



ORDERED in the Southern District of Florida on September 02, 2011.

A. Jay Cristol, Judge
United States Bankruptcy Court

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov**

In re:

CABI SMA Tower I, LLLP,
a Florida Limited Liability Limited
Partnership,

Case No. 10-49009--BKC-AJC

CHAPTER 11

Debtor.

**FINAL ORDER GRANTING MOTION TO (I) APPROVE SETTLEMENT, (II) CERTIFY
CLASS, APPOINT CLASS COUNSEL AND REPRESENTATIVES,
(III) PRELIMINARILY APPROVE SETTLEMENT AGREEMENT,
(IV) APPROVE FORM AND MANNER OF CLASS NOTICE, (V) SCHEDULE
FINAL APPROVAL HEARING, AND (VI) APPROVE SETTLEMENT
AGREEMENT PURSUANT TO BANKRUPTCY RULE 7023**

THIS CAUSE came before the Court on August 16, 2011 at 11:30 a.m. (the "Final Approval Hearing") upon the motion (the "Motion")¹ by Cabi SMA Tower I, LLLP (the "Debtor") to (I) approve, pursuant to Bankruptcy Rule 9019, a Settlement Agreement (the "Settlement")

¹ Capitalized terms not otherwise defined in this Order shall have the meaning provided in the Motion.

Agreement") by and among the Debtor and Mark Weisberg ("Weisberg") and John Hagiag ("Hagiag") as representative plaintiffs (the "Representative Plaintiffs"), (II) certify a class of purchaser claimants for Settlement Agreement purposes only, (III) appoint The Law Offices of Robert Ader, P.A. as counsel for the Settlement Agreement Class and appoint Weisberg and Hagiag as class representatives, (IV) preliminarily approve the Settlement Agreement pursuant to Bankruptcy Rule 7023, (V) approve the form and manner of notice (the "Class Notice"), (VI) schedule a fairness hearing pursuant to Bankruptcy Rule 7023 to consider final approval of the Settlement Agreement, and (VII) finally approve the Settlement Agreement pursuant to Bankruptcy Rule 7023 [ECF No. 118].

The Court, after having reviewed the Motion, the Settlement Agreement, and the record, and having considered the arguments of the Debtor, proposed Class Counsel (as hereinafter defined), Palm Coast Title, Inc. ("Palm Coast"), and Brickell Central, LLC ("Brickell Central"), and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

Jurisdiction and Ratification of Interim Approval Order

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334.
2. The findings and conclusions of law set forth in the *Interim Order Preliminarily Granting Motion to (I) Approve Settlement, (II) Certify Class, Appoint Class Counsel and Representatives, (III) Preliminarily Approve Settlement Agreement, (IV) Approve Form and Manner of Class Notice, (V) Schedule Final Approval Hearing, and (VI) Approve Settlement Agreement Pursuant to Bankruptcy Rule 7023, and Setting Final Hearing* [ECF No. 151] (the "Interim Approval Order") are hereby finally ratified and affirmed in all relevant aspects.

Settlement Terms

3. The Settlement Agreement's benefits to Class Members include the Debtor's agreement to (i) release all applicable deposits from escrow, together with accrued interest on the deposits, (ii) recognize priority status of the Class Members' unsecured claims in the amount of \$2,600.00 to each claimant that is a natural person, and (iii) pay twenty percent (20%) (less the amount of priority claims paid) of each Class Member's allowed general unsecured claim, upon confirmation of a plan of reorganization.

Approval Pursuant to Bankruptcy Rule 9019

4. The Settlement Agreement has provided for the fair and efficient adjudication of this controversy, and is fair, reasonable, and adequate pursuant to Bankruptcy Rule 9019 and Bankruptcy Rule 7023. Specifically, the Court finds that the Settlement Agreement should be approved pursuant to Bankruptcy Rule 9019 because the terms of the Settlement Agreement are within the reasonable range of litigation possibilities, are otherwise reasonable, and fulfill the standards set forth in *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1549 (11th Cir. 1990), *cert. denied*, 498 U.S. 959 (1990).

5. Pursuant to the requirements outlined in *Justice Oaks*, the Debtor has demonstrated that (a) there is a question as to whether the Debtor or the Class Representatives will succeed on the merits, (b) the litigation between the Debtor and the Class Representatives would be complex, expensive and inconvenient, and would delay the outcome of this bankruptcy case, (c) collection could be difficult based upon the disparate location of a significant number of purchasers throughout the world, and (d) settlement is in the best interest of the majority of the creditors of the estate.

Approval Pursuant to Bankruptcy Rule 7023

6. In the Interim Approval Order, the Court previously considered the class certification prerequisites of numerosity, commonality, typicality, adequacy of representation, competency of

class counsel, existence (or lack thereof) of conflicts between the Representative Plaintiffs and the Settlement Class, and predominance of common issues, as set forth in Rule 23(a) and (b)(3). The Court finds that these prerequisites were satisfied in this case and reaffirms its prior holding as set forth in the Interim Approval Order.

7. The Court must determine whether the proposed Settlement Agreement is "fair, adequate and reasonable and is not the product of collusion" between the parties. *Leverso v. Southtrust Bank of Ala., Nat'l Ass'n*, 18F.3d 1527, 1530 (11th Cir. 1994); *Bennett v. Behring Corp.*, 131 F.2d 982, 986 (11th Cir. 1984); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981). The Court has considered six factors: (a) the likelihood that the Representative Plaintiffs would prevail at trial; (b) the range of possible recovery if they prevailed at trial; (c) the fairness of the Settlement Agreement compared to the range of possible recovery, discounted for the risks associated with litigation; (d) the complexity, expense and duration of litigation; (e) the substance and amount of opposition to the Settlement Agreement; and (f) the stage of the proceedings at which the Settlement Agreement was achieved. *Bennett*, 131 F.2d at 986; *Corrugated Container*, 643 F.2d at 212; *Behrens v. Wometco Enters.*, 118 F.R.D. 534, 538-39 (S.D. Fla. 1988), *aff'd* 899 F.2d 21 (11th Cir. 1990). The Court finds that the Settlement Agreement is fair, adequate and reasonable in light of the foregoing factors.

Risks and Burdens of Continued Litigation

8. The likelihood that the Representative Plaintiffs would prevail at trial is uncertain, particularly when viewed in light of the status of the Debtor's bankruptcy case at the time of the filing of the Motion. If the Representative Plaintiffs prevailed, the recovery that they could hope to recover would be greater than the amount achieved through settlement, but the incremental difference would be diminished by the time and difficulty litigating a recovery. Similarly, the

estate's resources would be significantly diminished by such litigation. The settlement amount is thus reasonable when compared against the costs and risks of litigation. The complexity, expense, and duration of litigation related to fact-intensive claims indicates that approval of the settlement is the most beneficial resolution to all relevant parties, particularly since many of the claimants are foreign nationals with limited access to the bankruptcy proceedings.

Objections

9. Objections were filed by Brickell Central and Palm Coast. Brickell Central objected on the basis that the Debtor failed to provide appropriate disclosure regarding the reasonableness of the Class Settlement and that the Debtor failed to establish any benefit to the Debtor's estate. The objections of Brickell Central are overruled for the reasons stated on the record in open court.²

10. Palm Coast objected to the extent that the Settlement Agreement failed to provide for reimbursement to Palm Coast for reasonable expenses incurred in carrying out its duties as Escrow Agent.

11. Palm Coast's objections to the Settlement Agreement shall be resolved by its agreement to accept the sum of \$6000 in respect of its outstanding invoices for services as escrow agent (the "Outstanding Invoices"), plus an additional \$500 for the services (the "Class Settlement Services") to be performed in connection with the disbursements under the Settlement Agreement. The Outstanding Invoices shall be paid by the Debtor, from the Debtor's funds in the escrow account. The Class Settlement Services shall be paid by Class Counsel and shall be reimbursable expenses to be reimbursed to Class Counsel from the Common Fund.

² Brickell Central stated at the Final Approval Hearing that it did not oppose the return of principal and interest to the Class Members and only opposed the improved plan treatment of the Class Members pursuant to the terms of the Settlement Agreement. Brickell Central has not waived its objections regarding the plan treatment of the Class Members and shall be permitted to assert these arguments in the context of plan confirmation.

Opt-Out

12. No Class Members elected to opt out of this class action and no Class Members objected to the Settlement Agreement.

Stage of the Proceedings When Settlement Was Achieved

13. The Adversary Proceeding was settled approximately two weeks prior to the trial period, after motion practice, discovery, and arms-length negotiations between Class Counsel and counsel to the Debtor. The facts demonstrate that the Class Representatives were sufficiently informed to negotiate, execute, and recommend approval of this Settlement Agreement. *See, e.g., Davies v. Cont'l Bank*, 122 F.R.D. 475, 479-80 (E.D. Pa. 1988).

Opinions of Class Counsel

14. This Court also may consider the opinions of Class Counsel. *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982), cert. denied, 459 U.S. 828 (1982). Class Counsel has experience in the prosecution of large, complex consumer class actions. This Court gives credence to the opinion of Class Counsel, amply supported by the Court's independent review, that the Settlement Agreement is a beneficial resolution of all claims held by Class Members.

Absence of Fraud or Collusion Between the Parties

15. In addition to finding the terms of the proposed Settlement Agreement fair, reasonable and adequate, this Court must determine that there was no fraud or collusion between the parties or their counsel in negotiating the Settlement Agreement's terms. *Bennett*, 131 F.2d at 986; *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428-29 (5th Cir. 1977). There is no evidence on the record of fraud or collusion between the parties. Furthermore, the terms of the Settlement Agreement indicate that the process by which the Settlement Agreement was achieved was fair. *Miller*, 559 F.2d at 429; *see Ressler*, 822 F. Supp. at 1553. Finally, there is no evidence

of unethical behavior, want of skill or lack of zeal on the part of Class Counsel.

Sufficiency of the Class Notice

16. In the Interim Approval Order, this Court preliminarily approved the Class Notice and found that the proposed form and content of the Class Notice to the Class Members satisfied the requirements of due process and Rule 23(c)(2) and (e) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7023. The Court reaffirms that finding and holds that the Class Members received the best notice practicable under the circumstances.

17. Class Counsel timely caused the Class Notice to be mailed by U.S. mail, postage prepaid, to each of the Class Members. The Class Notice, which was directed to all Class Members, provided the opportunity for any Class Member to opt out of this class action, set forth the requirements for objecting to the proposed Settlement Agreement, and advised Class Members and interested parties of the date for the Final Approval Hearing. The Class Notice identified Class Counsel and set forth the bases for Class Counsel's request for attorneys' fees and expenses. The Class Notice also described in full the claims released by Class Members as part of the Settlement Agreement, and advised Class Members to read the Class Notice carefully because it would affect their rights if they failed to object to the Settlement Agreement. The Class Notice was mailed in both English and Spanish.

18. This Court has again reviewed the Class Notice and the accompanying documents and finds that the Class Members received the "best notice that is practicable under the circumstances" and that the Class Notice was "reasonably calculated" to (a) describe the adversary proceeding (the "Adversary Proceeding") commenced by the Complaint and proposed to be settled by the Settlement Agreement and (b) apprise interested parties of the pendency of the litigation and of their right to opt out or have their objections to the Settlement Agreement heard. *See*

Phillips Petroleum Co. v. Shifts, 472 U.S. 797, 810 (1985); accord Fed. R. Civ. Pro. 23(c)(2) (stating that the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort" shall be given to class members). The Court thus reaffirms its findings that the Class Notice given to the Class Members satisfies the requirements of the due process clause. The Court further finds that the Class was and is adequately represented by Class Representatives Mark Weisberg and John Haggiag.

Based upon the foregoing, IT IS ORDERED that:

1. The Motion is finally approved.
2. The objection of Brickell Central is overruled for the reasons set forth at the final hearing on the Motion, and the objection of Palm Coast is overruled based upon the agreement of the parties set forth in paragraph 11 in the findings of fact set forth above.
3. The releases provided in the Settlement Agreement are hereby approved.
4. This Final Approval Order shall forever be binding upon Mark Weisberg and John Haggiag and all other Class Members, as well as their heirs, executors and administrators, successors and assigns. All such persons or entities are hereby permanently enjoined from asserting against the Debtor any claim or cause of action related to the Debtor, the Debtor's bankruptcy case, or the Property other than as provided in the Settlement Agreement or this Order.
5. The terms of the Settlement Agreement are fully and finally approved as fair, reasonable, and adequate as to, and in the best interests of, the Representative Plaintiffs, the Class Members, and the Debtor's estate.

Submitted by:

Robert Ader, Esq.
Law Offices of Robert A. Ader P.A.
Miami Tower – Suite 3550
100 SE 2nd Street
Miami, Florida 33131

Copy furnished to:

Robert Ader, Esq., who shall serve a copy of this order on all interested parties and file a certificate of service