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

IN RE:	)	
	)	
JERRY DEWAYNE GADDY,	)	Case No. 17-01568
	)	
Debtor.	)	

ORDER APPROVING SECOND MOTION TO COMPROMISE (DOC. 146)
AND DENYING MOTION TO APPROVE PURSUIT OF CLAIMS (DOC. 156)

This case came before the court on January 27, 2020 for an evidentiary hearing on (1) the second motion to compromise (doc. 146) filed by chapter 7 trustee Terrie Owens and the defendants ("movants" or "defendants"), including the debtor Jerry DeWayne Gaddy ("Gaddy"), in case no. 1:16-cv-00332-JB-M currently pending in the United States District Court for the Southern District of Alabama; (2) the objection (doc. 149) filed by creditor SE Property Holdings, LLC ("SEPH"); and (3) SEPH's related motion to approve pursuant of claims on behalf of the estate (doc. 156). The evidentiary hearing lasted eight hours. The court heard testimony from Jennifer Corbitt, Vice President of SEPH; the trustee Ms. Owens; and Gaddy. It admitted movants' exhibits 1-29, 31-65, 68-71 and SEPH's exhibits 1-28 (except page 3 on exhibit 7). Having carefully considered the evidence and the applicable law, the court approves the second motion to compromise and denies SEPH's motion to approve pursuit of claims.

Background

In 2006 and 2008, Gaddy guaranteed two business loans by Vision Bank to Water's Edge, LLC related to a real estate project in Baldwin County, Alabama. The real estate project ultimately failed, and Water's Edge defaulted on its obligation to Vision Bank in June 2010.

Vision Bank is no longer operating; it sold all of its assets in or around 2011[1] and SEPH now owns the two loans at issue. Corbitt testified that SEPH holds the Vision Bank "legacy assets" and that SEPH will continue in operation "however long it takes" to collect those assets.

Vision Bank (later SEPH) sued Gaddy and other guarantors in October 2010 in the Circuit Court of Baldwin County, Alabama. In December 2014, the circuit court entered judgment in favor of SEPH against Gaddy and others in the amount of $9,168,468.14, although the Alabama Supreme Court later held that the judgment was not final because of one defendant's bankruptcy.[2] *See Gaddy v. SEPH*, 218 So. 3d 315, 324 (Ala. 2016).

In 2016, SEPH sued Gaddy, his wife, his daughter, and several family-owned business entities in the U.S. District Court for the Southern District of Alabama, case nos. 16-cv-00332 and 16-cv-00560, for a variety of fraudulent transfer and conspiracy claims under Alabama law. (*See* movants' exs. 43, 44). The district court consolidated both cases into case no. 16-cv-00332, and SEPH subsequently amended its complaint in that case. (*See* movants' exs. 45, 46).

In the district court case, SEPH alleges that from 2009 through 2014, with knowledge of Water's Edge potential and then actual default, Gaddy began transferring his property to family members and others. Neither side disputes that these transfers took place. The following is a summary of pertinent events from SEPH's district court complaints and the evidence admitted at the hearing:

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[1] Dan Murtaugh, *Vision Bank sold to Arkansas's Centennial*, PRESS-REGISTER, Nov. 17, 2011, *available at* www.al.com/press-register-business/2011/11/vision_bank_sold_to_arkansass.html.

[2] SEPH and Gaddy disagree as to whether the judgment is now final and how this affects the district court case. The finality or non-finality of the state court judgment does not affect the court's analysis related to the settlement approval. Accepting for the sake of argument SEPH's position that the judgment is final and that there is no need to litigate the finality of the judgment as part of the district court case, the court would still approve the settlement as reasonable.

12/5/2006	First loan to Water's Edge (#98809) for $10 million
11/28/2006	Gaddy's unlimited guaranty for Loan 1
12/5/2006	Second loan to Water's Edge (#98817) for $4.5 million
11/28/2006	Gaddy's limited guaranty for Loan 2 (limited to $84,392)
4/25/2008	Gaddy reaffirms guaranty of Loan 1 with principal increase to $12.5 million
4/25/2008	Gaddy reaffirms limited guaranty of Loan 2
March 2009	It becomes clear that the project will not be completed on time
3/13/2009	Guarantors begin missing capital contributions
May 2009	First guarantors file for bankruptcy
10/3/2009	Letter to guarantors from the bank regarding upcoming payment and potential default
10/16/2009	Gaddy deeds Marengo County, Alabama parcels to Rembert, LLC (Movants' ex. 24)
10/30/2009	Rembert, LLC formed per Secretary of State with debtor, wife Sharon, and daughter Elizabeth as 1/3 members (Movants' exs. 22, 23)
11/20/2009	Gaddy transfers 46% of Gaddy Electric & Plumbing, LLC to his wife Sharon (Movants' ex. 3)
11/20/2009	Gaddy quitclaims three Marengo County parcels to his wife Sharon (Movants' exs. 37, 38)
June 2010	Water's Edge defaults on both Loans and the bank demands payment from Gaddy pursuant to his guaranties
10/4/2010	Gaddy conveys real property (110 Barley Avenue) to daughter Elizabeth (Movants' ex. 31)
10/11/2010	SEPH files lawsuit against Water's Edge and guarantors, including Gaddy, in Baldwin County Circuit Court
12/31/2011	Gaddy conveys his 1/3 interest in Rembert, LLC to daughter Elizabeth (Movants' ex. 28)
February 2012	SLG Properties, LLC ("SLG") formed by Gaddy's wife Sharon (Movants' exs. 8, 9)
4/18/2012	Gaddy conveys real property (145 Industrial Park) to SLG (Movants' ex. 13)
4/18/2012	Gaddy conveys real property (179 Industrial Park) to SLG (Movants' ex. 19)
11/17/2014	Baldwin County Circuit Court rules against Gaddy and other guarantors
12/15/2014	Gaddy transfers 44% interest in Gaddy Electric to his wife Sharon (Movants' ex. 7)
12/17/2014	Baldwin County Circuit Court enters judgment against Gaddy and other guarantors for $9.1 million
12/23/2014	Gaddy transfers $293,945.51 to Gaddy Electric
4/26/2017	Gaddy files this chapter 7 bankruptcy

Some discovery was conducted in the district court case before it was stayed in May 2017 because of Gaddy's bankruptcy. (*See, e.g.*, movants' exs. 47-57; SEPH exs. 12, 22-27). The trustee was substituted as the party in interest to the district court case in June 2019. (*See* SEPH ex. 12). A jury trial was requested; the case is not currently set for trial. (*See id.*, movants' exs. 63, 64).

On May 9, 2019, the trustee and the defendants filed a motion in the bankruptcy court to approve a compromise (doc. 115) of the district court claims in the amount of $375,000. This court denied approval of that settlement because SEPH was willing to pay $400,000 to the trustee to be able to pursue the claims. (*See* order, doc. 134). This court (with the permission of the district court judge) ordered the trustee and the defendants to mediate the district court claims with retired Bankruptcy Judge Jack Caddell. SEPH also participated in the mediation. Although a settlement was not reached at mediation, the trustee and the defendants continued to negotiate and filed the subject motion on November 15, 2019 proposing to settle the claims in the district court case for $825,000.

SEPH and Union State Bank are the only two creditors in this chapter 7 case. SEPH has filed a claim for about $2.5 million, and Union State Bank has filed a claim for about $1.87 million. Both claims are filed as secured, but the collateral does not appear to be property of the bankruptcy estate, so without ruling upon the issue the court has considered both claims to be unsecured for purposes of this decision. Union State Bank supports the proposed settlement (*see* joinder, doc. 170), while SEPH opposes it.

Analysis

In deciding whether or not to approve a settlement, a bankruptcy court must consider the following factors to the extent applicable:

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

In re Justice Oaks II, Ltd., 898 F.2d 1544, 1549 (11th Cir. 1990). The court "consider[s] these factors to determine the fairness, reasonableness[,] and adequacy of a proposed settlement . . . ." *See In re Chira*, 567 F.3d 1307, 1312-13 (11th Cir. 2009) (citation and quotation marks omitted).

"In examining the relevant factors, courts have deferred to the [t]rustee's business judgment when reasonable." *In re Sportsman's Link, Inc.*, No. 07-10454, 2011 WL 7268047, at *11 (Bankr. S.D. Ga. Dec. 20, 2011); *see also In re Morgan*, 439 F. App'x 795, 795 (11th Cir. 2011); *In re Able Body Temporary Servs., Inc.*, No. 8:13-BR-6864-CED, 2015 WL 791281, at *4 (M.D. Fla. Feb. 25, 2015), *aff'd*, 632 F. App'x 602, 602 (11th Cir. 2016). While the court must not just "rubber stamp" the trustee's proposal, it also must not "substitute its own business judgment for that of the [t]rustee." *See In re Harbour E. Dev., Ltd.*, No. 10-20733-BKC-AJC, 2012 WL 1851015, at *1 (Bankr. S.D. Fla. May 21, 2012). It need not "hold a 'mini-trial' to determine the merits of each and every claim subject of a disputed settlement . . . but must simply be convinced that a trustee's judgment is based upon a sound assessment of the situation." *See id.* (citation and quotation marks omitted); *see also Brown v. Harris*, No. 3:11-CV-25 CDL, 2011 WL 3473312, at *2 n.5 (M.D. Ga. Aug. 9, 2011).

The court's role "is not to decide the numerous questions of law and fact raised by [the litigation] but rather to canvass the issue[s] and see whether the settlement falls below the lowest point in the range of reasonableness." *In re Pullum*, 598 B.R. 489, 492-93 (Bankr. N.D. Fla. 2019) (citation, quotation marks, and brackets omitted). "The concept of the 'range of reasonableness' has been defined as a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Id.* (citation, quotation marks, and ellipses omitted). The court should examine "the probable outcomes of the litigation, including its advantages and disadvantages, and make a pragmatic decision based on all equitable factors." *See In re McDowell*, 510 B.R. 660, 663 (Bankr. N.D. Ga. 2014). "Settlements are favored in bankruptcy and appellate courts have held that a bankruptcy court's approval of a compromise must be affirmed unless the court's determination is either (1) completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Matter of Marvelay, LLC*, No. 18-69019-LRC, 2019 WL 3334706, at *6 (Bankr. N.D. Ga. July 23, 2019) (citation, quotation marks, and brackets omitted).

SEPH argues (1) that the court should have required the trustee to conduct more discovery or allowed SEPH more discovery and (2) that the *Justice Oaks* factors are not met. The court discusses SEPH's arguments below.

I. SEPH's request for more discovery

SEPH's argument that the settlement should not be approved without more discovery is not well-taken. It is not SEPH's role to evaluate the settlement; that is for the court. *See infra*, section II.A.

