

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE:

F. TAIT CARSON

Debtor

Case No. 02-32215
Chapter 7

MOUNTAIN MARKETING
PROFESSIONALS, INC.

Debtor

Case No. 02-30820
Chapter 11

NOTICE OF APPEAL FILED:

April 1, 2005

DISTRICT COURT NO.:

3:05-cv-364

DISPOSITION:

United States District Court Judge Thomas A. Varlan granted an Agreed Order Dismissing Appeal on October 25, 2005.

MEMORANDUM OPINION

March 25, 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE:	:	
	:	
F. TAIT CARSON	:	Case No. 02-32215
	:	Chapter 7
Debtor	:	
	:	
MOUNTAIN MARKETING	:	Case No. 02-30820
PROFESSIONALS, INC.	:	Chapter 11
	:	
Debtor	:	

BEFORE THE HONORABLE RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR F. TAIT CARSON:

CRAIG J. DONALDSON, ESQ.
1024 Maple Lane
Greenback, Tennessee 37742

FOR MOUNTAIN MARKETING
PROFESSIONALS, INC.:

EDWARD J. SHULTZ, ESQ.
2121 First Tennessee Plaza
800 South Gay Street
Knoxville, Tennessee 37929

FOR MAURICE K. GUINN,
CHAPTER 7 TRUSTEE:

E. JEROME MELSON, ESQ.
Post Office Box 1990
Knoxville, Tennessee 37901

1 THE COURT: This contested matter is before the court on the Motion to
2 Compromise filed jointly on January 21, 2005, by Maurice K. Guinn, Trustee of the
3 Chapter 7 bankruptcy estate of F. Tait Carson, and the Chapter 11 Debtor, Mountain
4 Marketing Professionals, Inc., seeking authority, pursuant to Rule 9019 of the Federal
5 Rules of Bankruptcy Procedure, to compromise and settle various claims against
6 Bluegreen Vacations Unlimited, Inc., Bluegreen Corporation, and Justin Alex Hodges.
7 The Objection of F. Tait Carson to Motion to Compromise was filed by F. Tait Carson in
8 opposition to the Motion to Compromise on February 7, 2005. No other creditor or
9 party in interest in either case objects to the proposed compromise.

10 At the conclusion of the evidentiary hearing on the Motion to Compromise
11 held on March 23, 2005, I reserved decision until this afternoon. The record before me
12 consists of five exhibits introduced into evidence, along with the testimony of four
13 witnesses, the Trustee, Mr. Guinn, two attorneys, Thomas M. Leveille and Jerry K.
14 Galyon, and Mr. Carson.

15 This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

16 Mountain Marketing Professionals, Inc., who I will hereafter refer to as
17 Mountain Marketing, filed the Voluntary Petition commencing its case under Chapter 11
18 of the Bankruptcy Code on February 15, 2002, and it has continued to operate as a
19 debtor-in-possession since that date. Thereafter, on April 24, 2002, Mr. Carson, the sole
20 shareholder and president of Mountain Marketing, filed the Voluntary Petition
21 commencing his case under Chapter 11 of the Bankruptcy Code. The court approved
22 Mr. Guinn's appointment as Chapter 11 Trustee on February 7, 2003, and he continued
23 in the capacity as Chapter 7 Trustee after the case was converted on October 21, 2004.

24 The Trustee and Mountain Marketing seek to compromise various prepetition
25 claims existing between the two Debtors and Bluegreen Vacations Unlimited, Inc.,

1 Bluegreen Corporation, and Justin Alex Hodges stemming from a business relationship
2 gone sour. On December 8, 2000, Bluegreen Vacations Unlimited, Inc., who I will
3 hereafter refer to as Bluegreen, and Mountain Marketing entered into an Off-Site
4 Premises Contact Agreement whereby Mountain Marketing agreed to market and
5 promote timeshares owned by Bluegreen. In exchange, Bluegreen agreed to pay a
6 minimum marketing fee of \$175.00 for each qualified prospect completing a scheduled
7 tour, less a reduction for gift and premium costs.

8 The next year, on December 18, 2001, Mountain Marketing, through
9 Mr. Carson, and Bluegreen executed a Letter of Intent relative to Bluegreen's purchase
10 of Mountain Marketing's assets. Included within the terms of the Letter of Intent was
11 the proposed assignment and transfer of leases for thirteen off-site personal contact
12 locations, all billboard advertising contracts, and an advertising contract with the *Best*
13 *Read Guide* magazine. The proposed purchase price was based upon a schedule
14 whereby Mountain Marketing would receive gradually decreasing amounts from \$20.00
15 to \$5.00 per net qualified tour from the locations to be transferred.

16 Nevertheless, this sale of assets never came to fruition, the Off-Site Premises
17 Contact Agreement was terminated on January 18, 2002, and the business relationship
18 between the parties deteriorated, culminating in Bluegreen filing a complaint in the
19 Chancery Court for Sevier County, Tennessee, on February 8, 2002, styled *Bluegreen*
20 *Vacations Unlimited, Inc. v. Mountain Marketing Professionals, Inc., F. Tait Carson,*
21 *individually, and Other as Yet Unidentified and/or Unnamed Civil Co-Conspirators,*
22 Case No. 02-2-084. In this complaint, Bluegreen alleges that Mr. Carson breached the
23 December 18, 2001 Letter of Intent and engaged in conduct to damage its business
24 reputation by conspiring with others to interfere with Bluegreen's business relationships
25 with customers and intimidate its employees. The complaint further avers that

1 Mr. Carson and his unnamed associates attempted to bribe Bluegreen's employees and
2 attempted to obtain trade secrets by falsely claiming to be Bluegreen employees
3 themselves. For such civil conspiracy, tortious interference with business relationships,
4 trespass, breach of contract, defamation, injurious falsehood, diversion of trade secrets,
5 nuisance, and violations of the Tennessee Consumer Protection Act, Bluegreen asked for
6 injunctive relief, compensatory damages, punitive damages, treble damages, and
7 attorney's fees in an amount expected to exceed \$5,000,000.00. It also filed a similar
8 action in Florida. Both actions were stayed, however, with respect to Mountain
9 Marketing, when it commenced its Chapter 11 case on February 15, 2002.

10 Mr. Carson then filed his own complaint in the Circuit Court for Sevier
11 County, Tennessee, on April 2, 2002, initiating *Carson v. Justin Alex Hodges, Bluegreen*
12 *Vacations Unlimited, Inc., and Bluegreen Corporation*, Case No. 2002-0234-I.
13 Bluegreen Corporation is alleged to be the parent corporation of Bluegreen. This
14 complaint avers, first, that Bluegreen breached the December 8, 2000 Off-Site Premises
15 Contact Agreement by soliciting Mountain Marketing's employees and off-site premises
16 contact landlords, in violation of the Agreement's non-compete provision. It also alleges
17 that Bluegreen, through its Sevier County representative and sales manager, Justin Alex
18 Hodges, conspired with employees of Fairfield Resorts to take over Mountain Marketing
19 and put Mr. Carson personally out of business in Sevier County. Finally, Mr. Carson's
20 complaint states that he was forced to enter into the Letter of Intent by Bluegreen, who
21 then gained access to and used to his detriment key personnel and locations information,
22 causing Mr. Carson to default on notes. For these causes of action, including fraud,
23 deceit, common law and statutory procurement of breach of contract, intentional
24 interference with business relationships, conspiracy, and violations of the Tennessee
25 Consumer Protection Act, Mr. Carson seeks damages in the amount of \$10,000,000.00.

1 Additionally, approximately three weeks after he filed this lawsuit in the Sevier County
2 Circuit Court, Mr. Carson filed his bankruptcy case.

3 In its bankruptcy proceeding, Mountain Marketing filed an adversary
4 proceeding against Bluegreen Vacations Unlimited, Inc., Bluegreen Corporation, and
5 Mr. Hodges, on May 29, 2002. These defendants filed an answer and counter-claim on
6 August 19, 2002, and thereafter, on October 9, 2002, filed, first, a motion for abstention,
7 which was granted by the court's order entered on October 30, 2002, and, second, a
8 motion for relief from the automatic stay in order to proceed with the lawsuit pending in
9 the Sevier County Chancery Court, which was granted on November 1, 2002.
10 Additionally, on June 11, 2002, Mr. Carson filed two unsecured claims in Mountain
11 Marketing's bankruptcy case for "unpaid compensation for services performed between
12 August 1, 1999, and February 15, 2002," in the amounts of \$600,000.00 and
13 \$1,500,000.00, respectively, and on June 17, 2002, Bluegreen filed unsecured claims in
14 both bankruptcy cases in the amount of \$5,000,000.00, attaching the same documents
15 relied upon in its Chancery Court lawsuit.

16 With respect to the Chancery Court lawsuit, Mountain Marketing filed an
17 answer, counter-complaint, and third-party complaint on December 20, 2002, denying all
18 allegations of wrongdoing and averring that the Letter of Intent was not binding and
19 enforceable. In that pleading, Mountain Marketing makes similar allegations as those set
20 forth by Mr. Carson in his Circuit Court complaint, alleging that Bluegreen breached the
21 Off-Site Premises Contact Agreement by soliciting Mountain Marketing's employees
22 and landlords, that Bluegreen intentionally interfered with Mountain Marketing's
23 business relationships in Sevier County by inducing its landlords, employees, and
24 vendors to breach contracts with Mountain Marketing, and that Bluegreen and
25 Mr. Hodges conspired to destroy its business. Mountain Marketing's counter-complaint

1 and third-party complaint also avers that Bluegreen breached the Off-Site Premises
2 Contact Agreement by failing to pay for qualified prospects because it improperly
3 reported tours as “NT” for tours not taken or “NQ” meaning not qualified in that the
4 customer did not meet the qualifications for Bluegreen to make a presentation, when, in
5 fact, tours should have been offered. The counter-complaint additionally alleges that the
6 Letter of Intent was not binding and enforceable because it was based upon Bluegreen’s
7 fraud and bad faith. For these breaches of contract, intentional interference with
8 business relationships, common law and statutory inducement of breach of contract, civil
9 conspiracy, fraud, breach of covenant of good faith, Tennessee Consumer Protection
10 Act, and Uniform Trade Secrets Act causes of action, Mountain Marketing prays for
11 damages from Bluegreen, Bluegreen Corporation, and Mr. Hodges in the amount of
12 \$12,731,179.28 plus treble damages, punitive damages, and attorney’s fees.

13 The two actions were consolidated for a jury trial in the Sevier County
14 Chancery Court, and the Chancellor appointed a special master on January 13, 2003. On
15 April 29, 2003, Bluegreen, Bluegreen Corporation, and Mr. Hodges filed an answer to
16 Mountain Marketing’s counter-complaint and third-party complaint, denying all
17 allegations of wrongdoing and raising, as affirmative defenses, estoppel, waiver, unclean
18 hands, set off, Mountain Marketing’s breach of contract, and bad faith.

19 Since that time, both sides have amended their complaints, added new counts,
20 including an additional allegation that Bluegreen breached the Off-Site Premises Contact
21 Agreement by not paying for qualified tours from December 2001 through January 2002,
22 and requested additional relief. A mediation between the parties was held on June 2,
23 2004, and although it produced a couple of settlement offers, the lawsuits were not
24 resolved. Accordingly, in December 2004, the Special Master scheduled a total of
25 twenty-one days for evidentiary hearings before the jury trial is scheduled. On

1 January 6, 2005, prior to the first day of hearings scheduled by the Special Master for
2 January 10, 2005, the Trustee reached an agreement with Bluegreen and subsequently
3 filed the Motion to Compromise.

4 The settlement before the court is summarized as follows. In exchange for
5 dismissing, with prejudice, both Bluegreen's actions against Mountain Marketing and
6 Mr. Carson and Mr. Carson's action against Bluegreen, Bluegreen Corporation, and
7 Mr. Hodges, as well as all counter-complaints and third-party actions between these
8 parties, Bluegreen will pay to the Trustee \$700,000.00. Additionally, Bluegreen will
9 withdraw its claims filed in both bankruptcy cases. Mr. Guinn testified that he
10 anticipates payment in full, plus interest, to all of Mr. Carson's creditors as a result of the
11 settlement, but that the actual allocation of the settlement proceeds between the Carson
12 and Mountain Marketing estates have not yet been determined and will, in any event, be
13 subject to court approval after a hearing on notice to all creditors.

14 The Trustee and Mountain Marketing ask the court to approve the
15 compromise, arguing that it is in the best interests of both bankruptcy estates, especially
16 in light of the existing and ongoing expenses and risks associated with continuing
17 litigation of the consolidated lawsuit in the Sevier County Chancery Court, which is
18 complex and hotly contested by all parties. Mr. Carson, the sole party objecting to the
19 Motion to Compromise, argues that the Trustee has failed to consider the residuary
20 interest he and Mountain Marketing would retain following the conclusions of their
21 bankruptcy cases and avers that, if the litigation is prosecuted to its conclusion, they
22 have the potential to realize funds above and beyond the amounts owed to their creditors.

23 "Compromises are 'a normal part of the process of reorganization.'"

24 *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v.*
25 *Anderson*, 88 S. Ct. 1157, 1163 (1968). "It is well accepted that compromises are

1 favored in bankruptcy in order to minimize the cost of litigation to the estate and
2 expedite its administration[.]” *In re Edwards*, 228 B.R. 552, 568-69; *see also In re West*
3 *Pointe Properties, L.P.*, 249 B.R. 273, 282.

4 Rule 9019 of the Federal Rules of Bankruptcy Procedure allows me to
5 approve the Motion to Compromise, after notice and a hearing, as long as it is “fair and
6 equitable.” *Anderson*, 88 S. Ct. at 1163; *West Pointe Properties*, 249 B.R. at 281. In
7 making this determination, however, I may not merely “rubber stamp or rely on the
8 trustee’s word that the compromise is reasonable.” *West Pointe Properties*, 249 B.R. at
9 281 (quoting the Sixth Circuit’s decision *Reynolds v. Commissioner*, 861 F.2d 469, 473).
10 Instead, the focus is not deciding the questions of fact and law raised, but canvassing the
11 issues to see whether the offer “fall[s] below the lowest point in the range of
12 reasonableness[.]” *Cosoff v. Rodman (In re W.T. Grant Company)*, 699 F.2d 599, 608.
13 Nevertheless, while I have the discretion to approve or disapprove a compromise, the
14 Trustee’s judgment “deserves some deference” as long as there is a legitimate business
15 justification for his actions. *West Pointe Properties*, 249 B.R. at 281; *see also In re*
16 *Coram Healthcare Corporation*, 315 B.R. 321, 330. It is the Trustee’s burden of
17 persuasion that the proposed compromise meets these standards. *In re Victoria Alloys,*
18 *Inc.*, 261 B.R. 918, 920.

19 Equitable considerations are paramount in deciding whether to approve a
20 compromise, and “[t]he benchmark for determining the propriety of a bankruptcy
21 settlement is whether the settlement is in the best interests of the estate.” *In re Lee Way*
22 *Holding Company*, 120 B.R. 881, 890. In order to make an “informed and independent
23 judgment” regarding the fairness and equity of a proposed compromise, I am required to
24 examine the facts necessary to give an “objective opinion of the probabilities of ultimate
25 success should the claim be litigated[, which includes an examination of] the complexity,

1 expense, and likely duration of such litigation . . . and all other factors relevant to a full
2 and fair assessment of the wisdom of the proposed compromise.” *Anderson*, 88 S. Ct. at
3 1163.

4 This does not, however, require me to hold a “mini trial on the merits,” but
5 instead, requires me to review only those “issues which are subject to the settlement.”
6 *Committee of Unsecured Creditors v. Interstate Cigar Distribution, Inc. (In re Interstate*
7 *Cigar Company, Inc.)*, 240 B.R. 816, 822. Moreover, “[t]he more complex and novel the
8 subject litigation is, the less thorough a factual record is necessary to obtain approval of
9 a settlement which will substantially benefit the bankruptcy estate.” *Lee Way Holding*
10 *Company*, 120 B.R. at 890.

11 Furthermore, although I do consider the reasonable views of creditors,
12 objections do not rule, and an objection “will not prevent approval of the compromise
13 where it is evident that the litigation would be unsuccessful and costly.” *West Pointe*
14 *Properties*, 249 B.R. at 282.

15 The Sixth Circuit has held that “the court is obligated to weigh all conflicting
16 interests in deciding whether the compromise is ‘fair and equitable,’ considering such
17 factors as the probability of success on the merits, the complexity and expense of
18 litigation, and the reasonable views of creditors.” *Bauer v. Commerce Union Bank*,
19 859 F.2d 438, 441. Therefore, the basic factors I must examine with respect to the
20 pending state court lawsuits and the proposed compromise are (1) the probability of
21 success on the merits in the state court; (2) the complexity, expense, and likely duration
22 of the consolidated lawsuits if they proceeded to trial; (3) possible difficulties in
23 collecting a judgment against Bluegreen; and (4) any other factors that I deem relevant,
24 including the interests of creditors.

25 With respect to the first factor, likelihood of success on the merits, the

1 Trustee and Mountain Marketing are not required to conclusively establish that
2 Mr. Carson and Mountain Marketing would either succeed or fail at a trial on the merits
3 in the Sevier County Chancery Court. As stated by the Fifth Circuit,

4 Obviously, it would not be a settlement if to obtain approval the
5 Trustee would have to demonstrate that he could not succeed had
6 the . . . claim been pressed. All that he must do is establish to the
7 reasonable satisfaction of the [court] that, all things considered, it
8 is prudent to eliminate the risks of litigation to achieve specific
9 certainty though admittedly it might be considerably less (or
10 more) than were the case fought to the bitter end.

11 *Florida Trailer & Equipment Company v. Deal*, 284 F.2d 567, 573.

12 Mr. Carson argues that, if allowed to proceed with the state court lawsuits, he
13 is very likely to succeed at trial. The Trustee, however, disagrees with Mr. Carson's
14 optimism for success on the merits before a jury. At trial, Mr. Guinn testified that based
15 upon the "hotly disputed" facts and problems with proof, including the large number of
16 documents and the multiple witnesses that would be necessary to make Mr. Carson's
17 case, he believes that the likelihood of success on the merits as well as the potential for
18 recovery are extremely uncertain as to both the contractual and tort claims. Mr. Guinn
19 does acknowledge that, if proved, the breach of contract issues concerning the Off-Site
20 Premises Contact Agreement alone could yield sums exceeding the \$700,000.00 amount,
21 once prejudgment interest and attorney's fees are included. However, he reiterated that
22 any recovery on either the breach of contract issues or the tort issues depends upon how
23 the disputed facts are presented to and resolved by the jury.

24 Mr. Guinn testified that while he has reviewed all of the pleadings in the two
25 state court lawsuits, has attended and participated in several meetings among the various

1 parties and their attorneys, and participated in the day-long June 2, 2004 mediation, he
2 has not attended discovery depositions or hearings in the state court lawsuit, nor has he
3 independently researched the facts and/or areas of law raised therein. To that end,
4 Mr. Guinn deferred to Mr. Leveille, Mountain Marketing's attorney in the state court
5 lawsuits.

6 Mr. Leveille testified that he has primarily focused upon the contract issues
7 and has been in the process of preparing a motion for partial summary judgment as to his
8 counter-complaint against Bluegreen for breach of the Off-Site Premises Contact
9 Agreement with respect to the "NQ" and "NT" customers that were improperly
10 disqualified and should have been paid for by Bluegreen. The motion, requesting a
11 judgment in the amount of \$731,000.00 plus prejudgment interest and reasonable
12 attorney's fees, is supported by records obtained from Bluegreen concerning the "NQ"
13 and "NT" customers. Based upon his personal review of these more than 2,000
14 documents, Mr. Leveille divided them into three categories: (1) those that Mountain
15 Marketing should win based upon the face of the documents themselves; (2) those that it
16 would not recover based upon the face of the documents; and (3) those that could go
17 either way. With respect to the "can win" group, consisting of approximately 200 to 300
18 customers, Mr. Leveille testified his belief that Mountain Marketing should recover
19 approximately \$52,000.00. With respect to the third group, the "gray" category which
20 was the largest, he optimistically hoped to prevail as to 50% of them, which could result
21 in an additional recovery of approximately \$330,000.00.

22 Mr. Leveille testified that he also believes that Mountain Marketing's
23 likelihood of success on the merits with respect to Bluegreen's failure to pay for
24 qualified tours in December 2001 through January 2002 is good. This aspect is based
25 upon paragraph 12 of the Off-Site Premises Contact Agreement, which provides that in

1 the event of termination, Mountain Marketing would still be entitled to compensation for
2 qualified customers that had scheduled a tour. At trial, Mr. Leveille recalled attending
3 the deposition of Mr. Hodges, who admitted that Bluegreen cut checks to Mountain
4 Marketing for tours, totaling approximately \$52,300.00, but he was instructed to send
5 them to his superior, Mr. Teclaw, in Indianapolis. The second breach of contract issue
6 asserted by Mr. Carson involves paragraph 9 of the Off-Site Premises Contact
7 Agreement. This paragraph prohibits the solicitation by Bluegreen or Mountain
8 Marketing of the others' employees or contract locations. Mr. Carson contends that
9 Bluegreen solicited some 42 of his employees, 13 contract stands, advertising, and
10 billboard space. Again, this is disputed by Bluegreen and Mr. Leveille testified as to
11 witness problems in establishing this aspect of Mountain Marketing's claim.

12 With respect to the tort issues, Mr. Leveille was less enthusiastic, stating that
13 he believed he could prove the claims but "it would take a lot of work," since most of the
14 evidence was circumstantial, there was "a lot of smoke" and "mud to be slung," and a
15 final determination depended upon how it was presented to and accepted by the jury. In
16 his final assessment of the likelihood of success, Mr. Leveille stated that, taking all of
17 the components of the lawsuits, together with the problems and complexities therein, he
18 believes Mountain Marketing will obtain a judgment against Bluegreen. Although he
19 could understandably not give a concrete amount for that judgment, Mr. Leveille
20 testified that his reasonable estimates were \$385,000.00 at the low end and \$5,000,00.00
21 for what he termed "a home run" at the high end, not inclusive of prejudgment interest or
22 attorney's fees.

23 In his testimony, Mr. Carson painted a rosier view of the probability of
24 success on the merits. He testified that after reviewing the 2,000 or so documents
25 produced by Bluegreen with respect to the "NQ" and "NT" disqualifications, he

1 determined that all of them were, in fact, qualified customers, which would result in a
2 judgment for \$675,000.00. He also felt extremely confident that Mountain Marketing
3 would prevail on the unpaid tours issue, resulting in a judgment of approximately
4 \$52,000.00. Finally, Mr. Carson seemed extremely sure that the facts would prove his
5 tort issues, although he did not speculate as to an amount of the final judgment.

6 With respect to this factor, I am depending most heavily upon the testimony
7 provided by Mr. Leveille, Mountain Marketing's attorney, who is the most objective
8 witness with the ability to gauge the possible outcome at trial. Mr. Leveille testified that
9 he feels fairly confident that Mountain Marketing can recover the \$52,300.00 for
10 qualified but unpaid tours, plus approximately \$385,000.00 for improperly recorded
11 "NT" and "NQ" customers, totaling \$437,300.00, which is more than \$260,000.00 less
12 than the \$700,000.00 settlement amount. Although he did not expressly say so, it was
13 obvious that Mr. Leveille is much less confident about recovering a judgment on the tort
14 claims in light of the level to which Bluegreen disputes the facts, the witness issues
15 encountered, and the uncertainty of what a jury will decide.

16 The second factor, complexity, expense, and likely duration of trial, is tied
17 into the first factor concerning the likelihood of success on the merits, requiring me to
18 examine the same facts and issues in a different light. Collectively, these lawsuits
19 involve the following issues under Tennessee law: violation of the Tennessee Consumer
20 Protection Act, violation of the Uniform Trade Secrets Act, civil conspiracy, fraud,
21 tortious interference with business, breach of contract, defamation, trespass, diversion of
22 trade secrets, nuisance, and injurious falsehood, together with the affirmative defenses
23 and damages available under each of these causes of action. While these legal issues
24 may not be novel or complex to attorneys, I venture to guess that many jurors will likely
25 find them quite novel and complex. Additionally, the nature of the facts that will be

1 relied upon to prove the foregoing legal issues are extremely complex and vigorously
2 disputed on both sides. Both Mr. Guinn and Mr. Leveille acknowledge proof problems,
3 as well as the need for additional discovery, a tremendous amount of documentary proof,
4 and the involvement of a countless number of witnesses. Mr. Leveille also testified that
5 there have been allegations of witness tampering and intimidation, and that the testimony
6 of witnesses is sometimes conflicting with some witnesses contradicting their prior
7 statements.

8 I must also consider the expense involved if the settlement is not approved.
9 Over the course of the three years since Bluegreen filed its complaint, these parties have
10 incurred a substantial amount of attorney's fees, much of which remains unpaid. At trial,
11 Mr. Carson testified that he has paid Mr. Leveille's firm approximately \$50,000.00 and
12 currently owes approximately \$73,000.00 in connection with its representation of
13 Mountain Marketing in these lawsuits. Mr. Carson also testified that he owes attorney's
14 fees of approximately \$75,000.00 to Mr. Donaldson's firm for representing him in the
15 state court litigation and approximately \$20,000.00 is owed to Mr. Shultz's firm as
16 administrative expenses arising out of Mountain Marketing's bankruptcy case.
17 Moreover, Mr. Leveille testified that the mediator had not been paid his \$3,000.00 fee,
18 for which Mountain Marketing was responsible for half, and there were outstanding
19 court reporter bills to date totaling approximately \$3,000.00.

20 Mr. Leveille echoed Mr. Carson's testimony that his firm is currently owed
21 roughly \$73,000.00, although he thought his firm had been paid approximately
22 \$30,000.00. Mr. Leveille also acknowledged that he represented Mountain Marketing in
23 a similar type lawsuit against Fairfield Resorts in the United States District Court, and
24 that the tort claims therein related to those being litigated in these lawsuits, namely the
25 intentional interference with business relationships and civil conspiracy causes of action.

1 As in the lawsuits at issue here, Fairfield Resorts has denied any allegations of
2 wrongdoing, and although Mr. Leveille testified that he believes the contract issues
3 could settle, he expects the tort issues to be “hotly contested.” When questioned as to
4 the status of that lawsuit, Mr. Leveille stated that some discovery had been completed,
5 and Rule 26(a)(1) disclosures had been made, but that a trial was not scheduled until
6 later this year, in late summer or early fall.

7 During his testimony, Mr. Guinn expressed his concern with the mounting
8 attorney’s fees and expenses, in light of Mr. Carson’s inability to pay them, stating that
9 he would not want his firm to take on that risk if Mountain Marketing’s and
10 Mr. Carson’s present attorneys could not or did not proceed. Mr. Leveille testified that
11 because of the large outstanding bills owed to his firm, they had been negotiating a new
12 fee arrangement, but that nothing had been finalized, and unless a new agreement was
13 reached, he questioned whether his firm could continue with its representation of
14 Mountain Marketing after seeing through the motion for partial summary judgment.
15 Mr. Carson’s attorneys are likewise in a similar situation. Mr. Donaldson’s associate,
16 Mr. Galyon, testified that he and Mr. Donaldson were committed to seeing Mr. Carson
17 through his legal battles; however, he acknowledged that they expect to be paid for their
18 services. Mr. Galyon testified that they have reached a tentative fee arrangement with
19 Mr. Carson for payment at the conclusion of the case, but that, as of the trial date, there
20 is no formal fee arrangement.

21 Mr. Carson testified that he has, at his disposal, \$30,000.00 loaned him by a
22 brother to pay his attorney’s fees and the commitment of his mother and another brother
23 to loan him an additional \$60,000.00 to cover the outstanding expenses owed, and
24 prosecute these lawsuits to their conclusion. He also testified that he is developing a
25 new partnership which he hopes will be profitable in 90 days, but he did not testify as to

1 any particulars with respect to this new business venture, nor has he consulted with the
2 Trustee about it. Otherwise, however, Mr. Carson offered no evidence as to his ability to
3 pay any present or future costs associated with the state court litigation.

4 While the parties did not attempt to establish the amount of future attorney's
5 fees and expenses that might be required if the litigation is prosecuted to its conclusion,
6 the court can easily anticipate that they would be in the hundreds of thousands of dollar
7 range, given the fact that at least twenty-one days of hearings will be required before the
8 Special Master after which a jury trial of another ten days will be required. Then comes
9 the appellate review. Both the Carson and Mountain Marketing estates are
10 administratively insolvent, and the parties cannot, therefore, look to the estates to fund
11 the litigation expenses.

12 Assuming that Mr. Carson, in fact, now has access to \$90,000.00 to pay on
13 his outstanding fees and expenses, the \$172,500.00, more or less, he presently owes, not
14 counting fees incurred at the trial held earlier this week, substantially exceeds that
15 \$90,000.00. Additionally, Mr. Carson on February 10, 2005, filed a Motion for
16 Authority to Pay Claims and to Dismiss Case whereby he sought court approval
17 authorizing him to pay the administrative and unsecured claims in his individual case
18 after which the case would be dismissed thus allowing him to proceed with the state
19 court litigation unencumbered by his bankruptcy. This Motion was withdrawn when
20 Mr. Carson was unable to come up with the \$190,000.00 necessary to allow him to, in
21 effect, "buy out" the Chapter 7 Trustee.

22 An additional factor is the likely duration of a trial, which, based upon the
23 proof presented, and which, as I have already discussed, will be lengthy. As discussed,
24 the Special Master originally scheduled twenty-one days for his pretrial hearing, but
25 Mr. Leveille testified that additional days would likely have been needed, even focusing

1 primarily upon the breach of contract issues. Following the Special Master's hearing
2 and report, along with any objections thereto, the Chancellor is to preside over the jury
3 trial of these lawsuits, which Mr. Leveille conservatively estimated would take a
4 minimum of ten days. In the event of an adverse outcome, Mr. Guinn testified that
5 Bluegreen's attorneys have indicated their client's intention to fully exhaust all appeals,
6 and clearly Mr. Carson has exhibited the same intention on his part. When all is said and
7 done, Mr. Guinn conservatively estimated that it will take three to four more years to
8 resolve these lawsuits if they are to proceed in state court.

9 These factors weigh heavily in favor of approving the settlement. First, these
10 lawsuits have been pending, in some form or fashion, for more than three years. All of
11 the parties vigorously contest the facts and events upon which the lawsuits are grounded,
12 and it is obvious that all parties are committed to exhausting all appeals necessary. The
13 likelihood of success on the merits is speculative, at best, a fact that was evident from
14 Mr. Leveille's testimony. Even with respect to the breach of contract issues for which
15 Mr. Leveille felt quite confident, the damages thereon totaled more than \$260,000.00
16 less than the settlement amount. Moreover, it is also clear that Mr. Carson is
17 emotionally invested in these lawsuits, which, as one would expect, clouds his
18 objectivity and judgment concerning his ability to prevail in the state court before a jury,
19 which is always uncertain. The court finds Mr. Leveille, notwithstanding his role as an
20 advocate for Mountain Marketing and Mr. Carson, to be far more objective and candid.

21 Mediation has previously proved unsuccessful, and substantial litigation is
22 forthcoming. As I have stated, the Special Master set aside twenty-one days for his
23 hearings prior to trial, and Mr. Leveille testified as to the possible necessity for
24 additional days. He also testified that the actual trial should take at least ten days. The
25 potential for a positive result at trial is questionable, and the potential for an adverse

1 ruling is tangible. In addition, to state that the parties' relationship is acrimonious is to
2 understate their feelings towards each other, and there is nothing in the record to indicate
3 that these tendencies would not continue through the course of any future litigation.
4 Finally, based upon the complexities involved, the parties stand to incur substantially
5 more expense if the lawsuits continue to be litigated in the Chancery Court. At the
6 present, Mr. Carson has no concrete income to ensure that his attorneys will be paid.
7 Thus, these factors weigh in favor of approving the compromise.

8 The court must also examine any possible difficulties in collecting a
9 judgment against Bluegreen or Hodges, if obtained. With respect to this factor,
10 Mr. Guinn testified that he did not know Mr. Hodges' financial status, nor did he
11 investigate Bluegreen's financial status, stock prices, 2004 sales, or company value.
12 Stating that collection of the judgment was not his driving force behind the compromise,
13 Mr. Guinn nevertheless stated that he would not have filed the Motion to Compromise if
14 he did not believe that Bluegreen was able to and would pay the \$700,000.00 settlement.
15 He also pointed out that even though Bluegreen could pay that amount at this time, there
16 was no certainty that such funds would be available in 2008 or 2009 assuming that when
17 the litigation finally ended he and Mountain Marketing had obtained a judgment. On the
18 other side, Mr. Carson testified that Bluegreen is not only a multi-billion dollar
19 company, but also the world's second largest timeshare developer, from which he could
20 perceive no difficulty in collecting a judgment.

21 I agree with Mr. Guinn's assessment with respect to this factor. Although he
22 offered no concrete evidence to support his testimony as to Bluegreen's financial status,
23 assuming Mr. Carson's estimations are correct, and Bluegreen is currently a multi-billion
24 dollar company, there is no certainty that it will remain so. As Mr. Guinn correctly
25 pointed out, WorldCom was very recently a multi-billion dollar company, as were Enron

1 and Adelpia. Collectibility of a judgment at some later date is, by its nature, uncertain,
2 since there is always the possibility that something can happen to hinder collection.
3 Finally, there are additional costs associated with collecting a judgment which are not
4 incurred through settlement.

5 Finally, based upon the Supreme Court's instructions in *Anderson*, I must
6 also look to any other factors I deem relevant relating to the proposed compromise,
7 including the reasonable views of creditors. None of Mr. Carson's creditors objected to
8 the Motion to Compromise, and Mr. Carson was the only creditor of Mountain
9 Marketing to object. It was clear from his testimony that he feels passionate about and
10 has committed his life to pursuing these lawsuits. He testified that he recently moved to
11 Maryville to better assist his attorneys in this litigation, and I understand that he has
12 invested a great amount of time, energy, and money into it. Nevertheless, as I have
13 noted, Mr. Carson has no semblance of objectivity where Bluegreen is concerned, and
14 this lack of objectivity has totally clouded his judgment with respect to this settlement.

15 On the other hand, the Trustee, Mr. Guinn, has a fiduciary duty requiring his
16 objectivity with respect to Mr. Carson's bankruptcy estate and simply seeks to best serve
17 the unsecured creditors. As Trustee, he is required to represent the interests of the
18 unsecured creditors, and I must afford some deference to his decision. Mr. Guinn has
19 been a member of the trustee panel for fifteen years, and he has served as trustee in
20 hundreds of Chapter 7 cases. He is well aware of his duties and responsibilities as
21 trustee, recognizing at trial that his duty is to maximize the estate to benefit creditors,
22 and although he does not owe a fiduciary duty to Mr. Carson, he must not act in any
23 detrimental way towards Mr. Carson. Along those lines, Mr. Guinn testified that this is
24 the largest single settlement offer that he has received during his fifteen years of service
25 as a Chapter 7 trustee, and it should enable him to pay Mr. Carson's creditors in full,

1 plus interest. Mr. Guinn also testified that he truly believes that he is acting not only in
2 the creditors' best interests, but that this settlement is also in Mr. Carson's best interest.

3 Furthermore, even though perhaps not an entirely objective witness because,
4 as I have stated, he is an advocate for Mountain Marketing, it is obvious that
5 Mr. Leveille possessed more objectivity with respect to the actual likelihood of success
6 and potential for recovery than did Mr. Carson.

7 One aspect of the state court litigation that was not explored at the trial earlier
8 this week is Bluegreen's ongoing claims against Mr. Carson and Mountain Marketing.
9 Nothing in the record before me suggests that Bluegreen will not continue to prosecute
10 these claims if the state court litigation goes forward. The meritorious nature of
11 Bluegreen's claim would presumably also be decided by the jury thus adding another
12 level of uncertainty to the outcome of any trial.

13 The compromise with Bluegreen allows the Trustee and Mountain Marketing
14 to settle the state court lawsuits, in exchange for \$700,000.00, which will then benefit the
15 creditors in both bankruptcy cases. Taking into account the amount of the settlement, in
16 light of the complexities involved, the substantial time and expense to be saved, and the
17 interests of creditors, I find that this compromise is fair and equitable and is in the best
18 interests of the Debtors' respective bankruptcy estates. Accordingly, the compromise
19 between the Trustee, Mountain Marketing, and Bluegreen set forth in the Motion to
20 Compromise shall be approved.

21 This Memorandum constitutes findings of fact and conclusions of law as
22 required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this
23 contested matter by Rule 7052 of the Federal Rules of Bankruptcy Procedure. I will not
24 request that the court reporter transcribe my opinion. If it is transcribed at the request of
25 any party, the original will be delivered to me for such corrections and additions I might

1 make. The Memorandum will then be filed with copies, of course, served on counsel. I
2 will see that an order consistent with the Memorandum is entered this afternoon.

3 FILED: May 3, 2005

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/s/ Richard Stair, Jr. _____
RICHARD STAIR, JR.
U.S. BANKRUPTCY JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-32215

F. TAIT CARSON

Debtor

Case No. 02-30820

MOUNTAIN MARKETING
PROFESSIONALS, INC.

Debtor

ORDER

This contested matter came on for hearing on March 23, 2005, on the Joint Motion to Compromise filed on January 21, 2005, by Maurice K. Guinn, the Chapter 7 Trustee for the bankruptcy estate of F. Tait Carson, and the Chapter 11 Debtor, Mountain Marketing Professionals, Inc., and on the Objection of F. Tait Carson to Motion to Compromise filed by F. Tait Carson on February 7, 2005.

For the reasons stated in the memorandum dictated orally from the bench on March 25, 2005, containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this contested matter by Rule 9014 of the Federal Rules of Bankruptcy Procedure, the court directs that the Objection of F. Tait Carson to Motion to Compromise is **OVERRULED** and the Motion to Compromise is **GRANTED**. Maurice K. Guinn, Trustee, and Mountain Marketing Professionals, Inc., are authorized to compromise all claims of their respective bankruptcy estates against Bluegreen

Vacations Unlimited, Inc., Bluegreen Corporation, and Justin Alex Hodges under the terms set forth in the Motion to Compromise.

SO ORDERED.

ENTER: MAR 25 2005

BY THE COURT

A handwritten signature in black ink, appearing to read 'R. Stair, Jr.', written over the printed name below.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE