Dated: February 24, 2015
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

EARL BENARD BLASINGAME and
MARGARET GOOCH BLASINGAME,

Debtors.

Case No. 08-28289-L
Chapter 7

ORDER DENYING MOTION TO APPROVE COMPROMISE AND SETTLEMENT

ON FEBRUARY 11, 2015, the motion of the Debtors to approve compromise and settlement of the bankruptcy estate's cause of action for legal malpractice against Martin A. Grusin, J.G. Law Firm, Tommy L. Fullen, and the Law Offices of Tommy L. Fullen (collectively the "Malpractice Defendants") came on for hearing. The Debtors were represented by David J. Cocke. Edward L. Montedonico, Chapter 7 Trustee, filed a response to the motion in which he asked the court to approve the motion. At the hearing, he orally moved to be permitted to join in the motion. The

Trustee was represented at the hearing by Barry Ward. Church Joint Venture, a limited partnership ("Church JV"), and Farmers and Merchants Bank, Adamsville ("FMB"), together the largest creditors in the case, filed an objection. Church JV and FMB were represented by Bruce W. Akerly.

Mr. Ward called the Trustee as his witness and presented 17 written exhibits in support of the motion. No other witnesses were called or exhibits admitted. Having carefully considered the testimony of the Trustee, and the written exhibits, and the entire case record, which is very familiar to the court, the court must regretfully decline to approve the proposed compromise and settlement.

JURISDICTION

Jurisdiction over a complaint related to a bankruptcy case, such as the complaint against the Malpractice Defendants, lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The determination of the "matters concerning administration of the estate" and "other proceedings affecting the liquidation of assets of the estate," such as the motion to compromise and settle the estate's cause of action, are core proceedings arising in a bankruptcy estate. *See* 28 U.S.C. § 157(b)(2)(A) and (O).

FACTS

The motion, which was filed by the Debtors rather than the Trustee, asks that the Trustee be permitted to settle the estate's malpractice claim against the Malpractice Defendants arising out of their pre-petition representation of the Debtors. The proposed agreement would also settle the

Debtors' post-petition malpractice claim against the same defendants. The Debtors and the Trustee do not agree about whether any claim against the Malpractice Defendants belongs to the bankruptcy estate. Church JV does not agree that the Debtors have a post-petition claim against the estate. The Malpractice Defendants deny any liability to the Trustee or the Debtors for malpractice.

The only pending lawsuit against the Malpractice Defendants is that brought by Church JV on behalf of the Trustee. That complaint was originally filed in the United States District Court for the Western District of Tennessee, but was referred to the bankruptcy court and assigned Adversary Proceeding Number 12-00454. Answers have been filed by the Malpractice Defendants and demands for a jury trial have been made. Activity in the malpractice suit has been voluntarily stayed pending the outcome of trial on Church JV and the Trustee's objections to the Debtors' discharge. That trial is now complete. Following post-trial briefing, a memorandum opinion denying the Debtors' discharge was entered in Adversary Proceeding Number 09-00482 on January 15, 2015. The Debtors have until February 24, 2015, to file a notice of appeal.

The material terms of the proposed settlement are set forth in the Motion to Approve Compromise and Settlement. As set forth in the motion, the terms of proposed settlement are as follows:

> (a) On the effective date of the Settlement Agreement, the Malpractice Defendants shall pay to the Trustee and to the Blasingames an aggregate amount of $1,250,000 (the "Settlement Payment") to be allocated between the Trustee's pre-petition malpractice claim and the Blasingames' post-petition malpractice claims on the following basis:
>
> > (i) $200,000 shall be paid to the attorneys for the Debtor to be applied to post-petition attorneys' fees incurred by the Debtors in full settlement and satisfaction of the Debtors' Post Petition Malpractice Claims. Upon receipt of such funds by counsel for the Debtors, the Debtors shall execute a complete release of the Post Petition Malpractice Claims in

favor of the Defendants. The Debtors shall be responsible for taxes, if any, attributable to the $200,000 received by their attorneys.

