UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

SWANSEA PROPERTIES, LLC et al, **Debtors.**	**In Chapter 11 proceedings** **Case No. 2-08-bk-11486-CGC** **UNDER ADVISEMENT DECISION APPROVING SETTLEMENT**

I. Introduction

If you don't like March in Phoenix, you don't like Phoenix. The weather is chamber of commerce perfect with highs in 80's, cool evenings (perfect for sweatshirts), little wind, and an endless blue sky. A sense of well-being envelops the Valley that is punctuated by baseball. "Pitchers and catchers report" is a surer sign of spring than any cactus bloom can offer. The smell of freshly cut green grass, the taste of a hot dog with mustard, relish and onions, and the crack of a bat all shock the senses of our visitors from the Midwest. For a baseball lover, Arizona is the place to be in March. These images were surely in the mind of the Wood Family, Jack Rose and the City of Goodyear when they agreed to build the Goodyear Ballpark.

However, instead of enjoying the fruits of their labors and toasting to each others success, the parties were in Bankruptcy Court in Spring 2009 and Spring 2010 when the Cleveland Indians and Cincinnati Reds respectively moved to the Ballpark. The Woods were here, because they were trying to save the land – what remained of their family farm – surrounding the Ballpark. The Roses were here trying to avoid a lawsuit filed by the Woods accusing them of fraud and more. In December 2008, they had agreed to a settlement that would help each of them achieve their goals. This agreement fell apart in the early winter of 2009. The Woods decided that they could no longer abide by their agreement; the Roses not only believed they could, but that they must. They spent

the next year trying to resolve their differences. They could not and so they appeared before the Court in March 2010, arguing whether the settlement they reached in December 2008 should be approved. The Court concludes that it should and therefore rules in favor of the Roses.

II. Facts

A. The Parties

There are four major parties involved with the development and construction of the Goodyear Ballpark: 1) Swansea Properties, L.L.C. ("Swansea"), MPK Enterprises, Inc. ("MPK"), and Eagletail Bighorn, L.L.C. ("Eagletail," and collectively with MPK and Swansea, the "Debtors") are companies owned by Margaret Wood Carl, Kenneth Wood, and Clarence Wood ("Woods"). The Woods owned the land where the Ballpark was built and land surrounding the Ballpark; 2) Jack Rose, Civica Properties, LLC ("Civica Properties"), CiviTerra Design-Build, LLC ("CiviTerra"), and Civica Development, LLC ("Civica Development") (collectively along with Vanessa Rose the "Rose Parties") partnered with the Debtors to develop the Ballpark and surrounding land; 3) Marshall & Ilsley Bank ("M&I") provided financing up to $38 million to Debtors to complete infrastructure improvements under various development agreements; and 4) the City of Goodyear, the owner of the Ballpark and development partner with the Debtors and Rose Parties. The goal of the parties was to develop 240 acres of real property in Goodyear, Arizona into what eventually became the Goodyear Spring Training Complex ("Complex").

B. Pre-Bankruptcy History

In June 2004, Wood Family Enterprises ("WFE")[1], MPK's predecessor-in-interest, and Civica Properties entered into a letter of agreement regarding the Property which was ultimately formalized when WFE, Swansea, and Eagletail entered into a formal management agreement with the predecessor of Civica Development ("Management Agreement"). Under the Management Agreement, Civica Development was the Debtors' agent in negotiations with Goodyear regarding the build out of the Complex, including the ballpark and practice facilities ("Ballpark") and office

[1]A non-debtor also owned by the Woods.

and retail space (the "Project"). Later, MPK entered into two construction agreements with CiviTerra relating to the Project. As part of the Project, MPK, Swansea, Eagletail, Civica Properties, and Civica Development entered into agreements with Goodyear and others (collectively "City Agreements"), including:

- a Ballpark Village/Wood Corporate Campus Development Agreement dated May 29, 2007;
- an Infrastructure Development Agreement dated May 29, 2007; and
- a Ballpark Village-Wood Corporate Campus Agreement for Conveyance of Real Property dated May 29, 2007; and
- a Memorandum of Understanding and Agreement Regarding Retail Liner Space Adjacent to Ballpark Owned by the City of Goodyear dated September 18, 2007.

