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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re
GTI CAPITAL HOLDINGS, LLC, an
Arizona limited liability company dba
ROCKLAND MATERIALS, G.H. Goodman
Investment Companies, LLC, an Arizona
Limited Liability Company,

Debtors.

In Re
DAVID M. REAVES, as the Trustee
of GTI CAPITAL HOLDINGS, LLC, an
Arizona limited liability company dba
ROCKLAND MATERIALS, G.H. Goodman
Investment Companies, LLC, an Arizona
Limited Liability Company,

Plaintiffs,

vs.

COMERICA BANK-CALIFORNIA, as
successor by merger to Imperial Bank,

Defendant.

In Proceedings Under Chapter 7

Case Nos. 03-07923-SSC through 03-
07924-SSC

Jointly Administered Cases

Adv. No. 03-00583;
Adv. No. 07-00031

MEMORANDUM DECISION DENYING
MOTION FOR STAY PENDING APPEAL
- MANDAMUS
(Expedited Decision Requested –Oral
Argument Waived)

1
2 **I. Preliminary Statement**

3 This matter comes before the Court on a “Request for Stay Pending Appeal
4 - Mandamus and Request for Expedited Stay Hearing, Or Sua Sponte Order” (“Motion for Stay”)
5 filed on March 17, 2008 by Triad Commercial Captive, Stirling Bridge LLC, New York Newport,
6 and Teri and Grant Goodman (the “Goodman parties”). The Goodman parties request that the
7 Court “stay the proceedings” and “request immediate imposition of the stay.” The Goodman
8 Parties further state that they will appeal from the “judgments, orders, or decrees of bankruptcy
9 judge...entered in this adversary proceeding on the 17th day of March 2008.” The Goodman
10 parties filed their “Notice of Appeal” concurrently with the Motion for Stay. David Reaves, the
11 duly appointed Chapter 7 Trustee and Plaintiff in this proceeding, filed and served his Response
12 on March 20, 2008. On March 21, 2008, the Goodman parties filed their Reply. The Goodman
13 parties request that this Court expedite a decision on their Motion for Stay and do not request oral
14 argument. The Trustee has also not requested oral argument on the Motion for Stay. The Court
15 has reviewed the underlying pleadings filed and served by each side, and considers this matter
16 ready to be disposed of without further argument or briefing. The Court has set forth its decision
17 on the Motion for Stay hereinafter.¹ To the extent necessary, it has set forth its findings of fact
18 and conclusions of law. Fed. R. Bank. P. 7052. The Court has jurisdiction over this matter
19 pursuant to 28 U.S.C. §§1334 and 157.

20 **II. Factual Discussion**

21 On February 22, 2008, the Trustee filed a “Motion to Approve Settlement
22 Agreement” (“Settlement Agreement”). The Trustee sought Court approval of a Settlement
23 Agreement with Comerica Bank-California, the Defendant in several adversary proceedings
24

25 _____
26 **1.** The Court has not considered the Goodman parties’ argument on the issues of
27 mandamus, recusal, qui tam, or other items simply strung together by Mr. Goodman. Those
28 matters are not before this Court.

1 (“Comerica”).² The Settlement Agreement contemplated (1) the dismissal of the Trustee’s claims
2 in Adversary Proceeding 2:07-ap-00031;³ (2) the dismissal of the Trustee’s Appeal in Adversary
3 Proceeding 2:03-ap-00583;⁴ and (3) a general release of the claims between the parties. As a part
4 of the Motion to Approve the Settlement Agreement, the Trustee also sought the Court’s approval
5 of the attorneys’ fees in the amount of \$316,666.66, and costs in the amount of \$1,929.76, to be
6 paid to Michael W. Carmel, Ltd. (the “Firm”), for its representation of the Debtor, and later the
7 Trustee, in the aforesaid Adversary Proceedings. The Trustee also filed a Notice of Hearing on
8 February 22, 2008, advising interested parties that a hearing would be conducted on the
9 Settlement Agreement between the Trustee and Comerica on March 11, 2008, with any objections
10 or responses to the relief requested to be served and filed by Thursday, March 6, 2008.⁵ The
11 Settlement Agreement Motion did not have the underlying Agreement attached to it, because the
12 parties had just finished mediation. However, the parties advised the Court and interested parties
13 that the executed Settlement Agreement would be filed shortly. A certificate of mailing avowing
14 that the Motion for Settlement Agreement and the Notice of Hearing were duly served on the
15 interested parties, including the Goodman parties, was filed with the Court on February 25, 2008.⁶
16 Mr. Goodman, on behalf of the Goodman parties, filed his objection the morning of the hearing

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18 **2.** See Docket Entry No. 40 in Adversary 07-00031.

19 **3.** The parties have referred to this litigation as the “Equitable Subordination Litigation,”
20 focusing on the relief sought by the Trustee that the claims of Comerica be equitably subordinated
21 to the claims of other creditors.

22 **4.** The parties have referred to this matter as the “DePrizio Litigation,” as a result of the
23 relief sought, at one time, by the Debtors that Comerica had received certain alleged preferences.
24 The preference claim was dismissed by this Court, with prejudice, but the estate’s claim for a
25 fraudulent conveyance was taken up by the Trustee. At the time of the settlement, the Trustee
had appealed this Court’s dismissal, with prejudice, of the final claim of the estate involving a
fraudulent conveyance allegedly received by Comerica when it perfected its security interest on
certain personal property of the Debtors.

26 **5.** See Docket Entry No. 41 in Adversary 07-00031.

27 **6.** See Docket Entry No. 42 in Adversary 07-00031.

1 on March 11, 2008. Even though Mr. Goodman filed his Objection that morning, the Court
2 allowed him to be heard at the 10:00 a.m. hearing.

3 There were two very important reasons why the hearing on the Settlement
4 Agreement was set for March 11, 2008. First, this Court had scheduled a two-day trial in the
5 Equitable Subordination Litigation for March 11 and 12, 2008, which required that the Trustee
6 and Comerica file their joint pretrial statement with the Court on March 4, 2008.⁷ Because the
7 parties were requesting that the two-day trial be vacated, the Court scheduled the hearing, on the
8 Settlement Agreement, for what would have been the first day of the trial⁸ The Court was also
9 advised at the March 11, 2008 hearing that there was some urgency that the Settlement
10 Agreement matter be heard in Mid-March, since the Bankruptcy Appellate Panel of the Ninth
11 Circuit (“BAP”) had set oral argument on the appeal filed by the Trustee concerning the dismissal
12 of the DePrizio Litigation filed against Comerica. Counsel stated that they needed to notify the
13 BAP by March 28, 2008, as to whether the Trustee’s appeal would be dismissed as a result of the
14 Settlement Agreement. Therefore, counsel needed to have the Settlement Agreement approved
15 prior to the March 28 date.

16 The Court also needs to revisit some of the issues previously addressed by it, since
17 the Goodman parties seem to have a misunderstanding, or a lack of memory, as to what has
18 happened in this case. Mr. Goodman, as the principal of GTI Capital Holding, LLC, and GH
19 Goodman Investment Cos., LLC (the “Debtors” or “Debtor”) filed a Chapter 11 petition for each
20 Debtor on May 8, 2003. The Debtors’ cases were subsequently administratively consolidated.
21 The Debtors were given the opportunity to continue with their operations. Early in the
22 proceedings, Comerica requested the appointment of an Examiner who soon took over financial

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24 **7.** See Minute Entry dated October 4, 2007, Docket Entry No. 19, in Adversary
25 Proceeding No. 07-00031

26 **8.** In the District of Arizona Bankruptcy Court, it is not unusual to set a hearing on a
27 settlement agreement for the date and time of the trial. The matter should either be settled or the
28 parties should be ready to commence the trial as indicated.

oversight of the operations. The Examiner was a party selected by the United States Trustee's Office, after consultation with the interested parties in the case, and the Court approved that appointment. By the fall of 2003, the Examiner had serious concerns about the Debtors' ability to continue with their operations. Although Mr. Goodman and the Goodman entities believed that they could raise capital to keep the Debtors' operating or they could sell the Debtors' assets for a substantial amount of money, neither event occurred.

Ultimately, in what is a final order of this Court, the Debtors' assets were sold for an aggregate amount of \$8 million.⁹ It is important to consider how those funds were allocated, because it is critical to understanding why the Trustee settled these matters along the lines described by him. Of the \$8 million, it was determined that the proceeds of the sale would be allocated as follows: \$950,000 to the Deer Valley Property, which would be an unencumbered asset; \$1,010,851 to the "rolling stock" vehicles upon which Comerica asserted a lien which was being challenged by the Examiner, \$32,046 to the "rolling stock equipment" which was subject to separate Comerica liens, \$4,685,110 to the liens held by Comerica on the Debtors' other real property assets which were not subject to avoidance, \$2,234,940 allocated to the lien asserted by Comerica on certain equipment which the Debtor and the Examiner believed were subject to possible avoidance as a preference or fraudulent conveyance, and \$37,053 in inventory.¹⁰ After the hearings on April 15, 2004, and May 27, 2004, on the issue of asset allocation of the sale proceeds and the appropriate amount of an interim payment to Comerica for its liens on the 43rd Avenue Property and the Buckeye Property, which were not subject to challenge, the Court entered an Order, dated June 14, 2004, approving the allocation and authorizing the payment of \$2,661,000 to Comerica for its liens on the Real Property.¹¹ Of importance is the fact that after

9. See Docket Entry No. 594 in the Administrative Case.

10. See Docket Entry No. 699 in the Administrative Case.

11. See Docket Entry No. 775. (Docket Entry No. 781, dated June 18, 2004, appears to be a duplicate.) At the time of the May 27, 2004 hearing, Mr. Goodman and the Goodman parties withdrew their objection on the record.

1 the sale, there were limited cash funds available for immediate distribution to all creditors.¹² The
2 Examiner then undertook the difficult task of asking those entities that had administrative expense
3 claims, as of the sale of the Debtors' assets, to reduce their claims. Ultimately, the claims were
4 reduced, with the Flood Control District of Maricopa County reducing its claim in excess of \$2
5 million to a claim of little more than \$100,000.¹³

6 Subsequently litigation ensued on a variety of fronts. The Examiner pursued the
7 "rolling stock" litigation and ultimately set aside the lien of Comerica on certain vehicles.¹⁴
8 Those funds, previously allocated to Comerica, became unencumbered for distribution to the
9 creditors. The Debtors, with the assistance of Mr. Goodman as the principal, and the Examiner
10 pursued Surcharge Litigation against Comerica. This Litigation also resulted in this Court
11 entering an order surcharging the collateral of Comerica to pay those administrative expenses
12 consented to by Comerica or which Comerica caused to be undertaken for which it received a
13 benefit. Again, a detailed Memorandum Decision was entered by this Court on this matter, which
14 was appealed. This Court was affirmed on appeal.¹⁵

15 **12.** See Docket Entry No. 691 in the Administrative Case. Separate from the sale
16 proceeds, the Examiner held \$684,916 in cash, which he attributed to the liquidation of the
17 Debtors' accounts receivable. The Examiner estimated that an additional \$1,430,881 remained in
18 accounts receivable to be collected, but they were of dubious value, and were subject to the liens
19 of Comerica and Orix Credit. (Orix had an estimated secured claim of \$635,000.) There were
20 certain preference payments to be pursued in the amount of \$5,000,000, and pre- and post-petition
21 transfers to insiders of \$2,624,874. However, the Examiner believed that there would be various
22 costs incurred in litigating such matters. Overall, the Examiner allocated \$4,771,846 to all of the
23 real property held by the Debtors (\$950,000 of this amount was allocated to the Debtors'
24 unencumbered Deer Valley Real Property), and \$3,228,102 to the personal property, including
25 equipment and vehicles held by the Debtors.

26 **13.** See Docket Entry No. 750 in the Administrative Case.

27 **14.** See Memorandum Decision and Order Incorporating at Docket Entry Nos. 21 and 22
28 in Adversary Proceeding No. 05-00676. See Orders from Bankruptcy Appellate Panel affirming
Decision at Docket Entry Nos. 40 and 42.

15. See Memorandum Decision and Order Incorporating at Docket Entry Nos. 1232 and
1233 in Administrative Case. See Docket Entry No. 1460: Order from Bankruptcy Appellate
Panel affirming Decision.

1 But let's be clear. The Debtors and the Examiner did not choose to request a
2 surcharge as to every administrative expense incurred by the Debtors' estates. The Court also
3 determined that if the Debtors or the Examiner wished to pursue Comerica on the basis of the
4 Bank having received a preference or a fraudulent conveyance, they could certainly do that, but
5 that type of administrative expense claim for attorneys' fees that would necessarily arise was not
6 something that Comerica consented to or that Comerica caused for which it received a benefit, so
7 expenses for such litigation could not be surcharged against Comerica's collateral.

8 It was also clear to the parties, including the Debtors, that since a portion of the
9 sale proceeds had been allocated to the personal property collateral upon which Comerica held a
10 lien, which lien was subject to avoidance as a preference or a fraudulent conveyance (also known
11 as the DePrizio litigation), those allocated funds would retain the lien of Comerica until, and only
12 if, the Comerica lien were set aside. Unfortunately for the Debtors, the Bankruptcy Code was
13 amended in 2005 which eliminated the Debtors' ability to set aside the lien of Comerica as a
14 preference.¹⁶ The Court allowed the Debtors to continue with the request that the lien of
15 Comerica be set aside, on certain personal property, as a fraudulent conveyance. It was this claim
16 that the Trustee ultimately pursued and which was a part of the Settlement Agreement heard on
17 March 11, 2008.

18 However, given the contentious nature of these proceedings, the administrative
19 expense claims of principally the Examiner and the Examiner's counsel were increasing
20 dramatically. And, as has been noted, not all of the other administrative expense claims
21 previously incurred by the estates had been a part of the Surcharge Litigation. There were also
22 taxes to be paid, concerning the sale of the Debtors' real property, which were administrative
23 expenses. The Examiner, thus, began a series of distributions to the administrative expense
24 claimants, on a pro rata basis.¹⁷ Ultimately the Examiner was able to distribute the net sum of

25 **16.** See Docket Entry No. 34 in Adversary Proceeding No. 03-00583.

26 **17.** See Docket Entry Nos. 1296 and 1299 in the Administrative Case. The following
27 claimants received distributions on their claims: Bombardier Capital, Inc., \$32,565.02; Trade

1 \$807,707.52, allocated to the Deer Valley Property,¹⁸ the sum of \$1,010.851, which had been
2 allocated to the rolling stock litigation, after the Examiner set aside the lien of Comerica on said
3 personal property, and the sum of \$1,609,877.55 as a result of the Surcharge Litigation.¹⁹ The
4 Examiner and his counsel believed that said distributions in the aggregate amount of
5 \$3,428,436.07 were mandated, since many of the creditors had settled with the Examiner on the
6 basis that they would be paid on an expedited basis. Of course, these requests for distributions
7 led to objections by Comerica or, in some cases, by the Debtors concerning the Examiners' or his
8 counsel's attorneys' fees, which only led to more attorneys' fees being created. The Examiner
9 had also concluded that Comerica had a viable lien on the 43rd Avenue and the Buckeye property
10 in the allocated amount of \$4,685,100,²⁰ and the Examiner used a portion of the allocated sale
11 proceeds, in the amount of \$2,661,000, to make a partial payment to Comerica on its real property
12 liens.²¹ If the Court simply adds \$3,428,436.07 and \$4,685,110, that equals an amount that is
13 approximately \$8,113,546. Thus, even though the Debtors' assets only had a value of \$8,000,000,
14 at the time of sale, once the Examiner started making distributions to creditors, he was validly
15 "surcharging" or using Comerica's collateral to pay creditors.

16 At the hearing on March 11, 2008, on the Settlement Agreement, the Trustee
17 testified that he was then holding in excess of \$1.2 million and that only 66 percent of the Chapter
18 11 administrative expense claims had been paid. Of the over \$1.2 million that he was holding, he

19 Payables, \$ 48,902.27; Flood Control District of Maricopa County, \$37,118.45; Arizona
20 Department of Revenue, \$6,236.50; Nation's Rent, Inc., \$4,619.89; Hawley Aktinson &
21 Company, \$3,711.84; James Carmichael, \$4,189.02; Hebert Schenk, PC (net of retainer),
22 \$232,250.65; CBIZ Restructuring Group, \$96,665.21; FTI Consulting, Inc., \$26,996.44; Baker &
McKenzie, \$40,720.71; Bryan Cave LLP, \$446,047.09.

23 **18.** The Examiner needed to pay real and personal property taxes and other amounts prior
24 to a distribution.

25 **19.** See Docket Entry No. 1296 in the Administrative case.

26 **20.** See Docket Entry Nos. 699, 775, and 781 in the Administrative Case.

27 **21.** See Docket Entry Nos. 775 and 781 in the Administrative Case.

1 testified that the approximate sum of \$600,000 was unencumbered and that the sum of \$620,000
2 (roughly) had been allocated as proceeds upon which Comerica held a lien, but which had been
3 allocated to the personal property as a result of the Sale Order and which could only be retained if
4 the Trustee were successful on the remaining fraudulent conveyance claim in the DePrizio
5 Litigation.

6 Of course, the Court had already dismissed the fraudulent conveyance claim in the
7 DePrizio Litigation, with the Trustee having filed a notice of appeal as of the March 2008
8 hearing. But the reality was, and the Trustee so testified, that he believed that he would not be
9 successful on the appeal. Thus, without the Settlement Agreement, and given the prior Orders of
10 this Court on the Sale and allocation of the proceeds, if the Trustee were not successful on appeal,
11 he would have been required to return the sum of \$620,000 to Comerica. To the extent the
12 Goodman parties somehow believed that the sum of \$620,000 belonged to the estate as
13 unencumbered assets that could be distributed to creditors, they were mistaken.

14 The Goodman parties also seem to misunderstand the nature and extent of the
15 claims that are still unpaid in this case. The Trustee testified, on March 11, 2008, that there were
16 Chapter 7 administrative expense claims of the Debtors' estates held by the Trustee and Trustee's
17 counsel that had to be paid, and that only 66 percent of the Chapter 11 administrative expense
18 claims, even after the settlements reducing the amount outstanding on many of these claims were
19 approved, had been paid at this time. If the Settlement Agreement were approved, the Trustee
20 estimated that the Chapter 7 administrative expenses would be paid, and the Chapter 11
21 administrative expense claimants would be paid 90 percent of their claims. No payments would
22 be made to unsecured creditors, which included the Goodman parties. Even if the Trustee
23 proceeded with the DePrizio and the Equitable Subordination Litigation and won on all claims,
24 with the Court finding, as a matter of fact and law, that the Debtors had incurred \$1.4 million in
25 damages as a result of Comerica's actions, the Trustee testified that the claims against the
26 Debtors' estates were so great that the unsecured creditors would receive a *de minimus*
27 distribution. Given the risk involved, the Trustee proceeded with a mediation of the controversy

1 Firm's retention contemplated that if a trustee were subsequently appointed in a Chapter 7
2 proceeding for the Debtors' estates, the trustee could determine whether to continue the retention
3 of the Firm. Thus, the Firm also undertook the additional risk that it would provide valuable
4 services to the Debtors' estates, but a trustee subsequently appointed in this case, if converted,
5 would choose another law firm to continue with the estates' litigation. However, in this case, the
6 Trustee who was appointed, after a conversion to Chapter 7, chose the continued retention of the
7 Firm on behalf of the estates. Now Mr. Goodman, as one of the Goodman parties, somehow
8 believes that the retention was unfair or unethical.

