
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
TOPGALLANT LINES, INC.)	
(Chapter 7 Case <u>89-41996</u>))	Number <u>90-4028</u>
)	
<i>Debtor</i>)	
)	
)	
TOPGALLANT LINES, INC.)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
MILITARY SEALIFT COMMAND)	
)	
<i>Defendant</i>)	

ORDER ON APPLICATION TO COMPROMISE

Debtor, an international shipping concern, filed this adversary proceeding on February 16, 1990, seeking the recovery of unpaid freights. The Chapter 7 Trustee, James Drake Jr., has prosecuted the matter since conversion of the case on December 17,

1990. The Defendant, Military Sealift Command, initially offered to settle the case in 1992 for \$450,000.00 and the Trustee prepared to file an application for authority to settle. Upon learning of the settlement discussions, two creditors, Ambassador Factors and Southeastern Maritime Company, Inc. (hereinafter "SEMCO"), objected to the settlement and, according to the Trustee, he abandoned any advocacy of that settlement upon their representations that they had a witness and evidence to support a higher settlement value for the case.

Considerable additional discovery ensued and the Trustee ultimately concluded that he could not verify any of the creditors' contentions. At some point the Defendant withdrew its offer and filed a motion for summary judgment which was denied by this Court's order entered July 29, 1994. *See Topgallant Lines, Inc., v. Military Sealift Command (Matter of Topgallant Lines Inc.)*, Ch. 7 Case No. 89-41996, Adv. No. 90-4028, Doc. No. 124, slip op. (Bankr.S.D.Ga., July 29, 1994) (Davis, J.). The Trustee and Defendant renegotiated subsequent to the denial of the motion for summary judgment and on September 25, 1995, this Court conducted a settlement conference. Ultimately, the Defendant offered \$425,000.00 to settle and on May 24, 1996, the Trustee filed a motion to approve that settlement.

In response to the notice of compromise, Ambassador and SEMCO objected and another creditor, First American Bulk Carrier Corp. (hereinafter "FABC"), stated no

objection. Ambassador's argument is essentially two-fold: first, Ambassador claims that it is the only party in interest and it objects; second, Ambassador contends that the compromise amount is insufficient.¹ I have considered the objections and the argument of counsel, and overrule the objections.

Ambassador's first contention is only a renewal of its continued assertion throughout this case that Debtor's freights should have been abandoned by the Trustee because Ambassador has claimed a first perfected interest in those freights. To its credit Ambassador is at least consistent in this contention. Moreover, when this tortured case finally concludes, Ambassador may, in hindsight, be found to have been correct. However, since the very inception of this bankruptcy, other creditors and the Trustee have disputed Ambassador's contention and at present remain equally consistent in their opposition to Ambassador's claim. As a result, much litigation has ensued and Ambassador:

- (a) Has been held to have a valid perfected security interest in Debtor's freights. *See Ambassador Factors, et al. v. First American Bulk Carrier Corp., et al. (Matter of Topgallant Lines Inc.)*, Ch. 7 Case No. 89-41996, Adv. No. 90-4072, Doc. No. 237, slip op. (Bankr.S.D.Ga., July 16, 1991) (Davis, J.).

¹ SEMCO adopted Ambassador's presentation during the hearing to consider the Trustee's Motion for Compromise and, therefore, it is unnecessary to address separately its objection.

- (b) Has been held to have a claim which is subordinate to the claims of certain maritime lienholders. See Ambassador Factors, et al. v. First American Bulk Carrier Corp., et al. (Matter of Topgallant Lines Inc.), 125 B.R. 682 (Bankr.S.D.Ga. 1991); *aff'd* 154 B.R. 368 (S.D.Ga. 1993); *aff'd* McAllister Towing v. Ambassador, 20 F.3d 734 (11th Cir.1994); *reh'g denied* 49 F.3d 734 (11th Cir.1995).
- (c) Is a defendant in a major preference and fraudulent conveyance action brought by the Trustee which is still pending, see Topgallant Lines Inc., v. Frank K. Peeples et al. (Matter of Topgallant Lines Inc.), Ch. 7 Case No. 89-41996, Adv. No. 91-4141, slip op. (Bankr.S.D.Ga., filed Dec. 12, 1991) (Walker, J.). Therefore, Ambassador's claim potentially is subject to disallowance *in toto* under 11 U.S.C. Section 502(d); see also Ambassador Factors, et al. v. Topgallant, Lines, Inc. (Matter of Topgallant Lines Inc.), Ch. 7 Case No. 89-41996, Doc. No. 722, slip op. (Bankr.S.D.Ga., Feb. 5, 1993) (Davis, J.); *aff'd* Civil Action No. CV 493-076, slip op. (S.D.Ga. July 6, 1994) (Edenfield, J.)
- (d) Has yet to establish that Debtor earned all of the freights of the final voyage of the M/V Delaware Bay and if it fails to do so, FABC, or the estate, may capture as much as \$1.8 million in freights that will not be subject to Ambassador's security interest.

See Ambassador Factors, et al. v. First American Bulk Carrier Corp., et al. (Matter of Topgallant Lines Inc), Ch. 7 Case No. 89-41996, Adv. No. 90-4072, Doc. No. 366, slip op. (Bankr.S.D.Ga., Aug. 9, 1996) (Davis, J.) (pre-trial order).

- (e) Is subject to the Trustee's claims for administrative expenses and professional fees under Section 506(c) and Section 552(b).

Ambassador dismisses as irrelevant these remaining issues, and in effect asks the Trustee and the Court to accept its version of the facts and its interpretation of the law, prospectively, to determine that the Trustee holds sufficient other monies to cover all potentially conflicting claims. Ambassador therefore concludes that only Ambassador could ever recover these funds and that as the sole party in interest it can veto the settlement. This contention is only a modification of its prior arguments in support of motions for relief from stay to recover all the money which this Court has rejected, and which rulings have been affirmed. *See* Ambassador Factors, et al. v. Topgallant Lines (Matter of Topgallant Lines Inc.), Ch. 7 Case No. 89-41996, Doc. No. 722, slip op. (Bankr.S.D.Ga., Feb. 5, 1993) (Davis, J.); *aff'd* Civil Action No. CV 493-076, slip op. (S.D.Ga. July 6, 1994) (Edenfield, J.).

To the contrary, the course of litigation supports the Trustee's contention

that these funds may be subject to unresolved adverse claims of other creditors and, therefore, Ambassador at this point in time may not unilaterally veto the settlement on the grounds that it is the sole interest holder. Ambassador may ultimately prevail, but it has yet to do so. Until all material adverse claims are resolved it would be foolhardy of the Trustee to abandon control of the funds on hand, or this claim, to any individual claimant. That decision, no matter how rational when made, if later proven erroneous, would be costly to the Trustee and would violate the Code's promise of insuring an orderly liquidation with equality of distribution to similar classes of creditors. *See Id.*; 11 U.S.C. §§ 704, 725, and 726. In short, Ambassador has not yet shown itself to be the only party with an interest in these funds. As such it cannot unilaterally veto the Trustee's application.

Ambassador's second contention is that the settlement is insufficient in amount. The proposed settlement is \$425,000.00 on a net claim of approximately \$1.2 million and Ambassador disputes the amount as to its reasonableness. In response, the Trustee provided an extended analysis on the record for his recommendation for settlement of \$425,000.00. On July 31, 1996, he also filed a timely written response. In essence, the Trustee believes the Debtor's claim is subject to \$512,000.00 in recoupment claims that he cannot defeat yielding a maximum net claim ranging between \$744,000.00 and \$646,000.00. Additionally, this net maximum figure is subject to a claim by the Defendant that Debtor can be held on a successor liability theory for \$1 million in debt owed to the Defendant by the

Topgallant Group; it is further subject to the Defendant's claim that Debtor cannot offer adequate proof to support a recovery on the merits of this adversary proceeding under the doctrine of *pro rata iteneris*. Although this Court denied Defendant's motion for summary judgment finding that questions of fact concerning the applicability of the doctrine remained, *see Topgallant Lines, Inc., v. Military Sealift Command (Matter of Topgallant Lines Inc.)*, Ch. 7 Case No. 89-41996, Adv. No. 90-4028, Doc. No. 124, slip op. (Bankr.S.D.Ga., July 29, 1994) (Davis, J.), the Trustee's concern about his ability to prove his case on this theory is a major factor in his advocacy of the settlement.²

When considering an application to compromise the role of the Court is to determine whether a settlement is in the best interest of an estate before approving it. *See In re Martin*, 1996 WL 419021, *5 (3rd Cir.); *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991); *In re Energy Coop, Inc.*, 886 F.2d 921, 927 (7th Cir. 1989). A court is not required to "decide the numerous questions of law and fact raised by [objecting parties] but rather must canvas the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *Nellis v. Shugrue*, 165 B.R. 115, 121 (S.D.N.Y. 1994) (*citing In re W.T. Grant Co.*, 699 F.2d 599, 608 (2nd Cir. 1983), *cert. denied*, 464 U.S. 822, 104 S.Ct. 89, 78 L.Ed. 2d 97 (1983)); *see also Matter of Jackson*

² Because of my ruling that the application is to be approved it is not necessary to address the contentions of counsel for the Trustee and Defendant that Ambassador's counsel was advised of the proposed settlement before it was reached and indicated that Ambassador would not oppose it.

Brewing Company, 624 F.2d 599, 604 (5th Cir.1980) (holding that under the Bankruptcy Act, settlement is often appropriate when considering the policy of the law generally to encourage settlements, and in light of the inherent uncertainties, and the expense of litigation). A court, however, must make an independent determination when approving a settlement, and although the court may consider the opinions of the trustee or debtor and their counsel that a settlement is fair and equitable, the judge cannot "accept the trustee's word that the settlement is reasonable nor may the judge merely rubberstamp a trustee's proposal." Nellis v. Shugrue, 165 B.R. at 122 (*citing In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 426 (S.D.N.Y. 1993), *aff'd* 17 F.3d 60 (2nd Cir. 1994)). *See also In re Energy Coop, Inc.*, 886 F.2d at 924.

The bankruptcy judge is ultimately responsible for an unbiased and informed assessment of a settlement's terms, *see Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2nd Cir. 1982), but should not conduct a "mini-trial" on the merits of the underlying litigation. *See In re Prudential Lines, Inc.*, 170 B.R. 222, 246 (S.D.N.Y. 1994); *see also In re Purofied Down Products Corp.*, 150 B.R. 519, 522 (S.D.N.Y. 1993). As the Supreme Court has noted:

There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts

necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all of the factors relevant to a full and fair assessment of the wisdom of the proposed compromise.

Protective Comm. for Indp. Stockholders of TNT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163-64, 20 L.Ed.2d 1 (1968). In making such an assessment courts have set forth a number of factors for a court to consider: (1) the probability of success in the litigation; (2) the difficulties associated with collection; (3) the complexity of the litigation and the attendant expense, inconvenience and delay; and (4) the paramount interest of the creditors. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) cert. dismissed, 506 U.S. 1088, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993); Nellis v. Shugrue, 165 B.R. at 122; In re Ionosphere Clubs, Inc., 156 B.R. 414, 428 (S.D.N.Y. 1993).

In applying the above standards for reviewing any proposed compromise, I am persuaded that the Trustee has made a compelling case for approval. I am mindful of the fact that I am not to conduct a "mini-trial", much less fully try all issues on the merits but rather to canvas the issues and determine whether the settlement is within the "lowest point

in the range of reasonableness." The Trustee has satisfied me that "lowest point" could in fact be zero. In other words, there is a substantial likelihood that, if the settlement is not approved and if the case is tried on the merits, the Trustee will recover no more than the proposed settlement and could recover absolutely nothing for creditors, while incurring significant administrative expenses at the same time. The Trustee stands before the Court, bearing a fiduciary responsibility to the creditors in this case and a professional obligation of candor advising the Court that in his professional judgment that this settlement is in fact in the best interest of creditors. His opinion is supported by the evidence. Notwithstanding Ambassador's position that the case if tried might achieve a larger recovery, the uncertainty of that outcome and the great downside risk compel a conclusion that the Trustee's application should be granted. Therefore, I hold that the case should be settled on the terms set forth.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Trustee's Motion to Compromise Disputed Claim is granted.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of August, 1996.