Jennifer Corbitt, SEPH's representative, testified that SEPH obtained some documents and appraisals on at least some of the properties at issue as part of the state court case. There was also some discovery done in the district court case before the bankruptcy was filed. Additionally, SEPH could have requested discovery under Federal Rule of Bankruptcy Procedure 2004 related to the alleged fraudulent transfers. Throughout the almost three years that this bankruptcy has been pending since April 2017, SEPH has not requested an examination (and related documents) of the debtor or any of the other defendants under Bankruptcy Rule 2004. As a creditor of the debtor's chapter 7 bankruptcy estate, SEPH is a "party in interest" under Rule 2004(a) entitled to make such a request.[3]

Instead, when the court asked SEPH to outline what discovery it believed it needed to evaluate the trustee's first settlement proposal, SEPH responded with what this court considered to be essentially full litigation of the district court case through the discovery stage. (*See* order, doc. 125; SEPH resp. to court order, doc. 127; SEPH ex. 15); *Brown v. Harris*, 2011 WL 3473312, at *2 n.5 (bankruptcy judge not required "to hold a full evidentiary hearing or even a 'mini-trial' before a compromise can be approved[; o]therwise, there would be no point in compromising, the parties might as well go ahead and try the case") (citations and quotation marks omitted). SEPH did not limit its requested discovery in opposition to the second motion but reiterated its earlier request that essentially asked for full discovery and a trial on the merits of the fraudulent transfer claims. (*See* SEPH opp., doc. 149, p.14). Although it was not required to do so, the court allowed SEPH the opportunity to present evidence and extensively question witnesses (including the trustee) at an evidentiary hearing. *See, e.g.*, *In re Able Body Temporary Servs.*, 2015 WL 791281, at *2; *In re Sportsman's Link*, 2011 WL 7268047, at *11.

[3] If SEPH's position is that the court would not have allowed Rule 2004 discovery, that position is speculative. The court will not *ex post facto* decide how it would have ruled on a request that was never made.

SEPH's contention that it needed more discovery does not persuade this court to deny settlement approval.

II. The *Justice Oaks* factors

A. Paramount interest of creditors

SEPH, the creditor with the majority of the debt, objects to the settlement, while Union State Bank, a creditor which is owed a smaller but still substantial debt, supports the settlement. The question for the court is whether the case reflects a scenario in which "proper deference" to SEPH's views dictates rejection of the settlement. The court finds that it does not.[4]

Creditor views are only one factor "in approving a settlement . . . and are not controlling." *See In re S.E. Banking Corp.*, 314 B.R. 250, 273 (Bankr. S.D. Fla. 2004). "It is not the creditors' task to determine the fairness of a proposed settlement; it is the court's obligation to make that determination while making certain not to ignore their legitimate views or concerns." *In re Vazquez*, 325 B.R. 30, 37 (Bankr. S.D. Fla. 2005). Moreover,

> [w]hile the trustee's obligation is to marshal assets for the benefits of creditors, that task is assumed as a fiduciary relationship to the estate itself and not as some sort of 'hired gun.' The trustee is not the employee or agent of the creditors; they do not have the right to direct how the trustee chooses to perform the statutory duties of the position. The trustee is in essence an independent third party charged with the responsibility of maximizing assets for the estate. A bankruptcy trustee is an officer of the court that appoints . . . her. When persons perform duties in the administration of the bankruptcy estate, they act as 'officers of the court' and not private persons. They are held to high fiduciary standards of conduct, and these duties are owed not only to the entire creditor body but to the debtor as well.

[4] The court analyzes SEPH's concerns about the settlement throughout this opinion, not just in this section.

. . .

> Clearly, the trustee is not the 'agent' of the creditors. The trustee's obligation – as an officer of the court – is to maximize assets as best as possible under the circumstances, not to serve as an extension of a creditor whose other collection efforts have been forestalled. In many cases, the trustee's fiduciary duties may well require litigating a matter to conclusion; in other instances, a trustee may find that a settlement is the most effective way to expedite litigation and avoid uncertainty. And in those instances in which the trustee's comprehensive examination of the underlying facts leads to a conclusion that further litigation will lead only to diminishing returns, protracted investigation, or costly litigation with absolutely no guarantee as to the outcome, an inquiring court is to afford the trustee wide latitude.

Id. at 37-38 (citations and quotation marks omitted); *see also In re Soderstrom*, 477 B.R. 249, 262 (Bankr. M.D. Fla. 2012) ("When the potential augmentation of a bankruptcy estate involves protracted investigation or potentially costly litigation, with no guarantee as to the outcome, the trustee must tread cautiously, and an inquiring court must accord [the trustee] wide latitude in deciding whether to settle.") (citation, quotation marks, and brackets omitted).

The court rejects SEPH's implication that as the majority creditor it should have a "veto." *See In re Vazquez*, 325 B.R. at 37. "Such a 'veto power' would run counter to the very idea that the court's task is to independently assess the" settlement. *See id.* "'Proper deference to the creditor's reasonable views is not the same as saying that the court must defer to the creditor simply because the only creditor (or a majority of creditors) does not think the settlement is fair." *See id.* (citation and brackets omitted).

The court similarly rejects SEPH's complaint that the trustee settled after the mediation concluded and did not include SEPH in further settlement discussions. The mediation deadline was a date set by this court for the parties to participate in the mediation, which they did. The trustee was free to continue discussions with the defendants after the mediation; this is common practice and does not indicate that the settlement reached is unreasonable. The trustee in her fiduciary role to the estate was not required to include SEPH in those discussions or seek SEPH's "blessing" on any proposed settlement.

SEPH contends that the court should disapprove the settlement because it has offered to fund the litigation and guarantee a recovery to the estate – at some later date – of at least $825,000. (*See* SEPH ex. 16). However, SEPH's offer to fund the litigation under some sort of joint prosecution or similar agreement (*see* SEPH exs. 13, 14) does not compel disapproval of the settlement for multiple reasons.

First, both the trustee and Union State Bank are opposed to SEPH – a non-fiduciary – controlling the litigation, and the court shares their concern that SEPH would not necessarily put the interests of the estate above its own interests. *See In re Vazquez*, 325 B.R. at 38 ("Again, it seems contrary to the intent of the code that the trustee's role could be subverted from an independent, fiduciary capacity to one in which the trustee is compelled to pursue a course of litigation which she does not believe will prove fruitful."). If the trustee were to continue the district court litigation, she would have her own counsel and control the litigation; under SEPH's proposal, she would not be able to do so or would do so in name only. Second, SEPH's proposal contemplates that SEPH will have an allowed claim in this bankruptcy, usurping the trustee's ability and duty to object to the claim if warranted.[5] Third, and as discussed in more detail in section C., the continuation of the district court case would likely delay the administration of this bankruptcy case for several more years.