(ii) $1,050,000 shall be paid to the Chapter 7 Trustee in full settlement and satisfaction of any and all Pre-Petition Malpractice Claims asserted by the Chapter 7 Trustee in the adversary proceeding. The Trustee and the bankruptcy estate shall be responsible for taxes, if any, attributable to the settlement funds received by the Chapter 7 Trustee.

(b) The Debtors' bankruptcy estates shall be consolidated for purposes of distribution as part of this Settlement.

Motion to Approve Compromise and Settlement, Dkt. No. 543, pp. 3-4.

The Trustee filed a "Response of the Chapter 7 Trustee to Debtors' Motion to Approve Compromise and Settlement" in which he urged the court to approve the compromise and settlement, which he said represented "numerous hours of post-mediation negotiation among all parties" concerning a matter that is "highly complex, ... hotly contested, and ... uncertain of outcome." Dkt. No. 544.

Church JV, however, filed an objection to the motion. Dkt. No. 549. Church JV raised eleven separate objections to the motion, which are summarized below:

1. Church JV objected that Bankruptcy Rule 9019(a) permits the *trustee* to file a motion to approve a compromise or settlement, but not a debtor. At the time that Church JV's objection was filed, the Trustee had not joined in the Motion to Approve Compromise and Settlement. The Debtors are not parties to the pending malpractice case. Thus, Church JV argued, the Debtors have no standing to pursue the motion and the court lacks jurisdiction to hear it.

2. Church JV objected that the motion was premature. Church JV, on behalf of the estate, has filed a complaint for declaratory judgment asking the court to determine whether the

malpractice claims, or any of them, belong to the estate. The Debtors were named as parties to that action and it is pending. Thus, argued Church JV, there is already pending a forum for determining whether the Debtors actually have a claim against the Malpractice Defendants. At the time the objection was filed by Church JV, the court had not yet rendered its opinion on the discharge claims.

3. Church JV objected that the terms of the proposed settlement are ambiguous. Attached to the Motion to Approve Compromise and Settlement is a one-page memorandum of the terms of settlement, but not a "Compromise and Settlement Agreement." Church JV specifically noted that the terms of any releases have not been reduced to writing.

4. Church JV objected that the proposed settlement is illusory in that the claims of the estate that were to be settled have not been specified or evaluated. Church JV objected that the Trustee has made no effort to evaluate the estate claims that are proposed to be resolved.

5. Church JV objected that the proposed settlement fails for lack of consideration on the part of the Debtors. It asked what consideration the estate is receiving for release of its claims against the Debtors. It noted that the Debtors are not contributing any funds to the proposed settlement (except their assertion of the existence of a malpractice claim that has not yet been filed (more than three years after the Malpractice Defendants were disqualified from representing the Debtors)).[1]

6. Church JV objected that the court lacks jurisdiction to settle claims between non-estate parties, i.e., the Debtors and the Malpractice Defendants.

[1] If there is a tolling agreement between the Debtors and the Malpractice Defendants, the court has not been made aware of it.

7. Church JV objected that the motion provides no substantive analysis of how the settlement amount was determined.

8. Church JV noted that as the representative of the largest creditors of the bankruptcy estate, its views should be considered. It stated that it believes that the value of the malpractice action is much higher than the amount of the proposed settlement. It stated its belief that the Trustee has considered only the amount of available insurance, but has not considered what the Malpractice Defendants could contribute to a settlement.

9. Church JV objected that the unsecured creditors hold in excess of $10,000,000 in claims against the estate, but the primary beneficiaries of the settlements are: the Malpractice Defendants, the Debtors, the Trustee, counsel for the Trustee, derivative counsel for the Trustee, and the Internal Revenue Service, which holds a priority tax claim. Church JV reiterated that the amount that the unsecured creditors would receive as the result of the settlement does not reflect the true value of the malpractice claim.

10. Church JV objected that the settlement does not include the requirement that Mr. Grusin withdraw his appeal of the sanctions award against him.

11. Finally, Church JV objected that the fact that it will retain its position in the discharge action and the non-estate alter-ego and fraud claims should not be taken into consideration by the court in considering the proposed settlement.

At the hearing on the Motion to Approve Compromise and Settlement, the Trustee was the only witness. He testified that in his opinion, the legal malpractice claim is very complex; that it involves claims of the Debtors and of the estate; that there is a question of causation based upon the court's denial of the Debtors' discharges; and that the statute of limitations is not clear. In sum, the

Trustee testified there remain issues of both fact and law that make the settlement attractive to the estate. The Trustee offered his opinion that if the proposed settlement was not accepted, there was a possibility that there would be no recovery for the estate. The Trustee pointed out that the insurance policies for the Malpractice Defendants are "wasting" policies, meaning that any funds expended on defense of the action would be subtracted from the amount available for payment. The Trustee testified that the settlement was negotiated at arms length, although he acknowledged that Church JV did not participate in the discussions.

The Trustee gave some information about the possible distribution of the settlement proceeds, if approved. He said that the applicable income tax rate for the estate is 35%. He said that it would be possible to mitigate the amount of tax owed if expenses of the estate were paid in the same year that the settlement proceeds are received. He said that expenses owed by the estate at this time total $360,000. This amount is made up exclusively of attorney fees and trustee commission. He said that if the estate's expenses were paid from the proceeds to be paid to the estate, $1,050,000, the remaining taxable amount would be $744,000.[2] Tax on that amount would be $244,000, leaving $440,000. The Internal Revenue Service has a priority tax claim of $300,000. If there were no other expenses, $183,000 of the original settlement amount of $1,250,000, would be available for general

[2] The court notes that there seems to be a discrepancy. The settlement offer is $1,250,000. Mr. Cocke, attorney for the Debtors, is to receive $200,000. The remaining $1,050,000 is to be paid to the Trustee. $1,0500,00 less $360,000 is $690,000. Tax of 35% on that amount is $241,500, leaving $448,500. Subtracting the priority claim of the IRS of $300,000 leaves $148,500 for unsecured claims. The claims register reveals claims filed excluding the IRS claim of $9,626,674.79. This includes the claim of FMB, originally filed as a secured claim, in the amount of $5,539,707.52. The FMB claim was assigned to Church JV on October 8, 2013. Its original proof of claim was in the amount of $3,628,874.30, so that it holds combined claims of $9,168,581.82. These combined claims are approximately 95% of the general unsecured claims (excluding the priority claim of the IRS). Under the proposed settlement, Church JV would be reimbursed for the attorney fees expended in pursuing the malpractice action on behalf of the estate (according to the Trustee, approximately $55,000) together with 95% of $148,500 = $141,075. That amount represents 1.5% of its combined general unsecured claims.

unsecured claims. The Trustee noted that another $93,000 resulting from the sanctions awards could also be available for unsecured creditors.

The Trustee expressed his opinion that it was "now or never" for a settlement of the malpractice claim. He was of the opinion that policy limits had been demanded on his behalf, and that the current offer, at least from Mr. Grusin's insurance carrier, represents an "acceptance" of the offer to settle for policy limits. Thus, the Trustee was of the opinion that he could not demand more.

The Trustee explained that he was constrained by some (unwritten) term of the settlement agreement not to present the motion to approve the proposed agreement. He said that if he did, it would cost the estate another $50,000. Notwithstanding this agreement, at the hearing, the Trustee did orally join the motion for approval.

Upon cross examination, the Trustee indicated that the $50,000 cost to the estate related to the possibility of appeal. He said that in the event of appeal from an order approving the motion, the estate would bear the cost of appeal. He also indicated that Mr. Grusin refused to dismiss his appeal from the sanctions awarded against him as part of the settlement. The Trustee also explained that the insurance carriers refused to settle unless the Debtors were part of the agreement. The Trustee stated that he did not ask for financial statements from Mr. Grusin or Mr. Fullen, or in any other way assess their ability to contribute to the proposed settlement. He said that the one-page memorandum attached to the motion is the agreement. There is no other document, and none is anticipated except releases which have not yet been drafted.

In response to a question about what the Debtors are compromising, the Trustee stated that in the insurance carriers' view, there are three claimants, i.e., the estate, and the two Debtors. He

said that whatever claim the Debtors have against the Malpractice Defendants, if any, is being given up in exchange for a payment to their attorney of $200,000.

In argument, counsel for the Trustee argued that he is "absolutely convinced that we've gotten the last dollar we will get in settlement." He argues that the motion should be approved because Church JV has offered no alternative.

Counsel for Church JV argued that the malpractice case should not be settled for policy limits because the policy limits have been eaten up. He pointed out that the Trustee declined to pursue the case, and that Church stepped in at its own expense to pursue it. He stated that in his opinion, the malpractice case was not a complex one. He reiterated his concern about the procedural anomaly that the Trustee did not file the motion. He pointed out that the Trustee has done nothing to investigate the ability to collect any possible judgment, and noted that under the proposed settlement, the Debtors will receive approximately the same amount as the unsecured creditors. He reiterated his concern that neither Mr. Fullen nor Mr. Grusin has offered to add anything to the proposed settlement and noted that Mr. Grusin continues to attempt to "claw back" the sanctions he has paid. In summary, he said, the proposed settlement benefits the IRS and the estate professionals, but not the unsecured creditors.

Counsel for Church JV filed a post trial memorandum in which he reiterated remarks he had made in closing argument. There were two significant additions to his argument. First, he correctly pointed out that the malpractice insurance policies were not placed in evidence nor was there any evidence that the offers by the carriers represented "policy limits." Second, he pointed out that Church JV's offer to settle for policy limits had expired by its terms five days after it was made

(February 17, 2014). He describes a subsequent letter sent by Mr. Ward to counsel for Mr. Grusin as "nothing more than attempts to encourage settlement."

The Trustee filed a response to Church JV's post-hearing memorandum. In this memorandum, counsel for the Trustee argued that Church JV has offered no reasonable basis for its objection to the proposed settlement, and further that it had not shown why it should not be equitably estopped from objecting to the proposal based on policy limits. Counsel for the Trustee stated that *he* made a demand for settlement at policy limits subsequent to Church JV's original demand. In support of his position, he points to his own letter dated August 20, 2014, directed to counsel for Mr. Grusin.[3] This letter asserts that it is being written at the request of Mr. Akerly, attorney for the Plaintiff, and demands "the policy limits remaining to resolve the legal malpractice action against Martin A Grusin and JG Law Firm brought by the Trustee and in a derivative action." Mr. Ward argues that this is not a mere "encouragement letter," but a second demand for policy limits (that arguably was not limited in time).

Counsel for the Trustee also argues that Church JV ignores the requirement of the Federal Rules of Civil Procedure that obtaining financial records from a defendant is not available until a judgment against the defendant has been obtained. Mr. Ward references interpretations of Rule 26 of the Federal Rules of Civil Procedure.

Church JV and the Trustee take diametrically opposite interpretations of the court's denial of the Debtors' discharges. Church JV takes the position that the ruling establishes malpractice and fixes the amount of damages. The Trustee takes the position that the ruling calls into question the

[3] This letter appears in the record as part of Exhibit 11.

issue of causation, and believes that going forward with the malpractice litigation at this point would amount to a "roll of the dice."

Counsel for Mr. Grusin filed a late "Response to Objection to Motion to Approve Settlement" in which he takes issue with the ability of Church JV or the Trustee to discover his financial assets.

ANALYSIS

The court is asked to approve the Debtors' and Trustee's proposed settlement of the estate's claims against the Malpractice Defendants[4] pursuant to Federal Rule of Bankruptcy Procedure 9019(a). That rule permits a bankruptcy court to approve a settlement upon the trustee's motion and after notice and a hearing. The Trustee's failure to join in the original motion and his subsequent explanation for why he failed to do so are troubling. In fact, the court is not sure even now that it understands the potential penalty to the estate in the event the Trustee were to follow the Rules of Bankruptcy Procedure and present the motion to the court for approval. The apparent side agreement between the Trustee and unnamed parties to the proposed agreement is disturbing.[5]

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[4] To the extent that the original motion asked the court to consider settlement of the Trustee's claims against the Debtors, it is apparently moot. The Trustee's only claims against the Debtors that the court is aware of were the claims that their respective discharges should be denied. Those claims have been decided in favor of the Trustee.

[5] The court has not forgotten that the prior motion to approve compromise and settlement brought by the Debtors and the Trustee required "the voluntary dismissal **or dismissal by the Court** of the pending motion for sanctions against Fullen and Grusin." The court denied the prior motion because that requirement, which enured to the benefit of the Malpractice Defendants who were the targets of the sanctions motion brought by Church JV (which was ultimately decided against them) offended public policy and the dignity of the court. *See Order Denying Motion of Trustee and Debtors to Approve Compromise and Settlement and Sustaining Objection of Creditors Church Joint Venture and Farmers & Merchants Bank to the Motion,* Dkt. No. 517 (May 22, 2014).

The court is also troubled about the posture of the motion because the Trustee declined or refused to bring the malpractice action on behalf of the estate, which required Church JV to seek the authority of the court to bring the action derivatively on behalf of the estate and at its own expense. *See Order Granting Motion for Derivative Standing,* Dkt. No. 403 (January 30, 2012). While the inability of the Trustee to bring the action because the estate lacked the resources to do so is understandable, the ability of the Trustee to propose a settlement of that action in its current posture is questionable. Church JV was authorized by this court to pursue the malpractice claims on behalf of the estate. Counsel for Church JV is acting as plaintiff's counsel in that litigation – the litigation that the *Debtors*, who are not parties to that lawsuit, joined by the *Trustee*, who declined to pursue it, propose to settle. The Debtors clearly have no standing to pursue settlement of the lawsuit, and the standing of the Trustee is questionable.[6] It is Church JV who has shouldered the financial burden of pursuing the malpractice claims, and it is Church JV who has the greatest interest in maximizing the estate for unsecured creditors. Notwithstanding these concerns, which may well be dispositive in themselves but were not briefed by the parties, the court will consider the substance of the motion.

Before approving a settlement under Rule 9019(a), the court must "'apprise itself of all the facts necessary to evaluate the settlement and make an informed and independent judgment as to whether the compromise is fair and equitable.'" *Papas v. Buchwald Capital Advisors, LLC (In re Greektown Holdings, LLC),* 728 F.3d 567, 575 (6th Cir. 2013), quoting *Bard v. Sicherman (In re Bard),* 49 Fed. Appx. 528, 530 (6th Cir. 2002). In the Sixth Circuit, four factors articulated in the *Bard* case are used to determine whether a settlement is fair. These are:

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[6] The Trustee was ready to abandon the malpractice claims of the estate in the event that the Motion for Derivative Standing was denied. See Motion to Approve Abandonment of Cause of Action, Dkt. No. 395 (January 13, 2012).

> (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Bard, 49 Fed. Appx. at 530 (citations omitted). The Trustee, as proponent of the motion, bears the burden of proof on each of these elements. Although the court knows the Trustee to be a very thorough and conscientious practitioner, in this case it seems that each of these four factors militates against approval of the proposed settlement.

First, the record developed by the Trustee was insufficient for the court to conclude that success on the merits of the malpractice complaint is *un*likely. While not necessary, the court would have been aided by the testimony of an expert in legal malpractice litigation to offer an analysis of the pending case. As the record stands, however, the court must weigh the opinion of counsel for Church JV, who is prosecuting the claim on behalf of the estate and has the most to gain from its success, against the opinion of the Trustee who advocates a settlement that will allow various professionals to be paid, but will accomplish little else. The court itself was witness to the overwhelming evidence of malpractice and wrongdoing by the original attorneys for the Debtors in this case. The court has expressed its opinion about their conduct on numerous occasions. Mr. Grusin came under the special condemnation of the court because he undertook a representation for which he was admittedly incompetent, overwhelmed the better judgment of competent bankruptcy counsel, misled his clients as to the "ease" of a Chapter 7 bankruptcy case and its potential leverage in settlement negotiations, and refuses to this day to take responsibility for his actions. The court made clear in its opinion denying the discharge of the Debtors that while they

should and would be held responsible for their actions, the outcome of their case could have been different:

> This in no way excuses the Debtors' attorneys. Had they impressed upon the Debtors the seriousness of their undertaking or insisted that they take time to read their documents before submitting them for filing, the Debtors might have conducted themselves differently.

Memorandum Opinion, Adv. Proc. No. 09-00482, Dkt. No. 598 (January 15, 2015), fn. 3. This opinion dealt only with the Debtors and Malpractice Defendants' pre-petition activities.

The court expressed similar sentiments in its *Order Granting Motion for Derivative Standing.* Objections filed by Mr. Grusin and Mr. Fullen to Church JV's pursuit of malpractice claims against them asserted that the court had already decided the question of malpractice in their favor when it granted partial summary judgment against the Debtors on the discharge claims. In it opinion, this court responded as follows:

> Without further factual information, the court did not and does not express an opinion about whether the advice that Debtors' counsel gave or omitted to give deviated from the standard of care expected of lawyers in this judicial district, or whether that advice or admission overrode the Debtors' subjective understanding of their duty to disclose. It is one thing to apply an objective standard to the Debtors' conduct and hold them responsible for it – i.e., to find that it was unreasonable for them not to complete their schedules in the way dictated by the Official Bankruptcy Forms – and another thing to say that counsel can escape liability for negligent or improper legal advice based upon the Debtors' subjective misunderstanding of their duty. It is simply not the case that the court has previously ruled on the merits of the issue of counsels' legal malpractice.

Order Granting Motion for Derivative Standing, Dkt. No. 403 (January 30, 2012), pp. 17-18.

Mr. Grusin's pre-petition activities were called into question with the filing of his Affidavit in Support of the Motion to Alter or Amend the court's *Order Granting Partial Summary Judgment*, Adv. Proc. No. 09-00482, Dkt. No. 126, Exhibit 1. As the court has explained elsewhere, it was originally given the impression that Mr. Townsend prepared the motion and affidavits supporting

it because Mr. Townsend filed the motion. Only later, in the discharge trial, did the court learn from Mr. Grusin that it was he who prepared the affidavit (which was only slightly altered by Mr. Townsend for signature by Mr. Fullen). In his affidavit, Mr. Grusin: (1) admitted that he was incompetent to give advice concerning bankruptcy; (2) gave a legal opinion with case citations to support the Debtors' failure to disclose his "earned on receipt" retainer; and (3) offered his opinion that the Debtors' other omissions from their schedules and statements were legally justified. The affidavits are both amazing and offensive, and resulted in the Trustee advising Mr. Fullen and Mr. Grusin to put their insurance carriers on notice of potential malpractice claims. Mr. Grusin admitted under oath that he gave pre-petition advice to the Debtors about the preparation of their schedules and statements that was not legally supported. He later, under oath, claimed that his affidavit was untrue. The court has previously found not credible Mr. Grusin's testimony that statements in his affidavit resulted from "mistake." *Order Granting Motion for Sanctions,* Adv. Proc. 09-00482, Dkt. No. 528 (July 16, 2014), p. 17.

The court has also expressed its displeasure with Mr. Grusin's post-petition activities in its *Order Provisionally Granting Motion for Relief from Judgment Against Earl Benard Blasingame and Margaret Gooch Blasingame*, Adv. Proc. No. 09-00482, Dkt. No. 356 (February 1, 2013). This order resulted from the disqualification of Mr. Fullen and Mr. Grusin and the hiring of new counsel, Mr. Cocke, by the Debtors. In the *Order Provisionally Granting Motion for Relief from Judgment,* the court stated:

> Focusing solely on the Motion for Partial Summary Judgment, I am convinced that the motion would not have been granted adversely to the Blasingames but for the failure of their attorneys to discuss the advice of counsel defense with them and to advise them to consult and/or engage other counsel to assist them in evaluating the defense.

Dkt. No. 356, pp. 16-17. As the court later learned, it was Mr. Grusin who took the lead in preparing the Debtors' defense of the Motion for Partial Summary Judgment. The failure to properly advise or even make his clients aware that he intended to raise reliance upon advice of counsel as a defense to the Motion for Partial Summary Judgment was part of Mr. Grusin's continuing pattern of malpractice in the representation of the Debtors.

The evidence of legal malpractice is overwhelming. Without an expert to advise the court that the finding that the Debtors' discharge should be denied in some way exculpates the Malpractice Defendants from their errors (a result that the court definitely did not intend), the court can only conclude that there is a high probability that the legal malpractice claim will be successful on the merits. Moreover, without any evidence to the contrary, the court agrees that the measure of damages should be the amount of the debts that would have been discharged but for the failure of the Malpractice Defendants to properly advise their clients.

Second, the court heard no evidence concerning the difficulty of collecting any judgment that might be rendered in the malpractice action. While Mr. Grusin undoubtedly is correct that he cannot be compelled through discovery to reveal his financial position, he mistakes the current posture of this case. The Debtors and the Trustee (and presumably the Malpractice Defendants and their insurance carriers) have asked this court to approve a settlement of the estate's causes of action against the Malpractice Defendants. If the Trustee believes that collection of a judgment beyond the insurance policy limits would be difficult, it was up to the Trustee to show that difficulty to the court. Moreover, it was up to the Trustee to assess that difficulty before recommending settlement to the court. Without the financial information of the Malpractice Defendants, the Trustee can only tell the court that he does not know whether a judgment could be collected, an admission that weighs against approval of the proposed settlement.

Third, while the Trustee asserted that the malpractice litigation is complex, he did not explain how that complexity increases the expense or inconvenience to the estate in light of the fact that Church JV bears the financial and other responsibility for it. One complexity that the Trustee pointed to was the difficulty in separating the malpractice claim belonging to the estate from that asserted by the Debtors. As the court stated previously, the Debtors have no pending claim, and they seem to be well beyond the limitation for filing one. If there is a tolling agreement between the Debtors and the Malpractice Defendants, the court was not made aware of it. The court is asked to evaluate only the malpractice claim that *is* pending and that clearly *does* belong to the estate. This claim seems straightforward, especially in light of the factual findings made by the court in its numerous opinions in this case and related adversary proceedings.

Fourth, the paramount interest of the creditors and a proper deference to their reasonable views in the premises also weighs against approving the proposed settlement. Church JV, holding 95% of the general unsecured claims and taking full financial responsibility for the litigation, does not support the proposal. Counsel for the derivative plaintiff has expressed his opinion that the proposed settlement does not represent the value of the lawsuit. The court believes and finds that, absent expert testimony to the contrary, Church JV is in the best position to evaluate the potential recovery to the estate from the litigation.

Moreover, counsel for Church JV is correct that the Trustee did not prove that the offers made by the insurance carriers actually represent their policy limits. Church JV's demand for policy limits, which has expired, nevertheless asserted that there are two claims pending against each attorney – one for the estate of Mr. Blasingame and another for the estate of Mrs. Blasingame. Counsel for the Trustee failed completely to address this assertion. The logic of it is compelling and the Bankruptcy Code supports the creation of two estates upon the filing of a joint bankruptcy

petition. *See* 11 U.S.C. § 302(b) ("After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' *estates* shall be consolidated." (emphasis added)). Federal Rule of Bankruptcy Procedure 1015 also supports this result. Two debtors had their discharges denied as the result of the errors of their counsel; therefore, it would seem that there are two claims for legal malpractice. The Trustee has failed to show that either of the pending offers represents policy limits for two claims of malpractice.

While not necessary to its decision, the court also comments that the Trustee's position that Church JV is estopped from demanding more from the Malpractice Defendants is simply without merit. Church JV, the only party with authority to settle the pending malpractice claims of the estates, made a demand that expired by its terms before any offer to settle was made.

CONCLUSION

For the foregoing reasons, the Motion to Approve Compromise and Settlement is **DENIED**.