SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: September 9, 2020

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

HERITAGE REAL ESTATE INVESTMENT, INC.,	**CASE NO. 14-03603-NPO**
DEBTOR.	**CHAPTER 7**

IN RE:

ALABAMA-MISSISSIPPI FARM INC.,	**CASE NO. 16-01156-NPO**
DEBTOR.	**CHAPTER 7**

ORDER: (1) GRANTING TRUSTEE'S MOTION TO APPROVE COMPROMISE AND SETTLEMENT AND (2) APPROVING TRUSTEE'S APPLICATION FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF NECESSARY EXPENSES OF ATTORNEY FOR SPECIAL PURPOSE

This matter came before the Court for a telephonic hearing on August 14, 2020 (the "Hearing"),[1] on the Trustee's Motion to Approve Compromise and Settlement (the "Settlement

[1] Because of COVID-19-related restrictions, the Hearing was converted from an in-person hearing to a telephonic hearing. (Heritage Dkt. 477; AMF Dkt. 368); *see* https://www.mssb.uscourts.gov/special-notices/court-hearings (last visited Sept. 9, 2020).

Motion") (Heritage Dkt. 427; AMF Dkt. 349)[2] and the Trustee's Application for Allowance of Compensation and Reimbursement of Necessary Expenses of Attorney for Special Purpose (the "Fee Application") (Heritage Dkt. 428; AMF Dkt. 350) filed by J. Stephen Smith ("Smith"), chapter 7 trustee ("Trustee") for the bankruptcy estates of Heritage Real Estate Investment, Inc. ("Heritage") and Alabama-Mississippi Farm Inc. ("AL-MS Farm") in the Heritage Case and the AL-MS Farm (together with the Heritage Case, the "Bankruptcy Cases"); the Amended Objection to Trustee's Motion for Approval of Compromise and Settlement and Application for Allowance of Compensation (the "Heritage Objection") (Heritage Dkt. 456) filed by Dynasty, Inc. ("Dynasty"), Apostolic Association Assemblies, Inc., Greater Christ Temple Apostolic Church ("Greater Christ Church"), Luke Edwards ("Edwards"), and Apostolic Advancement Association, Inc. ("AAA") in the Heritage Case; and the Objection to Trustee's Motion for Approval of Compromise and Settlement and Application for Allowance of Compensation (the "AL-MS Farm Objection" or, together with the Heritage Objection, the "Objections") (AMF Dkt. 354) filed by Reach, Inc. ("Reach"), Edwards, and AAA in the AL-MS Farm Case.

At the Hearing, Jim F. Spencer, Jr. represented the Trustee, and Henry L. Penick ("Penick") represented Dynasty, Apostolic Association Assemblies, Inc., Greater Christ Church, Edwards, AAA, and Reach (the "Objecting Parties"). The Trustee and special counsel for the Trustee, Jerry M. Blevins ("Blevins"), testified at the Hearing in support of the Settlement Motion and the Fee Application. The Trustee introduced into evidence two exhibits, marked as Trustee Exhibit 1 and Trustee Exhibit 2. (Heritage Dkt. 475; AMF Dkt. 367). The Objecting Parties did not call any

[2] Citations to the record are as follows: (1) citations to docket entries in the above-referenced bankruptcy case of Heritage Real Estate Investment, Inc. (the "Heritage Case") are cited as "(Heritage Dkt. ___)" and (2) citations to docket entries in the above-referenced bankruptcy case of Alabama-Mississippi Farm Inc. (the "AL-MS Farm Case") are cited as "(AMF Dkt. ___)".

witnesses or introduce any evidence at the Hearing. The Court granted the Settlement Motion from the bench and took the Fee Application under advisement. This Order memorializes and supplements the Court's bench ruling on the Settlement Motion and constitutes the Court's decision on the Fee Application.[3]

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Cases pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Settlement Motion and Fee Application was proper under the circumstances.

Facts

The Trustee asks the Court to approve the settlement of the legal malpractice claim of the bankruptcy estates of Heritage and AL-MS Farm (the "Settling Parties") against William C. Brewer, III ("Brewer") arising out of his pre-petition representation of Heritage and AL-MS Farm. The Trustee also asks the Court to approve the payment of attorneys' fees and expenses to special counsel for the Settling Parties.

By way of background, Edwards, a Pentecostal minister, established Greater Christ Church in Michigan in 1961 and later expanded its operations into Mississippi and Alabama. Greater Christ Church operates through distinct corporate entities that work together to serve the missionary work of its members. The debtors, Heritage and the AL-MS Farm, are two of the separate but related corporate entities that informally operate under the organizational umbrella of

[3] Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, the following constitutes the findings of fact and conclusions of law of the Court.

Greater Christ Church, an unincorporated association. Reach, Apostolic Association Assemblies, Inc., AAA, and Dynasty are four other such entities.

In 2011, William Harrison ("Harrison"), Bruce L. Johnson ("Johnson"), and Michael L. King (collectively, the "Judgment Creditors") obtained a default judgment in the amount of $6,599,648.00 (the "Alabama Default Judgment") against Heritage, AL-MS Farm, Edwards, and AAA (the "Judgment Debtors") in the Circuit Court of Greene County, Alabama in *Bruce L. Johnson, et al. v. Luke Edwards et al.*, No. CV-2010-32 (the "Alabama Litigation"). The Judgment Debtors' subsequent efforts to set aside or vacate the Alabama Default Judgment were unsuccessful. *Edwards v. Johnson*, 143 So. 3d 691 (Ala. 2013). On September 20, 2011, they filed a motion to set aside the Alabama Default Judgment based on insufficiency of service of process pursuant to Rule 55(c) of the Alabama Rules of Civil Procedure (the "Rule 55(c) Motion"). After the Judgment Creditors attempted to execute on the Alabama Default Judgment, the Judgment Debtors filed a motion to quash the writ of execution on May 4, 2012, stating that the Alabama Default Judgment was not yet final because of the pending Rule 55(c) Motion. In response, the Judgment Creditors filed a motion to strike or deny the motion to quash arguing that the failure of the trial court to dispose of the Rule 55(c) Motion within ninety (90) days after its filing constituted an automatic denial pursuant to Rule 59.1 of the Alabama Rules of Civil Procedure[4] ("Rule 59.1"). They further argued that the 42-day period in which to appeal the denial of the Rule 55(c) Motion had expired on January 30, 2012. *See* ALA. R. APP. P. 4(a)(1). On July 2, 2012, the Judgment Debtors filed a motion to set aside the Alabama Default Judgment pursuant

[4] Rule 59.1 provides, in pertinent part, that "[n]o postjudgment motion filed pursuant to Rule[] . . . 55 . . . shall remain pending in the trial court for more than ninety (90) days" and that "[a] failure by the trial court to render an order disposing of any pending postjudgment motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period." ALA. R. CIV. P. 59.1.

to Rule 60 of the Alabama Rules of Civil Procedure (the "Rule 60 Motion"), in which they acknowledged that the Rule 55(c) Motion had been denied automatically ninety (90) days after its filing. The trial court denied the Rule 60 Motion as an improper attempt to circumvent the ninety (90)-day period proscribed in Rule 59.1.

On February 15, 2013, the Judgment Debtors filed a notice of appeal of the denial of the Rule 55(c) Motion and the Rule 60 Motion, but the Alabama Supreme Court held that that it lacked jurisdiction because the notice of appeal was not filed timely based on the date of the Rule 59.1 denial of the Rule 55(c) Motion. *Edwards v. Johnson*, 143 So. 3d 691 (Ala. 2013). Before the entry of the Alabama Default Judgment by the trial court and during their appeal to the Alabama Supreme Court, the Judgment Debtors were represented by Brewer.

The Judgment Debtors apparently first learned of the procedural errors in the Alabama Litigation in early 2014 when they consulted new counsel, Blevins. On February 28, 2014, Blevins filed a legal malpractice lawsuit pursuant to the Alabama Legal Services Liability Act, ALA. CODE § 6-5-571 (1975), in the Circuit Court of Sumter County, Alabama, styled *Luke Edwards, Alabama-Mississippi Farm, Inc., Heritage Real Estate Investment Corporation Inc. & Apostolic Advancement Association, Inc. v. William C. Brewer, III*, in Civil Action No. CV 2014-900026 (the "Malpractice Action") alleging that Brewer breached the duty of care in allowing the Alabama Default Judgment to be entered against the Judgment Debtors and failing to file a timely appeal. While the Malpractice Action was pending, Heritage and AL-MS Farm commenced the Bankruptcy Cases. The Judgment Creditors are their largest creditors.

Heritage Case

On November 6, 2014, Heritage filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (Heritage Dkt. 1). Months later, the Court converted the Heritage Case to a

chapter 7 case (Heritage Dkt. 75), and Smith was appointed the Trustee. In its bankruptcy schedules, Heritage listed the Judgment Debtors as holding a contingent and disputed claim in the amount of $7,061,717.36. (Heritage Dkt. 25 at 12).

On May 21, 2015, Johnson filed a proof of claim ("Johnson's POC-Heritage") (Heritage Cl. 11-1) asserting a secured claim in the amount of $9,094,862.00 based on the Alabama Default Judgment. That same day, Harrison filed a proof of claim (the "Judgment Creditors' POC-Heritage") (Heritage Cl. 13-1) on behalf of "Johnson, et al." asserting the identical claim. The Trustee objected to both Johnson's POC-Heritage and the Judgment Creditors' POC-Heritage. (Heritage Dkt. 308, 309).

AL-MS Farm Case

Before the adjudication of the Trustee's claims objections in the Heritage Case, AL-MS Farm filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on March 31, 2016. (AMF Dkt. 1). Months later, the Court converted the AL-MS Farm Case to a chapter 7 case (AMF Dkt. 57), and Smith was appointed the Trustee. Smith is thus the chapter 7 trustee in both Bankruptcy Cases. In its bankruptcy schedules, AL-MS Farm listed the Judgment Debtors as holding a contingent and disputed claim in an unknown amount. (AMF Dkt. 21 at 7).

On November 3, 2016, the Judgment Debtors filed a proof of claim in the AL-MS Farm Case, asserting a secured claim in the amount of $10,074,062.00 (the "Judgment Creditors' POC-AMF") (AMF Cl. 2-1). The Trustee objected to the Judgment Creditors' POC-AMF. (AMF Dkt. 192).

Judgment Creditors' POC

After a combined hearing on January 10, 2018 on the Trustee's claims objections in both Bankruptcy Cases, the Court entered an order disallowing Johnson's POC-Heritage in its entirety

and allowing the Judgment Creditors' POC-Heritage and the Judgment Creditors' POC-AMF (together, the "Judgment Creditors' POC"), but only to the extent that the Judgment Creditors had a general unsecured claim in the Heritage Case of $8,047,163.52 and in the AL-MS Farm Case of $10,069,800.11. (Heritage Dkt. 342; AMF Dkt. 239). The Court also ruled that any disbursement to the Judgment Creditors would be made in equal shares of one-third of the total disbursement and that any disbursement from the bankruptcy estates of Heritage and AL-MS Farm would be applied to the balance of the Alabama Default Judgment to prevent any duplication of recovery. (Heritage Dkt. 342; AMF Dkt. 239).

Trustee's Employment of Blevins

Upon the commencement of the Bankruptcy Cases, the Malpractice Action became property of the bankruptcy estates of Heritage and AL-MS Farm and remained so upon the conversion of the Bankruptcy Cases to chapter 7. 11 U.S.C. § 541. As property of the estates, the Trustee had the exclusive authority to prosecute and settle the Malpractice Action. *Schertz-Cibolo-Universal City, Indep. Sch. Dist. v. Wright (In re Educators Grp. Health Tr.)*, 25 F.3d 1281, 1284 (5th Cir. 1994). Accordingly, the Trustee was substituted as the plaintiff in place of Heritage and AL-MS Farm in the Malpractice Action. Because Heritage and AL-MS Farm filed bankruptcy approximately sixteen (16) months apart, however, the Trustee's substitution as the plaintiff in the Malpractice Action on behalf of each of the estates occurred approximately the same number of months apart. There was a similar gap in time in the Trustee's retention of Blevins as special counsel, first in 2015 on behalf of Heritage and then in 2016 on behalf of AL-MS Farm.

In the Heritage Case, the Trustee filed the application seeking the Court's permission to employ Blevins as special counsel on February 3, 2015. (Heritage Dkt. 88). As stated in the application, the special purpose of employment was "for pursuit of a lawsuit previously pending

in the Circuit Court of Green[e] County, Alabama." (*Id.*). Under the terms of his employment, Blevins requested "compensation of an undivided contingent interest in [the] . . . claim as forty percent (40%), plus expenses . . . [but] the total sum of attorneys' fees and expenses shall not exceed fifty percent (50%) of the total amount of the settlement." (Heritage Dkt. 88). No objection was filed, and the Court approved the application in an order dated March 18, 2015. (Heritage Dkt. 100).

On May 30, 2015, Blevins moved for permission to withdraw as counsel for Edwards, AL-MS Farm, and AAA in the Malpractice Action but months later rescinded the motion. The Trustee filed an amended employment application in the Heritage Case "to ensure transparency to all parties," stating that Blevins represented all four (4) plaintiffs, including the Trustee, in the Malpractice Action and that any causes of action that the Trustee may have against the co-plaintiffs, Edwards, AL-MS Farm, and AAA, were unrelated to the Malpractice Action. (Heritage Dkt. 207). The terms of Blevins' employment remained unchanged. No objection was filed, and the Court entered an order approving the amended employment application on October 8, 2015. (Heritage Dkt. 208).

In the AL-MS Farm Case, the Trustee filed the application seeking permission to employ Blevins as special counsel on July 5, 2016. (AMF Dkt. 65). The terms of Blevins' employment mirrored those approved in the Heritage Case. No objection was filed, and the Court approved the application on August 1, 2016. (AMF Dkt. 75).

In late 2016, Blevins withdrew as counsel for Edwards and AAA in the Alabama Litigation, and Penick was substituted as their counsel. At present, Blevins represents the Trustee on behalf of Heritage and AL-MS Farm in the Alabama Litigation, and Penick represents Edwards and AAA.

Mediation

On October 2, 2019, the Trustee and Blevins met with counsel for Brewer's malpractice insurer in Birmingham, Alabama in an attempt to mediate the malpractice claims on behalf of Heritage and AL-MS Farm. Penick also attended the mediation. Brewer purportedly owns a $1 million malpractice insurance policy. Brewer's malpractice insurance policy is described by the parties as a "wasting" policy, meaning that all costs incurred by the insurer in defending the Malpractice Action erode the limits of the policy. The malpractice insurance policy apparently is the only source for recovery on these claims. At that time, the amount available for settlement under the policy was approximately $600,000.00. At the mediation, the parties reached a tentative global settlement of the Malpractice Action in the amount of $500,000.00, with each plaintiff receiving an equal share of $125,000.00 of the settlement proceeds. Penick, however, expressed concern about the timing of the payment of the settlement proceeds. According to the Trustee, Edwards and AAA refused to agree to the settlement if the Judgment Debtors received any of the proceeds and, for that reason, Penick asked the Trustee to delay seeking approval of the settlement from this Court until the proceeds actually had changed hands. The Trustee disagreed with what he viewed as an attempt by Edwards and AAA to avoid paying the Judgment Debtors. Any money paid to the Judgment Debtors to satisfy the Alabama Default Judgment, of course, would reduce the amount of the Judgment Creditor POC against the bankruptcy estates. Penick argued at the Hearing that the Judgment Debtors had no lien on the settlement proceeds in the Malpractice Action and that his clients' concern about the timing of the payments was valid. The mediation ended without a settlement because of this disagreement.

Settlement Motion and Fee Application

In later negotiations with the insured that did not include Penick, Edwards, or AAA, the Trustee reached a settlement of the Malpractice Agreement. The terms of the proposed settlement are set forth in the Settlement Motion as follows:

> [T]he bankruptcy estate of Alabama-Mississippi Farm, Inc. and the bankruptcy estate of Heritage Real Estate Investment, Inc. will each receive $125,000, plus a pro rata share of any settlement paid by Brewer's insurance company to the other plaintiffs, Luke Edwards and Apostolic Advancement Association, Inc., to the extent such payment exceeds $250,000.

(Heritage Dkt. 427; AMF Dkt. 349). The Trustee explained at the Hearing that requiring the insured to pay "a pro rata share of any settlement paid by Brewer's insurance company to the other plaintiffs . . . [in excess of] $250,000" (the "Pro Rata Provision") assures that Heritage and AL-MS Farm will not receive less than Edwards or AAA in any future settlement. The Pro Rata Provision, however, would apply only if the insured enters into a voluntary settlement for more than $250,000.00 and would have no effect in the event a jury renders a verdict in favor of Edwards and AAA for more than $250,000.00.

In the Settlement Motion, the Trustee asks the Court to approve the terms of the settlement of the Malpractice Action pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure ("Rule 9019") and the payment from each of the bankruptcy estates of Heritage and AL-MS Farm of Blevins' attorney's fees and expenses in the amount of $51,357.69. In the Objections, the Objecting Parties oppose the Settlement Motion on the ground the Trustee failed to disclose whether he will be entitled to additional insurance proceeds after the settlement. (Heritage Dkt. 456; AMF Dkt. 354). They oppose the Fee Application because the Trustee failed to produce a copy of the employment agreement with Blevins and failed to itemize his expenses. Two days

before the Hearing, the Trustee filed two proposed exhibits,[5] consisting of the docket in the Malpractice Action (Tr. Ex. 1; Heritage Dkt. 475-1, 475-2 at 1-6; AMF Dkt. 367-1, 367-2 at 1-6) and an itemization of Blevins' expenses (Tr. Ex. 2; Heritage 475-2 at 7-18; AMF Dkt. 367-2 at 7-18).

The Trustee testified at the Hearing that the settlement is in the best interests of the bankruptcy estates and that Blevins' attorney's fees and expenses are fair and reasonable. The Objecting Parties asked the Court to remove the Pro Rata Provision from the terms of the settlement and to deny the payment of any expenses. They asserted that the Pro Rata Provision unduly prejudices their opportunity to settle their claims with the insurer for more than $250,000.00. With the Pro Rata Provision removed, they had no objection to the settlement. They also alleged that because no employment agreement was attached to the Fee Application,[6] it was unclear whether Heritage and AL-MS Farm had agreed to pay the itemized expenses reflected in Trustee Exhibit 2. The Objecting Parties did not call any witnesses or present any evidence to refute the Trustee's testimony or support their position.

[5] Pursuant to the *Notice Regarding Hearings in Jackson Division (Judge Neil P. Olack) July 1, 2020*, attorneys must file exhibits through the Court's electronic case-filing system at least twenty-four (24) hours before an in-person hearing. *See* https://www.mssb.uscourts.gov/special-notices/court-hearings (last visited Sept. 9, 2020). The Trustee filed the exhibits before the Hearing was converted from an in-person hearing to a telephonic hearing.

[6] No federal or local rule of bankruptcy procedure required that the Trustee attach a copy of the employment agreement to the application although it is a common practice to do so. Penick admitted at the Hearing that he did not request a copy of the employment agreement in discovery.

Discussion

A. Standing

As a threshold matter, the Court addresses the Trustee's argument that the Objecting Parties lack standing to object to, or otherwise be heard on the Settlement Motion or the Fee Application. Because it is the Objecting Parties that seek to be heard, they bear the burden of establishing that they have standing to do so. *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 635 (5th Cir. 2012). In considering the standing issue, the Court is "free to weigh the evidence and resolve factual disputes." *Montez v. Dep't of Navy*, 392 F.3d 147, 149 (5th Cir. 2004).

The Objecting Parties are not creditors or equity interest holders of either Heritage or AL-MS Farm[7] and will not receive any distribution of any bankruptcy estate assets. Moreover, they are not parties to the proposed settlement. Two Objecting Parties, Edwards and AAA, however, are co-plaintiffs with the Trustee in the Malpractice Action.

In the Objections, Dynasty, Apostolic Association Assemblies, Inc., Greater Christ Church, and Reach claim to "have an interest in the distribution of the Debtor's Estate by virtue of their interest in funds paid into the Estate." (Heritage Dkt. 456; AMF Dkt. 354). The remaining Objecting Parties, Edwards and AAA, allege "an undetermined interest in the funds which comprise the malpractice insurance policy proceed from which the settlement funds are derived." (Heritage Dkt. 456; AMF Dkt. 354).

[7] The Court entered an order disallowing the proof of claim filed by Reach in the AL-MS Farm Case (AMF Dkt. 158), which was affirmed on appeal. *See Reach, Inc. v. Smith (In re Alabama-Mississippi Farm Inc.)*, 3:18-cv-00350-DPJ-FKB (S.D. Miss. Feb. 15, 2019), *aff'd*, 791 F. App'x 466 (5th Cir. 2019). At the Hearing, Penick suggested that Reach may have filed a petition for a writ of certiorari to the U.S. Supreme Court, but counsel for the Trustee confirmed that he had not received notice that such a petition had been filed. Moreover, the time to file such a petition has expired. *See* SUP. CT. R. 13.

Generally, only a party in interest has standing to raise, appear, and be heard on issues in bankruptcy proceedings. At a minimum, a "party in interest" must have a legally protected interest that could be affected by the bankruptcy case. *Khan v. Xenon Health, L.L.C. (In re Xenon Anesthesia of Tex., P.L.L.C.)*, 698 F. App'x 793, 794 (5th Cir. 2017). Although the term "party-in-interest" appears in many different sections of the Bankruptcy Code, it is not defined in 11 U.S.C. § 101, the definitional section of the Bankruptcy Code. The legislative history suggests the term was omitted intentionally from the list of definitions in 11 U.S.C. § 101 to allow some flexibility in its use. *See In re N. Am. Oil & Gas, Inc.*, 130 B.R. 473, 479 (Bankr. W.D. Tex. 1990), *abrogated on other grounds by Pritchard v. U.S. Tr. (In re England)*, 153 F.3d 232 (5th Cir. 1998). The Bankruptcy Code uses the phrase "parties in interest" in a list of parties who may raise and appear and be heard on any issue in a chapter 11 case. 11 U.S.C. § 1109. Although that catch-all provision applies only in the context of a chapter 11 case, the examples listed are instructive. They include "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee."[8] 11 U.S.C. § 1109(b). Notably, all of these entities have some type of direct relationship to the debtor or estate property. In applying these standing requirements, the Court separates the Objecting Parties into two groups based on their alleged interests.

1. Dynasty, Apostolic Association Assemblies, Inc., Greater Christ Church, and Reach

Heritage and AL-MS Farm are separate legal entities under the organizational umbrella of Greater Christ Church, an unincorporated association. Dynasty, Apostolic Association Assemblies, Inc., Greater Christ Church, and Reach have no direct relationship to Heritage or AL-

[8] The term "equity security holder" means the holder of an equity security of the debtor, which the Objecting Parties do not claim to be. 11 U.S.C. § 101(17).

MS Farm, are not creditors in either the Heritage Case or the AL-MS Farm Case, and are not parties in the Malpractice Action. Despite the allegation in the Objections that they have an "interest in funds paid into the Estate," Penick admitted at the Hearing that Dynasty, Apostolic Association Assemblies, Inc., Greater Christ Church, and Reach have no pecuniary interest that could be affected by the approval or disapproval of the Trustee's proposed settlement. Because they are unaffected, they are not parties in interest. *Xenon Health, L.L.C.*, 698 F. App'x at 794. Therefore, the Court finds that Dynasty, Apostolic Association Assemblies, Inc., Greater Christ Church, and Reach have failed to meet their burden of establishing standing to be heard on the Settlement Motion or on the Fee Application.

2. Edwards and AAA

Like the other Objecting Parties, Edwards and AAA have no direct relationship to Heritage or AL-MS Farm and are not creditors in either the Heritage Case or the AL-MS Farm Case. Unlike the other Objecting Parties, however, Edwards and AAA have an interest in the outcome of the Malpractice Action. At the Hearing, Penick argued that Edwards and AAA will suffer an "injury in fact" if the Court approves the Settlement Motion because the Pro Rata Provision will deprive them of the opportunity to settle their claims in the Malpractice Action for an amount greater than $250,000.00.

Penick's injury-in-fact argument rests on Article III of the U.S. Constitution, which delegates the "judicial power" to the U.S. Supreme Court and any "inferior Courts" that Congress may create and grants jurisdiction to those courts to decide "Cases" or "Controversies." U.S. CONST. art. III, § 2, cl. 1. For a suit to fall within Article III, the party seeking relief must have suffered a concrete injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010); *S. Christian Leadership Conference v. Supreme*

Court of the State of La., 252 F.3d 781, 788 (5th Cir. 2001). An Article III injury requires that a party show that he has "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

Bankruptcy courts, however, are not Article III courts bound by traditional standing requirements. *Furlough v. Cage (In re Technicool Sys., Inc.)*, 896 F.3d 382, 385 (5th Cir. 2018) ("The order must burden his pocket before he burdens a docket."). Instead, standing is a matter of statutory interpretation and bankruptcy courts must ask not only whether a party has suffered an injury in fact but also whether a party has satisfied the party-in-interest standing requirements in the Bankruptcy Code. At the Hearing, Penick invoked the phrase "injury in fact" in his argument, but Edwards and AAA also must show that they have a sufficient stake in the Bankruptcy Cases to have bankruptcy standing.

Edwards' and AAA's opposition to the Settlement Motion is that it places an artificial cap on their ability to reach a settlement in excess of $250,000.00.[9] There is no evidence, however, that the removal of the Pro Rata Provision will eliminate the only barrier to a settlement in excess of $250,000.00. All four plaintiffs allegedly sustained the same injury and incurred the same damages. Moreover, the settlement amount is unlikely to exceed the policy limits and that amount

[9] Although not discussed by the parties, the Court notes that the Pro Rata Provision does not create the same problems associated with a *Mary Carter* agreement where a defendant secretly agrees to pay the plaintiff a minimum amount, the settling defendant remains a party in the lawsuit, the plaintiff agrees not to enforce any judgment against the settling defendant, and the settling defendant's liability is reduced proportionately by increasing the liability of its co-defendants. *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967); *Wilkins v. P.M.B. Sys. Eng'g, Inc.*, 741 F.2d 795 (5th Cir. 1984). Unlike a *Mary Carter* agreement where a settling co-defendant retains its ability to influence the jury, the settlement agreement proposed by the Trustee would end his participation in the Alabama Litigation.

continues to erode. The Malpractice Action has been pending since 2014, and mediation in October 2019 was unsuccessful.

The Court finds that Edwards and AAA will not suffer any legal prejudice as a result of the settlement beyond what any non-settling plaintiff would suffer. The settlement does not divest Edwards or AAA of their malpractice claims or prevent them from asserting those claims. No legal rights will be lost to Edwards and AAA. Penick admitted at the Hearing that outside of bankruptcy, Edwards and AAA would have no standing to object to the settlement.

Moreover, the Court finds that this type of alleged injury is not within the zone of interests that Rule 9019 was designed to protect. A party-in-interest is not anyone who might be affected by a bankruptcy proceeding but only a party who has a "legally protected interest." *Xenon Health, L.L.C.*, 698 F. App'x at 794. Yet agreements settling lawsuits related to bankruptcy proceedings often affect third parties. To allow Edwards and AAA to object would open the door to other objectors who, like Edwards and AAA, may be harmed by a settlement but who have no legally recognized interest in the assets of the bankruptcy estate. *In re Delta Underground Storage Co.*, 165 B.R. 596, 598 (Bankr. S.D. Miss. 1994). For these reasons, the Court finds that Edwards and AAA have failed to meet their burden of establishing standing to be heard on the Settlement Motion or on the Fee Application.

B. Settlement Motion

Rule 9019 authorizes bankruptcy courts to approve compromises and settlements proposed by a trustee that is "fair and equitable and in the best interest of the estate." *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 & n.2 (5th Cir. 1995). To minimize litigation and expedite the administration of a bankruptcy estate, "[c]ompromises are

favored in bankruptcy." 10 COLLIER ON BANKRUPTCY ¶ 9019.01 (16th ed. 2019). No creditor or other party in interest opposed the Settlement Motion.

In considering whether a compromise is "fair and equitable and in the best interest of the estate," the Fifth Circuit Court of Appeals has identified three factors "with a focus on comparing 'the terms of the compromise with the likely rewards of litigation.'" *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015) (quoting *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980)). A bankruptcy court must evaluate: (1) the probability of success in litigating the adversary claim; (2) the complexity and likely duration of litigation; and (3) all other factors bearing on the wisdom of the compromise. *Id.* With respect to the third prong's "other factors," the Fifth Circuit has elaborated on what issues courts should consider in assessing the wisdom of a compromise, including: (a) "the best interests of the creditors, 'with proper deference to their reasonable views'"; and (b) "'the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.'" *Id.* (quoting *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.)*, 119 F.3d 349, 356 (5th Cir. 1997)). The Trustee bears the burden of establishing that the balance of the above factors supports a finding that the compromise is fair, equitable, and in the best interest of the estate. *In re Roqumore*, 393 B.R. 474, 480 (Bankr. S.D. Tex. 2008). "[T]he Trustee's burden is not high. The Trustee need only show that his decision falls within the range of reasonable litigation alternatives." *Id*. (internal quotations & citations omitted). The Court now turns to each of these factors.

1. Probability of Success in Litigating Malpractice Claim

If the Trustee litigated the Malpractice Action, it is likely that the legal malpractice claim will succeed on the merits. There is evidence of malpractice by Brewer during at least two stages

of the Alabama Litigation. First, Brewer failed to respond to the applications for default judgment filed by the Judgment Creditors, and second, he failed to appeal the denial of the Rule 55(c) Motion in a timely manner. (Heritage Dkt. 207-1). Brewer, however, has asserted that the Malpractice Action is barred by a two-year statute of limitations. *See* ALA. CODE § 6-5-574. Brewer's alleged malpractice occurred at the latest on January 30, 2012, and the Malpractice Action was filed on February 28, 2014. The Judgment Debtors have contended that Brewer's actions after the denial of the Rule 55(c) Motion, including his filing of the Rule 60 Motion and his untimely appeal of the denial of the Rule 55(c) Motion and the Rule 60 Motion, were designed to conceal their malpractice claim from them. They have alleged that they did not discover their malpractice claim until February 1, 2014 when they first consulted Blevins, and, thus, had two (2) years from that date to file suit pursuant to Alabama's savings statute. (Heritage Dkt. 207-1 at 5-6); *see* ALA. CODE § 6-2-3. The statute of limitations defense is apparently the subject of cross-motions for summary judgment that remain pending in the Alabama Litigation.

The Court finds that although there is evidence of malpractice by Brewer, the existence of a statute of limitations defense raises an issue regarding the outcome. "[I]t is unnecessary to conduct a mini-trial to determine the probable outcome of any claims waived in the settlement." *Cajun Elec.*, 119 F.3d at 356. Instead, the bankruptcy court "need only apprise [itself] of the relevant facts and law so that [it] can make an informed and intelligent decision." *Id.* (internal quotations & citation omitted). The Court finds that this factor weighs in favor of approving the settlement.

2. Complexity, Expense, and Likely Duration of Litigating the Malpractice Claim

The Alabama Litigation, initiated on September 4, 2014, has been ongoing for over five (5) years. As noted previously, Brewer's defense of the Malpractice Action has been vigorous,

and cross-motions for summary judgment are pending before the trial court. Because the ongoing cost of Brewer's defense will deplete the available insurance even further, it is doubtful the Trustee would collect more than $250,000.00 if the Malpractice Action proceeds to a jury trial. The Trustee testified at the Hearing that he had investigated Brewer's assets and does not believe they will provide a source of recovery. The sole source of recovery, therefore, is the insurance policy.

The Trustee also testified at the Hearing that approval of the proposed settlement would result in the bankruptcy estates not having to involve themselves any further in the Alabama Litigation—including any appeal. Moreover, approval of the proposed settlement would mean that at least in the AL-MS Farm Case, the Trustee would have no other assets to administer and could file a final report after paying administrative claims. Such circumstances are consistent with 11 U.S.C. § 704(a)(1)'s language that the Trustee shall "collect and reduce to money the property of the estate for which such trustee serves, and close such estates expeditiously as is compatible with the best interests of parties in interest." In the Heritage Case, approval of the proposed settlement would not end the administration of assets but would provide much needed liquidity. The Court finds that this second factor weighs in favor of approving the settlement.

3. Other Relevant Factors Bearing on the Wisdom of the Settlement

In evaluating the proposed compromise, the Court must consider whether the settlement is "fair and equitable and in the best interest of the estate." *Rivercity*, 624 F.2d at 602; *see Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). No creditor opposes the Settlement Motion. The Trustee's testimony establishes that the settlement is in the best interests of the creditors of the bankruptcy estates and was the result of arm's-length bargaining, both of which are relevant factors bearing on the wisdom of a proposed

settlement. *Cajun Elec.*, 119 F.3d at 356. This factor, therefore, weighs in favor of the proposed settlement.

In summary, the Court finds that the Trustee likely will succeed on the merits of the Malpractice Action but first must overcome Brewer's statute of limitations defense. The Alabama Litigation has been ongoing for over five (5) years and the insurance policy limits that constitute the only source of recovery continue to erode. Approval of the settlement will allow the AL-MS Farm Case to be fully administered and closed and would provide much needed liquidity to the Heritage Case. Accordingly, the Court finds that the balance of relevant factors weighs in favor of approving the proposed settlement and granting the Settlement Motion.

C. Fee Application

No creditor or other party in interest opposed the Fee Application. The Court, however, has an independent duty to investigate the reasonableness of the fees and unreimbursed expenses sought by the Trustee even in the absence of an objection. *Butler, Snow, O'Mara, Stevens & Cannada v. Henderson (In re White)*, 171 B.R. 554, 555-56 (S.D. Miss. 1994).

1. Compensation

In the Heritage Case and in the AL-MS Farm Case, the Court approved the Trustee's employment of Blevins under 11 U.S.C. § 327 on a contingent fee basis. Although the application did not refer to 11 U.S.C. § 328 expressly, the Court could authorize the contingent fee arrangement only under the authority of that statute. Because the Trustee obtained the Court's approval of the terms of employment under 11 U.S.C. § 328, the contingent fee arrangement may be changed only "if such terms and conditions prove to have been improvident in light of

developments no capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a).

The Trustee filed the Fee Application seeking the Court's approval of an award of attorney's fees of $50,000.00 ($125,000.00 times 40% equals $50,000.00) from each of the bankruptcy estates. No unforeseen development has occurred since the Court approved the contingent fee arrangement. The Court finds that an attorney's fee of $50,000.00 from each of the bankruptcy estates is reasonable and necessary and should be approved.

2. Expenses

The Trustee also seeks the Court's approval of the payment of expenses of $1,357.69 from each of the bankruptcy estates. The reimbursement of Blevins' actual, necessary expenses is authorized in 11 U.S.C. § 330(a)(1)(B) and was approved by the Court as a term of his employment. The Trustee introduced into evidence Trustee Exhibit 2, an itemization of Blevins' unreimbursed expenses supported by documentation when appropriate. (Tr. Ex. 2, Heritage Dkt. 475-2 at 7-18; AMF Dkt. 367-2 at 7-18). According to the itemization and a copy of a check drawn on his office account, Blevins paid $1,200.00 for the cost of mediation set to take place on October 27, 2016. (Tr. Ex. 2, Heritage Dkt. 475-2 at 11; AMF Dkt. 367-2 at 11). The mediation was cancelled, and Blevins received a refund of $700.00, as evidenced by a check in that amount made payable to Blevins. (Tr. Ex. 2, Heritage Dkt. 475-2 at 10; AMF Dkt. 367-2 at 10). Blevins seeks reimbursement of the non-refundable deposit of $500.00. On December 29, 2017, Blevins paid a filing fee of $52.05 in connection with a motion for summary judgment filed on behalf of the Trustee. Payment of the filing fee is evidenced by an automated receipt. (Tr. Ex. 2, Heritage Dkt. 475-2 at 13; AMF Dkt. 367-2 at 13). On August 12, 2019, Blevins paid a deposit of $500.00 for the cost of mediation set to take place on October 2, 2019 (Tr. Ex. 2, Heritage Dkt. 475-2 at

15; AMF Dkt. 367-2 at 15), and on October 10, 2019, he paid the balance due of $783.33 for a total mediation expense of $1,283.33. (Tr. Ex. 2, Heritage Dkt. 475-2 at 18; AMF Dkt. 367-2 at 18). His payment of $1,283.33 is shown by checks drawn on his office account. Blevins also seeks reimbursement of his mileage expenses at $0.50 per mile. He lists six round-trips from his office to the Sumer County Courthouse, a distance of approximately 260 miles, to attend pretrial and motion hearings on specific dates from 2016 through 2019. (Tr. Ex. 2, Heritage Dkt. 475-2 at 7; AMF Dkt. 367-2 at 7). At $130.00 for each trip ($0.50 times 260 equals $130.00), the mileage expense for all six (6) trips to the courthouse totals $780.00. He also seeks reimbursement of his mileage expense to attend the mediation in Birmingham, Alabama, a round trip of 200 miles, at a total expense of $100.00 ($0.50 times 200 equals $100.00). The total sum of these unreimbursed expenses is $2,715.38 ($500.00 plus $52.05 plus $1,283.33 plus $880.00 equals $2,715.38). The Trustee divides this total sum in half to reach unreimbursed expenses of $1,357.69 for each bankruptcy estate.

Although a copy of the employment agreement with Blevins was not attached to the application, both the Trustee and Blevins testified at the Hearing that these unreimbursed expenses fell within the category of expenses the Trustee had agreed to pay. With respect to the mileage expense, the Court notes that the standard mileage rate for the business use of a vehicle was more than $0.50 per mile from 2016 through 2019, the years in question. IRS, *Standard Mileage Rates*, www.irs.gov/tax-professionals/standard-mileage-rates. The Court finds that these unreimbursed expenses are actual and necessary and should be reimbursed.

Conclusion

The tangential interest of the Objecting Parties in the approval or disapproval of the Settlement Motion and the Fee Application does not give rise to standing and allow them to appear

and participate in these bankruptcy matters. The Objecting Parties have no legal interest in the distribution of the estates, and Edwards and AAA have only a remote interest in the settlement. To allow them standing to object would permit them to usurp the Trustee's ability to act expeditiously in the best interests of the bankruptcy estates. Moreover, it would require bankruptcy trustees to negotiate settlements with co-plaintiffs when they have no legally protected interest.

Pursuant to the settlement, the Trustee will receive on behalf of each estate $125,000.00 and a pro rata share of any settlement paid by the insurer to Edwards and AAA that exceeds $250,000.00. The Trustee has considered the amount of available insurance and the amount that Brewer could contribute to a settlement. His testimony is undisputed that the collection of a judgment against Brewer beyond the insurance policy limits would be difficult. The Court finds that this settlement is "fair and equitable" when considering the likely rewards, costs, and risks of litigation. *See Foster Mortg.*, 68 F.3d at 917. Moreover, the Court finds that the attorney's fees and expenses sought by the Trustee are reasonable. The Court thus concludes that the Objections should be overruled, the settlement should be approved, the Settlement Motion should be granted, and the Fee Application should be approved.

IT IS, THEREFORE, ORDERED that the Objections are hereby overruled, and the Settlement Motion is hereby granted.

IT IS FURTHER ORDERED that the Fee Application is hereby approved.

##END OF ORDER##