On June 10, 2008, MPK terminated the two CiviTerra contracts. On August 1, 2008, the City of Goodyear terminated the Infrastructure Development Agreement.

C. The Bankruptcy

The Debtor filed Chapter 11 on August 29, 2008. In September 2008, the Debtors rejected the executory management contracts between the Debtors and Rose Parties. In the same time frame, the Debtors filed an adversary (08-00609) against Jack Rose, Vanessa Rose, Civica Development, LLC f/k/a Rose Properties Management, LLC, CiviTerra Design-Build, LLC, and Civica Properties, LLC f/k/a Rose Properties Southwest, LLC (the "Adversary Action"). The Debtors allege fraudulent concealment, breach of fiduciary duty, negligent misrepresentation, breach of contract, and conversion. The Rose Parties' counterclaims include breach of contract, defamation, intentional interference with contract and breach of fiduciary duty.[2] The Rose Parties have filed proof of claims totaling almost $8 million.

Soon after filing bankruptcy, the Debtors, the Civica Entities[3], and Goodyear reached a partial settlement under which the Rose Parties assigned to MPK rights and obligations under the City Agreements that were formerly in the name of Civica Development and/or Civica Properties.

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[2]Pursuant to an agreement between the parties the Rose Parties have not filed an answer in the adversary. But, according to the declaration of Jack Rose, were they to file an answer these would be their counterclaims.

[3]Civica Entities is defined in the Rose Settlement (defined below) as Civica Development, Civica Properties, and Civiterra.

This completed a direct relationship between MPK and the City with respect to the City Agreements and excised the Rose Parties from any intermediary position. The settlement provided a general release of claims as between the Rose Parties and Goodyear, but did not settle claims between the Debtors and Rose Parties regarding the Property.

In early November 2008 M & I sought stay relief on 105.14 acres of land ("Remaining Property") held by the Debtors. M&I claimed that the Debtors owed over $28 million, were in default since May 2008, are a single asset real estate debtor as defined in the Code and that the Remaining Property appraised value was $18.5 million. During a hearing on the matter on November 25, 2008, the Court did not grant stay relief or determine the SARE issue, but did set a December 23, 2008 deadline for filing a plan of reorganization.

On December 23, 2008 the Debtors filed its plan and disclosure statement ("Plan"). A key component of the Plan was a forthcoming settlement between the Rose Parties and the Debtors. Under the contemplated settlement and Plan, the Rose Parties agreed to be a consenting impaired class allowing the Debtors to cram down M&I in an attempt to retain the Remaining Property. During the Christmas holiday, the Debtors and the Rose Parties finalized the settlement which the Debtors filed with the Court on December 29, 2008 ("Rose Settlement"). Key terms of the Rose Settlement include:

- WFE shall pay $50,000 to CiviTerra.
- CiviTerra shall be deemed to hold an allowed claim jointly against each of the Debtors in the amount of $200,000.
- CiviTerra agrees that it will support any plan of reorganization promulgated by the Debtors which provides for the release of its mechanics lien in exchange for a priority unsecured claim that will be paid in full within two years of the effective date of such plan of reorganization.
- All other claims asserted by and among the parties with respect to the Real Property, the Project, or the City Agreements shall be released.

M&I originally objected to the Rose Settlement and Plan on the grounds that the Plan did not have a reasonable chance of being confirmed in a reasonable amount of time and the Rose Settlement was simply a transparent attempt to satisfy the accepting impaired class requirement of Section 1129(a)(10).

Before the Court held a hearing on the Rose Settlement, the Debtors did an about face by entering into a settlement with M&I ("M&I Settlement") and withdrawing their support for the Rose Settlement. Key terms of the M&I Settlement include:

- The Debtors agree to stay relief as requested by M&I;
- M&I releases all claims against the Debtors;
- M&I will not try to convert, dismiss or appoint a receiver;
- M&I will make no claims to funds recovered by the Debtors;
- Debtors release all claims against M&I;
- Debtors will alert the Court they no longer believe the Rose Settlement is in the best interests of the estates.

The Rose Parties did not object to the M&I Settlement. Instead, they advised the Court that the Court could approve both the M&I Settlement and Rose Settlement – a position they have maintained throughout these proceedings. The Court approved the M&I Settlement. M&I has not put forth a position as to whether the Rose Settlement should be approved after the Court approved the M&I Settlement.

III. Position of the Parties

A. Debtors

The Debtors claim that the Rose Settlement is no longer in the best interest of the Debtors because they can no longer perform under the Rose Settlement; the consideration granted the Debtors is no longer commensurate with the benefits received by the Debtors; and it is no longer in the best interest of the estate or its creditors. Relying on *In re Mickey Thompson Entertainment Group, Inc.*, 292 B.R. 415, 421 (9th Cir. BAP 2003), the Debtors claim that they have a fiduciary duty to withdraw the motion because the Rose Settlement makes no economic or legal sense. Just one day before filing the Plan, Jan Sell, appraiser for the Debtors, provided a verbal estimation of the Remaining Property valuing it at $5.3 million – far below the $18.5 million valuation provided by M&I just months earlier. In the weeks that followed, the Debtor argues, it became apparent that it no longer made economic sense to hold onto the Remaining Property in hopes of developing it; thus the Plan, centered on retaining the Remaining Property, also no longer made economic sense. Around the same time that the Debtors received word of the falling value of the Remaining Property,

negotiations with Goodyear broke down, making it apparent, according to the Debtors, that no consensual agreement would occur regarding the damage payment that they anticipated from the City. These two factors, according to the Debtors, make the Plan unfeasible both because the economics do not support retaining the Remaining Property and the source of initial funding under the Plan – settlement with Goodyear – has evaporated. Against this backdrop, the Debtors entered into successful negotiations with M&I.

According to the Debtors, the Rose Settlement no longer meets the *Woodson* factors[4] because: (1) Avoiding complex and time consuming litigation is no longer a driving motivation for the Debtors because the Debtors face complex and time consuming litigation regardless as there will be no settlement with Goodyear; (2) Expense is no longer a concern because the special counsel in the Goodyear matter will likely agree to pursue much of the Rose litigation on contingency; and (3) the Debtors can no longer perform under the Rose Settlement.

The third factor, according to the Debtors, is the most compelling. The Debtors claim that because they can no longer rely on a settlement with Goodyear, they cannot assure payment of the $200,000 claim in full within two years. Further, argue the Debtors, once M&I forecloses on the Remaining Property, the issue of lien priority between CiviTerra and M&I will have to be addressed. According to the Debtor, if it is determined that CiviTerra's claim is ahead of M&I, it will be paid from the proceeds of the Remaining Property and CiviTerra will have no claim against the Debtors; but if CiviTerra's lien is determined to be behind the Bank and wholly unsecured, then it would be inconsistent for CiviTerra to hold an allowed secured claim, or even an allowed priority claim, against the Debtors' estates. Thus, argue the Debtors, approval of the Rose Settlement could lead to inconsistent ruling which do not conform to the priority scheme in the Bankruptcy Code.

[4]The factors under *In re Woodson*, 839 F.2d 610 (9th Cir. 1988) are discussed more fully below. The *Woodson* factors are: (1) the probability of success in the litigation; (2) the difficulties encountered in the matter of collection; (3) the complexity of the litigation involved, the expense, inconvenience and delay attending it; and (4) the paramount interest of creditors, with proper deference to their reasonable views.

The Debtors now claim that the Rose Parties are not judgment proof because none of them have filed for bankruptcy, Mr. Rose continues to hold business interests, and CiviTerra's Mechanic's lien is a valuable asset.

B. Rose Parties

The Rose Settlement is binding and the Debtors cannot unilaterally cancel the contract according to the Rose Parties. Once executed, urge the Rose Parties, a settlement agreement is binding, conclusive, and final as if it had been incorporated into a judgment. *See Clinton Street Greater Bethlehem Church v. City of Detroit*, 484 F.2d 185, 189 (6th Cir. 1973); *Hisel v. Upchurch*, 797 F.Supp. 1509, 1518 (D. Ariz. 1992). As cited by the Rose Parties, numerous courts have held that a settlement agreement is binding between the parties prior to approval by the court, and if the debtor attempts to back out, the settlement may still be enforced. *See Providers Benefit Life Ins. Co. v. Tidewater Group, Inc. (In re Tidewater Group, Inc.)*, 8 B.R. 930, 933 (N.D. Ga. 1981); *In re Lyons Trans. Lines, Inc.*,163 B.R. 474, 476 (Bankr. W.D. Pa. 1994); *In re Columbus Plaza, Inc.*, 79 B.R. 710, 715 (Bankr. S.D. Ohio 1987).

Further, according to the Rose Parties, express terms of the Rose Settlement make it binding because Arizona law requires a court to construe a contract to give effect to all of its provisions. *New Pueblo Constructors, Inc. v. lake Patagonia Recreation Ass'n*, 467 P.2d 88, 92 (Ariz. App. 1970). The Rose Parties point to paragraph 5 of the Civica Settlement Agreement which states, "upon execution of this Agreement, no party shall take any action contrary to their obligations under this Agreement pending a determination by the Bankruptcy Court as to its approval" as intent by the Debtor to be bound.

The Rose Parties do concede that under Arizona law a change in circumstances beyond control of the party allows excuse of performance. *See Mobile Home Estates, Inc. v. Levitt Mobile Home Systems, Inc.*, 575 P.2d 1245, 1248 (Ariz. 1978). However, the burden of proof is on the party seeking to excuse performance to show that the supervening event was not reasonably foreseeable. *Garner v. Ellingson*, 501 P.2d 22, 24 (Ariz. App. 1972). The Rose Parties claim that the Sell appraisal and the failure of negotiations with Goodyear were neither unforeseen or unavoidable.

Phillip David Meyers, Debtors former chief restructuring officer, admitted on cross examination that negotiations with the Goodyear fell apart before December 23, 2010. It follows, argue the Rose Parties, that the Debtors knew before they executed the Rose Settlement that the Plan would be in serious jeopardy if the Sell Appraisal was accurate or negotiations with the city fell apart.

The Rose Parties also argue that the Rose Settlement is in the best interest of the Debtors because the Rose Parties are judgment proof. Even if the Debtors were to succeed in their claims, according to the Rose Parties they would not be able satisfy and judgment due to over $2,000,000 in judgments existing against them with another $8.6 million soon to be entered. Mr. Rose claims his current net worth is negative. The Debtors concede that the companies are judgment proof, but Mr. Rose's claimed insolvency is questionable.

IV. Analysis

Before turning to whether the Court should approve the Rose Settlement, the Court will first determine if the Debtor can oppose a settlement agreement it proposed.

A. Do the Debtors Have the Ability to Withdraw Support for the Settlement

Both Parties claim that their positions are supported under the Rose Settlement. The Rose Parties rely on paragraph 5 which states, "no party shall take any action contrary to their obligations under this Agreement pending a determination by the Bankruptcy Court as to its approval."[5] The Rose Parties ask the Court to adopt the language of *Tidewater* (a Northen District of Georgia case) which concluded "an agreement by a debtor in possession to compromise litigation should also be

[5]Paragraph 5 reads:

> The Parties agree that upon execution of this Agreement, no party shall take any action contrary to their obligations under this Agreement pending a determination by the Bankruptcy Court as to its approval. Promptly upon the Effective Date, the Civica Entities shall deliver to the Wood Entities (i) copies of all transaction privilege tax returns filed by CiviTerra with the City of Goodyear and/or the State of Arizona since CiviTerra was formed, (ii) supporting detail for such returns identifying the taxes relating to the work performed with respect to the Project, and (iii) copies of endorsed checks or other evidence of the taxing authority's receipt of payment by CiviTerra of the taxes shown on such returns. Further, Rose and the Civica Entities have requested that WFE and its principals take steps to wind up and conclude all the financial and business dealings between and among them (which dealings do not involve the Property, the Project or the City Agreements and which do not impact on the Debtors or their estates). Accordingly, these parties agree that, upon the Effective Date, they will proceed in good faith to attempt to reach a mutually agreeable manner for terminating and winding up such financial and business dealings.

binding upon all parties to the agreement pending a Court determination as to whether or not to approve the agreement." *Id.* at 933. Accordingly, it held that the agreement was binding on the debtor. The Debtors counter by citing to paragraph 2 which states "The approval of the Bankruptcy Court is a condition precedent to the enforcement of this Agreement. The Debtors will seek Bankruptcy Court approval of this Agreement promptly..."[6] In support of its position the Debtor cites to *Mickey Thompson*.

Mickey Thompson is quite instructive to the Court. In *Mickey Thompson*, the Chapter 7 trustee sought approval of a settlement of claims between the estate and parties who held fraudulent transfer claims. After filing the settlement with the court, the trustee received a better offer. The trustee then vacillated between the two offers; ultimately advocating for the original offer in the settlement. The Panel determined that "a trustee's fiduciary duty to maximize the assets of the estate trumps any contractual obligation that a trustee arguably may incur in the course of making an agreement that is not enforceable unless it is approved by the court." *Mickey Thompson* at 421. (citing to

In re Martin, 91 F.3d 389, 395 (3rd Cir.1996)). The Panel continued, "Everyone who deals with a bankruptcy trustee in a transaction that is not in the ordinary course of business is charged with knowledge that the law may require court approval and that a trustee has an obligation to present all relevant facts to the court, including whether there is a more attractive solution than that which the trustee has negotiated." *Id.*

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[6]Paragraph 2 reads:

> Bankruptcy Court Approval; Effective Date. The approval of the Bankruptcy Court is a condition precedent to the enforcement of this Agreement. The Debtors will seek Bankruptcy Court approval of this Agreement promptly, and the Parties expressly acknowledge and agree that none of the obligations set forth below shall become binding or due until after Bankruptcy Court approval is received. Absent receipt of such approval, this Agreement shall be null and void. The "Effective Date" of this Agreement shall be the date upon which an order of the Bankruptcy Court approving this Agreement becomes final and not subject to appeal, or if an appeal is filed, it has been dismissed or resolved by an appellate order affirming the approval order in all respects, provided, however, that in the event of an appeal, the Parties may agree to waive the condition precedent to an Effective Date of dismissal or resolution of such appeal, and agree to an earlier Effective Date as long as an order has not been entered by a court of competent jurisdiction staying implementation of the Agreement.

Here, it is important to remember the role of the Debtor which, as debtors-in-possession, have all the duties of a trustee under Section 1107. Thus, when settling with a Chapter 11 debtor a party is settling with a debtor *and* its trustee. The debtor is charged not only with looking after its own self interests, but it must also look to the interests of the estate and estate creditors. Therefore, under *Mickey Thompson* as debtors-in-possession the Debtors' fiduciary duty as a trustee trumps any contractual duty they may have to support the agreement. This conclusion consistent with *Tidewater* which states:

> It may happen that [the debtor] will oppose its own application at that hearing. If that occurs, the opinion of counsel for the debtor, considerably experienced in the bankruptcy field, is entitled to some weight in evaluation of the proposed compromise. Nonetheless, it remains for the Court, not the debtor in possession, to determine whether or not a compromise of litigation should be approved.

