UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re: Case No. 8:16-bk-06728-CED
Chapter 7

JS Enterprises of Florida, Inc.,

Debtor.
_____/

ORDER GRANTING
MOTION TO APPROVE COMPROMISE

THIS CASE came before the Court for hearing on March 9, 2020, to consider the Chapter 7 Trustee's *Motion to Approve Compromise* (the "Compromise Motion")[1] and Clemons' Objection to the Compromise Motion.[2] In the Compromise Motion, the Trustee asks the Court to approve a settlement of (1) his objection to two proofs of claim filed by EnerSys Advanced Systems, Inc. ("Defendant") in this Chapter 7 case, and (2) fraudulent transfer and related claims asserted by the Trustee against Defendant in Adv. Pro. No. 8:18-ap-355-CED.

Having carefully reviewed the record, the Court finds that the proposed compromise does not fall below the lowest point in the range of reasonableness and satisfies the *Justice Oaks* standard. Therefore, the Court will grant the Compromise Motion.

A. Background

Debtor, an Alabama corporation, was engaged in the business of manufacturing batteries used in missile guidance systems and selling the batteries to government defense contractors. Debtor's shareholders were Robert R. Jackson ("Jackson") (66%), Nicholas Shuster ("Shuster") (17%), and Debra Clemons ("Clemons") (17%). Together, Jackson and Shuster are referred to as the "Majority Shareholders." Clemons was employed by Debtor until she retired in 2010,[3] prior to the events described below.

On March 5, 2015, Debtor, the Majority Shareholders, and Defendant entered into an asset purchase agreement providing for the sale of substantially all of Debtor's assets to Defendant in exchange for payment at closing of $12,000,000.00 (the "March APA").[4] When Clemons learned of the March APA, she exercised her dissenter's rights under Alabama law.[5] Alabama law provides that a shareholder is entitled to dissent from a sale of all, or substantially all, of the property of the corporation other than in the usual and regular course of business and to obtain payment of the fair value of his or her shares.[6]

On April 16, 2015, Defendant terminated the March APA, citing Clemons' dissenter's rights as one of three reasons for the termination.[7]

On December 16, 2015, Debtor, the Majority Shareholders, and Defendant entered into a second asset purchase agreement (the "December APA"). As with the March APA, under the December APA, Defendant agreed to purchase substantially all of Debtor's assets for payment at closing of $12,000,000.00.[8] The December APA stated that the $12,000,000.00 purchase price, referred to as the "Enterprise Value," was based in part on Debtor's estimate of its net working capital. The December APA provided for an adjustment of the Enterprise Value if the actual net working capital as of the date of the closing of the sale (the "Closing Date") was more or less than the estimate.[9]

Upon learning of the December APA, Clemons again exercised her dissenter's rights under

[1] Doc. No. 160.
[2] Doc. No. 163.
[3] Adv. Pro. No. 8:18-ap-355-CED, Exhibit AAA to Doc. No. 42, ¶ 6.
[4] Adv. Pro. No. 8:18-ap-355-CED, Exhibit BB to Doc. No. 28, Defendant's Motion for Summary Judgment (hereafter referred to as Defendant's MSJ).
[5] Ala. Code § 10A-2-13.01 through §10A-2-13.32.
[6] Ala. Code § 10A-2-13.02(a)(3).
[7] Exhibit CC to Defendant's MSJ.
[8] Exhibit EE to Defendant's MSJ.
[9] Exhibit EE to Defendant's MSJ, § 2.4(b)(i).

Alabama law and demanded the fair value of her 17% of Debtor's shares.[10]

On April 7, 2016, in connection with the proposed closing, Shuster's attorney sent an email to Debtor's attorney that referenced "setting aside the 17% that will be escrowed as a result of [Clemons'] exercise of dissenter's rights."[11] On April 13, 2016, Debtor, the Majority Shareholders, and Defendant entered into a "Letter Agreement Regarding Closing" (the "Letter Agreement") in which they agreed, *inter alia*, to amend the December APA to define the term "Closing Payment" as the Adjusted Enterprise Value, "less seventeen percent (17%) of the Enterprise Value (the '**Holdback Amount**')" and certain other expenses or deductions.[12] The Court notes that 17% percent of the Debtor's "Enterprise Value" of $12,000,000.00 is $2,040,000.00.

The Letter Agreement further provided that Defendant could submit its reconciliation of Debtor's "Actual Net Working Capital" as of the Closing Date within 120 days after the Closing Date. And, in paragraph 10 of the Letter Agreement, Defendant waived one of the December APA's closing conditions to the extent that it required the satisfactory resolution of a pending investigation against Debtor by the Department of Justice, provided that Defendant deliver the sum of $459,458.00 (the "DOJ Settlement Amount") to an escrow account "to be released upon receipt of a declination letter from the Department of Justice."[13]

The sale of Debtor's assets to Defendant closed on April 13, 2016. The "Funds Flow Memorandum" from the closing reflects a "Total Adjusted Enterprise Value" (total consideration due Debtor) of $14,419,271.00, which included the Holdback Amount of $2,040,000.00.[14] The $2,040,000.00 Holdback Amount and the $459,458.00 DOJ Settlement Amount were deposited in an escrow account, as required by the Letter Agreement (the "Escrowed Funds"). Debtor received cash at closing in the amount of $3,470,548.54 (the "Sale Proceeds").

In the four months between the April 2016 Closing Date and August 3, 2016, from the Sale Proceeds, Debtor paid Jackson more than $1,700,000.00 for amounts allegedly owed Jackson under his employment contract, for unused and unpaid paid time off, and for an accrued bonus. During the same period, Debtor paid Shuster more than $738,000.00 and paid its Chief Financial Officer, Philip Polly ("Polly"), more than $243,000.00 for amounts they were allegedly owed under their employment contracts and for unused and unpaid paid time off.[15]

B. Debtor files a Chapter 7 case.

On August 4, 2016, after Debtor had distributed nearly all of the Sale Proceeds, including having made distributions to Jackson, Shuster, and Polly, Debtor filed a petition under Chapter 7 of the Bankruptcy Code.

In its bankruptcy schedules, Debtor listed an interest in a term insurance policy on Jackson's life valued at $90,000.00 and a total of $14,067.00 in cash, deposits, and prepayments. Debtor's Statement of Financial Affairs disclosed the sale of its assets to Defendant as well as the distributions to Jackson, Shuster, and Polly.[16]

Debtor's bankruptcy attorney filed a Disclosure of Compensation (the "Original Disclosure") under 11 U.S.C. § 329(a) that disclosed his law firm's receipt of $92,483.07 within the one year prior to the filing of the Debtor's bankruptcy petition, of which $23,696.00 was for services rendered on Debtor's behalf in contemplation of bankruptcy.[17] The Original Disclosure also stated that Debtor had paid the law firm an advance retainer of $10,000.00 on December 22, 2015—shortly after Debtor and

[10] Proof of Claim No. 2-2, Part 10 (Exhibit 8).
[11] *See* Doc. No. 163, ¶ 6. The email was not attached to Clemons' Objection because of confidentiality concerns, but was tendered to the Court at the hearing on March 9, 2020.
[12] Exhibit FF to Defendant's MSJ (emphasis in original).
[13] Exhibit FF to Defendant's MSJ.
[14] Exhibit HH to Defendant's MSJ.
[15] Defendant's MSJ, ¶¶ 125-128, and Exhibits B, G, and SS to Defendant's MSJ.
[16] Doc. No. 8.
[17] Doc. No. 8-2.

Defendant entered into the December APA. Debtor's counsel later filed an amended Disclosure of Compensation (the "Amended Disclosure") that did not mention the December 2015 advance retainer.[18] Both the Original and the Amended Disclosures disclosed that $24,460.74 of the $92,483.07 received by Debtor's counsel was paid by Defendant "as part of the closing of the sale of substantially all of the Debtor's assets" to Defendant.

After the Closing Date, Debtor's CFO, Polly, was employed by Defendant as a consultant.[19] Polly prepared a document titled "Working Capital Rollforward from March 31, 2016 to April 13, 2016" (the "Reconciliation").[20] The Reconciliation, dated August 10, 2016, reflected that Debtor's actual net working capital as of the Closing Date was less than had been estimated. Defendant contends that Debtor's Enterprise Value—the purchase price—should be decreased by the $2,040,000.00 Holdback Amount and an additional $520,327.00.[21]

C. The proofs of claim in the bankruptcy case

Five proofs of claim were filed by creditors in Debtor's Chapter 7 case. Two of the claims were *de minimus*, totaling less than $12,000.00.

Clemons filed Claim Number 2-2 in the amount of $2,104,569.56. Her claim states that it is based on her entitlement to compensation for her dissenter's rights under Alabama law and her entitlement to the reimbursement of certain expenses. Jackson, Shuster, and Polly filed an objection to Clemons' claim, but later withdrew it.[22] Jackson later filed a separate objection to Clemons' claim. He objected to Clemons' dissenter's rights claim on the ground that her claim should have been calculated on the net proceeds of the sale to Defendant, not the gross proceeds, and to Clemons' claim for reimbursement of expenses as being outside the statute of limitations.[23]

Defendant filed two claims in Debtor's Chapter 7 case. Both of Defendant's claims (Claim Number 3-1 and Claim Number 4-1, together "Defendant's Claims") are in an amount "estimated to be at least $2,040,000.00." Claim 3-1 appears to assert a right to the Holdback Amount; Claim 4-1 states that it is based on an indemnity claim under the December APA. The Trustee objected to Claim 3-1 on the grounds that the claimed amount was not substantiated and to Claim Number 4-1 because it is a contingent indemnification claim.[24]

The Trustee's objections to Defendant's Claims were consolidated for purposes of discovery and trial with the adversary proceeding against Defendant described below.[25]

D. The Trustee's adversary proceedings against Jackson, Shuster, and Polly

In January 2017, the Trustee filed separate adversary proceedings against Jackson, Shuster, and Polly.

In the Trustee's complaints against Shuster and Polly, the Trustee alleged that in the year preceding the bankruptcy filing, Shuster received transfers from Debtor totaling $803,486.17[26] and Polly received transfers from Debtor totaling $502,405.20.[27] The Trustee alleged that the transfers were voidable as preferential and fraudulent payments. In January 2018, the Trustee filed a motion to compromise the controversy between the Trustee, Shuster, Polly, and Clemons.[28] Under the compromise, Shuster and Polly jointly and severally paid $450,000.00, "with $250,000 paid directly to Clemons and $200,000 paid to the Trustee." The Court approved the compromise.[29]

[18] Doc. No. 22.
[19] Exhibit LL to Defendant's MSJ.
[20] Exhibit OO to Defendant's MSJ.
[21] Defendant's MSJ, ¶ 146.
[22] Doc. Nos. 50 and 69.
[23] Doc. No. 120.
[24] Doc. No. 117.
[25] Doc. No. 143.
[26] Adv. Pro. No. 8:17-ap-3-CED, Doc. No. 1.
[27] Adv. Pro. No. 8:17-ap-2-CED, Doc. No. 1.
[28] Doc. No. 100.
[29] Doc. No. 116.

In the Trustee's complaint against Jackson, the Trustee alleged that Jackson had received preferential and voidable payments from Debtor totaling $1,972,181.83 in the year preceding the bankruptcy filing.[30] In June 2018, the Trustee filed a motion to compromise the controversies between the Trustee and Jackson (the adversary proceeding) and Clemons (Jackson's objection to Clemons' claim).[31] Under the compromise agreement, Jackson paid $325,000.00, "with $145,000 going directly to Clemons on account of her direct claims and $180,000 going to the estate." The Court approved the compromise.[32]

Pursuant to the compromises with Jackson, Shuster, Polly, and the Trustee, Clemons executed a general release of her claims against them. Clemons has not released any claims she may hold against Defendant.

E. The Trustee's adversary proceeding against Defendant

In August 2018, the Trustee filed an adversary complaint against Defendant (the "Complaint").[33] The Complaint contains six counts: (1) a claim for declaratory judgment to determine whether the Escrowed Funds, including the Holdback Amount, are property of Debtor's bankruptcy estate; (2) a claim to recover the Holdback Amount as a fraudulent transfer under § 548(a)(1)(A) of the Bankruptcy Code; (3) a claim to recover the Holdback Amount as a fraudulent transfer under Fla. Stat. § 726.105(1)(a); (4) a claim to avoid payments of more than $3.2 million to Debtor's officers after the Closing Date (the "Bonus Transfers") as fraudulent transfers under § 548(a)(1)(A) of the Bankruptcy Code; (5) a claim to avoid the Bonus Transfers as fraudulent transfers under Fla. Stat. § 726.105(1)(a); and (6) a claim against Defendant for aiding and abetting Debtor's officers' alleged breaches of fiduciary duty.

Defendant filed a motion for summary judgment, the Trustee filed a response to the motion, and Defendant filed a reply in support of his motion. The motion is awaiting oral argument or disposition by the Court.[34]

F. The proposed compromise between the Trustee and Defendant

In the Compromise Motion, the Trustee asks the Court to approve the settlement of the Trustee's claims against Defendant as alleged in the Complaint as well as the Trustee's objections to Defendant's Claims in the bankruptcy case.[35]

The Trustee represents that the settlement was reached after an all-day mediation. Under the proposed compromise, the Escrowed Funds will be disbursed, with $2,040,000.00 being released to Defendant and $482,550.82 being paid to the Trustee on behalf of the bankruptcy estate, and Defendant's Claims in the bankruptcy case will be disallowed.

The Trustee asserts that the proposed compromise is in the best interest of the bankruptcy estate in view of the facts and the likelihood that the Trustee will not prevail on his claims against Defendant. The Trustee contends that the compromise represents a better result than the risk of administrative insolvency should the Trustee incur the expense required to prepare and try his case.

In addition, both the Trustee and Defendant have confirmed that the proposed compromise—unlike the compromises reached with Jackson, Shuster, and Polly—does not require Clemons to release any claims, including any claims she may hold against Defendant.

G. Clemons' objection to the compromise

Clemons objects to the proposed compromise.[36] Clemons contends that she, the only real creditor in the case, was excluded from the settlement process, including the mediation, and that her attorney's efforts to assist the Trustee in litigating against Defendant were rebuffed.

[30] Adv. Pro. No. 8:17-ap-1-CED, Doc. No. 1.
[31] Doc. No. 139.
[32] Doc. No. 141.
[33] Adv. Pro. No. 8:18-ap-355-CED, Doc. No. 1.
[34] Adv. Pro. No. 8:18-ap-355-CED, Doc. Nos. 28, 42, 44.
[35] Doc. No. 160.
[36] Doc. No. 163.

Clemons points out that the $2,040,000.00 Holdback Amount is the exact amount of her dissenting shareholder's claim and was specifically calculated by Debtor and Defendant to cover her claim. She argues that the proposed settlement falls below the lowest point in the range of reasonableness as it essentially values the Trustee's claims in the adversary proceeding at zero and allows Defendant to receive everything it would receive if it were to prevail at trial. And Clemons asserts, that to add insult to injury, the proposed settlement will not provide any additional funds for the Trustee to distribute to her as a creditor because the $482,550.82 to be paid to the estate represents the DOJ Settlement Amount required to be paid to the Department of Justice under the December APA.[37]

Finally, Clemons contends that, as demonstrated by Defendant's payment of $24,460.74 of Debtor's attorney's fees,[38] the December APA and this bankruptcy case were orchestrated by Debtor and Defendant to allow Defendant to acquire Debtor's assets, for Debtor to distribute the bulk of the Sale Proceeds to the Majority Shareholders, and for Debtor to eliminate Clemons' dissenting shareholder claim by filing the bankruptcy case.

H. Standard for approval of a compromise

Under Federal Rule of Bankruptcy Procedure 9019, the court may approve a compromise or settlement on motion by the trustee and after notice and hearing.[39] "It is a fundamental tenet of bankruptcy jurisprudence that the proponent of a settlement, such as the trustee in this case, bears the burden of demonstrating that the proposal is both reasonable and in the best interests of the bankruptcy estate."[40]

In the Eleventh Circuit, bankruptcy courts consider four factors, commonly referred to as the *Justice Oaks* factors, to determine the "fairness, reasonableness and adequacy"[41] of a proposed compromise:

> (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.[42]

In evaluating the *Justice Oaks* factors, courts generally do not decide the specific legal and factual issues presented, but instead canvas the issues to determine whether the compromise falls below the lowest point in the range of reasonableness.[43]

I. Canvassing the issues

The Trustee's claim for declaratory relief

In Count I of the Complaint, the Trustee asks the Court to determine whether the Escrowed Funds are property of the bankruptcy estate.[44]

Defendant contends that under the December APA and Letter Agreement, the purchase price was subject to adjustment if Defendant gave timely notice to Debtor of a reconciliation of Debtor's net working capital as of the Closing Date. Defendant claims it gave timely notice by providing Debtor with its "Working Capital Rollforward from March 31, 2016 to April 13, 2016" (the "Reconciliation") on August 10, 2016.[45]

---

[37] The Department of Justice has not filed a proof of claim in the bankruptcy case and it is unclear to the Court why the Trustee will distribute payment to it.

[38] Doc. No. 8-2.

[39] Fed. R. Bankr. P. 9019(a).

[40] *In re Vazquez*, 325 B.R. 30, 35 (Bankr. S.D. Fla. 2005)(quoted in *In re Gibson*, 2017 WL 7795950, at *6 (Bankr. M.D. Fla. June 22, 2017)).

[41] *In re Chira*, 567 F.3d 1307, 1312-13 (11th Cir. 2009)(quoting *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986)).

[42] *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990)(quoting *In re A & C Properties*, 784 F.2d at 1381).

[43] *In re Pullum*, 598 B.R. 489, 492 (Bankr. N.D. Fla. 2019)(quoting *In re W.T. Grant Company*, 699 F.2d 599, 608 (2d Cir. 1983)).

[44] Complaint, ¶ 42.

[45] Exhibit OO to Defendant's MSJ.

Clemons contends the Reconciliation is suspect for two reasons. First, Clemons contends the Reconciliation was not timely delivered, resulting in Defendant's waiver of any claim to the Escrowed Funds. And second, Clemons contends the Reconciliation itself is not credible because it was prepared by Polly, who was employed by Defendant as a consultant immediately after the Closing Date and who himself received payments from Debtor of over $500,000.00 ("paid off," according to Clemons) from the Sale Proceeds.[46]

In response, the Trustee asserts that he recently obtained discovery from Debtor's customers, including Lockheed Martin, that supports Defendant's position that Debtor's accounts receivable had significantly decreased prior to the Closing Date. Additionally, the Trustee argues that he deposed Polly in 2019, and Polly testified as to the preparation and justifications for the adjustments made in the Reconciliation.[47] Consequently, the Trustee contends that the Reconciliation may be legitimate, that the Trustee has no facts or witnesses who can disprove it, and that to proceed to trial on this issue, the Trustee would need to retain the services of an (expensive) forensic accountant who likely would not have a factual basis with which to support the Trustee's claim.

The Court concludes that the evidence obtained by the Trustee supports Defendant's contention that the Reconciliation results in a downward adjustment of Debtor's net working capital as of the Closing Date and a decrease in the purchase price of Debtor's assets. Accordingly, the Court finds that the Trustee is unlikely to succeed on his request for a determination that the Escrowed Funds are property of Debtor's estate.

The Trustee's fraudulent transfer claims

In Counts II and III of the Complaint, the Trustee seeks to recover the $2,040,000.00 placed in escrow under the December APA and Letter Agreement. In Counts IV and V of the Complaint, the Trustee seeks to recover $3.2 million paid to Debtor's officers after the sale. The Trustee's claims are brought under 11 U.S.C. § 548(a)(1) and Fla. Stat. § 726.105(1)(a), both of which provide for the avoidance of actually fraudulent transfers. The Complaint alleges that the transfers were made with the actual intent to hinder, delay, or defraud creditors of Debtor. Fraudulent transfer claims under § 548(a)(1) and § 726.105(1)(a) are analogous "in form and substance" and may be analyzed contemporaneously.[48]

To prevail on his fraudulent transfer claims, the Trustee must show that Debtor transferred an interest in property and that the transfer was made with actual fraudulent intent.[49] The Trustee acknowledges, however, that the $2,040,000.00 was not transferred by Debtor—a required element of a fraudulent transfer claim— but rather was transferred by Defendant to an escrow account under the terms of the December APA.

The Trustee further acknowledges that Debtor has no interest in the $2,040,000.00 unless Debtor was entitled to an upward adjustment of the purchase price, which, based upon the Trustee's analysis, the Trustee will not be able to prove. And to prove that the transfer was made with actual fraudulent intent, the Trustee would need fact-intensive evidence involving the badges of fraud that he alleged, such as the lack of reasonably equivalent value and Debtor's insolvency.

Defendant argues that the Trustee will never be able to establish actual fraudulent intent because the December APA's provision for a holdback pending a post-closing reconciliation of working

[46] The payments were for expense reimbursements, repayment of a loan, unused paid time off, and amounts allegedly due under his employment contract. *See* Defendant's MSJ, pp. 23 and 24 and exhibits cited therein.

[47] Exhibit A to Defendant's MSJ, Deposition excerpt of Polly, pp. 233-262.

[48] *In re Rollaguard Security, LLC*, 591 B.R. 895, 907 (Bankr. S.D. Fla. 2018)(quoting *In re Stewart*, 280 B.R. 268, 273 (Bankr. M.D. Fla. 2001)).

[49] *In re Lydia Cladek, Inc.*, 494 B.R. 555, 558 (Bankr. M.D. Fla. 2013).

capital is a standard provision in sales contracts and was necessary in this transaction to "guard against the risk of errors with the Estimated Net Working Capital which could not be confirmed at Closing."[50]

The Court finds that the Trustee is unlikely to succeed in its fraudulent transfer claims as to the Holdback Amount because the Trustee is unlikely to prove that Debtor transferred the $2,040,000.00 or that the deposit of the Holdback Amount was intended to defraud creditors rather than to protect Defendant against an inaccurate estimate of Debtor's net working capital.

With respect to Debtor's transfers to its officers (the "Bonus Transfers"), Defendant contends that the payments were not made to or for Defendant's benefit, that Debtor made these payments on account of valid obligations under Debtor's employment contracts and loan agreements with its officers, and that Defendant did not direct the payments.[51]

The Court finds that the Trustee is unlikely to succeed on its fraudulent transfer claims as to the Bonus Transfers. First, the Trustee is unlikely to prove that the Bonus Transfers were not made on account of Debtor's legitimate contractual obligations. And second, even if the Bonus Transfers could be avoided, the Trustee is unlikely to prove that they can be recovered against Defendant, who is not a transferee of the Bonus Transfers.

The Trustee's aiding and abetting claim

In Count VI of the Complaint, the Trustee seeks damages against Defendant for aiding and abetting breaches of fiduciary duty by Debtor's officers. The Complaint alleges that the officers' breaches of their duty of loyalty include authorizing and ensuring payment of their own bonuses, negotiating for their own employment as part of the December APA, negotiating for the payment of their debts as part of the sale to Defendant, "[c]ausing the Holdback (in the exact percentage as Clemons percentage ownership) into the Escrow Account," and manipulating Debtor's finances to ensure that the Holdback Amount would not be paid to creditors.[52] The Complaint further alleges that Defendant aided and abetted the breaches by entering the December APA, paying the Holdback Amount, allowing payment of the Bonus Transfers, providing employment agreements to two officers, and paying some of Jackson's debts out of the Sale Proceeds.[53]

Defendant responds that the Trustee's claims are governed by Alabama law because Debtor is an Alabama corporation and that Alabama law does not recognize a cause of action for aiding and abetting a breach of fiduciary duty.[54] And, even if the cause of action were recognized, the Trustee may be required to prove both the underlying breaches by the officers and Defendant's knowledge of and substantial assistance or encouragement in the breaches.[55] The Trustee acknowledges that he may not be able to establish that Debtor's officers owed any fiduciary duty to Clemons and also acknowledges the difficulty in proving that Defendant participated in the alleged breaches.

The Court finds that the Trustee is unlikely to succeed on its claim for aiding and abetting Debtor's officers' breaches of fiduciary duty, especially given case authority holding that "Alabama law does not recognize the common law cause of action of aiding and abetting breach of fiduciary duty."[56]

J. Conclusion

On the record before it, the Court agrees with Clemons that the chronology of events surrounding

[50] Defendant's MSJ, pp. 40-41.
[51] Defendant's MSJ, pp. 42-45.
[52] Complaint, ¶ 90.
[53] Complaint, ¶ 92.
[54] Defendant's MSJ, p. 46(citing *In re Verilink Corp*., 405 B.R. 356, 380-81 (Bankr. N.D. Ala. 2009), and *Continental Casualty Co. v. Compass Bank*, 2006 WL 566900, at *11 (S.D. Ala. Mar. 6, 2006)).
[55] *Pearlman v. Alexis*, 2009 WL 3161830, at *5 (S.D. Fla. Sept. 25, 2009).
[56] *In re Verilink Corp*., 405 B.R. at 380-81(citing *Continental Casualty Co. v. Compass Bank*, 2006 WL 566900, at *11).

the sale of Debtor's assets to Defendant and Debtor's bankruptcy filing do not pass the smell test. The chronology includes the March APA, Clemons' assertion of her dissenting shareholder's rights, the cancellation of the March APA, the execution of the December APA, Clemons' re-assertion of her dissenter's rights, the execution of the Letter Agreement providing for the Holdback Amount in the same amount as Clemons' dissenter's rights claim, the significant distributions by Debtor to Jackson, Shuster, and Polly from the Sale Proceeds, and, ultimately, Debtor's bankruptcy filing. That said, the issue before the Court is whether the Court should approve the proposed compromise or compel the Trustee to litigate his claims against Defendant with the risk that the Debtor's bankruptcy estate will be rendered insolvent.

In applying the *Justice Oaks* factors to the claims in this case, the Court finds first, that the issues are factually complex and that their litigation would be expensive for the estate and, second, as discussed above, the Trustee's probability of success in the litigation is unlikely.

In considering the paramount interests of creditors, the Court has carefully weighed Clemons' objection to the compromise. The Court understands Clemons' contention that the $2,040,000.00 Holdback Amount is in the exact amount as her dissenting shareholder's claim, and that the identical amounts are likely not a coincidence. But a dissenting shareholder's claim is based on the fair value of his or her shares in the corporation, which, first, has not been determined here, and, second, is not based upon the gross sales price of a corporation.[57]

Although Clemons appears to be the only creditor whose rights are affected by the proposed compromise, the Court may approve a compromise over a creditor's objection.[58] The Court is sympathetic to Clemons' frustration over the length of time that the Trustee's claims against Defendant have been pending—over three years since Debtor filed this bankruptcy case—and her exclusion from the prosecution of the case and the mediation that gave rise to the proposed compromise. But the Court has considered two other factors that demonstrate that the proposed compromise is not unfair to Clemons. First, Clemons is not bound by the compromise and is not deemed to have released any claims she may hold against Defendant. And second, in light of Jackson, Shuster, and Polly's repayment of a portion of the distributions they received after closing, and Clemons' receipt of $395,000.00 from those repayments, the net distributions to Debtor's shareholders, including Clemons, may be in approximately the same percentages as their ownership interests in Debtor.

For these reasons, the Court finds that the Trustee has met his burden to demonstrate that the proposed compromise is reasonable and in the best interests of the bankruptcy estate, does not fall below the lowest point in the range of reasonableness, and satisfies the *Justice Oaks* standard.

Accordingly, it is

ORDERED that the Trustee's Motion to Approve Compromise is GRANTED and the compromise between the Trustee and Defendant is APPROVED.

DATED: April 13, 2020.

/s/ Caryl E. Delano

_____

Caryl E. Delano
Chief United States Bankruptcy Judge

[57] For example, under Ala. Code § 10A-2-13.01(4), the fair value of a dissenter's shares means "the value of the shares" immediately before the sale, not a simple percentage of the sale price, and under Ala. Code § 10A-2-13.25(b)(1), the corporation must provide the dissenting shareholder with the corporation's balance sheet when making an offer of payment. *See also Cox Enterprises, Inc. v. News-Journal Corp.*, 510 F.3d 1350, 1357-58 (11th Cir. 2007)(Florida courts recognize that valuation proceedings involve a variety of evidence aimed at determining the price of minority interests, including net asset values.).

[58] *In re Vazquez*, 325 B.R. at 37(It is the court's task to independently assess a proposed compromise, and creditors do not hold an absolute veto power over approval of a settlement.).