UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

IN RE:	)	
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CHARLOTTE COMMERCIAL GROUP, INC	)	CASE NO. B-01-52684 C-7W
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	)	
DEBTOR	)	
	)	

ORDER APPROVING MOTION BY TRUSTEE TO ENTER INTO LITIGATION AGREEMENT

This matter came on for hearing after due and proper notice, before the undersigned bankruptcy judge on the Motion of Trustee to Approve Litigation Agreement and the objection to the motion filed by Fleet National Bank ("Fleet"). Appearing before the Court was William P. Miller, the Chapter 7 Trustee, Herman L. Stephens, Special Counsel for the Trustee, Kenneth M. Greene, counsel for Fleet, Thomas W. Waldrep, Jr., counsel for Robert M. Sauls ("Sauls") and Robyn Whitman, counsel for the U. S. Bankruptcy Administrator.

The Court after reviewing the pleadings filed in this case and hearing the arguments of the parties finds as follows:

1. On November 13, 2001, the above-captioned debtor (the "Debtor") filed for relief under Chapter 11 of the Bankruptcy Code. During the pendency of the Chapter 11 case, William P. Miller was appointed as Trustee. On April 26, 2002, the case was converted to a case under Chapter 7. William P. Miller (the "Trustee") is the duly appointed Chapter 7 trustee.

2. On December 17, 2001, the Debtor filed an Adversary Proceeding against Fleet, Adversary Proceeding Number 01-6044 (the "Adversary Proceeding"). The Court previously entered orders authorizing the Debtor to employ Herman L. Stephens and H. David Niblock as Special Counsel for the Debtor in connection with the litigation against Fleet. Under the agreement

with the Debtor, Special Counsel received a $20,000 non-refundable retainer and agreed to accept a sum equal to two percent (2%) of the first six million dollars of any recovery against Fleet, fifty percent (50%) of any recovery over six million dollars but less than eight million dollars, and twenty-five percent (25%) of any recovery over eight million dollars. The agreement also provided that the Debtor was responsible for all expenses incurred in connection with the litigation against Fleet, and the Debtor advanced Special Counsel the sum of ten thousand dollars ($10,000) for such litigation expenses. The order approving the agreement with Special Counsel also provides that the payment of the final contingency fee is subject to the approval of the Court.

3. On January 17, 2002, the court entered an order prohibiting the Debtor's use of cash collateral and granting relief from the automatic stay to permit Fleet to exercise its state court remedies against essentially all assets of the Debtor.

4. Without the use of cash collateral, Debtor was no longer able to operate its business or reorganize. On April 26, 2002, the case converted to Chapter 7. The Trustee negotiated a compromise and settlement of a pending objection filed by the Debtor to Fleet's proof of claim. As part of the Settlement, the Trustee received one hundred thousand dollars ($100,000) of unencumbered funds to be used in the administration of the bankruptcy case.

5. The primary unliquidated asset of the estate is the pending Adversary Proceeding against Fleet. The Trustee does not have sufficient monies in the estate to finance the cost of the Fleet litigation. As of June 30, 2002, the Trustee had approximately seventy thousand dollars ($70,000) on hand. The anticipated cost of the litigation will greatly exceed $70,000, particularly since the parties were unable to agree to non-binding mediation or dispute resolution during the early stages of the case.

Based on the foregoing, the Court makes the following conclusions:

Sauls is an insider of the Debtor. He is the majority shareholder of the Debtor and is a third

party defendant in the Adversary Proceeding. He has a right to purchase an interest in the litigation. Such a transaction does not violate the common law doctrines of champerty and maintenance, nor does it violate public policy. Sauls is an interested party in the litigation. He is not an "officious intermeddler." See Smith v. Hartsell, 150 N.C. 71, 63 S.E. 172 (1908). The common law doctrine of champerty deals with a situation in which a stranger to the litigation seeks to acquire an interest in the outcome. Sauls is no stranger to the litigation and his purchase of an interest does not offend public policy.

The Trustee filed an initial motion to approve a litigation agreement whereby Sauls would receive 0% of the first $300,000 of any recovery; 90% of any recovery in excess of $300,000 but less than $600,000; 48% of any recovery in excess of $600,000 up to six million dollars; and 25% of any recovery over eight million dollars. The first monies recovered would be used to repay Sauls for monies advanced. The Court, by Order dated July 1, 2002, did not approve this agreement.

The Trustee filed an amended Agreement by which Sauls would be paid as follows:

Litigation Expenses Paid	Percentage of Recovery
up to $25,000	25%
$25,000 to $50,000	30%
over $50,000	33%[1]

Additionally, the proposed Revised Litigation Agreement provides that first proceeds would be used to repay to Sauls any Litigation Expenses approved by the Trustee and paid by Sauls.

