(a) of the Bankruptcy Code and the principles set forth by the Eleventh Circuit in *In re Munford* and *In re U.S. Oil & Gas Litig.* *See In re Rothstein Rosenfeldt Adler, P.A.*, No. 09-34791-RBR, 2010 WL 3743885, at *6-8 (Bankr. S.D. Fla. Sept. 16, 2010) (granting request for a bar order entry of which was required by settlement); *In re S&I Investments*, 421 B.R. 569, 586 (Bankr. S.D. Fla. 2009) (approving request for entry of a bar order, which was a condition to a settlement with the debtor’s bankruptcy estate).

26. Courts outside the Eleventh Circuit have also entered orders enjoining lawsuits brought by third parties where those claims were based upon generalized injuries. *Fox v. Picard (In re Madoff)*, 848 F. Supp. 2d 469, 487 (S.D.N.Y. 2012) (affirming bankruptcy court order enjoining lawsuits based upon unjust enrichment and tort theories, where those were not based upon particularized injuries); *Gardi v. Gowan (In re Drier, LLP)*, Nos. 10 Civ. 4758 (DAB), 10 Civ. 5669 (DAB), 2010 WL 3835179, at *4-5 (S.D.N.Y. Sept. 10, 2010) (enjoining litigation claims predicated upon generalized injuries).

27. Trustee Yip believes that any claims against the Released Parties for any matter arising from or relating to the Bankruptcy Case, Secured Loan, or Amended Claim are inherently property of the Debtor's bankruptcy estate. While no claims against the Released Parties have been alleged, much less asserted, any such claim relating to the Bankruptcy Case, Secured Loan, or Amended Claim are within the jurisdiction of this Court because they: (i) are interrelated with claims which have been brought or could have been asserted by Trustee Yip concerning this case; and (ii) quite obviously would impact the administration of the Debtor's bankruptcy estate. *In re Rothstein Rosenfeldt Adler, P.A.*, 2010 WL 3743885, at *6-8. Moreover, the claims subject to the Bar Order are clearly generalized claims and, thus, are properly enjoined. *In re Madoff*, 848 F. Supp. 2d at 487; *In re Drier, LLP*, 2010 WL 3835179, at * 4-5.

28. Further, and importantly, the Settlement Agreement is dependent upon the entry of the Bar Order. *In re Rothstein Rosenfeldt Adler, P.A.*, 2010 WL 3743885, at *6-8; compare *In re Sentinel Funds, Inc.*, 380 B.R. 902 (Bankr. S.D. Fla. 2009) (Olson, J.) (denying injunction based on finding that not necessary to compromise). Comerica will not effectuate the agreement without the entry of the Bar Order.

29. As explained above, the Settlement Agreement meets the *Justice Oaks* Factors, and, in Trustee Yip's objective business judgment, benefits the Debtor's estate and its creditors. Thus, the Bar Order must be entered for the Debtor's estate and its creditors to obtain the benefits of the Settlement Agreement. The Settlement Agreement eliminates administrative expenses associated with the prosecution of the disputes with Comerica and shifts the risk associated with those issues out of the Debtor's bankruptcy estate. That transfer of risk is in-line with public policy and serves as the basis for approving a bar order. *In re S&I Investments*, 421 B.R. at 586.

30. For the reasons articulated in *In re Munford*, *In re U.S. Oil & Gas Litig.*, and their progeny and the other cases cite above, the Bar Order should be approved in connection with approval of the Settlement Agreement.

WHEREFORE, Trustee Yip respectfully requests that the Court enter an Order: (i) approving the terms of the Settlement Agreement; (ii) retaining jurisdiction over the terms of the Settlement Agreement and the parties thereto to enforce the Order granting this Motion; (iii) entering the Bar Order; and (iv) granting such other relief as the Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 20, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day via transmission of Notices of Electronic Filing generated by CM/ECF to those counsel or parties who are registered to receive Notices of Electronic Filing in this case, as indicated on the attached Service List.

By: /s/ Drew M. Dillworth
DREW M. DILLWORTH

SERVICE LIST

Case No.: 13-23165-JKO

United States Bankruptcy Court, Southern District of Florida

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