9 The Court has reviewed the affidavits filed by the Firm in support of its request for
10 \$316,666 in attorneys' fees and \$1,929.76 in costs.²³ One affidavit reflects the Mr. Carmel, on
11 behalf of the Firm, expended 124.80 hours in Adversary Proceeding No. 03-00583. The other
12 Affidavit reflects that Mr. Carmel, again on behalf of the Firm, expended 199.7 hours in
13 Adversary 07-00031. This is roughly 325 hours in two Adversaries. The Affidavit also included
14 a statement of costs in the Adversaries. Dividing \$316,666 by 325 hours is \$974 per hour. The
15 bankruptcy attorneys in Arizona usually request in the neighborhood of \$400 to \$425 per hour for
16 Chapter 11 proceedings and similar complex work. Given the fact that the Firm undertook the
17 risk of representing the Trustee in Litigation for which, if the Trustee lost, the Firm would receive
18 nothing, the Court concludes that the rate of \$974 per hour is appropriate and consistent with the
19 analysis in In re Reimers, 972 F.2d 1127, 1128 (9th Cir. 1992).

20 Returning to the Settlement Agreement between the Trustee and Comerica, even
21 though the Goodman parties filed an Objection²⁴ after the date set forth in the Notice of Hearing
22 concerning the Settlement Agreement, the Court gave them the opportunity, at the March 11,
23 2008 hearing, to set forth their arguments on the record and to cross examine the Trustee on the
24 evidence presented by him in favor of the Settlement. However, the Court must now place the

25 **23.** See Docket Entry No. 47 in Adversary Proceeding No. 07-00031.

26 **24.** According to the Electronic Docket, the Goodman parties filed their Objection at 4:02
27 a.m. on March 11, 2008.

1 Goodman parties' Objection in context. This is an insolvent estate in which not even the Chapter
2 11 administrative expense claimants shall be paid in full. Not one of the administrative expense
3 claimants objected to the Settlement. Only the Goodman parties, with unsecured claims that
4 would receive a *de minimus* distribution if the Trustee were successful on all claims in the
5 DePrizio and the Equitable Subordination litigation, interposed an objection to the Settlement
6 Agreement.

7 At the conclusion of the hearing, the Court set forth an overview of its decision,
8 advising the parties that it would follow-up with a written decision. The Court concluded that the
9 Settlement Agreement should be approved, with certain changes in the release language, and
10 directed the Trustee to upload an order that addressed the Goodman parties' concerns regarding
11 the claims of third parties. The Court also directed the Firm to file an affidavit setting forth the
12 time that it expended on the Adversary Proceedings and the costs incurred. On March 17, 2008,
13 the Court entered a Memorandum Decision, approving the Settlement Agreement, with the
14 modification of the release language as noted on the record, and approving the attorneys' fees and
15 costs requested by the Firm.²⁵ The Court also entered a separate Order granting the Settlement
16 Agreement, as well as an Order authorizing payment of the Firm's attorneys' fees and costs on
17 March 17, 2008.²⁶

18 **III. Legal Discussion**

19 Discretionary stays of judgments and orders pending appeal are governed by
20 Fed.R.Civ.P 62(c) & (g), Fed.R.App.P. 8(a) & (b), Fed.R.Bankr.P. 8005, and In re Wymer, 5
21 B.R. 802 (Bankr. 9th Cir. 1980). In the Ninth Circuit, in order to prevail, the party seeking the
22 stay must prove: 1) appellant is likely to succeed on the merits; 2) appellant will suffer
23 irreparable injury; 3) no substantial harm will come to appellee; and 4) the stay will do no harm
24 to the public interest. In re Wymer, 5 B.R. 802 (Bankr. 9th Cir. 1980); In re Irwin, 338 B.R. 839

25
26 **25.** See Docket Entry No. 51 Adversary Proceeding No. 07-00031.

27 **26.** See Docket Entry Nos. 52 and 53 Adversary Proceeding No. 07-00031.

1 (E.D. Cal 2006). The party moving for a stay has the burden on each of these elements. Irwin at
2 843; In re Doctors Hosp. of Hyde Park, Inc., 376 B.R. 242 (Bankr.N.D.Ill.,2007). A motion for
3 stay pending appeal is an extraordinary remedy and requires substantial showing on part of the
4 movant. In re Lickman, 301 B.R. 739 (Bankr. M.D. Fla. 2003).