This transaction should be reviewed under the provisions of 11 U.S.C. §363 in that the

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[1]The Revised Agreement includes a sliding payment scale, but at all times, if there is a recovery the estate will receive between 42% and 65% (using a blended rate for the first $600,000 recovered).

Trustee is seeking to sell an interest in estate property other than in the ordinary course of business. Proceedings to sell property are core proceedings under 38 U.S.C. §157(b)(2)(M) and (N). The Trustee has complied with the twenty day notice requirement of Bankruptcy Rule 2002 and notice of all terms of the Litigation Agreement has been served on all creditors. The only objection to the sale has been by Fleet.

The sale of an asset under §363 requires a "sound business reason." In re Lionel Corp., 722 F.2d1063 (2 Cir. 1983).[2] The sale must be proposed in good faith, the purchase price must be fair and reasonable, and adequate and reasonable notice of the sale must have been provided to parties in interest.

The Trustee is attempting to sell an asset which may have no value or may have great value. If Fleet prevails in the litigation, it is possible for the estate to have no recovery. If the Debtor prevails, the recovery could be very significant. It is clear that the litigation will be extensive and expensive. The Trustee does not have the monies on hand to pay for the cost of litigating this action. If the Trustee had funds to meaningfully participate in the lawsuit, then no "sound business reason" would exist to sell any interest in the lawsuit. Sauls is purchasing the right to participate in any recovery from the Fleet litigation. A recovery in that litigation is far from certain and Sauls is expending monies at some risk. Inasmuch as the Court views the transaction as a sale, Sauls will NOT be repaid any of the monies he advances for litigation costs. The monies advanced are equal to the purchase price of his interest in the litigation. His percentage recovery is appropriately tied to the purchase price.

The purchase price for the sale cannot be fixed, as Sauls will pay such amounts for so long as he wants to maintain an interest in the recovery. For example, if Sauls pays the sum of $75,000

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[2]Lionel was a Chapter 11 case but §363 applies to Chapter 7 as well has Chapter 11 cases.

in litigation costs and decides that he does not wish to pay any more monies, then Sauls forfeits his interest in any proceeds of recovery. Sauls will NOT be allowed an administrative claim for any monies advanced under the Litigation Agreement. Without Sauls, the Trustee does not have the financial ability to continue with the litigation. The Trustee can only sell an interest in the litigation to a party in interest. The court finds that the Revised Litigation Agreement as amended to provide that Sauls cannot be prepaid for any sums advanced is fair and reasonable as required under §363 and that Sauls and the Trustee have negotiated this Agreement in good faith.

Fleet's objection to the approval of the Litigation Agreement on the basis that the agreement is non-recourse loan is overruled. Inasmuch as Sauls may not be repaid any of the monies that he advances, the provision of §364 regarding the Trustee's authority to obtain credit has no application.

Fleet's contention that the Litigation Agreement shifts control of the Adversary Proceeding to Sauls is without merit. If Sauls fails to continue to pay for the litigation expenses, he loses all interest in any recovery. Sauls does not control the outcome of any settlement proposal that the Trustee might elect to present to the court. Sauls does not control the outcome of any trial on the merits. Sauls, by buying an interest in the lawsuit, gives the Trustee the opportunity to conduct discovery, respond to discovery and to hire experts.

Fleet's contention that there has been no explanation of the need for funding from Sauls and that "the fact of conversion of the underlying bankruptcy case has no impact on the nature of the Adversary Proceeding or the manner of its prosecution" is without merit. At the time that Special Counsel was approved by the Bankruptcy Court, the Debtor was a debtor in possession in an operating Chapter 11 proceeding. Events subsequent to that date, including the lifting of the automatic stay to permit Fleet to foreclose on its collateral and the conversion to a Chapter 7 case, have impacted the Debtor's ability to pay for ongoing legal expenses as required under the

agreement with Special Counsel.

The Trustee has represented to the court that he is comfortable with the financial ability of Sauls to make payments for Litigation Expenses. By separate agreement, Mr. Brodie Baker and Niblock Financial Systems, Inc. have guaranteed the payment of the Litigation Expenses by Sauls to the estate. The Trustee has reviewed the tax returns and financial statements of both Mr. Baker and Niblock Financial Systems and is satisfied with their financial ability.

The court finds that the Revised Litigation Agreement as further amended by this Order, compiles with the relevant provisions of §363; provides adequate assurance of performance; provides an effective mechanism for enforcing the obligations of Sauls and the Guarantors; does not transfer control of the prosecution of the Adversary Proceeding from the Trustee to Sauls; and does not violate any public policy of the State of North Carolina regarding champerty. The objection of Fleet is OVERRULED AND DENIED.

The court finds that the Revised Litigation Agreement as further amended by this Order is in the best interest of the bankruptcy estate, creditors and other parties in interest.

Based on the forgoing, IT IS ORDERED, ADJUDGED AND DECREED THAT the Revised Litigation Agreement as amended by this Order is hereby approved.

This the 12 day of August 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge