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Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE LGX, LLC,
Debtor.

BAP No. WO-05-008
BAP No. WO-05-009

CARGILL, INCORPORATED,
Appellant,

Bankr. No. 02-21140-WV
Adv. No. 03-01110-WV
Chapter 7

v.

ORDER AND JUDGMENT*

LYLE R. NELSON, Trustee,
Plaintiff – Appellee,

HINTON ECONOMIC
DEVELOPMENT AUTHORITY,
Defendant – Appellee.

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before CLARK, BROWN, and KARLIN,¹ Bankruptcy Judges.

BROWN, Bankruptcy Judge.

Appellant appeals an order of the United States Bankruptcy Court for the Western District of Oklahoma approving a settlement of an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 9019 between the trustee and

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Honorable Janice Miller Karlin, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Kansas, sitting by designation.

Defendant-Appellee Hinton Economic Development Authority (“HEDA”).

Finding no abuse of discretion, we AFFIRM.

I. Background

The debtor, LGX, LLC (“LGX”), owns a cocoa extraction plant in Hinton, Oklahoma. It pledged the plant, both its real and personal property, to secure financing for the plant’s construction. HEDA acquired by assignment LGX’s promissory note, mortgage and security agreement, pledging substantially all of LGX’s assets. LGX filed for Chapter 7 bankruptcy protection on November 5, 2002. Lyle R. Nelson was appointed as the Chapter 7 trustee of LGX (the “Trustee”).

A. Litigation Between LGX and Cargill & the MOU

Prior to its bankruptcy filing, LGX was embroiled in litigation with Appellant Cargill, Incorporated (“Cargill”). Cargill had initiated suit against LGX and its principal, Mr. Donald Hall (“Hall”), in the United States District Court for the Eastern District of Pennsylvania for patent infringement (the “Pennsylvania Litigation”). LGX asserted counterclaims of misappropriation of trade secrets, unfair competition, and breach of contract.

The parties arrived at a tentative settlement of the Pennsylvania Litigation, which they embodied in a Memorandum of Understanding (“MOU”). The MOU provided, among other things, that Cargill would pay HEDA \$1 million, plus up to an additional \$3 million in royalties on any revenues Cargill might generate from its future use of the two patented manufacturing processes at issue. The MOU also provided that Cargill would grant to LGX and Hall a covenant not to sue under the two patents. The parties expressly conditioned the MOU on entering into a “more formal agreement,” which had not occurred by the time of LGX’s bankruptcy filing.

In its bankruptcy schedules, LGX listed the MOU as an executory contract. Cargill filed a motion, seeking a determination of the bankruptcy court that the

MOU was an executory contract that, by virtue of the Trustee's failure to assume it within sixty days from the order for relief, had been rejected by operation of 11 U.S.C. § 365(d)(1). The Trustee disputed its characterization as an executory contract. The bankruptcy court held that the MOU was an executory contract and that:

In this case, the Trustee's rejection of the MOU does not render the agreement necessarily unenforceable as a result of rejection. The agreement remains effective and enforceable to the extent it is so under state law. Thus, the act of the Trustee's rejection itself of the MOU has no material effect on whether the Trustee is able to take and attempt to enforce an assignment of HEDA's claimed right to payment from Cargill under the MOU.²

B. Litigation Between the Trustee and HEDA & the Settlement Motion

At the time of the filing of LGX's Chapter 7 petition, LGX owed HEDA approximately \$8.5 million. Shortly after the bankruptcy filing, HEDA filed for relief from stay to foreclose on HEDA's collateral, which included the plant and essentially all of LGX's assets. The Trustee and creditor Atkins Benham Constructors, Inc. ("Benham"), which held an unsecured claim for approximately \$487,000, opposed HEDA's stay relief motion. The Trustee also filed an adversary proceeding (the "Adversary") against HEDA, seeking equitable subordination, avoidance of HEDA's secured claim as a preferential transfer, and disallowance of HEDA's claim in its entirety. Due to the commencement of the Adversary, the bankruptcy court denied HEDA's stay relief motion without prejudice.

The Trustee and HEDA later entered into a settlement of the Adversary. The most pertinent aspects of this settlement, as it was later revised, provide for:

1. Relief from stay granted to HEDA to foreclose on its collateral;
2. Dismissal of the Adversary;

² January 11, 2005, Order at 4, *in* Appellant's Appendix at 898.

3. HEDA's assignment to the Trustee of its rights under the MOU;
4. The Trustee's assignment to HEDA of 30% of his net recovery under the MOU, up to \$250,000;
5. HEDA's assignment to Benham of 50% of its recovery from the Trustee under the MOU;
6. The Trustee's grant to HEDA of a "Quitclaim License" to:
utilize certain intellectual and proprietary property rights and patent rights at the former LGX plant in Hinton Oklahoma relating to the design, construction and operation of [same] arising from:
 - a) The Operating Agreement creating LGX and the amendments thereto;
 - b) LGX's interest in U.S. Patent Application No. 09/845,709 Liquefied Gas Extraction Process;
 - c) Rights granted to LGX by virtue of the MOU [the covenant not to sue]; and
 - d) Any improvements to existing processes and technology developed by employees and agents of LGX in the course of designing, constructing and operating the former LGX plant in Hinton, Oklahoma,and said license shall include the right of HEDA, its successors and assigns to expand, alter or increase the capacity of the former LGX plant in Hinton, Oklahoma[;]³
and
7. On entry of a final order approving the settlement, HEDA's payment to the Trustee of \$5,000.

The Trustee filed a Motion to Compromise Controversy and Settle Pending Suit/Adversary and Brief In Support (the "Settlement Motion"), maintaining that, due to the anticipated complexity and expense of the Adversary, which would involve multi-state discovery, it would be in the best interests of creditors for the estate to "pursue and force compliance with" the terms of the MOU in the Pennsylvania Litigation. Cargill objected to the Settlement Motion, claiming among other things that the proposed settlement was not in the best interests of

³ First Revised Settlement Term Sheet ¶ 7, *in* Appellant's Appendix at 704-05.

creditors insofar as the MOU was unenforceable. On January 28, 2005, the bankruptcy court entered its Order granting the Trustee authority to enter into the Settlement (the “Order”).⁴

II. Jurisdiction and Standard of Review

This Court has jurisdiction over this appeal. Cargill timely filed a Notice of Appeal from the Order, which is a final order under 28 U.S.C. § 158(a).⁵ The parties have consented to this Court’s jurisdiction because they have not elected to have the appeal heard by the United States District Court for the Western District of Oklahoma.⁶

To the extent that Cargill asserts errors of law in approving the settlement, we review *de novo*.⁷ To the extent Cargill asserts that there is an insufficient factual foundation for approval, we review the bankruptcy court’s Order approving the settlement for an abuse of discretion.⁸

III. Discussion

Cargill asserts two grounds for reversal of the Order. First, Cargill claims that the bankruptcy court’s approval of the settlement agreement rested on three errors of law and, therefore, it was *per se* an abuse of discretion. Second, Cargill claims that the Trustee failed to introduce sufficient evidence to carry his burden of proof that the settlement is in the best interests of creditors and, therefore, the

⁴ This Order incorporated by reference the court’s findings and conclusions that it had orally set forth on the record on January 21, 2005. Order, *in* Appellant’s Appendix at 1084-85.

⁵ See *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1021-22 (10th Cir. BAP 1997).

⁶ 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

⁷ *Kopexa Realty*, 213 B.R. at 1022 (citing *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

⁸ *Reiss v. Hagmann (In re Reiss)*, 881 F.2d 890, 891-92 (10th Cir. 1989); *Kopexa Realty*, 213 B.R. at 1022.

bankruptcy court abused its discretion.

A. Cargill’s Assertions of Questions of Law

1. Can the MOU, as a Rejected Executory Contract, Be Assigned?

Cargill asserts that the MOU is an executory contract, which is deemed rejected by operation of law, and therefore the Trustee cannot assign any rights under it to HEDA. It follows, according to Cargill, that a settlement that purports to grant such an assignment is unenforceable and cannot be approved. The bankruptcy court’s January 11, 2005, Order, determining that the MOU was a rejected executory contract, is now a final order and is, therefore, law of the case. However, its finding that the MOU was a rejected executory contract does not necessarily mean that the MOU has been terminated or that the parties no longer have any rights under the rejected contract.⁹ Rather, the court held that the MOU “remains effective and enforceable to the extent it is so under state law.”¹⁰ The pre-assumption rejection of the MOU under 11 U.S.C. § 365¹¹ relieves the estate from the burden of continuing to perform any obligations of LGX under the MOU, and establishes that any claim held by the non-debtor parties to the contract against LGX constitutes a pre-petition claim.¹²

Cargill argues that because the Trustee never assumed the MOU, there are no longer any rights thereunder to assign, and likens the settlement to an impermissibly-belated assumption of the MOU. Leaving the Quitclaim License for separate discussion below, the Trustee is not assigning any of the estate’s

⁹ *See Sir Speedy, Inc. v. Morse*, 256 B.R. 657, 659 (D. Mass. 2000) (rejection does not cause a contract magically to vanish; post-rejection rights are the same as if breach had occurred prepetition).

¹⁰ January 11, 2005, Order at 4, *in* Appellant’s Appendix at 898.

¹¹ All references to “Section” refer to Title 11, United States Code, unless otherwise noted.

¹² 11 U.S.C. § 365(g)(1).

rights under the MOU. Instead the Trustee is accepting an assignment of HEDA's rights under the MOU. Section 365 is not applicable to a trustee's receipt of an assignment from a non-debtor.

Furthermore, the court's approval of the settlement does not constitute a ruling on the scope, enforceability, or even the assignability of HEDA's rights. Those are issues expressly preserved for determination in the Pennsylvania Litigation. The court's role in approving the settlement grants the Trustee the authority to give the consideration he has agreed to provide, such as the dismissal of his claims in the Adversary, his stipulation to relief from stay on HEDA's collateral, and his assignment of a portion of his recovery under the MOU in the Pennsylvania Litigation, if any such recovery occurs. It also gives the Trustee a right to enforce the settlement in the event that HEDA fails to perform its obligations. But the order approving the settlement does not by itself constitute a determination of HEDA's rights, if any, under the MOU.

2. Does the Quitclaim License Violate Restrictions on Assignment of Patent Licenses?

Cargill objects to the Trustee's grant of the Quitclaim License in the settlement. It asserts that the Quitclaim License is an impermissible transfer of a right under a patent.¹³ According to Cargill, since the Quitclaim License is a part of the overall settlement, the settlement cannot be approved.¹⁴ We conclude that

¹³ See *Hilgraeve Corp. v. Symantec Corp.*, 265 F.3d 1336, 1346 (Fed. Cir. 2001); *In re Access Beyond Techs., Inc.*, 237 B.R. 32, 45 (Bankr. D. Del. 1999); *Metabolite Labs., Inc. v. Lab. Corp. of Am. Holdings*, 370 F.3d 1354, 1369 (Fed. Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3298 (U.S. Nov. 3, 2004). Combined, these three patent cases support the proposition that patent licenses are essentially non-assignable covenants not to sue under the conferred grant of right.

¹⁴ See *Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp., Inc. (In re Debbie Reynolds Hotel & Casino, Inc.)*, 255 F.3d 1061, 1065 (9th Cir. 2001) (settlement approval resting on an erroneous interpretation of law is, *per se*, an abuse of discretion).

Cargill does not have standing to raise this issue on appeal.¹⁵

The United States patent statutes grant a patent owner the exclusive right to make, use, sell, and offer for sale the patented invention for a limited period of time.¹⁶ A patent has the “attributes of personal property.”¹⁷ Therefore, its ownership may be transferred by an assignment. An assignee may freely transfer his or her acquired rights.¹⁸

A patent owner may also grant a license to the patented invention. “A license differs most fundamentally from an assignment in the respect that a licensor retains legal title to the patent.”¹⁹ Licenses also differ in that the ability to assign a license is not addressed in the patent statutes. In the absence of a statute, federal courts have “fashioned a rule of federal common law to apply in cases concerning transfers of patent licenses. It is now well settled that a licensee has only a personal and not a property interest in the patent that is not transferable, unless the patent owner authorizes the assignment or the license itself permits assignment.”²⁰

¹⁵ For purposes of this appeal, we recognize Cargill’s standing as a creditor. Cargill has requested by motion to supplement the record on appeal to include the bankruptcy court’s Order of May 19, 2005, which allowed the Trustee’s withdrawal of his objection to Cargill’s proof of claim without prejudice. Because it does not impact this Court’s decision in any respect, we grant Cargill’s motion and assume, for purposes of this appeal, that Cargill holds an allowed claim against the estate, with standing to object to the settlement as a whole. Nevertheless, Cargill lacks standing to appeal the particular aspect of the settlement pertaining to the Quitclaim License.

¹⁶ 35 U.S.C. § 271(a) (establishing infringement of patent).

¹⁷ *Id.* § 261.

¹⁸ *Id.*

¹⁹ *Superbrace, Inc. v. Tidwell*, 21 Cal. Rptr. 3d 404, 407 (Cal. Ct. App. 2004) (quotation omitted).

²⁰ *Id.* (citing *Everex Systems, Inc. v. Cadtrak Corp.*, 89 F.3d 673, 679 (9th Cir.1996) (regarding nonexclusive licenses); *In re Hernandez*, 285 B.R. 435 (Bankr. D. Ariz. 2002) (applying same logic to exclusive licenses)); *see also*

(continued...)

A trustee's ability to assign a patent license is limited by § 365(c), which prevents assignment if:

- (1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
- (B) such party does not consent to such assumption or assignment.²¹

Traditionally, bankruptcy courts have held that federal common law preventing the non-consensual assignment of patent licenses constitutes "applicable law" that prohibits a debtor's assumption and assignment of the license over a patent owner's objection under § 365(c)(1).²²

In the present case, the objecting party is not the patent owner, but a party who appears to have no rights under the patent. The patent at issue is US 6,569,480, which is for a "liquefied gas extraction process" (the "Patent"). It is held in the name of Donald R. Hall, Michael R. Hall, Michael Moser, and L.V. Benningfield, Jr., denominated as the inventors (the "Inventors").²³ Neither LGX

²⁰ (...continued)
Unarco Industries, Inc. v. Kelley Co., Inc., 465 F.2d 1303, 1306 (7th Cir. 1972) ("The long standing federal rule of law with respect to the assignability of patent license agreements provides that these agreements are personal to the licensee and not assignable unless expressly made so in the agreement."); *In re Access Beyond Techs., Inc.*, 237 B.R. 32, 45 (Bankr. D. Del. 1999).

²¹ 11 U.S.C. § 365(c).

²² *Access Beyond Techs., Inc.*, 237 B.R. at 45; *In re Patient Educ. Media, Inc.*, 210 B.R. 237 (Bankr. S.D.N.Y. 1997).

²³ Cargill has requested that this Court take judicial notice of the Patent for other purposes. Cargill makes this request for purposes of admitting the statements in the Patent as to the uses for the invention as evidence that the bankruptcy court erred in finding a more limited use for the invention. Judicial notice does not extend to admitting all of the statements made in a document as evidence. But this doctrine does allow this Court to take notice that the Patent is on file in the U.S. Patent and Trademark Office, it covers a "liquefied gas extraction process," and it is held in the names of the Inventors. Cargill's request

(continued...)

nor Cargill are listed among the Inventors. Nothing in the record in this appeal demonstrates that Cargill holds any interest in, or is the owner or licensor of, the Patent. Accordingly, it does not have standing to object to the Patent's assignment or to this aspect of the Order.

“The language of section 365 is clearly intended to protect the rights of those persons or entities who share contractual relationships with the debtors. In other words, in order to invoke the protections provided in section 365, an entity must be a party to a contract with the debtor.”²⁴ In *ANC Rental Corp.*,²⁵ competitors attempted to block the debtors' assumption of airport concession contracts. The competitors' objections centered around the debtors' historical default on certain contract terms and their violation of certain airport regulations. They claimed that the assumption would violate applicable airport laws. The court held:

Although section 365 does confer the right to refuse assignment where excused by applicable law, that right is nevertheless conferred only upon *parties* to the contracts at issue. It creates no separate right of enforcement for other creditors of the estate who are not parties to the contract. Therefore, even if the appellants feel that the alleged violation of the law may effect [sic] them, they have not demonstrated that they have the legal right to enjoin such a violation.²⁶

Although neither the Trustee nor the bankruptcy court raised the issue of standing, standing is a jurisdictional requirement that is never waived, and can be

²³ (...continued)
is therefore granted in part.

²⁴ *Hertz Corp. v. ANC Rental Corp. (In re ANC Rental Corp.)*, 280 B.R. 808, 818 (D. Del. 2002), *aff'd without published opinion*, 57 Fed. Appx. 912 (3d Cir. 2003).

²⁵ *Id.*

²⁶ *Id.* (emphasis in original).

asserted at any stage in the proceedings.²⁷ In fact, “the court has the authority and the duty to raise the issue *sua sponte* when necessary.”²⁸ While Cargill, as a creditor, had standing to be heard by the bankruptcy court on the issue of whether the court should approve the settlement generally, it has no standing to be heard in this appeal on the issue of whether the Quitclaim License violated applicable patent law.²⁹

3. Does HEDA’s Transfer to Benham Violate the Code’s Priority Scheme?

Cargill argues that the portion of the settlement pertaining to HEDA’s agreement to share its recovery with Benham violates the Bankruptcy Code’s priority scheme as set forth in § 726 because it allows Benham, an unsecured creditor, to obtain more than other creditors within the general class of unsecured creditors will receive. Cargill is correct in its assertion that the bankruptcy court does not have authority to alter the Code’s distribution scheme. What one creditor voluntarily chooses to do with its own recovery, however, is a matter between two non-debtors that does not violate the Code. HEDA agreed to transfer to Benham only HEDA’s interest under the settlement, not an interest of the estate.

A reorganization plan in Chapter 11 is akin to a settlement agreement in

²⁷ *Id.* at 815 (citing *United States v. Hays*, 515 U.S. 737, 742 (1995); *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994)).

²⁸ *Id.*; *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *Koerpel v. Heckler*, 797 F.2d 858, 861 (10th Cir. 1986).

²⁹ In addition, Cargill contends that the holder of the patent never executed a license in favor of LGX. This would mean that the Trustee had nothing to quitclaim to HEDA. A transfer of rights by one with no rights confers no rights on the transferee and, thus, cannot violate the anti-assignment prohibition. *See Hydril Co. v. Baker Hughes Inc.*, 121 F.3d 728, 1997 WL 469722, at *6 (Fed. Cir. Aug. 19, 1997) (unpublished opinion) (Newman, J., concurring) (“A quitclaim deed executed by one with no rights and asserting no rights can not accomplish an assignment of rights.” (citing *Dorr-Oliver, Inc. v. United States*, 432 F.2d 447 (Ct. Cl. 1970) (quitclaim deed by one with no rights in the patent does not violate the anti-assignment statute))).

many respects. The weight of authority in the area of plan confirmation approves the use of “give-ups,” whereby one creditor transfers something of value to which it is entitled to another creditor, in order to secure the other creditor’s vote on a plan.³⁰ In the context of plan confirmation, the objection that is raised is that the plan violates the absolute priority rule, rather than the distribution scheme of § 726. In this context, however, courts have readily sanctioned “give-ups” on the basis that creditors are free to dispose of the distributed property in any manner they wish.³¹ In Chapter 11, § 1123(a)(4) expressly states that a creditor may consent to less favorable treatment than otherwise required by the Bankruptcy Code.

By way of comparison, Chapter 7 in general, and § 726 in particular, do not contain any language providing that a creditor may accept less favorable treatment. Section 726 uses mandatory language that “property of the estate *shall* be distributed” in the specified manner.³² This section, however, deals with distribution of estate property, not the voluntary transfer of property belonging to a particular creditor. There is nothing in Chapter 7 to prohibit a court from approving a comprehensive settlement where one creditor voluntarily chooses to relinquish its property to another.

Cargill argues that HEDA’s secured status, and therefore its entitlement to proceeds from a sale of the plant, is in dispute. Accordingly, Cargill maintains

³⁰ See *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 602 (Bankr. D. Del. 2001); *In re MCorp Fin., Inc.*, 160 B.R. 941, 960 (S.D. Tex. 1993); see also *In re SPM Mfg. Corp.*, 984 F.2d 1305, 1312-1313 (1st Cir. 1993) (Chapter 7 context). But see *In re Armstrong World Indus., Inc.*, 320 B.R. 523 (D. Del. 2005).

³¹ *In re Drexel Burnham Lambert Group, Inc.*, 138 B.R. 714, 717 (Bankr. S.D.N.Y.), *aff’d*, 140 B.R. 347 (S.D.N.Y. 1992); *In re Orlando Investors, L.P.*, 103 B.R. 593, 597 (Bankr. E.D. Pa. 1989); *In re Middle Plantation of Williamsburg, Inc.*, 47 B.R. 884, 892 (E.D. Va. 1984), *aff’d without published opinion*, 755 F.2d 928 (4th Cir. Feb. 5, 1985).

³² 11 U.S.C. § 726(a) (emphasis added).

that HEDA is giving estate property away, not its own property. We disagree. HEDA is not transferring to Benham its collateral. It is transferring its rights under the MOU.

B. Cargill's Assertions of Abuse of Discretion

“A bankruptcy court’s approval of a compromise may be disturbed only when it achieves an unjust result amounting to a clear abuse of discretion.”³³ Nevertheless, the bankruptcy court’s decision must not be a mere rubber stamp of the trustee’s judgment.³⁴ Instead the decision “must be an informed one based upon an objective evaluation of developed facts.”³⁵ Approval of a settlement that arises from an insufficient factual foundation “inherently constitutes an abuse of discretion.”³⁶ On the other hand, the bankruptcy court is not obliged to conduct a “mini-trial on the merits” of the proposed settlement.³⁷ As the bankruptcy court in this case noted, it is appropriate to approve a settlement after considering the following factors:

“the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views.”³⁸

³³ *Reiss v. Hagmann (In re Reiss)*, 881 F.2d 890, 891-92 (10th Cir. 1989).

³⁴ *Id.*; see also *Armstrong v. Rushton (In re Armstrong)*, 285 B.R. 344, 2002 WL 471332, at *2 (10th Cir. BAP Mar. 28, 2002) (unpublished disposition) (citing *Depoister v. Mary M. Holloway Foundation (In re Depoister)*, 36 F.3d 582, 587 (7th Cir. 1994)), *aff'd without published opinion*, 99 Fed. Appx. 210 (10th Cir. 2004).

³⁵ *Reiss*, 881 F.2d at 892.

³⁶ *Id.* (quoting *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 299 (5th Cir. 1984)).

³⁷ *Armstrong*, 2002 WL 471332, at *3 (quoting *Comm. of Unsecured Creditors of Interstate Cigar Co., Inc. v. Interstate Cigar Distribution, Inc. (In re Interstate Cigar Co., Inc.)*, 240 B.R. 816, 822 (Bankr. E.D.N.Y. 1999)).

³⁸ Transcript at 5-6 (quoting *Kopexa Realty*, 213 B.R. at 1022), *in* Appellant’s Appendix at 1058-59.

In the present case, the bankruptcy court conducted a day-long evidentiary hearing and then made detailed findings approving the settlement. Nevertheless, Cargill complains that the court based its decision on insufficient evidence. In summary, Cargill contends that the court was obligated to value the consideration that the Trustee gave as compared with what he received in the settlement. The primary consideration given by the Trustee was his abandonment of any interest of the estate in the plant and in his litigation with HEDA. In exchange, the primary consideration he received was the assignment of HEDA's rights under the MOU. Cargill asserts that there was incompetent or insufficient evidence on the value of (1) the Trustee's claims in the Adversary; (2) the plant - both the real and personal property; and (3) HEDA's rights under the MOU.

1. Evidence on Probability of Success in Adversary

Cargill contends that because the Trustee presented insufficient evidence of the probability of his success on his claims against HEDA, the bankruptcy court should not have approved the settlement. Cargill misunderstands the bankruptcy court's duties in evaluating a compromise of a claim under Bankruptcy Rule 9019(a). "A compromise agreement allows the trustee and the creditor to avoid the expenses and burdens associated with litigating 'sharply contested and dubious' claims."³⁹ The bankruptcy court need not conduct an exhaustive investigation into the validity of claims. It is sufficient if it has determined "that either (1) the claim has a 'substantial foundation' and is not 'clearly invalid as a matter of law,' or (2) the outcome of the claim's litigation is 'doubtful.'"⁴⁰

In this case, the bankruptcy court made numerous findings regarding the dubious nature of the Trustee's claims against HEDA. Cargill objects to the

³⁹ *United States v. Alaska Nat'l Bank (In re Walsh Constr., Inc.)*, 669 F.2d 1325, 1328 (9th Cir. 1982) (quoting *In re Calif. Assoc. Prod. Co.*, 183 F.2d 946, 949-50 (9th Cir. 1950)).

⁴⁰ *Id.* (quoting *Calif. Assoc. Prod.*, 183 F.2d at 949-50).

court's reliance on its familiarity with the litigation itself. Since Cargill was not a party to the Adversary, it asserts that it was improper for the court to base its ruling in part on knowledge and information it obtained outside of the hearing on the settlement.⁴¹ This objection does not take into account the distinction between a hearing on a compromise and an actual trial on the merits. The court's duty in approving a compromise is to apprise itself of all facts necessary to form an intelligent and objective opinion concerning the claim's validity.⁴² The bankruptcy judge is often uniquely situated to do so, given his overall familiarity with the pending action.⁴³

2. Evidence on Valuation of the Plant

Cargill claims that the Trustee offered no competent evidence on the value of the plant and LGX's technology. It asserts that the court erred by allowing the Trustee, who is not a qualified real estate appraiser, to testify as to the value of the estate's real and personal property. In the absence of competent evidence of value, Cargill claims the court could not approve the settlement. We find no abuse of discretion arising from the court's admission of, and reliance on, the Trustee's valuation opinion.

In his testimony, the Trustee opined that HEDA's collateral was worth approximately \$500,000. He based his opinion in part on his belief that: "if you seek to buy that building and that plant as it is, you're buying a lawsuit; you're buying patent litigation with Cargill. In my observation and experience most investors do not want to buy a lawsuit."⁴⁴ He also opined that the valuation was greatly affected by the plant's remote location, the fact that it was built for a

⁴¹ Appellant's Brief at 30.

⁴² *Walsh Constr. Co.*, 669 F.2d at 1328.

⁴³ *Id.*

⁴⁴ Transcript at 21, *in* Appellant's Appendix at 919.

specific manufacturing purpose (which was never successful), it was not climate-controlled, and the plant equipment had been sitting idle for two to three years.⁴⁵ In rebuttal, Cargill offered no testimony of value, instead relying on the local county tax assessor's valuation and the values listed by LGX in its schedules and court filings. The bankruptcy court found that evidence lacked "value or reliability."⁴⁶

In allowing the Trustee's testimony over Cargill's objection, the court acknowledged:

Undoubtedly, it would be better had there been a real estate appraisal. Yet, the evidence is the [T]rustee had no funds with which to pay for an appraisal. The [T]rustee does have 20 years of experience as a panel trustee. He has appeared in this court on many occasions, and the Court does believe the [T]rustee has adequate experience arising from his work as a trustee for 20 years that would enable him to give a reasonable opinion of the value of the property.⁴⁷

We also acknowledge that the Trustee was not specially qualified to value cocoa extraction plants, but he was not testifying as an expert witness. Rather, he was giving his opinion of the value of the property based on his knowledge of the property, lawsuits related to the property, and his experience in liquidating properties in the region. Experienced trustees, such as this Trustee, who had 20 years of trustee experience, often develop a general knowledge about real and personal property values in the area where they practice, which expertise the bankruptcy court properly chose to consider. Accordingly, his testimony was fully admissible under Federal Rule of Evidence 701.⁴⁸

⁴⁵ Transcript at 22, *in* Appellant's Appendix at 920.

⁴⁶ Findings at 22, *in* Appellant's Appendix at 1079.

⁴⁷ Findings at 22, *in* Appellant's Appendix at 1078-79.

⁴⁸ *Cf. United States v. 10,031.98 Acres of Land*, 850 F.2d 634, 639 (10th Cir. 1988) (president of landowning corporation can testify as to his opinion as to the value of the land).

Cargill would have us adopt a rule that requires independent appraisal evidence in every contested matter involving the abandonment of the estate's interest in real property. As a practical matter, many estates, including this one, cannot afford the expense of a formal appraisal. As a legal matter, such a formal appraisal is not the only admissible evidence on value. Here, the Trustee's opinion mirrored that of HEDA, which had valued its own collateral in its proof of claim at only \$500,000.⁴⁹ We cannot find that the bankruptcy court abused its discretion in either allowing the Trustee to testify or in giving greater weight to the Trustee's testimony than it did to Cargill's offer of pre-petition tax assessments and LGX's schedules.

3. Evidence on Proof of Enforceability of HEDA's Rights under the MOU

Finally, Cargill argues that the bankruptcy court erred in approving the settlement without first granting relief from stay to Cargill to proceed in the Pennsylvania Litigation to obtain a determination of whether HEDA's rights under the MOU were enforceable. Cargill's argument is tantamount to requiring full scale litigation on a claim in order to actually determine its value before analyzing a settlement of the claim. This would render any settlement meaningless. It would certainly rob the estate of any benefit of settling.

In its findings, the bankruptcy court correctly stated that the proper inquiry was "not whether pressing onward might [produce] more funds for the estate," but rather, whether the settlement "fell within the universe of reasonable alternatives."⁵⁰ After addressing the costs attendant in prosecuting the complex case against HEDA and deeming its legal underpinnings "dubious," the bankruptcy court found that even in the event of success, any net recovery in the

⁴⁹ Appellant's Appendix at 1120.

⁵⁰ *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 212 F.3d 632, 636 (1st Cir. 2000).

Adversary would be “small.”⁵¹ Its findings were based in part on the Trustee’s testimony, which was based on both his personal experience and on information received after conferring with outside counsel.⁵² The Trustee testified that since he filed the Adversary, he had become “significantly less confident [in the merits of the Adversary],”⁵³ and in the event the Adversary failed, the unsecured creditors would receive no distribution.⁵⁴ By way of contrast, the Trustee testified that a \$1 million recovery in the Pennsylvania Litigation would allow a 12% distribution to the unsecured creditors.⁵⁵ In its analysis, the court considered all of the relevant *Kopexa Realty* factors.⁵⁶ For all these reasons, approval of the settlement does not leave us with “a definite and firm conviction” that the bankruptcy court “made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.”⁵⁷

IV. Conclusion

For these reasons, we cannot say that the bankruptcy court’s approval of the Trustee’s settlement with HEDA is per se incorrect as a matter of law or achieves an unjust result amounting to a clear abuse of discretion. Accordingly, we AFFIRM.

⁵¹ Findings at 11-17, 24, *in* Appellant’s Appendix at 1065-73, 1081.

⁵² Transcript at 89-90, *in* Appellant’s Appendix at 987-88.

⁵³ *Id.* at 19, *in* Appellant’s Appendix at 917.

⁵⁴ *Id.* at 88, *in* Appellant’s Appendix at 986.

⁵⁵ *Id.* at 27-30, *in* Appellant’s Appendix at 925-27.

⁵⁶ *Kopexa Realty*, 213 B.R. at 1022. With respect to the likelihood of ever collecting on a judgment in the event the Adversary did theoretically succeed, the bankruptcy court needed only to revisit the Trustee’s testimony concerning valuation of the LGX property in the first place.

⁵⁷ *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-1554 (10th Cir. 1991)).