Tidewater at 933 (internal citations omitted). In the end, while the Debtors can withdraw their support, they cannot unilaterally rescind the agreement. Whether to approve still requires analysis under *Woodson*.

B. Should Court Approve the Rose Settlement?

Here, the Court is faced with an odd set of circumstances. Usually a third party is objecting to a settlement, but here the Debtor is objecting to the Rose Settlement – a settlement they proposed and initially supported.[7] Even though the Debtors have reversed course, the following *Woodson* factors still apply: (1) the probability of success in litigation; (2) the difficulties encountered in the matter of collection; (3) the complexity of the litigation involved, the expense, inconvenience and

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[7] According to the Debtors' motion to approve the Rose Settlement:

> Based on the factors of success, expense, and collectability, the proposed Agreement among the Debtors and WFE, and the Civica Entities and Rose, is more than fair and equitable. With respect to the factors set forth by the Court in [*In re A&C Properties*, 784 F.2d 1377 (9th Cir. 1986)] , there is no question that proceeding with the Adversary Action will be expensive and time-consuming. Debtors have set forth no fewer than eleven counts against the Civica Entities and Rose, many of which will be fact intensive, and all of which will be vigorously contested. Although the Debtors feel there is merit to the allegations set forth in the Adversary Action, success is never assured. Moreover, in this instance, the defendants to the Adversary Action have substantial counter claims that could expose the Debtors to large sums. Perhaps most importantly, however, at least two of the defendants in the Adversary Action are likely judgment-proof and the financial wherewithal of all of the defendants is questionable. The expense of pursuing the claims coupled with the significant question of collectability merit approval of this Agreement as being in the best interest of the Debtors' estates.

delay attending it; and (4) the paramount interest of creditors, with proper deference to their reasonable views. *Id.* at 620.

As to factor one, the Debtor throughout the proceedings has remained steadfast in its view that it will successfully prevail in the litigation; however, the Rose Parties are equally steadfast that they will prevail. Based on the Court's observations each party has an equal probability of success. Accordingly, the Court concludes that this factor does not tip the scales either way.

As to factor two, the Rose Parties have allegedly been on the brink of insolvency for over a year and Mr. Rose's March 2009 financial statement indicates a negative net work of over $500,000. However, in that year none of the Rose Parties have filed for bankruptcy and there is no indication that bankruptcy is imminent. Yet, the Debtors have not shown what has changed since December of 2009 when they concluded that "at least two of the defendants in the Adversary Action are likely judgment-proof and the financial wherewithal of all of the defendants is questionable. The expense of pursuing the claims coupled with the significant question of collectability merit approval of this Agreement as being in the best interest of the Debtors' estates." This factor weighs towards approving settlement.

As to factor three, the evidence weighs in favor of approval. First, the Rose Settlement settles outstanding claims between the Debtors and the Rose Parties. There is no dispute that the litigation, if allowed to proceed, would be complex and lengthy. The real question is how expensive would it be? The Debtors argue that it would be inexpensive because they have counsel available to pursue the matter. The evidence does not support the Debtors' claim. First, the Debtors have not yet retained counsel. Instead, Dale Zeitlen, the attorney representing them against Goodyear, has indicated only that he would be interested in representing the Debtors in this matter. To ask the Court to disapprove a settlement – a settlement reached in large part to avoid an expensive lawsuit – without securing counsel to pursue that lawsuit is an uncertainty creating real concern regarding the Debtors' ultimate ability to pursue its claims. Second, Mr. Zeitlin is pursuing the Goodyear matter on a hybrid contingency fee basis. If the Debtors retained him on the same terms, this would be not a zero cost for the Debtors. In the end, the Debtors ask permission to back out of a settlement

agreement to pursue a claim that may or may not succeed based on the hope that an attorney will agree to a contingency fee. This evidence is too tenuous to support a finding in favor of Debtors on this prong of the test.

As to the fourth factor, the Court concludes that the Rose Settlement is in the best interest of creditors. There is little indication that there are creditors opposed to the Rose Settlement. Yes, M&I initially opposed the Rose Settlement and the M&I Settlement does require the Debtors to withdraw their support for the Rose Settlement. But, the testimony of Scott Hampton, Debtors' Chief Restructuring Officer, during cross examination indicates that the Debtors, not M&I, required withdrawal of support.[8] Tellingly, after the Court approved the M&I Settlement, M&I has not taken a position on the Rose Settlement. None of the other creditors in this matter have filed a position regarding the Rose Settlement. It is difficult for the Court to find that a settlement is not in the best interest of creditors, when the creditors themselves have not seriously opposed it and one creditor is strenuously advocating for it.

As discussed above, the Rose Parties have a real chance of success on their claims and there is no guarantee that the Debtors will prevail on their claims. Further, if the Court does not approve

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[8]Transcript of Hearing p. 60 l. 7 - p. 61 l. 8:

Q Yeah, the deal with the bank doesn't require that the Debtors ensure that the Civica settlement is not approved. It just says you just have to tell the Court you do not believe it's in the best interests of the estates, correct?
A That's what this paragraph says. Yes.
Q And the Debtors have done that, right? You've informed the Court that you believe this settlement -- Civica settlement is no longer in the best interests of the estate?
A Correct.
Q Now, that provision was a provision that the Debtors wanted in the bank settlement, correct?
A It may be. I didn't draft this document.
Q Well, take a look at your deposition, page 28, line 19.
A You said page 28?
Q Page 28 of your deposition. See where --
A Yes.
Q In the Q and A prior to that line, we're talking about this particular provision, correct?
A Yes.
Q And at line 19 I asked you, quote, Is it your understanding that the Debtors wanted this provision in the bank settlement?
"A: That's my understanding.
"Q: So this was not something that the bank was asking for, is that correct?
"A: As far as I know."
A That's correct.

the Rose Settlement, the Rose parties will undoubtedly bring a breach of claim contract against the Debtors. While the Court expressed doubts whether this claim could succeed during the hearing, it would add an unnecessary expense – an expense that would erode any possible recovery of the Debtor.

The nub of the Debtors' position is that the Rose Settlement is not in the best interest of the estate because they receive no value from the settlement. The primary value of the Rose Settlement, according to the Debtors, was an impaired class voting in favor of the Plan. Once that was lost, the value of the settlement was lost as well. In short, the Debtors argue that they received no consideration for the Rose Settlement. The Court disagrees. By entering into the Rose Settlement, the Debtors received something that was in very short supply in the waning days of 2008 – time. Time to determine if they could save their Remaining Property. Time to reach a settlement with M&I. Time to try to settle with the Rose Parties, an attempt that has not succeeded. And time to accept the fact that the family farm is gone. Without the Rose Settlement, time to do all these things would have been non-existent.

C. Other Grounds for Relief

The Debtors ask the Court to not approve the Rose Settlement on the basis of impossibility, mutual mistake, and frustration of purpose.

The Debtors argue that it may be impossible to comply with the lien provisions in the M&I Settlement and the lien provisions in the Rose Settlement. "It is not enough that the contracting party is himself unable to perform. The doctrine of impossibility does not operate unless the contractual duties would be impossible for Anyone to perform." *Marshick v. Marshick,* 545 P.2d 436, 440 (Ariz.App. 1976) (capitalization in original). Debtors argue if it is determined that CiviTerra's claim is ahead of M&I, it will be paid from the proceeds of the Remaining Property and CiviTerra will have no claim against the Debtors; but if CiviTerra's lien is determined to be behind the Bank and wholly unsecured, then it would be inconsistent for CiviTerra to hold an allowed secured claim, or even an allowed priority claim, against the Debtors' estates. This essentially boils down to a lien dispute

between M&I and the Rose Parties. If they choose to fight it, the Court will take it up at that time, but its existence does not make the Rose Settlement impossible.

The Debtors' claim of mutual mistake is not clearly articulated. As the Court understands the argument, it is premised on the Debtors' claim that a viable Plan was a prerequisite for the Rose Settlement. To show mutual mistake the party seeking rescission must show by clear and convincing evidence that the mistake: (1) was a basic assumption on which both parties made the contract; (2) has such a material effect on the agreed exchange of performances as to upset the very bases of the contract; and (3) mistake must not be one as to which the party seeking relief bears the risk. *Emmons v. Superior Court In and For County of Maricopa*, 968 P.2d 582, 585-86 (Ariz.App.Div. 1, 1998)

The Debtors have not met this burden by clear and convincing evidence. Yes, the title of the Rose Settlement is "Settlement and Stipulation in Aid of Plan Confirmation Among Rose, Civica Entities, and Wood Entities" and representatives of the Debtors testified that the purpose of the Settlement was to propose the Plan. But these facts do not show a clear and convincing mutual mistake. If a viable plan was so integral to the Rose Settlement, why is there no contingency if the Court did not approve the Plan? Ultimately, the Debtors bore the risk of the Plan not being approved – whether by the Court or because the Debtors found that it was no longer feasible.

The alleged change in circumstance is the drop in value of the Remaining Property from $18.5 million is summer 2008 to $5.35 million in December 2008. In determining frustration of purpose, Arizona adopts RESTATEMENT (SECOND) OF CONTRACTS § 265 and particularity cmt a. *See 7200 Scottsdale Road General Partners v. Kuhn Farm Machinery, Inc.*, 909 P.2d 408 (Ariz.App. Div. 1 1995). Under Restatement cmt a Debtor must show, "change in circumstances makes one party's performance virtually worthless to the other."

The Court is unconvinced that there was a change in circumstance. The Debtors filed the Plan on December 23, 2008 and the Rose Settlement on December 29, 2008. When they filed these documents, the Debtors knew that the Remaining Property had an estimated value of only $5.35 million. Exhibit 3 clearly shows that Mr. Sell advised the Debtor on December 22, 2008 of his conclusions regarding the Remaining Property's value. Further, on December 23, 2008, the day the

Plan was filed, Scott O'Connor stated that "I am going to need your help getting individual parcel values into the plan" – a clear indication that the Debtor not only knew the value, but planned on incorporating the value into the Plan. The Debtors could not have been surprised when the formal report ultimately arrived. They knew the likely value of the Remaining Property when they filed the Plan and agreed to the Rose Settlement.

Further, those within the Debtors were not convinced the Plan was in the best interest of the Debtors. Scott O'Connor, Debtors current Chief Restructuring Officer,[9] testified on cross examination that personally as of December 29, 2008, "I was forming an opinion that [the Plan] was not in their best interests, because I didn't see the plan as being feasible." Transcript at p. 55 ll. 22-24. In his Declaration Mr. O'Connor states that as of December 29, 2008 he had not reached a conclusion regarding the feasibility of the Rose Settlement. Given all of these facts, the Court cannot conclude that there was a change in circumstances.

V. Conclusion

The Rose Settlement is within the zone of reasonableness. Although the Debtor may withdraw support, it may not unilaterally rescind. Based on the foregoing, the Agreement will be approved.

Counsel for the Rose Parties is to submit a form of order.

DATED: July 9, 2010

CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

[9]Mr. O'Connor did not take over officially as the Debtors' CRO until March or April 2009. However, he was serving as a real estate and plan feasibility consultant for the estate as of December 2008.

COPY of the foregoing mailed by the BNC and/or sent by auto-generated mail to:

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