5 In this case, the Goodman parties provide no basis to stay these proceedings while
6 their appeal is pending. Moreover, the Motion fails to satisfy or even address any of the elements
7 necessary to prevail on a such a Motion.

8 **A. Notice**

9 Addressing the notice issue raised by the Goodman parties in their Reply to their
10 Motion for Stay, the Court has already set forth above, in the Factual Discussion, that the Motion
11 and the Notice of Hearing were sent out to creditors, including the Goodman parties, on February
12 22, 2008, well in advance of the March 11, 2008 hearing. The Court has also stated, in this
13 Decision, that when parties request a trial, they must be ready to proceed on that date to present
14 evidence or present a settlement to the Court. The parties chose to present the Settlement
15 Agreement to the Court on the first day of trial. As previously discussed by this Court, the two-
16 day trial was set back in October 2007, well in advance of the start of the trial in March 2008. In
17 this matter, the Trustee and Comerica also had a concern about having the Settlement Agreement
18 heard before they were to report back to the BAP as to whether the DePrizio Litigation had been
19 settled. Since this is leap year, 18 days' notice was provided to the Goodman parties and to the
20 other creditors of these estates. No one objected other than the Goodman parties who had little to
21 gain even if the Trustee won on all remaining claims in the Litigation.

22 **B. Procedure**

23 The Goodman parties also cite to the Court's Local Rules as evidence that
24 something is amiss. First, the national rules, the Rules of Bankruptcy Procedure, do not provide
25 for a date certain for the response concerning a motion or a contested matter. *See* Fed. R.Bankr.
26 P. 9013 and 9014. Local Rule 9013-1(c) only allocates 15 days after service to serve and file an
27 objection or response to a motion. If the Court includes an additional 3 days in mailing, as a part
28

1 of the noticing process and as provided in Bankruptcy Rule 9006(f), the Trustee still provided 18
2 days' notice to the creditors and the Goodman parties prior to the March 11, 2008 hearing on the
3 Settlement Agreement. In this case, Court allowed the Goodman parties to present their
4 Objection at the time of the hearing. Moreover, the Trustee did place the bar date for objections
5 or responses in the Notice of Hearing, which is permitted by Local Rule 9013-1(j), and which is
6 an exception to Local Rule 9013-1(c). So, although the Goodman parties believed that the
7 Trustee did not comply with the Local Rules, he did.

8 Bankruptcy Rule 2002, a national Bankruptcy Rule, does provide that creditors
9 shall have "20 days' noticing by mail" of a hearing on "approval of a compromise or settlement."
10 *See* Fed. R. Bankr. P. 2002(a)(3). However, Bankruptcy Rule 9006(c), with or without a motion
11 and with or without a hearing, allows the Court to shorten the notice set forth under Rule 2002
12 (a)(3). In this case, the start of a two-day trial on March 11, 2008, allowed the Court to place the
13 Settlement Agreement on the calendar at the start of the trial. Bankruptcy Rule 9005 also
14 incorporates Fed. R. Civ. P. 61. Thus, if the setting of the Settlement Agreement on 18 days'
15 notice was in error, it was a harmless error. *Fraidin v. Weitzman (In re Fraidin)*, 188 B.R. 529,
16 532, note 1(D. Md. 1995), *aff'd* 110 F.3d 59 (4th Cir. 1997); *In re Sunflower Racing, Inc.*, 226
17 B.R. 665 (D. Kan. 1998) (unless shortening the noticing period would materially alter the
18 presentation of evidence by the party so complaining, the Court's error was harmless).

19 Under the rubric of "procedure", the Goodman parties also believe Local Rules
20 9072-1, *et seq.*, have been violated. First, the Mediation Program, under the Local Rules, is
21 voluntary, and may take a variety of forms. This matter was not assigned to mediation under
22 Local Rule 9072-2, so the Goodman parties' recitation of numerous Local Rules as to a more
23 formal mediation procedure were not consented to by the parties, nor ordered by this Court.
24 Local Rule 9072-1 does allow the parties to determine the appropriate format to settle their
25 matter, which may include that another judge of this Court assist them in an expedited, cost-
26 effective manner. Therefore, the Court finds no violation of Local Rules 9072-1, *et seq.*, in this
27 matter.

1 Moreover, the Court's conclusion that the Goodman parties' Objection was of
2 little merit and did not require that the Objection be set over for a further hearing was within the
3 Court's discretion. Indeed the Local Rules specifically provide that if the Court believes that the
4 response or objection has no merit, in that no material issues of fact are raised, the Court may
5 summarily rule on the Objection, disposing of it, if necessary, without a further hearing. *See*
6 Local Rule 9014-2(a). In this matter, the Court allowed Mr. Goodman and the Goodman parties
7 to be heard on their Objection. The Court allowed evidence to be presented, out of an
8 overabundance of caution, on a meritless objection. After evaluating the evidence presented, and
9 consistent with the Ninth Circuit case law concerning settlements, the Court concluded that given
10 the contentious nature of these proceedings, the Trustee's business judgment and evaluation of the
11 claims under a Woodson analysis, and the unlikelihood that even the Chapter 11 administrative
12 expense claimants, the real parties in interest, would ever be paid in full, the Court concluded that
13 approving the Settlement Agreement was in the best interest of creditors. The Court also
14 determined that it need not set any further hearings on the Settlement Agreement.

15 **C. Likelihood of Success on the Merits**

16 Turning to the various factors concerning a stay pending appeal, the Court
17 concludes that the Goodman parties have failed to show that their appeal is likely to succeed on
18 its merits. The Court set forth its findings of fact and conclusions of law in its March 17, 2007
19 Memorandum Decision which is incorporated herein. As the Court noted, the Debtors, and now
20 the Trustee, have engaged in contentious litigation with Comerica that has occurred over a
21 number of years and has been time-consuming and expensive. In his testimony before the Court
22 at the hearing on the Settlement Agreement, the Trustee carefully considered the remaining
23 claims that the estates had against Comerica and the difficult issues the estates would encounter in
24 proceeding with the DePrizio and the Equitable Subordination Litigation. For instance, the
25 Trustee did not believe that the probability of his overturning this Court's dismissal, with
26 prejudice, of the preference and fraudulent conveyance claims in the DePrizio Litigation was
27 great. He also noted that the appeal of the dismissal of that Litigation would be time-consuming.

1 As to the Equitable Subordination Litigation, the Trustee conceded that although
2 he had retained an expert to quantify the potential damages that might have been suffered by the
3 estates when Comerica breached its term sheet with the Examiner, then acting on behalf of the
4 Debtors' estates, he believed that the liability issues would be difficult to prove. He estimated
5 that he was likely to lose on the issue of liability, because he was unsure whether he had a viable
6 contract claim on which to proceed. If true, no Court would ever reach the issue of damages. He
7 also conceded that the equitable subordination claim, which was another count in the complaint,
8 was difficult to prove in the Ninth Circuit. It should also be noted that in this Court's August 30,
9 2007 Memorandum Decision in the Equitable Subordination Litigation, which the Goodman
10 parties like to rely on, the Court concluded that it was unclear whether the Trustee would be able
11 to present enough evidence to meet the stringent standard in the Ninth Circuit on equitable
12 subordination. Indeed, the Court did not grant the Trustee's motion for partial summary judgment
13 on the claim, noting that it needed something more than a mere recitation of what happened in the
14 Surcharge Litigation.²⁷ Because of the Trustee's uncertainty in being able to prove an equitable
15 subordination claim, he proceeded with the settlement of this claim.

16 To the extent that the Trustee had any doubts about his analysis of the DePrizio
17 and the Equitable Subordination Litigation, he participated in a mediation session with
18 Comerica's principals and counsel which only confirmed the weaknesses that he envisioned.
19 Using his business judgment, the Trustee concluded that the Settlement Agreement was in the
20 best interest of creditors. Therefore, the Court concluded, at the hearing on the Settlement
21 Agreement, that the resolution of all claims that existed between the estate and Comerica, through
22 the Settlement Agreement, had a tangible benefit to these estates that could not be overlooked.

23
24 **27.** For instance, the Court pondered, in its August 30, 2007 Memorandum Decision,
25 whether the remedy imposed on Comerica of surcharge was sufficient for the actions taken by
26 Comerica in this case. If Comerica's collateral were surcharged to pay certain administrative
27 expense claimants, what additional actions would be required to impose the additional remedy of
28 equitable subordination? At least on his motion for partial summary judgment, the Trustee had
failed to show those additional facts which would warrant an additional Draconian remedy of
subordination.

1 The Court found that the Settlement Agreement met the criteria set forth in the decision of In re
2 Woodson, 839 F.2d 610, 620 (9th Cir.1988) for the approval of compromises. Moreover, the
3 Court had wide discretion in granting approval of compromises between trustees and creditors. In
4 re Sanner Contracting Co., 181 B.R. 465 (Bankr.D.Ariz.,1995).

5 Yet the Goodman parties have failed to provide this Court with any countervailing
6 argument or evidence that would support any different conclusion on its current Motion for Stay.
7 The Goodman parties now argue that somehow the mediation was in violation of “Rule 9072.”
8 There is no national Bankruptcy Rule on this point, so the Court will turn to its Local Rules.
9 There is nothing in Local Rule 9072-1, et seq., which prohibits a judge of this Court as acting as a
10 mediator in proceeding over which he or she is not presiding. The Trustee and Comerica
11 apparently approached Judges Case and Haines to serve as a mediator in the dispute, and Judge
12 Haines consented. The Court sees no basis for this to be a violation of the Bankruptcy Court’s
13 Mediation Program. In fact, the program does allow the judges of this Court to serve as
14 mediators. *See* Local Rules 9072-6 and 9072-7. The Court has already discussed the noticing of
15 the hearing on the Settlement Agreement, and the other procedures utilized. The Court sees no
16 basis for the designated noticing and procedural matters to result in a likelihood of success on the
17 merits. The Court concludes that the Goodman parties are not likely to succeed on the merits of
18 their appeal.

19 **D. Failure to Show Irreparable Injury to Appellant**

20 The Goodman parties also fail to show that they will suffer irreparable harm if a
21 stay is not granted. The Court has reviewed the Motion, and there is no indication of any
22 irreparable injury or even a discussion of the issue. Given that the Goodman parties are
23 unsecured creditors in an insolvent estate, it is difficult to imagine what possible benefit they
24 would receive even if the Trustee continued to pursue the Litigation to a successful resolution.
25 As noted previously, the only parties that would benefit would be the Chapter 11 administrative
26 expense claimants, and they have not objected to the Settlement Agreement. In essence, the
27

Goodman parties have nothing to lose by continuing to increase the expenses of these estates.

However, this does not mean that the Court should somehow equate their “nothing to lose attitude” with any type of harm or injury.

E. Failure to Show No Substantial Harm to the Appellee

The Goodman parties have also failed to show that no harm will be suffered by the Trustee and, therefore, the estates, if the stay is granted. In reality, staying the proceedings will only serve to delay a distribution to administrative expense claimants who have been waiting years for some type of resolution of the remaining Litigation and will delay the winding-up of this estate. Additionally, an insolvent estate will be forced to incur the costs of a frivolous appeal, and the parties who will pay for such an appeal will be the administrative expense claimants who have not objected to the Settlement Agreement. Moreover, Trustee’s counsel, the Firm, which undertook the prosecution of the DePrizio and Equitable Subordination Litigation against Comerica at great risk would have to wait until the resolution of the appeal before receiving the attorneys’ fees and costs due to the Firm.

F. Failure to Show that the Stay will do No Harm to the Public Interest

As to the final factor concerning stays pending appeal, the Goodman parties have failed to provide any evidence that the stay will do no harm to the public interest. Not unlike the other factors, the Goodman parties have failed to address this factor. In this particular case, after years of litigation, it is the best interest of creditors that the Settlement Agreement be approved and that the Trustee may finally make another distribution that the administrative expense claimants have awaited.

G. The Firm’s Attorneys’ Fees and Costs

To the extent that the Goodman parties also raise an issue about the payment of the Firm’s attorneys’ fees and costs, the Court must deny their request for a stay. As noted previously, the Debtors had great difficulty in locating any counsel that would undertake their representation in August 2006. When the Firm agreed to be substitute counsel, it was after

1 several hearings at which the Debtors' principal was present. This same principal is now a
2 member of the Goodman parties and counsel for said parties. Surely if he knew of any reason
3 why the Firm should not be retained for the Debtors, he should have so stated. It is only now,
4 after several years have passed, and the Settlement Agreement has been presented to the Court,
5 that the Goodman parties now raise any ethical concerns. To the extent that they had those
6 concerns, the Court independently sought, and reviewed, the affidavits from the Firm outlining
7 the attorneys' fees and costs requested to consummate the Settlement Agreement. Given the risk
8 assumed by the Firm, the Trustee's statement at the evidentiary hearing on the Settlement
9 Agreement that he believed that the services rendered by the Firm were excellent and that the
10 compensation requested was reasonable, and the affidavits presented by the Firm as to the
11 services rendered by the Firm and the costs incurred, the Court concludes that the compensation
12 requested is consistent with the Ninth Circuit decision of In re Reimers, 972 F.2d 1127, 1128 (9th
13 Cir. 1992).

14 Nor have the Goodman parties shown that an hourly rate, in a contingent fee
15 matter, that is twice the normal rate of a bankruptcy attorney in Arizona for a similar type of
16 work, with the hours expended as set forth in Affidavits, somehow is a violation of the Arizona
17 ethical rules that are incorporated into the Local Rules of the Arizona Bankruptcy Court.²⁸ The
18 Goodman parties have presented no evidence or argument on this issue that would cause this
19 Court to issue a stay pending appeal preventing a payment to the Firm.

20 Based upon the foregoing,

21 The Court denies the Goodman Parties' Motion for Stay Pending Appeal. This
22 Court is unable to address the issues of mandamus, etc., which are not before it. The Court will
23 execute a separate order incorporating this Decision.

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26 **28.** The Goodman parties, in their Reply, assert that the Firm is receiving \$3,000 to
27 \$4,000 a hour. There is no support for that assertion.

DATED this 4th day of April, 2008.

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Honorable Sarah Sharer Curley
United States Bankruptcy Judge

BNC to notice.