[5] SEPH's counsel pointed out that the trustee has not yet objected to the claim. The trustee testified, and the court's experience in chapter 7 cases confirms, that chapter 7 trustees often do not object to claims until near the end of the case.

B. Difficulty in collecting

This factor is irrelevant or neutral because collection difficulties for the trustee related to the settlement amount are not at issue.[6] *See In re Chira*, 567 F.3d at 1313; *In re Morgan*, 600 B.R. 725, 733 n.8 (Bankr. N.D. Ga. 2019).

C. Probability of success, complexity of the litigation, and concerns of expense, inconvenience, and delay

i. The applicable law

The district court claims are brought under Alabama's Uniform Fraudulent Transfer Act (the AUFTA) for actual fraudulent transfers under Alabama Code § 8-9A-4(a) and for constructive fraudulent transfers under Alabama Code §§ 8-9A-4(c) and 8-9A-5.

To prevail under § 8-9A-4(a), the trustee would have to show that Gaddy made the subject transfer "with actual intent to hinder, delay, or defraud any creditor." The AUFTA "recites a non-exhaustive list of 11 factors that may be considered in determining actual intent . . . ." *See SEPH v. Braswell*, 255 F. Supp. 3d 1187, 1201 (S.D. Ala. 2017). "These circumstantial indicia of intent are sometimes called 'badges of fraud.'" *Id.* (citation omitted).

For constructive fraud under § 8-9A-4(c), the trustee must prove that Gaddy did not receive reasonably equivalent value in exchange for the subject transfer and either (a) was engaged or was about to engage in a business transaction for which his remaining assets were unreasonably small in relation or (b) intended to incur (or believed or reasonably should have believed that he would incur) debts beyond his ability to pay. For constructive fraud under § 8-

[6] The trustee's calculations of what she may ultimately be able to collect if successful at trial are discussed below.

9A-5, the trustee must prove that the claim arose before Gaddy made the subject transfer and that Gaddy either (a) made the transfer without receiving reasonably equivalent value in exchange and was insolvent when he made the transfer or became insolvent as a result of the transfer or (b) the transfer was made to an insider for an antecedent debt, he was insolvent at the time, and the insider had reasonable cause to believe that the defendant was insolvent at the time. Whether a debtor receives reasonably equivalent value for a transaction is determined from the viewpoint of the debtor's creditors. *See SEPH v. Braswell*, 255 F. Supp. 3d at 1198.

If the trustee succeeded on one or more of the claims, relief may include avoidance of the transfers at issue, *see* Ala. Code § 8-9A-7, and a "judgment for conveyance of the" transferred property under Alabama Code § 8-9A-8(b), *i.e.*, the property would come into the estate for the trustee to administer. Alternatively, the trustee could recover against the transferees a "judgment for the value of" the transferred property under Alabama Code § 8-9A-8(b). Value would be determined as of the date of the transfer. *See* Ala. Code § 8-9A-8(c).

ii. General concerns

The court outlines the trustee's testimony and its own analysis of each transfer below but addresses the following general concerns as an initial matter.

First, the court is not finding that no fraudulent transfers took place. The trustee's testimony did not show that she believed that there were no fraudulent transfers – only that she believed that $825,000 was a "premium" settlement based on her analysis of the claims. As discussed below, the court finds that her analysis and the resulting settlement are both fair, reasonable, and adequate.

Second, the court gives weight to the competency and experience of both the trustee and the trustee's counsel in supporting the settlement. *See, e.g.*, *In re Lorraine Brooke Assocs., Inc.*, No. 07-12641-BKC-AJC, 2007 WL 2257608, at *3 (Bankr. S.D. Fla. Aug. 2, 2007). The trustee testified, and the court is aware, that she has practiced in the bankruptcy arena since 2003, has represented chapter 7 trustees since 2008, and has served as a chapter 7 trustee in this district since 2012. During that time, she has had the opportunity to evaluate hundreds of fraudulent transfer claims; in this case, she testified that the original settlement proposal of $375,000 was a fair compromise and, again, that the $825,000 settlement is a premium reached with the defendants "to buy peace and to move on with their lives." (*See* mot. to approve compromise, doc. 146, pp. 11-12).

The court further finds the trustee's testimony credible that in evaluating the claims, she reviewed all of the district court pleadings and exhibits, took into account the complexity of the case and the possibility of success, including applicable defenses and any collection issues. She engaged in informal discovery with the defendants, including exchanges of documents about the underlying assets and their value (discussed in more detail in section iv. below) and examined potential liabilities such as mortgages. She hired an experienced lawyer to assist in the evaluation, C. Michael Smith, who has over 30 years of bankruptcy experience and frequently represents trustees in bankruptcy; he too recommended the settlement approval. She did not ignore the positions taken by either creditor and took their concerns into account, as well.

Third, while most of the fraudulent transfer claims are not complex as far as the elements of the claims themselves (although there are complexity of proof problems discussed herein and by the trustee), there is value in getting matters resolved. *Justice Oaks* contemplates consideration of delay and inconvenience, both of which weigh in favor of approving the settlement. This matter started over ten years ago in 2009 with the Water's Edge potential default, and all good things must come to an end. The court agrees with the trustee that it is reasonable to take into account the present value of money, rather than $825,000 to be received at an undetermined date if the district court case was to go forward. While there was some discussion at the hearing that SEPH might be willing to pay the money upfront, such an offer still does not solve the problem of keeping this chapter 7 case open for several years while the trustee prosecutes the case at SEPH's behest.[7]

The trustee, exercising her fiduciary role, decided that it would be better for the estate as a whole to close out the case in an expeditious manner rather than waiting on several years of litigation to conclude. *See, e.g., Matter of Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996) ("public policy strongly favors pretrial settlement in all types of litigation because such cases, depending on their complexity, can occupy a court's dockets for years on end") (citation and quotation marks omitted); *In re Soderstrom*, 477 B.R. 249, 254 (Bankr. M.D. Fla. 2012) ("As with most settlements, it may be possible to achieve a more favorable outcome for creditors through additional litigation. But, when the administration of an estate is burdened with costly litigation and drawn out to a pointless end, the trustee is encouraged to find alternative solutions."). She said that "time is the problem" and she does not want to "drag out" the estate. To this end, she testified, and the court concurs, that the district court case could take several years to complete and that a protracted appeal could stall resolution of this case for even more

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[7] SEPH asserted at the hearing through witness Corbitt and its counsel that it was willing to pay the $825,000 upfront. This "upfront" provision was not contained in SEPH's court-ordered written offer filed into the record on January 3, 2020 as doc. 157 and admitted as SEPH ex. 16. Assuming for the sake of argument that this is a "firm" offer, most of the concerns outlined herein – including about SEPH's non-fiduciary status – remain.

years. *See, e.g.*, *In re Harbour E. Dev., Ltd.*, No. 10-20733-BKC-AJC, 2012 WL 1851015, at *6-7 (Bankr. S.D. Fla. May 21, 2012); *In re Sportsman's Link, Inc.*, No. 07-10454, 2011 WL 7268047, at *18 (Bankr. S.D. Fla. Dec. 20, 2011); *see also In re Shoemaker*, 155 B.R. 552, 556 (Bankr. N.D. Ala. 1992) ("One of the goals of the bankruptcy laws is to provide a prompt and efficient adjustment of the debtor-creditor relationship. This goal is not furthered by protracted litigation.").

Fourth, while the elements of the claims themselves may not be complex, as recognized by both the trustee and this court, the discovery necessary to take these claims to trial – including multiple depositions, hiring of expert witnesses to do appraisals, written discovery, etc. – would be. It is not only a question of whether SEPH advances litigation costs but also about the time involved in taking this case to trial. SEPH implicitly recognizes this complexity in the extensive discovery it proposed to the court and for which it has advocated in attacking the trustee's position.

The trustee testified that while she did not conduct formal discovery in the district court case, she and the defendants engaged in "lots of informal discovery" and she believed she had all she needed to independently evaluate the claims and reach the settlement. The court finds this approach to be practical and a proper exercise of the trustee's fiduciary role. SEPH's argument that more formal discovery should be done does not compel a different result. *See, e.g.*, *In re Harbour E. Dev.*, 2012 WL 1851015, at *2 (the question is not whether an objecting party "would have made a different decision under the same circumstances – the question is whether the [t]rustee's decision was reasonable").

Fifth, fraudulent transfer claims are rarely ripe for summary judgment. *See In re Van Diepen, P.A.*, 236 F. App'x 498, 504 (11th Cir. 2007) ("'Ordinarily, the issue of fraud is not a proper subject of a summary judgment. Fraud is a subtle thing, requiring a full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute a fraud.'") (citation omitted). For the actual fraud claims, neither the court nor the trustee have overlooked that many of the badges of fraud (transfers to insiders, etc.) are present here. However, it is well-settled that actual intent "is a heavily fact-dependent question." *See SEPH v. Braswell*, 255 F. Supp. 3d at 1201-02; *Int'l Mgmt. Grp., Inc. v. Bryant Bank*, 274 So. 3d 1003, 1016 (Ala. Civ. App. 2018). "[P]roof of one or more of the [badges of fraud] does not compel a conclusion that a creditor is entitled to a judgment in its favor . . . ." *See Int'l Mgmt Grp. v. Bryant Bank*, 274 So. 3d at 1016. "This is in part because actual fraudulent intent requires a subjective evaluation of the debtor's motive." *Id.* (citation and quotation marks omitted). "Actual fraud most often is revealed through circumstantial evidence, and intent is a mental emotion, of which the external signs are the acts and declarations of the parties, taken in connection with the concomitant circumstances." *Id.* (citation, quotation marks, and ellipses omitted). Thus, "fraudulent transfer issues generally come down to the credibility of witnesses" and "are not well suited for summary judgment." *See id.* (citations, quotation marks, brackets, and ellipses omitted); *see also SEPH v. Braswell*, 255 F. Supp. 3d at 1201-02. There are also statute of limitations issues with some of SEPH's constructive fraud claims as outlined below.

Further, the Gaddys requested a jury trial in the district court case. In the court's experience in 32 years of private practice, a jury trial not only is much more expensive than a bench trial (or an early settlement), but also a jury will generally be more sympathetic to an individual defendant rather than a collection vehicle such as SEPH. In this respect, while a jury <u>may</u> award punitive damages if the trustee proved one or more of the fraudulent transfer claims, it would not be required to do so. *See SEPH v. Judkins*, No. 1:17-cv-00413-TM-B, 2019 WL

177981, at *8-9 (S.D. Ala. Jan. 11, 2019). The clear and convincing standard of proof for punitive damages is higher than the preponderance of the evidence standard for proving the AUFTA claims. *See SEPH v. Center*, No. 15-0033-WS-C, 2017 WL 3403793, at *35 (S.D. Ala. Aug. 8, 2017*)* (punitive damages "unavailable absent proof by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff") (citation and quotation marks omitted). Even if the trustee "made such a showing . . . , the decision of whether or not to award punitive damages" would still be discretionary for the jury and would almost certainly require a full-blown trial. *See id.* While SEPH offered to guarantee a recovery in the amount of the settlement, the court has outlined the time factor above and will not repeat that again here.

Finally, SEPH argues that the trustee should have obtained independent valuations of all of the transferred properties and should not have relied on tax records. As an initial matter, the trustee testified, and the court agrees, that hiring appraisers would have depleted money from the estate.[8] The court credits the trustee's testimony that it was not necessary to consult with realtors about the real property because she is familiar with Marengo County real estate. This testimony is consistent with the court's own knowledge of the trustee's role as the only chapter 7 trustee (absent conflicts) who handles the court's cases in its Northern Division, which includes Marengo County. This is not a case such as *In re Breland*, No. 16-2270-JCO, 2018 WL 1318954 (Bankr. S.D. Ala. Feb. 14, 2018) (Oldshue, J.), in which the trustee could have marketed the property. At this point and unless the trustee prevailed on the fraudulent transfer

[8] The court has already outlined both its concerns and the trustee's concerns with SEPH controlling the district court litigation even if it offered to pay for the appraisals (to later be reimbursed out of any recovery).

claims at trial, the property is not part of the bankruptcy estate; it was completely reasonable for the trustee to attempt to minimize costs to the estate while still gathering the information she needed to evaluate any settlement proposal through informal discovery.

The court acknowledges that Alabama courts have held that a tax assessment record is not admissible at trial to definitively establish the fair market value of property. *See Presley v. B.I.C. Constr., Inc.*, 64 So. 3d 610, 621 (Ala. Civ. App. 2009). In her capacity as a chapter 7 trustee in this court for approximately eight years (and representing trustees before that), the trustee frequently evaluates the value of assets in terms of what she could liquidate an asset for on behalf of the estate. The court finds her reliance on tax records to be analogous to an expert who is permitted under Federal Rule of Evidence 703 to rely on evidence that may not be admissible at trial in forming an opinion.

The court, the trustee, and the trustee's counsel could reasonably rely on tax records without the need for expensive appraisals to assist in evaluating the claims and to gauge the amounts that the trustee believes, in her business judgment, she could realize if certain properties ultimately came back into the estate. *See, e.g.*, *In re McDowell*, 510 B.R. 660, 663 (Bankr. N.D. Ga. 2014) (court "must not rest its approval of any proposed settlement on a resolution of the ultimate factual and legal issues underlying the compromise disputes" but must "make a pragmatic decision based on all equitable factors"); *Romagosa v. Thomas*, No. 6:06-CV-301-ORL-19, 2006 WL 2085461, at *8 (M.D. Fla. July 26, 2006) ("The approval of a proposed settlement does not depend upon establishing as a matter of legal certainty that the subject claim . . . is or is not worthless or valuable."), *aff'd*, *In re Van Diepen*, 236 F. App'x at 505. SEPH itself cited to tax records in its opposition brief (doc. 149). In short, the court is not convinced that the trustee's reliance on tax records shows that her judgment was not based on "a sound assessment of the situation[,]" *see In re Harbour E. Dev.*, 2012 WL 1851015, at *1, in forming her opinion of a reasonable settlement amount.

With these things in mind, the court now turns to the counts of the district court complaint as last amended (movants' ex. 45).

iii. Statute of limitations issues

SEPH filed its original complaint on June 30, 2016. All of the claims except the 2009 transfer of shares to Sharon fall within the statute of limitations for actual fraud (ten years for real property and six years for personal property) under Alabama Code § 8-9A-9. However, as discussed throughout, the "intent" element of actual fraud claims is fact-specific and generally a jury issue.

The constructive fraud claims are subject to a four-year statute for both real and personal property under § 8-9A-9. Several of the constructive fraud claims may be subject to a statute of limitations defense, as discussed in section iv. below. While the discovery rule of Alabama Code § 6-2-3 applies in fraudulent transfer cases, the issue of when SEPH discovered or should have discovered the alleged fraud will be for the jury. *See SEPH v. St. Family Ltd. P'ship*, No. 16-567-WS-MU, 2017 WL 1628898, at *6 (S.D. Ala. May 1, 2017); *Int'l Mgmt. Grp. v. Bryant Bank*, 274 So. 3d at 1015 n.11. Without ruling on this issue, the court notes that most of the transfers were recorded at the time the transfer was made, which may constitute constructive notice to SEPH of the existence of those transfers and a duty to inquire further. *See Int'l Mgmt. Grp. v. Bryant Bank*, 274 So. 3d at 1014-15.

iv. The specific fraudulent transfer and conspiracy claims

<u>Transfers of real property (145 Industrial Park and 179 Industrial Park) to SLG in April 2012: Count VIII</u>

Neither the trustee nor the court are ignoring the fact that no value was paid for these transfers. But actual fraud would be difficult to prove at the summary judgment stage, and the defendants likely have a statute of limitations defense sufficient to overcome summary judgment on the constructive fraud claims since these transfers were more than four years before SEPH filed its complaint. *See* Ala. Code § 8-9A-9.

The trustee also testified that assuming she prevailed on this claim, these properties have little or no liquidation value. There are mortgages on the properties and essentially no value for the estate based on the values assigned by the tax assessor. At the time of the transfer of 145 Industrial Park, that property was mortgaged to Robertson Banking Company for approximately $175,000 with a tax appraised value of $176,160. (*See* movants' exs. 11-15; SEPH ex. 6). At the time of the transfer of 179 Industrial Park, that property was mortgaged to West Alabama Bank & Trust for approximately $198,000 with an appraised value of $167,560. (*See* movants' exs. 16-21; SEPH ex. 6).

Even if there was some value to be recovered, the trustee testified that there is a limited market for sale of commercial properties in Marengo County; in her experience, such properties are usually sold at auction or through a realtor with a 10% commission, which is consistent with what this court approves for sale of commercial properties. The court not only finds the trustee's business judgment in this respect to be reasonable but agrees with this assessment based on its own experience of approving such sales.

Transfer of 110 Barley Avenue to Elizabeth Gaddy (Gaddy's daughter) in October 2010: Count VII

The court and the trustee have taken into account that the defendants may have a valid statute of limitations defense to the constructive fraud claims; the statute of limitations under Alabama Code § 8-9A-9 is four years, the transfer took place in 2010, and suit was filed in 2016. Assuming success, the trustee testified that at the time of the transfer this property was unencumbered raw land worth about $8,000 based on the deed tax of $8.00. (*See* movants' ex. 31); Ala. Code § 40-22-1 (deed tax is $.50 per every $500, or $1.00 per every $1,000). Gaddy and his wife owned the property jointly, meaning the value of Gaddy's portion was only about $4,000. Gaddy testified that his daughter was moving from Fairhope, Alabama and he and his wife gave her this property to build a house on it, which is what she did. (*See* movants' ex. 32). The 2016 appraised property tax value of $201,380 cited by SEPH (*see* SEPH opp., doc. 149, p.4; SEPH ex. 5) includes the subsequently-constructed home, which did not exist at the time of the transfer.

Transfers of three Marengo County parcels to Sharon Gaddy (Gaddy's wife) in November 2009: Count VI

There is a potential statute of limitations defense to the constructive fraud claims since the transfers took place seven years prior to suit and the statute is four years. *See* Ala. Code § 8-9A-9. These parcels are the homeplace of Jerry and Sharon Gaddy and the surrounding land. Gaddy had only a one-half interest in the parcels at the time of the transfer. (*See* movants' exs. 33-36).

The trustee testified that she used the deed tax valuation of $247,000 (*see* movants' ex. 38), subtracted the mortgage amount of $120,000 (*see* movants' exs. 33-36), and then divided that number in half (for Gaddy's one-half interest); as a result, and taking into account the costs of liquidation, she believes that if she were to sell the homeplace property, she would net around $50,000 for the estate. The court does not find this analysis to be flawed or otherwise unreasonable. Further, the deed tax valuation of $247,000 is more than the valuation proffered by SEPH of $132,340. (*See* SEPH opp., doc. 149, pp. 3-4; SEPH ex. 4).

<u>Transfer of Marengo County, Alabama parcels to Rembert, LLC in October 2009: Count V</u>

As with the claims above, there is a possible statute of limitations defense to any constructive fraud claim. The trustee testified that these two parcels were co-owned by Gaddy and his brother as inherited property and they both signed the deed transferring the parcels to Rembert, LLC. (*See* movants' ex. 24). Rembert paid Gaddy's brother $92,000 for his one-half interest (*see* movants' exs. 25, 26); Gaddy would argue at trial and the evidence supports that he received a one-third interest in Rembert, LLC in exchange for transferring his one-half interest in the properties. (*See* mtn. to approve compromise, doc. 146, p.6).

The property tax records (movants' ex. 27; SEPH ex. 3) show the appraised value of the first parcel as approximately $290,000, but that includes a building valued at about $140,000 that was not constructed at the time of the transfer; the value of the land was listed as $150,500. The value of the second parcel was listed as $28,000. The trustee added these two amounts ($150,500 plus $28,000) and subtracted the $92,000 paid to Gaddy's brother for a total amount of $86,500. She then divided that number by three (for Gaddy's one-third interest) to value this claim at approximately $29,000. The court finds this to be a reasonable analysis given the uncertainty of recovery on this claim.[9]

Transfer of membership interest in Rembert, LLC to Elizabeth Gaddy in December 2011: Count III

The court concurs with the trustee's analysis that, in addition to a statute of limitations defense on any constructive fraud claim under the four-year statute of limitations, the probability of success is far from certain on this claim because Elizabeth paid Gaddy $46,000 for the transfer of the membership, tending to make this an issue of fact for the jury. (*See* movants' ex. 29; doc. 130,[10] p.3); Ala. Code § 8-9A-3 (discussing "value" under the AUFTA). The value proffered by SEPH of $318,040 (*see* SEPH opp., doc. 149, p.3; SEPH ex. 3) for Rembert's assets includes the building that was not constructed at the time of transfer. Subtracting the building amount of $139,540 yields a value of $178,500 for the properties several years after the 2011 transfer. Dividing that number by three (for Gaddy's one-third interest) yields a value of $59,500. A jury could find that $46,000 was reasonably equivalent value in 2011. *See, e.g., Wheeler Bros., Inc. v. Jones*, No. 2:14-CV-1258-PGB-TFM, 2017 WL 2112349, at *3 (M.D. Ala. May 15, 2017) ("the touchstone of the reasonably equivalent value analysis is whether the parties exchanged comparable realizable commercial value") (citation and quotation marks omitted); *see also*

[9] There is also an issue of intent, discussed below, in that Gaddy argues that he did not know about the Water's Edge potential default at this time.

[10] This is the trustee's written analysis of the claims in support of the first motion to approve compromise and she testified about this document at the hearing on the second motion to approve compromise.

Thompson Props. 119 AA 370 Ltd. v. Birmingham Hide & Tallow Co., Inc., 897 So. 2d 248, 263 (Ala. 2004).

Regardless, even valuing this claim at $60,000 assuming that the trustee prevailed, the court still finds the settlement to be within the range of reasonableness.

<u>Transfers of membership interests in Gaddy Electric to Sharon Gaddy in November 2009 and December 2014: Counts I and II</u>

SEPH contends that the trustee should have obtained Gaddy Electric's financial records, including profit and loss statements and information about the company's port-a-potty business. Gaddy Electric is a closely held family-owned business. Gaddy Electric's website, discussed at the hearing, lists Sharon and Elizabeth as managing members and Gaddy as operations manager. Gaddy testified that Gaddy Electric has approximately 50 employees and "32 or so" trucks and that most of the business's clients are "paper mill clients."

