IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: CHARLES K. BRELAND, Debtor;	Case No.: 16-2272-JCO Chapter 11
In re: OSPREY UTAH, LLC, Debtor.	Case No.: 16-2270-JCO Chapter 11

ORDER

This matter is before the Court on the Motion of Levada EF Five, LLC ("Levada") to Alter, Amend or Alternatively Reconsider ("Levada's Motion") (Doc. 420)[1] this Court's Memorandum Order and Opinion entered April 3, 2020 (Doc. 418) denying the Joint Amended Motion to Approve Compromise (Doc. 353) without prejudice and the Response in Opposition thereto (Doc. 421) filed by Charles K. Breland ("Breland"). Having considered the record, prior Orders, Levada's Motion and Breland's Opposition thereto, this Court finds that sufficient grounds do not exist to alter or amend this Court's ruling. Accordingly, Levada's Motion is due to be DENIED for the following reasons:

1 For ease of reference the document citations herein pertain to *In re Osprey Utah, LLC*, 16-2270 unless otherwise noted.

FACTUAL AND PROCEDURAL HISTORY

The background, findings of fact and conclusions of law pertinent to consideration of this matter are set out in the Memorandum Opinion and Order of this Court dated April 3, 2020 (the "Opinion") which is incorporated herein by reference. (Doc. 418). The Opinion denied the Joint Amended Motion to Compromise ("2019 Motion")(Doc. 353) without prejudice finding it failed to meet the minimum standard of reasonableness. The Court deemed its prior Order ("Denial Order")(Doc. 285) denying the initial Joint Motion to Compromise ("2017 Motion")(Doc. 197), involving substantially the same parties and issues, relevant to the analysis. Accordingly, in the interest of judicial economy and efficiency, the Opinion referenced and incorporated its prior findings, rationale and conclusions. Upon analyzing the evidence presented at the hearing on the Amended Motion, the Court concluded that the Trustee had not satisfied his burden to establish that the proposed terms met the minimum standard of reasonableness necessary for approval.

Specifically, the Opinion explained that the evidence presented at the hearing on the 2019 Motion did not satisfactorily address the Court's previously expressed concerns including: lack of an unbiased appraisal, flaws with the Trustee's Appraiser's methodology, failure to value the significant transfer of rights under the ARA and the absence of genuine effort by the Trustee to fully evaluate the potential for a §363 sale of the entire property. Further, the Court noted additional factors weighing against approval of the settlement including the value of additional interests acquired by the Estate post Denial Order[2], the inequitable nature of the releases, the lack of sufficient information to fully assess the adequacy of consideration, the likelihood of success

2 The Trustee paid $200,000.00 to acquire the interests of William and Linda Donado, consisting of mineral interests in Debtor's Utah Property (valued at $150,000.00 in the 2017 Motion (Doc. 197 at 10)) and an assignment of their $250,000.00 judgment. *See* Order Granting Emergency Joint Motion to Approve Purchase of Judgment. (Doc. 297).

of the Trustee's pending preference action against Levada and the fact that the case would likely result in a surplus.

Levada's Motion was filed seeking relief pursuant to Federal Rule of Civil Procedure 59(e) and Bankruptcy Rule 9023. Charles K. Breland Jr. thereafter filed his Response in Opposition thereto. Despite the docketing event description as a "Joint Motion", the Chapter 11 Trustee, A. Richard Maples did not join in Levada's Motion.

CONCLUSIONS OF LAW

Motions to Alter or Amend are governed by Rule 9023 of the Federal Rules of Bankruptcy Procedure which adopts Federal Rule of Civil Procedure 59. Reconsideration of an order is an extraordinary remedy and should be employed sparingly. *Gougler v. Sirius Prod., Inc*., 370 F. Supp. 2d 1185, 1189 (S.D. Ala. 2005). As this Court has noted previously, a party seeking reconsideration of a prior order is held to a high standard and must demonstrate that: (1) controlling law has changed; (2) newly discovered evidence would merit a different result or (3) reconsideration is necessary to correct clear error of law or fact or to prevent a manifest injustice. *In re Breland, 2017 WL 2683980 (*Bank. S.D. Ala.*)*(*citing In re Strength*, 562 B.R. 799 (Bankr. M.D. Ala. Dec. 21, 2016)(*citing Jacobs v. Tempur-Pedic Int'l, Inc.,* 626 F.3d 1327, 1344 (11th Cir. 2010)); *See also In re McGregor*, 606 B.R. 460 (Bankr. M.D. Fla.2019). The decision to alter or amend a judgment is within the sound discretion of the court. *In re Davis*, 2015 WL 2208373, at 2 (Bankr. N.D. Ala. May 8, 2015)*(citing Futures Trading Comm'n v. Am. Commodities Group,* 753 F.2d 862, 866 (11th Cir.1984)).

Lack Of Meritorious Grounds To Alter Or Amend

Levada's Motion does not allege any change in controlling law but rather contends that an IRS Notice is "new evidence" and that the Court's conclusion that the terms of the 2019 Motion fell below the lowest standard of reasonableness was "clear and manifest error". Upon careful consideration of the arguments set forth in Levada's Motion, this Court is satisfied that there is no newly discovered evidence that would merit a different result. Further, Levada has not demonstrated clear error or that amendment or alteration of the Opinion is necessary to prevent manifest injustice. Hence, there is no justification for altering or amending the Opinion.

Purported New Evidence

Although new evidence may constitute grounds for a Motion to Alter or Amend an Order, the evidence must be sufficient to warrant a different result. *See In re Powers,* No. 15-03267-JJR13, 2018 WL 5255295 (N.D. Ala. Oct. 15, 2018)(citing *In re Keeley & Grabanski Land Partnership*, 832 F.3d 853 (8th Cir. 2016) (bankruptcy court did not abuse its discretion when it denied Rule 9023 motion based on newly discovered evidence because such evidence would not change its findings). Subsequent to entry of the Opinion, the United States of America filed a Notice of Estimated IRS Claim ("IRS Notice") (*In re Breland* Companion Case No. 16-2272, Doc 1816) indicating a significant, $22,386,671.00 reduction of its proof of claim and suggesting continued negotiations and the possibility of additional downward adjustments. The IRS Notice relates to the Debtor's Objection to Claim which has been pending since May 14, 2018 (*In re Breland*, Companion Case No. 16-2272, Doc. 1029) and has been the subject of numerous court settings which Levada's Counsel has attended. In this case, while the IRS Notice was technically filed subsequent to entry of the Opinion, Levada's assertion that it constitutes "new evidence" is tenuous. The IRS Notice had not only been long awaited but also

clearly reflects it is an *estimate* and further downward adjustments are anticipated. The Opinion referenced the unequivocal testimony of the Trustee that he expected the case to result in a surplus. The Court found the Trustee's testimony on this issue to be credible, supported by the record and sufficient to justify the Court's findings on that point.

This Court does not deem it appropriate or prudent to disregard the testimony presented at the hearing of this matter based upon an *estimated* claim. Additionally, the potential surplus nature of the case was only one of the many considerations weighing against the reasonableness of the settlement. Hence, the IRS Notice of a reduced, estimated claim with further reductions likely, does not constitute new evidence sufficient to warrant a different result.

Absence of Clear Error

Absent a change in law or new evidence, a party seeking to alter or amend a judgment must establish that the ruling of the Court constituted clear and manifest error. The clearly erroneous standard affords great deference to the trial court. *Anderson v. City of Bessemer Cite, N.C.*, 470 U.S. 564, 105 S.Ct 1504, 84 L. Ed 2d 518 (1985). A finding of fact is not clearly erroneous absent a firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525 [542], 92 L.Ed. 746 (1948). Although the Court favors settlements generally, it has an obligation to ensure that the settlement is fair and equitable, and not simply accept the trustee's word or rubberstamp the trustee's proposal. *In re Greenberg*, 2005 WL 6746610, at 3 (Bankr. S.D.Ga. Apr. 5, 2005). The Trustee, as the proponent of the Motion to Compromise bears the burden of demonstrating the proposed settlement is both reasonable and in the best interest of the bankruptcy estate. *In re Vazquez*, 325 B.R. 30 (Bankr.S.D. Fla. 2005).

The Court Properly Applied the Applicable Law

The Court's Opinion properly set forth the applicable law noting Bankruptcy Rule 9019 provides the court *may* approve a settlement. However, it does not mandate approval or require a perfunctory endorsement of a trustee's motion. The Opinion acknowledged the overriding principle that a proposed settlement must be fair, equitable and in the best interests of the estate. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424–25, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968); *In re Justice Oaks II, Ltd.*, 898 F.2d 1544 (11th Cir.1990). The Opinion properly recognized the *Justice Oaks* factors as the standard in this Circuit. Further, it cited the prior Denial Order which analyzed the pertinent factors and determined that the terms of the 2017 Motion failed to meet the minimum standard of reasonableness. The prior Denial Order was deemed relevant to the analysis because: (1) the parties and issues presented were substantially similar; and (2) the Denial Order specifically set forth the deficiencies the Trustee needed to address in any future proposed settlement with Levada. The Opinion elucidated the reasons the 2019 Motion fell short of satisfying the deficiencies clearly set out in the Denial Order. Accordingly, the Court found the Movant's failed to establish that the 2019 Motion met the minimum standard of reasonableness.

The Court's denial of the 2019 Motion did not constitute clear and manifest error of law or fact. The Court applied the correct legal standard generally as well as the rule of the case as established by its prior Denial Order. The Court duly considered the testimony and documentary evidence and as the trier of fact afforded each the weight and deference deemed appropriate in its discretion. Thereafter, upon canvassing the issues and applying the applicable law to the facts,

the Court opined that the settlement fell below the minimum standard of reasonableness required for approval.

The Court Is The Arbiter Of Factual Disputes

A Rule 59(e) motion cannot be used to relitigate old matters, raise arguments or present evidence that could have been raised prior to the entry of judgment. *Michael Linet, Inc. v. Village of Wellington, Fla.,* 408 F.3d 757, 763 (11th Cir.2005). It is not proper to ask the Court to rethink a decision. *In re Titus,* 479 B.R. 362 (Bankr. W.D Penn 2012). Litigants should be cautioned against alleging clear error when it is simply a disagreement between the Court and the litigant. *Id.*

The Court was not mistaken in its understanding of the facts or the law and was resolute in its decision. The fact that Levada, as the proponent and beneficiary of the proposed settlement, disagrees with the Court's findings and conclusions does not constitute clear error or result in manifest injustice. In the Court's view, the evidence presented on the 2019 Motion did not alleviate the prior concerns clearly expressed in the Denial Order and simply did not establish that the proposed settlement was fair, equitable or in the best interest of the Estate. The Opinion set out in detail the various settlement components and circumstances which led to its conclusion. The Court explained that each of the deficiencies on its own constituted cause for denial and collectively they clearly evidenced the unreasonableness of the proposed settlement.

Fallacy in Levada's Contentions

Notwithstanding the Court's confidence in its assessment of the facts, application of the law and appropriateness of its ruling, it will for the benefit of Levada further summarily address its arguments. Although Levada's Motion contends that no creditor objected and the court failed

to consider the paramount interest of Creditors, neither is accurate. In its analysis the Court noted that although Levada is a Creditor, it is also the proponent of the Amended Motion. Therefore, Levada's position in support of the settlement is self-serving and was weighted accordingly in the Court's discretion. As to the assertion that the IRS "commented" in favor of the Compromise, testimony of the United States was not offered at the hearing. Although an IRS representative may have commented favorably regarding the Compromise or lack of opposition thereto at some point, Levada's Motion does not cite an officially binding position statement, pleading, brief or sworn testimony of the United States submitted for consideration in conjunction with the Amended Motion. Hence, Levada was the only Creditor that formally supported the 2019 Motion. Additionally, the likely surplus nature of the case necessitated an evaluation of the interests of the sole owner of the Debtor, Charles Breland. The evidence established that the Trustee did not afford adequate consideration to Breland's objections to the settlement. Overall, the Court determined that the 2019 Motion fell below the minimum standard of reasonableness as it did not garner sufficient value for the significant bundle of rights and interests given up. Further, as the 2019 Motion sought to allow $850,000.00 of Levada's claim to be paid as secured, as opposed to fully unsecured in the 2017 Motion, such treatment could potentially be prejudicial to other unsecured creditors and Breland.

Additionally, Levada's Motion implies that this Court should have given credence to other purported "comments" of the United States regarding the value of the property and contract rights sought to be compromised. Such approach would have been improper as any such comments were neither sworn nor introduced into evidence at the hearing on the 2019 Motion. Further, consideration of any such evidence as to the value of estate assets would require the proper foundation to establish that the IRS was qualified to give an opinion as to the value of such

interests. This Court is not inclined to give consideration to such arguments or inuendo post hearing.

Although Levada's Motion contends the Trustee's support of the proposed Compromise should have been given more latitude, the unequivocal testimony of the Trustee was that the terms of the proposed Compromise were ***worse*** than the 2017 Motion which was previously denied. Additionally, the full weight of the evidence in the view of the Court established that the terms of the settlement fell below the minimum standard of reasonableness preventing approval regardless of the Trustee's position.

Levada next contends that there is no support in the record for the Court's finding that the proposed releases are not equitable. The Court noted the Amended Settlement Agreement ("Agreement") provided for releases in enumerated paragraph 13 by stating: " . . . the Trustee on behalf of Breland and Osprey Utah, shall grant comprehensive releases to Levada, Zajac, Argos and all principals, agents, owners, members, attorneys, agents, employees, affiliates and affiliated and related persons and entities." (Doc. 353 at 7). Hence, Levada's assertion that "it would be entirely inequitable for Levada to release Breland without obtaining a release from Breland" (Doc. 420 at 5) results from Levada's misreading of the plain terms of the Agreement. The Agreement contemplates comprehensive releases of Breland's claims yet does not include releases for Osprey Utah, the Trustee or Breland. Although Levada contends it offered to release the Trustee at the hearing and that an implication should be inferred therefrom that the Debtor entity would be released, the nebulous nature of any such statement, the fact that it was an afterthought and the omission of Breland from the released parties, was deemed sufficient for the Court to find the releases inequitable. This Court does not favor impromptu verbal changes to the terms of a proposed agreement during the course of a hearing and is not inclined to infer releases

of parties not specifically delineated. In any event, the Court's concern with regard to the inequitable nature of the proposed releases was warranted.

Levada's position that the Court failed to recognize the evidence concerning the valuation of terminating the Amended and Restated Agreement ("ARA") is likewise flawed. The Opinion addressed the Court's findings on the value of the ARA as follows:

> Hansen's Report failed to reflect analysis or discrete valuations with regard to various components of the Amended Compromise Motion including: the proposed transfer of rights under the ARA; the benefit to Levada of termination of its obligations under the ARA; or the value of the potential contingency interest held by Osprey upon a default by Levada (collectively the "Additional Interests"). Hansen's conflicting testimony that he assessed the Additional Interests in his valuation, contradicted his report, his prior deposition testimony and his prior in Court testimony. This Court previously deemed such Additional Interests significant and therefore, the failure of the Trustee to clearly set out and substantiate findings as to any purported valuation thereof leaves this Court once again with insufficient information to assess the reasonableness of the settlement.

(Opinion at 14.)

Although Levada's Motion contends there is no value to the Debtor's contractual rights under the ARA, this Court's Denial Order previously determined per the testimony at the prior hearing, that "there is significant value in terminating the ARA". (Doc 285 at 7.) The Court agrees that the pertinent evaluation is the value of what the Estate is giving up. The Estate would be giving up the opportunity to pursue enforcement of its contractual rights under the ARA including pending litigation. Despite the explicit prior finding of this Court that there is significant value in termination of the ARA, the scant and contradictory evidence presented in furtherance of the 2019 Motion failed to convince the Court otherwise or establish receipt of corresponding value to the Estate for such loss of rights.

Further, at the behest of Levada, this Court reviewed its findings and conclusions concerning the Trustee's appraiser and does not discern them to be erroneous. The recitation in the Opinion that

the testimony of both appraisers was forthright does not negate the Court's perception of bias by the Trustee's appraiser. The prior Denial Order clearly explained the need for the Trustee to obtain an independent, unbiased appraisal. The Opinion explained that in this case of dueling appraisals, differing by millions of dollars, involving subjective discount factors, impartiality of the Trustee's appraiser is of the utmost importance. Yet, the evidence established that the Trustee communicated with the principal of Levada (Zajac) regarding appraiser selection, selected the first appraiser on the list he received from Zajac and involved Zajac in the process and communications to the extent that the Trustee's Appraiser referenced in an e-mail he was appraising the property for Zajac. (Breland's Ex.140). The Court disagrees with the position of Levada that in light of the prior hearing and ruling of the Court, the extent of involvement of the principal of Levada (the proposed purchaser) in the appraisal process was reasonable.

Additionally, Levada contends the Court erred in its determination that the Trustee's appraiser's partial interest discount was not appropriate. On this point the Court noted that Breland argued and the Trustee's testimony acknowledged that in an instance such as this when a co-owner is acquiring a full fee interest "it does not make sense" to apply a discount factor. The Court agreed. Further, the Court afforded greater deference and weight to Breland's appraiser's valuation report and testimony.

Although Levada's Motion disputes the characterization of the net claim reduction, an analysis of the settlement documents supports the Court's finding that the Estate's acquisition of the Donados' interest constituted significant value proposed to be transferred from the Estate to Levada. The terms of the 2017 Motion required Levada to: (1) pay the Donados up to $250,000.00 for an assignment of their judgment (Doc. 197 at 10 ¶6) and (2) forbear collection thereof and release it upon payment of Levada's claim. (Doc. 197 at 11 ¶11). In addition, Levada was to pay $150,000.00 for the Donados' mineral interests. The need for Levada to pay the above-referenced amounts was

obviated due to the Estate's post Denial Order acquisition of the Donados' interests for $200,000.00. (Doc. 296). The 2019 Motion provided for the Estate to convey the mineral interest it acquired from the Donados to Levada. This constitutes additional value given up by the Estate and in effect is a likely savings by Levada of up to $400,000.00 as compared to the 2017 Motion. The Opinion noted this dichotomy as well as the more important fact that the 2019 Motion grants Levada a claim partially secured for $850,000.00 when the 2017 Motion provided for the claim to be fully unsecured. In the Court's analysis, those factors were relevant to its overall consideration of the reasonableness of the settlement.

Further, the possible surplus nature of the case necessitated consideration of the residual rights of Breland as the sole member of the Debtor entity. Breland's opposition to the 2019 Motion and the legitimate concerns espoused therein were duly noted. To put it simply, the residual interest of the Debtor and Breland should have been considered in the Trustee's analysis. With over $5,500,000.00 in the Estate account, the evidence did not establish any urgent need to immediately liquidate property of the Debtor. As noted previously, each of the above deficiencies on its own constituted cause for denial and collectively they clearly evidence the unreasonableness of the proposed settlement.

CONCLUSION

Based upon the forgoing, this Court concludes that there is no justification for altering or amending its prior Order denying the Joint Amended Motion to Compromise without prejudice. (Doc.418). The Court, as the trier of fact, weighed the evidence, applied applicable law and concluded that the terms of the settlement fell below the minimum standard of reasonableness. There has been no change in the law, there is no new evidence that would warrant a different result and the arguments espoused in Levada's Motion were duly considered previously at the hearing and in conjunction with the issuance of the Opinion.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that the Motion of Levada EF Five, LLC ("Levada") to Alter, Amend or Alternatively Reconsider is DENIED.

Dated: May 29, 2020

JERRY C. OLDSHUE, JR.
U.S. BANKRUPTCY JUDGE