

FILED

Samuel L. Kay, Clerk
United States Bankruptcy Court
Brunswick, Georgia
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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

IN RE:)	CHAPTER 11 CASE
)	NUMBER <u>10-21034</u>
SEA ISLAND COMPANY, et al.)	
)	
Debtor)	

**ORDER GRANTING THE LIQUIDATION TRUSTEE'S
MOTION FOR SUMMARY JUDGMENT**

This matter is before me on the Liquidation Trustee's Motion for Summary Judgment on his Motion for Express Authorization to Use Funds from the Accepting Unsecured Creditors Fund to Pay Trust Costs filed on February 14, 2012 ("Motion for Summary Judgment"). (ECF No. 767.) The U.S. Trustee (ECF No. 813) and accepting unsecured creditor Dennie McCrary (ECF No. 811) filed briefs opposing the Motion for Summary Judgment.

The issue is whether the Liquidation Trustee has the power, pursuant to the Debtor's confirmed chapter 11 Plan and the Liquidation Trust Agreement ("Trust Agreement"), to pay Trust Costs using funds from the Accepting Unsecured Creditors Fund ("AUC Fund"). Based upon the pleadings, the briefs, and the record in this case, I find that the Plan and the Trust Agreement clearly and unambiguously authorize the Liquidation Trustee to pay Trust Costs using funds from the AUC Fund. Therefore, the

Motion for Summary Judgment is granted for the reasons that follow.

BACKGROUND

The Liquidation Trustee filed his Motion for Express Authorization to Use Funds from the Accepting Unsecured Creditors Fund to Pay Trust Costs ("Motion to Use Funds") on November 18, 2011. (ECF No. 700.) Objections were filed by the U.S. Trustee (ECF No. 716), Mr. McCrary (ECF No. 719), and a group of accepting unsecured creditors ("Objecting Creditors") (ECF No. 717).

On January 11, 2012, a consent order was entered granting the Liquidation Trustee limited authority to use funds in the AUC Fund according to the following terms:

1. The Liquidation Trustee is authorized: to use funds from the AUCF to pay Trust Costs (as defined in the Trust Agreement) in an aggregate amount not greater than \$329,872.00 (the "AUCF Cap").

2. Upon written stipulation among the Liquidation Trustee and Objectors . . . the Objectors and the Liquidation Trustee may modify the authority granted hereunder and the limitations applicable thereto without further order of this Court.

3. The Liquidation Trustee must exhaust all other Trust Cash (as defined in the Trust Agreement but excluding any funds in the AUCF) to pay Trust Costs . . . before exercising the authority granted hereunder to use any portion of the AUCF.

4. To the extent that the Liquidation Trustee uses funds from the AUCF, the Liquidation Trustee shall reimburse the AUCF in the amount of such use from the first Trust Cash received by the Trust Estate after the date of this Order that is not subject to an asserted encumbrance or limitation (whether disputed or not) in favor of a third party.

5. This Order is without prejudice to the Liquidation Trustee's right to subsequently seek the full array, or any portion, of the relief sought in his Motion and is without prejudice to the Objectors' right to contest the granting of such relief and seek the full array of protections Objectors may assert . . .

6. The Court sets a hearing . . . on March 15, 2012 . . . (the "Hearing Date"). The Court shall consider at the Hearing the relief sought by the Liquidation Trustee in his Motion and the Objections thereto by the Objectors. The Hearing Date may be continued to a subsequent date by the written consent of the Liquidation Trustee and Objectors as approved by the Court without further notice or hearing on such requested continuance.

(ECF No. 732 at 2-3.) On February 8, 2012, an amended consent order was entered continuing the hearing to April 12, 2012. (ECF No. 760.)

The Liquidation Trustee filed his Motion for Summary Judgment (ECF No. 767), a Brief in Support of His Motion for Summary Judgment (ECF No. 772), and a Statement of Undisputed Material Facts on February 14, 2012 (ECF No. 773). Three responses to the Motion for Summary Judgment were filed. The Objecting Creditors supported the Motion. (ECF No. 809.) The U.S. Trustee opposed the Motion. (ECF No. 813.) Mr. McCrary opposed the Motion (ECF No. 811) and filed a Statement of Undisputed

Material Facts (ECF No. 812). The Liquidation Trustee subsequently filed a reply brief to address several issues raised by the U.S. Trustee and Mr. McCrary. (ECF No. 824.)

UNDISPUTED FACTS

The Debtor's petition for chapter 11 relief was filed on August 10, 2010. (ECF No. 1.) The Debtor's Plan was filed on August 10, 2010 (ECF No. 25), and amended on September 24, 2010 (ECF No. 217). The Plan provides in relevant part:

Section 1.01 Definitions.

...
"Accepting Unsecured Creditors Fund" means Cash in the amount of \$3,000,000¹, which the Secured Lenders will fund from their allocation of proceeds from the sale under the Asset Purchase Agreement, to the Liquidati[on]² Trust for the benefit of the Accepting Unsecured Claims . . .

...
Section 3.09 Class 4: Accepting Unsecured Claims.

...
(b) Treatment: Each holder of an Allowed Class 4 Accepting Unsecured Claim shall receive its Pro Rata share of the Accepting Unsecured Creditors Fund on or as soon as practicable after the later of (i) the Effective Date, (ii) the date that such Accepting Unsecured Claim becomes Allowed, and (iii) a date agreed to by the

¹ On October 22, 2010, the Debtor filed a Motion to Approve Settlement Agreement Resolving Disputes Between the Debtor, Secured Lenders, and the Unsecured Creditors Committee. (ECF No. 306.) Pursuant to the Settlement Agreement, the amount in the AUC Fund was increased to \$6,329,872. (*Id.* at 12.) The order confirming the Debtor's chapter 11 Plan said, "The Plan is modified as provided for in the Plan Settlement." (ECF No. 372 at 4.)

² The Plan uses the terms "Liquidating Trust" and "Liquidation Trustee." In this opinion, the term "Liquidation" is used in all instances for the sake of consistency.

Liquidation Trustee and the Holder of such Class 4 Accepting Unsecured Claim.

. . . .
Section 5.04 Liquidati[on] Trust. The Liquidati[on] Trust shall be established to receive certain Property of the Debtors and Cash from the Secured Lenders and to distribute such Property and Cash to certain Creditors in accordance with the Plan . . . [A]ll Property comprising the Estates of the Debtors (including, but not limited to the Accepting Unsecured Creditors Fund and the General Unsecured Creditors Fund) not conveyed to the Purchaser under the Asset Purchase Agreement shall automatically vest in the Liquidati[on] Trust, free and clear of all Claims, Liens, [etc.] on the Effective Date, . . . subject to the rights of Holders of Allowed Accepting Unsecured Claims, Other General Unsecured Claims and Convenience Claims to obtain distributions provided for in this Plan. . . .

. . . . **Expenses of the Liquidati[on] Trust, including the expenses of the Liquidation Trustee and his representatives and professionals, will be satisfied from the assets of the Liquidati[on] Trust and its proceeds, as set forth in the . . . Trust Agreement.**

. . . .
Section 7.04 Powers and Duties of the Liquidation Trustee. The Liquidation Trustee shall administer the Liquidati[on] Trust and its assets in accordance with this Plan, the . . . Trust Agreement, and the other . . . Trust Documents and shall be responsible for, among other things, making certain distributions required under this Plan. From and after the Effective Date and continuing through the date of entry of a Final Decree, the Liquidation Trustee shall: (a) possess the rights of a party in interests pursuant to section 1109(b) of the Bankruptcy Code for all matters arising in, arising under, or related to the Chapter 11 Cases and, in connection therewith, shall (i) have the right to appear and be heard on matters brought before the Bankruptcy Court or other courts, (ii) be entitled to notice and opportunity for hearing on all such issues, (iii) participate in all matters brought before the Bankruptcy Court, and (iv) receive notice of all applications, motions, and other papers and pleadings filed in the Bankruptcy Court; (b) have the authority to act on behalf of the Debtors in all

adversary proceedings and contested matters pending in the Bankruptcy Court and in all actions and proceedings pending elsewhere; and (c) have the authority to retain such personnel or professionals . . . as it deems appropriate and compensate such personnel and professionals as it deems appropriate, **all without prior notice to or approval of the Bankruptcy Court.**

. . . .
Section 12.20 Entire Agreement. The Plan (and all Exhibits to the Plan and the Plan Supplement) sets forth the entire agreement and undertakings relating to the subject matter hereof and supersedes all prior discussions and documents.

(ECF No. 217 at 1-49 (emphasis added).)

The Disclosure Statement, which was approved on September 24, 2010, states, "A copy of the Liquidati[on] Trust Agreement shall be included with the Plan Supplement to be filed on or before the fifth day prior to the Confirmation Hearing." (ECF No. 216 at 42.)

The Plan Supplement was filed on October 19, 2010. (ECF No. 294.) The Trust Agreement was attached as an exhibit to the Plan Supplement. (Ex. A, ECF No. 294 at 7-40.) On December 15, 2010, the Debtor and the Liquidation Trustee executed the Trust Agreement.³ (ECF No. 449-1.) The Trust Agreement provides in relevant part:

1.1 Definitions.

. . . .
(c) "Beneficiaries" means the holders of Allowed Claims under Classes 4, 5 and 6.
. . . .

³ The executed Trust Agreement is identical to the Trust Agreement attached to the Plan Supplement in all material respects.

(i) "Trust Assets" means the "Property" comprising the "Estates" of the Debtors (including, but not limited to the "Accepting Unsecured Creditors Fund" and the "General Unsecured Creditors Fund") not conveyed to the "Purchaser" under the "Asset Purchase Agreement"

.....
(k) "Trust Cost" means all costs, expenses, liabilities and obligations incurred by the Trust and [Liquidation] Trustee in administering and conducting the affairs of the Trust, and those incurred by the Trust and the [Liquidation] Trustee in otherwise carrying out the terms of the Trust and the Plan on behalf of the Trust and the Debtors, including without limitation, any taxes owed by the Trust, the fees and expenses of the [Liquidation] Trustee and professionals and other persons employed by the Trust or [Liquidation] Trustee, and the expenses and obligations otherwise defined as a Trust Cost in the Trust Agreement or the Plan.

.....
1.3 Incorporation of the Plan. The Plan is hereby incorporated into this Trust Agreement and made a part hereof by this reference; provided, however, that in the event of any conflict between the terms of the Plan and this Trust Agreement, the terms of the Plan will control and govern.

.....
4.3 Bankruptcy Court Approval of Trustee Actions.

(a) Except as provided in the Plan or otherwise specified in the Trust Agreement, the [Liquidation] Trustee need not obtain the order or approval of the Bankruptcy Court in the exercise of any power, rights, or discretion conferred hereunder, or account to the Bankruptcy Court. The [Liquidation] Trustee shall exercise its business judgment for the benefit of the Beneficiaries in order to maximize the value of the Trust Assets and distributions, giving due regard to the cost, risk, and delay of any course of action.

(b) Notwithstanding the foregoing, the [Liquidation] Trustee, in its sole discretion and judgment, shall have the right to submit to the Bankruptcy Court any question or questions regarding which the [Liquidation] Trustee may desire to have

explicit approval of the Bankruptcy Court for the taking of any specific action proposed to be taken by the [Liquidation] Trustee with respect to the Trust Assets, this Trust Agreement, the Plan, or the Debtors, including the administration and distribution of the Trust Assets. The Bankruptcy Court shall retain jurisdiction for such purposes and shall approve or disapprove any such proposed action upon motion by the [Liquidation] Trustee.

.
4.10 Costs. All fees, costs and expenses incurred by the [Liquidation] Trustee and the Trust in the exercise of any right, power or authority conferred by section 4 [Powers of the Trustee] hereof shall be as a Trust Cost.

.
5.8 Trust Costs. From the Trust Assets, the [Liquidation] Trustee shall pay all Trust Costs when due if not disputed in good faith by the [Liquidation] Trustee, or provide for payment of such Trust Costs in full through reserve, prior to making distributions to any Beneficiaries.

.
6.1 Allocation of Beneficial Interests to Holders of Class 4 Claims, Class 5 Claims and Class 6 Claims.

6.1.1 Class 4 Claims. The [Liquidation] Trustee shall allocate to each holder of an Allowed Claim under Class 4, a Beneficial Interest in the Trust equal to its Pro Rata Share of the Accepting Unsecured Creditors Fund.

.
10.7 Relationship to Plan. The principal purpose of this Trust Agreement is to aid in the implementation of the Plan and therefore the entirety of this Trust Agreement is incorporated into the Plan. To that end, the [Liquidation] Trustee shall have full power and authority to take any action consistent with the purpose and provisions of the Plan and shall be bound by the terms of the Plan. If any provision of this Trust Agreement is found to be inconsistent with the provisions of the Plan, the provisions of the Plan shall control.

10.7⁴ Consent to Jurisdiction. Each of the parties hereto (and each Beneficiary by its acceptance of the benefits of the Trust created hereunder) consents and submits to the exclusive jurisdiction of the Bankruptcy Court for any action or proceeding instituted for the enforcement or construction of any right, remedy, obligation, or liability arising under or by reason of this Trust Agreement or the Plan.

(ECF No. 449-1 at 9-33.)

Four entities objected to the confirmation of the Debtor's Plan and Plan Supplement. (ECF No. 237; ECF No. 298; ECF No. 318; ECF No. 319.) None of the objections related to the Trust Agreement or any of the provisions of the Plan stated above.⁵ Each of the objections was subsequently resolved or withdrawn.⁶

The Plan was confirmed on November 8, 2010. (ECF No. 372.) The confirmation order provides that the "Liquidation Trustee . . . may pay any Professional fees and expenses incurred after the Effective Date without any application to the Bankruptcy Court."

(Id. at 38.)

⁴ The Trust Agreement contains two sections 10.7. (ECF No. 449-1 at 33.)

⁵ Former Sea Island Company President James Brown objected to the Plan's treatment of his employment agreement. (ECF No. 237.) Creditor Deere Credit objected to the Plan's treatment of several unexpired equipment leases. (ECF No. 218.) The "Parker Club Members" objected to the Plan Supplement's description of the new Sea Island Club membership program and the handling of membership deposits. (ECF No. 298.) A group of "Retirement Creditors," of which Mr. McCrary was a member, objected to the Plan to the extent it sought to automatically subordinate or recharacterize their deferred compensation claims. (ECF No. 319 at 2.)

⁶ The objections of Mr. Brown and Deere Credit were withdrawn prior to hearing. (ECF No. 261; ECF No. 352.) The objection of the "Parker Club Members" was withdrawn at hearing on October 21, 2010. The Retirement Creditors filed a Notice of Resolution of Objection, stating that the objection had been resolved because the Debtors agreed to add clarifying language to the confirmation order. (ECF No. 361.)

CONCLUSIONS OF LAW

Mr. McCrary raises several threshold issues in his brief opposing the Motion for Summary Judgment. (ECF No. 811 at 15-18.) First, he argues that the Motion for Summary Judgment and the underlying Motion to Use Funds should have been brought as adversary proceedings. (Id. at 16.) According to Mr. McCrary, the more formal procedure of an adversary proceeding is necessary because all Accepting Unsecured Creditors are affected by this issue. (Id.) Conversely, the Liquidation Trustee argues that this is a proper contested matter. (ECF No. 824 at 10.) The Liquidation Trustee is correct because the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") do not require this matter to be brought as an adversary proceeding.

According to Bankruptcy Rule 7001, the following are adversary proceedings:

- (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;
- (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);
- (3) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;
- (4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), (a)(9), or 1328(f);

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;

(6) a proceeding to determine the dischargeability of a debt;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or

(10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.

Fed. R. Bankr. P. 7001. The issue here, which involves post-confirmation interpretation of the Debtor's Plan and the Trust Agreement, does not fall into any of the enumerated categories.

Mr. McCrary argues that determining whether the Liquidation Trustee is authorized to pay Trust Costs with funds from the AUC Fund "bears all the earmarks of a declaratory judgment action." (ECF No. 811 at 16.) Therefore, Mr. McCrary contends, the matter falls under subsection (9), "a proceeding to obtain a declaratory judgment relating to any of the foregoing." (Id.) However, subsection (9) only refers to requests for declaratory judgment relating to the proceedings specified in subsections (1)-(8). In re Three Strokes Ltd. P'ship, 397 B.R. 804, 807 (Bankr. N.D. Tex. 2008). The issue here does not fall into any of the categories in

subsections (1)-(8) and Mr. McCrary does not argue otherwise. Accordingly, this is a proper contested matter.

Second, Mr. McCrary argues that this Court does not have subject matter jurisdiction to hear the Liquidation Trustee's Motions. (ECF No. 811 at 17.) Mr. McCrary assumes that the Liquidation Trustee relies solely on the retention-of-jurisdiction provision in the Plan as the basis for the Court's jurisdiction in this matter. (Id.) The Liquidation Trustee argues that the Court has subject matter jurisdiction independent of any provisions in the Plan. (ECF No. 824 at 12-13.) Mr. McCrary is correct that a retention-of-jurisdiction provision in a plan cannot, on its own, grant a court subject matter jurisdiction. See U.S. Trustee v. Gryphon at Stone Mansion, Inc., 216 B.R. 764, 769 (W.D. Pa. 1997) (citing In re Holly's, Inc., 172 B.R. 545, 555 (Bankr. W.D. Mich. 1994)). However, the Liquidation Trustee is also correct that independent subject matter jurisdiction exists here.⁷

Upon referral by a district court, bankruptcy courts have jurisdiction over "civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §§ 157, 1334. A proceeding is "related to" a bankruptcy case when "the

⁷ In fact, both cases Mr. McCrary cites to support his contention that this Court does not have subject matter jurisdiction recognize that post-confirmation jurisdiction exists for matters pertaining to the implementation or execution of a reorganization plan. See In re Seven Fields Dev. Corp., 505 F.3d 237, 258 (3d Cir. 2007); In re United States Brass Corp., 301 F.3d 296, 304 (5th Cir. 2002).

outcome of that proceeding could conceivably have an effect on the estate being administered in bankruptcy." Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 788 (11th Cir. 1990) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

In the post-confirmation context, however, the jurisdiction of bankruptcy courts is more limited because the estate no longer exists. See In re Thickstun Bros. Equip. Co., 344 B.R. 515, 521 n.2 (6th Cir. B.A.P. 2006); In re Resorts Int'l, Inc., 372 F.3d 154, 164-69 (3d Cir. 2004); In re Craig's Stores of Texas, Inc., 266 F.3d 388, 390-91 (5th Cir. 2001). The essential inquiry post-confirmation is whether there is a "close nexus" to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter. In re Resorts Int'l, 372 F.3d at 166-67. See, e.g., In re Thickstun Bros. Equip., 344 B.R. at 521-22; In re Pegasus Gold Corp., 394 F.3d 1189, 1193-94 (9th Cir. 2005). Specifically, matters affecting the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated trust agreement will typically have the requisite close nexus. In re Resorts Int'l, 372 F.3d at 167.

Trusts that are established for the purpose of distributing estate assets, like the Liquidation Trust here, serve a valid purpose in the bankruptcy process. See Id. at 164. This type of

trust may continue long after a reorganization plan has been confirmed, and yet bankruptcy jurisdiction exists if there is sufficient connection to the bankruptcy. Id.; see also In re Boston Reg'l Med. Ctr., Inc., 410 F.3d 100, 107 (1st Cir. 2005) (stating that in the case of a liquidating plan of reorganization, litigation in the same forum furthers the federal policy in favor of the expeditious liquidation of debtor corporations and the prompt distribution of available assets to creditors).

Indeed, trusts on which creditors rely for payment of their claims "by their nature maintain a connection to the bankruptcy even after the plan has been confirmed." In re Resorts Int'l, 372 F.3d 154 at 167. Here, the principal purpose of the Trust Agreement is to aid in the implementation of the Plan. (ECF No. 449-1 at 33.) The Plan grants the Liquidation Trustee the power to "administer the Liquidati[on] Trust and its assets in accordance with [the] Plan" (ECF No. 217 at 39.) Furthermore, deciding whether the Liquidation Trustee can use funds from the AUC Fund to pay Trust Costs requires interpretation of the Plan and the Trust Agreement. Therefore, this matter maintains a "close nexus" to the Debtor's Plan sufficient to uphold this Court's jurisdiction over the matter.

Third, Mr. McCrary questions whether the Supreme Court's recent decision in Stern v. Marshall, 131 S. Ct. 2594 (2011),

affects this Court's power to enter a final order in this matter. (ECF No. 811 at 17-18.) While Mr. McCrary discusses the Supreme Court's holding and the issues it raises, he fails to explain how it would apply here. (Id.)

In fact, Stern v. Marshall does not raise questions about whether this Court may constitutionally determine this matter. In Stern v. Marshall, the Supreme Court held that "[t]he Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." 131 S. Ct. at 2620. The question presented in the case implicated the authority granted to bankruptcy judges pursuant to 28 U.S.C. § 157(b)(2)(C). Id. at 2604.

The Eighth Circuit Bankruptcy Appellate Panel has held that the balance of authority granted to bankruptcy judges by Congress to hear and determine "core proceedings" under § 157(b)(2) is constitutional, unless and until the Supreme Court takes up other provisions specifically. See Badami v. Sears (In re AFY, Inc.), 461 B.R. 541, 547-48 (B.A.P. 8th Cir. 2012) (noting that the Supreme Court characterized the question presented in Stern v. Marshall as a "narrow" one).

Here, the Liquidation Trustee asserts that this matter falls under either § 157(b)(2)(A), "matters concerning the administration of an estate," or § 157(b)(2)(L), "confirmation of

plans." (ECF No. 824 at 7.) I agree. Section 157(b)(2)(C) is not implicated here. Accordingly, this Court may constitutionally hear and determine this matter as a core proceeding.

Having resolved the threshold matters raised by Mr. McCrary, I now turn to the merits of the Liquidation Trustee's Motion for Summary Judgment. Rule 56 of the Federal Rules of Civil Procedure, applicable here by Bankruptcy Rules 9014 and 7056, provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party moving for summary judgment bears the initial burden of showing, by reference to the record, that there is not a genuine issue of material fact. Velten v. Regis B. Lippert, Intercat, Inc., 985 F.2d 1515, 1523 (11th Cir. 1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

Here, there is no genuine dispute as to the material facts. The material facts are provisions of the Debtor's confirmed Plan and the Trust Agreement. The express terms of those documents unambiguously authorize the Liquidation Trustee to pay Trust Costs using funds from the AUC Fund. When a contract is

unambiguous, it shall be enforced according to its clear terms. McKinley v. Coliseum Health Group, LLC, 708 S.E.2d 682, 684 (Ga. App. 2011)(citing Record Town, Inc. v. Sugarloaf Mills Ltd. P'ship of Ga., 687 S.E.2d 640, 642 (Ga. App. 2009)).

The Plan identifies the AUC Fund and states that each holder of an Accepting Unsecured Claim shall receive its pro rata share of the Fund (ECF No. 217 at 5, 26). According to section 5.04 of the Plan, the Liquidation Trust shall be established to receive the Debtor's property and distribute it to creditors according to the Plan. (Id. at 30.) The Plan also states that the Liquidation Trustee shall administer the assets in accordance with the Plan and the Trust Agreement. (Id. at 39.) Finally, the Plan states that the expenses of the Liquidation Trust will be satisfied from the Trust Assets as set forth in the Trust Agreement. (Id. at 30.)

The Trust Agreement states that the AUC Fund is a Trust Asset. (ECF No. 449-1 at 9.) The Trust Agreement instructs the Liquidation Trustee to pay all Trust Costs from the Trust Assets prior to making distributions to any Beneficiaries (Id. at 23), which includes Accepting Unsecured Creditors (Id. at 9).

Nothing in the Plan or the Trust Agreement states that Trust Costs cannot be paid using funds from the AUC Fund. To the contrary, the Plan and the Trust Agreement unambiguously instruct the Liquidation Trustee to pay Trust Costs using Trust Assets,

which specifically include the AUC Fund, prior to making distributions to Beneficiaries.

Moreover, all parties received notice of the Plan (ECF No. 277) and the Plan Supplement (ECF No. 299), which included a copy of the Trust Agreement, and had the opportunity to object prior to the confirmation hearing. No objections were made to the Trust Agreement or to any of the Plan provisions related to the Liquidation Trust. After hearing, the Plan was confirmed (ECF No. 372) and the Trust Agreement was executed (ECF No. 449). Pursuant to Bankruptcy Code § 1141, the parties are bound by the terms of the Plan, the Plan Supplement, and the Trust Agreement. See 11 U.S.C. § 1141(a). Accordingly, the Liquidation Trustee has met his burden in showing that there are no material facts in dispute and he is entitled to judgment as a matter of law.

The burden now shifts to the objecting parties to show that an issue of material fact exists that precludes summary judgment. Mr. McCrary argues that the Liquidation Trustee cannot use the AUC Fund to pay Trust Costs because the AUC Fund was specifically set aside for distribution only to Accepting Unsecured Creditors. (ECF No. 811 at 18-19.) According to Mr. McCrary, the language in the Plan and the Trust Agreement stating that the Debtor's property will vest in the Liquidation Trust "subject to the rights of Holders of Allowed Accepting Unsecured Claims" implies

that the AUC Fund is not subject to dilution or erosion. (Id. at 23-28.)

In essence, Mr. McCrary would like to alter the terms of the Plan and the Trust Agreement based on the Accepting Unsecured Creditors' belief that they were guaranteed to receive a pro rata share of \$6,329,872. Similarly, the U.S. Trustee argues that the Accepting Unsecured Creditors "believed that they stood to receive a pro rata share of the money in the AUC Fund without the possibility of diminishment." (ECF No. 813 at 1.) According to the U.S. Trustee, the Accepting Unsecured Creditors did not expect to receive their pro rata share "to the extent that any money remains in the [AUC Fund] after the payment of all Trust Costs." (Id. at 2.)

Nonetheless, the Plan and the Trust Agreement provide otherwise. They instruct the Liquidation Trustee to use Trust Assets, including the AUC Fund, to pay Trust Costs prior to making distributions to Beneficiaries. The relevant provisions of the Plan and the Trust Agreement are not ambiguous and the Plan contains a merger clause (ECF No. 217 at 49). Therefore, it is not necessary to consider parole evidence -- the beliefs of creditors -- to decide this matter.

Furthermore, the U.S. Trustee argues that the Plan requires the Liquidation Trustee to distribute the money set aside in the AUC Fund to Accepting Unsecured Creditors "well before the

Liquidation Trustee completes his administration of the case." (ECF No. 813 at 2.) As the Liquidation Trustee explains in his reply brief, the U.S. Trustee mistakenly assumes that Section 3.09 of the Plan, which describes when distribution will be made to the Accepting Unsecured Creditors, requires prompt distribution because it uses the phrase "as soon as practicable." (ECF No. 824 at 26-27.) However, according to Section 3.09, distribution is to be made "as soon as practicable after the later of" the effective date of the Plan, the date the creditor's claim becomes allowed, and a date agreed to by the Liquidation Trustee and the creditor. (ECF No. 217 at 26-27 (emphasis added).) There is no requirement that distribution be made to creditors before Trust Costs are paid. Moreover, the claims objection deadline is currently April 23, 2012. (ECF No. 710.) The Liquidation Trustee is still in the process of objecting to claims. Claims do not become allowed until the claims objection deadline has passed. Therefore, the Liquidation Trustee is not required to make distributions to Accepting Unsecured Creditors prior to paying Trust Costs.

The arguments of Mr. McCrary and the U.S. Trustee do not change the clear and unambiguous terms of the Plan and the Trust Agreement. The Plan and the Trust Agreement clearly state that Trust Assets, including the AUC Fund, will be used to pay Trust Costs. (ECF No. 217 at 30; ECF No. 449-1 at 23.) The Trust

Agreement further states that Trust Costs are to be paid prior to any distribution to Beneficiaries. (ECF No. 449-1 at 23.) Therefore, the Liquidation Trustee has the power to pay Trust Costs using funds in the AUC Fund. Distributions will be made to creditors after the claims objections deadline has passed and the Liquidation Trustee has resolved all objections. At that time, each Accepting Unsecured Creditor will receive its pro rata share of the AUC Fund, as the Plan provides. The Plan and the Trust Agreement are not ambiguous and do not contain conflicting provisions. Therefore, Mr. McCrary and the U.S. Trustee have failed to show that there is a material fact in dispute.

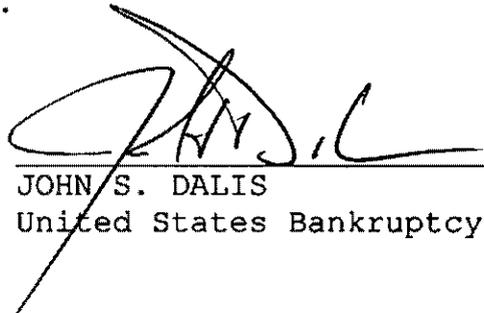
Finally, the U.S. Trustee requests that certain restrictions be imposed on the Liquidation Trustee if he is permitted to pay Trust Costs using funds from the AUC Fund. (ECF No. 813 at 7.) The U.S. Trustee argues that the Liquidation Trustee should be required to obtain Court approval prior to paying any Trust Costs from the AUC Fund. (Id.)

However, the U.S. Trustee ignores the provision in the Trust Agreement that states, "the [Liquidation] Trustee need not obtain the order or approval of the Bankruptcy Court in the exercise of any power, rights, or discretion conferred hereunder, or account to the Bankruptcy Court." (ECF No. 449-1 at 16.) The Trust Agreement empowers the Liquidation Trustee to "exercise its business judgment for the benefit of the Beneficiaries in order

to maximize the value of the Trust Assets and distributions, giving due regard to the cost, risk, and delay of any course of action." (Id.) Moreover, the order confirming the Plan states that the Liquidation Trustee "may pay any Professional fees and expenses incurred after the Effective Date without any application to the Bankruptcy Court." (ECF No. 372 at 38.) Accordingly the Liquidation Trustee can pay Trust Costs from the AUC Fund without Court approval.

ORDER

IT IS THEREFORE ORDERED that the Liquidation Trustee's Motion for Summary Judgment on his Motion for Express Authorization to Use Funds from the Accepting Unsecured Creditors Fund to Pay Trust Costs is **GRANTED**.



JOHN S. DALIS
United States Bankruptcy Judge

Dated at Brunswick, Georgia,
this 10th day of April, 2012.