The trustee testified that in her experience family-owned businesses are difficult to market and generally have little value without the involvement of the family that owns it, *i.e.*, selling the business without the goodwill, reputation, and involvement of the Gaddy family would be very difficult. Although in a different context, the Eleventh Circuit – in the face of a strenuous objection by SEPH – has recognized that it is proper to evaluate the risk of critical employees (here, the Gaddys themselves) leaving a business in valuing the business. *See generally In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015). The court finds the trustee's business judgment about the tenuous value of this claim to be reasonable.

There are other factors that make recovery on this claim uncertain. Two transfers are at issue: a 2009 transfer of 46% of the shares to Sharon and a 2014 transfer to Sharon of 44% of the shares. The defendants would argue at trial that the 2009 transfer took place so that Sharon (who had a 5% interest at the time) would then own a majority of company and the company would be classified as a majority-owned woman business. The court concurs with the trustee that if Gaddy was really trying to thwart SEPH (or any other creditor) at the time, he would have transferred his entire interest, not just 46%. And there is an issue of fact as to whether Gaddy knew about the letter from Vision Bank regarding the Water's Edge potential default at the time of the 2009 transfer. SEPH contends that Gaddy is lying about not receiving the letter (or reading the email attaching the letter); however, since all reasonable inferences would be resolved in the defendants' favor on summary judgment, this claim would likely go to trial.[11] There is also likely a valid statute of limitations defense to both the actual and constructive fraud claims based on the 2009 transfer, making the likelihood of success on the claims related to that transfer low. *See* Ala. Code § 8-9A-9.

The second transfer of 44% of the shares occurred in December 2014. While this transfer is more suspect than the 2009 transfer because the state court had recently ruled in SEPH's favor, there is evidence that Sharon paid $421,000 for the shares. (*See* movants' exs. 4-6). SEPH argues that the trustee should not have relied on the appraisal (referred to as the Aderholt appraisal in this litigation and admitted as movants' ex. 62 and SEPH ex. 27) of the shares at that value because that appraisal was prepared by Gaddy's accountant at Gaddy's request. But the court does not find the valuation to be somehow unreliable because Gaddy requested it; to the contrary, a jury could find that this evidence tends to show that Gaddy was attempting to determine an appropriate price and was not merely "gifting" the shares to his wife

[11] The same is true for the other transfers made in 2009.

in an effort to avoid the state court judgment. Even so, the court is not definitively finding that the shares were worth that much but has taken into account that whether this amount constitutes reasonably equivalent value would be an issue for the jury. *See, e.g.*, *Thompson Props. v. Birmingham Hide & Tallow*, 897 So. 2d at 263.

SEPH argues that the 2014 financial statement for Jerry and Sharon Gaddy (SEPH ex. 1) shows a total value of their membership interests in Gaddy Electric as $1.5 million. But even if a jury found that the 2014 transfer was fraudulent, the court concurs with the trustee that the Gaddy Electric shares would not be readily marketable without the Gaddys and that the value of the shares in that circumstance is highly speculative. The trustee also testified that there would be no value in Gaddy Electric's physical assets, all of which are encumbered.

<u>Gaddy's payment of $293,945.51 to Gaddy Electric in December 2014: Count IV</u>

Gaddy has a defense that this amount was actually due and owing to Gaddy Electric on account of a loan made from Gaddy Electric to Gaddy in October 2014. (*See* movants' exs. 40-42). Again, SEPH believes that it could prevail on this claim if it went to trial, but that is not a given and there is nonetheless a jury issue. But even valuing this claim at its full amount, the court still does not find that the $825,000 settlement falls below the lowest range of reasonableness.

<u>Conspiracy claim: Count IX</u>

The success of this claim would depend on the success of the other claims outlined above.

SEPH has not provided any genuine alternative analysis or stated its own view of a reasonable settlement value, other than to claim ignorance of the "real" amount of the claims because it never obtained its own property appraisals and financial records for Gaddy Electric.[12] This is despite the facts that SEPH (1) brought the fraudulent transfer claims in the first place, and (2) could have requested a Rule 2004 examination at any point (including in the 2 ½ years the bankruptcy was pending before this settlement motion) to obtain information. SEPH refuses to give even a ballpark figure of what it contends the fraudulent transfer and conspiracy claims are worth; instead, it simply argues that they are worth more than what has been proposed and that the litigation should proceed as it desires. SEPH contends the trustee should fully (or almost fully) litigate the claims – hire expert appraisers, take depositions, engage in extensive written discovery, issue subpoenas, etc. – before even entertaining settlement. (*See, e.g.*, SEPH exs. 13, 14). But SEPH's argument that it would do things differently if it were in control does not mean that the proposed settlement fails to meet the *Justice Oaks* factors or is otherwise unreasonable.

To be clear, the trustee and the court are not saying that there was no bad conduct here – only that a settlement of $825,000 is reasonable in light of the circumstances, including defenses that would likely result in the district court case going to trial and the uncertainty of what a jury would do. Although there is a possibility that the trustee could recover more, that is not the standard. As demonstrated above, the court has taken SEPH's views into account and is not merely rubber stamping the trustee's proposal but has made its own independent review of the

[12] SEPH's opposition brief, cited herein, does include some numbers, but those numbers do not take into account any mortgages or other factors, such as whether buildings existed on land at the time of the transfer.

evidence and argument before it in light of the *Justice Oaks* factors. In sum, the court finds that the trustee's analysis of the claims and the settlement is reasonable under the circumstances and that the proposed settlement exceeds the likely net recovery to the estate if she were successful at trial. The court also finds that the settlement is fair and, at the very least, does not fall below the lowest point in a range of reasonableness.

Conclusion

To the extent the court has not specifically addressed any of the parties' arguments, it has considered them and determined that they would not alter the result. The court therefore grants the second motion to approve compromise. Because the court is granting that motion, the court denies SEPH's motion to pursue claims as moot.

Dated: March 26, 2020

Henry A. Callaway

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE