UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	Chapter 7 Cases
David B. Welliver	BKY No. 98-34454
DBW Investment Advisors, Inc.,	BKY No. 99-31154
DBW Capital Corporation,	BKY No. 99-31155
Debtors.	**ORDER DENYING APPROVAL OF SETTLEMENT**

These consolidated matters were heard on May 2, 2001, on motion of the trustee, Mary Jo A. Jensen-Carter for approval of settlement of Adversary Proceeding No. 00-3138 with Defendants Judd L. Welliver and Anne Welliver. The Minneapolis Police Relief Association ("MPRA") and Minneapolis Firefighters Relief Association ("MFRA"), creditors in these bankruptcy cases, objected to the proposed settlement. Appearances were as noted in the record of the hearing. The Court, having heard arguments of the parties, having carefully reviewed the documents presented, and, being fully advised in the matter, now makes this **ORDER** pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.
THE CONTROVERSY

David B. Welliver filed for relief under Chapter 7 of the Bankruptcy Code on July 28, 1998. His companies, DBW Investment Advisors, Inc., and DBW Capital Corporation, filed under Chapter 7 on March 5, 1999. The cases were consolidated by order of the Court on July 21, 2000. Trustee Mary Jo A. Jensen-Carter is the trustee for the consolidated cases. Jensen-Carter commenced Adversary Proceeding No. 00-3138 against Judd L. Welliver and Anne Welliver, parents of Debtor David B. Welliver, on July 27, 2000, to recover alleged

fraudulent and preferential transfers made by the Debtors to them since January, 1995. The trustee now seeks to settle the adversary proceeding for payment to the trustee of $25,000. MPRA and MFRA object to the proposed settlement, claiming that it is substantially inadequate under the undisputed facts of the matter. The Court agrees.

II.
THE TRANSFERS

From January 1995 to September 28, 1998, Debtor David B. Welliver paid, or caused his wholly owned and controlled company Debtors to pay, Judd and Anne Welliver, or on their behalf, approximately $400,000. Of these payments, $25,000 was paid within a year before the filing of David B. Welliver's September 28, 1998, bankruptcy filing. Between January 1990 and the end of December 2000, Judd and Anne Welliver claim to have made payments to David B. Welliver, or on his behalf, in excess of $400,000, which they seek to use to offset against the payments received by them.

The following payments made to or for Judd and Anne Welliver by David B. Welliver are the focus of the adversary proceeding:

A. 1995	10,500
B. 1996	146,500
C. 1997	50,000
D. Home mortgage payments and payoff 1996-97	173,431
E. Lease payments on personal auto, August 1997-99	16,000
	396,431

According to Mr. and Mrs. Welliver, they made the following payments to or for David B. Welliver from January 1990 through 1994, which payments they seek to offset against payments received by them:

1. Grand Rapids Loan Company	42,500

2. Commercial State Bank St. Paul	65,000
3. Legal fees in connection with #2	15,000
4. Rothschild loan	21,000
5. Rothschild Nelson loan	100,000
6. Direct loans to David Welliver, 1991 to August 1994	92,554
7. Pledge for Investment license bond	25,000
	361,054

Additionally, Mr. and Mrs. Welliver claim that they made the following payments to or for David, which payments they seek to use to offset payments received:

8. Between December 24, 1997, and July 20, 1998	**22,840**

And, finally, Mr. and Mrs. Welliver claim to have made these payments to or for David Welliver, and therefrom also seek an offset of payments received, if necessary:

9. Between July 28, 1998, and October 5, 1998	104,615
10. Payments made during 1999	106,834
11. Payments made during 2000	64,039
	275,488

The total amount that Mr. and Mrs. Welliver claim available to them to offset against the payments received from David B. Welliver between January 1995 and September 28, 1998, the date of his bankruptcy filing, is:

1 through 7 above	361,054
8 above	22,840
9 through 11 above	275,488
	659,382

III.
ANALYSIS

The approval or disapproval of a proposed settlement of a dispute involving a bankruptcy estate is within the discretion of the bankruptcy court. In Re Flight Transportation Corp. Securities Litigation, 730 F.2d 1128, 1135 (8th Cir. 1984), cert. denied 469 U.S. 1207,

105 S.Ct. 1169, 84 L.Ed. 2d 320 (1985); In Re Hancock - Nelson Mercantile Co. Inc., 95 B.R. 982, 990 (Bankr. D. Minn. 1989); In Re Meyer, 105 B.R. 920, 923-928 (Bankr. D. Minn. 1989).

Generally, courts consider these factors in evaluating a proposed settlement:

1. Likelihood of success on the merits;
2. Difficulty in collecting any judgment obtained;
3. The complexity of the litigation and the expenses, inconvenience, and delay which may be caused by it;
4. The paramount interest of creditors; and
5. Whether the conclusion of the litigation promotes the integrity of the judicial system.

Likelihood Of Success.

The Trustee commenced the adversary proceeding to recover the alleged fraudulent and preferential transfers received by Judd and Anne Welliver, identified above, pursuant to: 11 U.S.C. § 548; 11 U.S.C. § 544 and Minn. Stat. Section 513.41 *et. Seq.*; and, 11 U.S.C. § 547.

The applicable fraudulent transfer statutes provide, in pertinent parts:

> § 548. Fraudulent transfers and obligations
>
> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
> (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

513.44. Transfers fraudulent as to present and future creditors[1]

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
(ii) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Minn. Stat. 513.45. Transfers fraudulent as to present creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

The preferential transfer statute, 11 U.S.C. § 547, provides:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -
(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;

[1] The Minnesota statutes apply through 11 U.S.C. § 544(b)(1), which reads: “Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.”

(4) made -
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if -
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Apparently, the trustee ultimately concluded that most of the payments made by David B. Welliver were for antecedent debts to his parents, as represented by the payments made by Judd and Anne Welliver listed 1 through 7 above. She concluded that both 11 U.S.C. § 548 and Minn. Stat. Section 513 recognize the satisfaction of antecedent debt of the debtor as value received by the debtor for purposes of determining whether a debtor has transferred property for less than reasonably equivalent value.[2] From that analysis, the trustee concluded that the most she could reasonably expect to recover is the $25,000 that was transferred within the year prior to the filing of David B. Welliver's bankruptcy as a preferential transfer under 11 U.S.C. § 547, the purpose of which is to provide for the recovery of certain pre-bankruptcy payment of antecedent debts of a debtor.

5. Trustee believes that the $25,000.00 payment made by David Welliver within one year of his individual Chapter 7 filing, is the only transfer which could be potentially recoverable under federal law. Although the lease payment was incurred within one year of the individual filing, the payment was made by one of the corporations, and the payment was clearly made more than one year prior to the corporate Chapter 7 filing.

6. All of the other transfers made by David Welliver and the corporate entities to the Wellivers are recoverable only under state law fraudulent conveyance statutes.

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[2] See 11 U.S.C. § 548(d)(2)(A) and Minn. Stat. Section 513.43(a)

> 7. Minn. Stat. Section 513.43(a) specifically provides that "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied..." (Emphasis added.)
>
> 8. Based upon the information received from the defendants', it appears that the debtors' payments to the defendants were used to reduce antecedent debt. That antecedent debt exceeded the total payments, and therefore, it appears that the defendants may have a legitimate defense to an action under the Minnesota Fraudulent conveyance statute, which greatly increases the risk of going to trial on this matter.

Trustee's Response To Objection To Settlement, May 1, 2001, *p* 2.

However, Mr. and Mrs. Welliver will not likely succeed in offsetting most of the payments they made against those they received, to contravene the trustee's claim of fraudulent transfer of the payments they received from David B. Welliver.

To the extent that the payments made by Judd and Anne Welliver from January 1990 through 1994 created debts of David B. Welliver to them, the debts were antecedent debts with reference to later payments to them by David, beginning in 1995.[3] Judd and Anne Welliver were clearly insider recipients of these payments for purposes of application of Minn. Stat. Section 513.45(b). Minn. Stat. Section 513.41 defines "insider," in pertinent part:

> (7) "Insider" includes:
>
> (i) if the debtor is an individual,
> (A) a relative of the debtor or of a general partner of the debtor;
>
> (ii) if the debtor is a corporation,
> (F) a relative of a general partner, director, officer, or person in control of the

[3] Of the 7 payments identified, the first 5 listed were personal obligations of Judd and Anne Welliver that resulted from their guarantees of pre-1989 debts of David B. Welliver that were discharged in an earlier bankruptcy filed by David in 1989. Only items 6 and 7 arguably qualify as antecedent debts of David, created by direct loans to him or on his behalf.

debtor;

Therefore, to the extent that the payments made by David B. Welliver to Judd and Anne Welliver from January 1995 to September 28, 1998, the date of his present bankruptcy filing, were paid toward satisfaction of antecedent debt they are avoidable as fraudulent transfers under Minn. Stat. Section 513.45(b), assuming that David was insolvent when the payments were made and Judd and Anne Welliver had reasonable cause to believe he was insolvent.[4] Based on the present record, it is highly unlikely that any of the payments made by Judd and Anne Welliver to or for David B. Welliver from January 1990 through August 1994, identified earlier as payments listed 1 through 7, will provide them a successful defense against the trustee's fraudulent transfer claim.

From the present record, it appears that only the payments made to David B. Welliver between December 24, 1997 and July 20, 1998, listed earlier as number 8 in the amount of $22,840, might be entitled to credit against the payments received by Judd and Anne Welliver between January 1995 to September 28, 1998, from David B. Welliver. The parties agree that Mr. and Mrs. Welliver are entitled to credit for return of fraudulent payments received.[5] Accordingly, without more, it appears that the trustee has a high likelihood of success on the

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[4] Although issues of David B. Welliver's solvency and knowledge of his insolvency by Judd and Anne Welliver were not addressed by the parties in connection with this motion, there exists a strong inference of his insolvency, and an inference that Mr. and Mrs. Welliver had reasonable cause to believe David was insolvent, based on the present record.

[5] Judd and Anne Welliver argue that they should receive credit for postpetition payments listed earlier as numbers 9 through 11 in the amount of $275,488. However, the prepetition fraudulent transfer action is property of the bankruptcy estates and is not affected by postpetition payments made to David B. Welliver for his personal use. Perhaps, a portion of the payment listed as numbers 9 and 10 might be credited against transfers received to the extent that it can be shown that it was used for the benefit of DBW Investment Advisors, Inc., or DWB Capital Corporation prior to their bankruptcies on March 5, 1999. The Wellivers have not made that claim; nor has the trustee.

merits of the litigation.

That appearance is mirrored in the affidavit submitted by counsel for Mr. and Mrs. Welliver in support of the motion to approve the settlement proposal. Counsel relates in the affidavit:

> 7. That Affiant was involved in substantial negotiation with the Trustee herein relative to issues of fact and law which would be presented at trial.
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> 8. That a considerable amount of the negotiation between Affiant and the Trustee related to the defenses by Judd L. Welliver and Anne Welliver under Minn. Stat. § 513.44(a)(2) as to reasonably equivalent value being given in exchange for repayments made by David B. Welliver to Judd L. Welliver and Anne Welliver.
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> 9. That a further subject of negotiation between Affiant and the Trustee related to the inclusion of satisfaction of antecedent debt as included within the definition of value given for a transfer and obligation, pursuant to Minn. Stat. § 513.43.(a).
>
> 10. That Affiant believes, and so argued to the Trustee, that advances in an amount of least $336,054.79 made between January 1, 1990 and August 8, 1994 constituted antecedent debt to be set off against repayments of $330,500.00 made by David B. Welliver following January 27, 1995 together with any value given Judd L. Welliver and Anne Welliver pursuant to a car lease provided by or on behalf of David B. Welliver.
>
> 11. That a further subject of the negotiation between Affiant and the Trustee was the defense under Minn. Stat. § 513.48(f) as to new value given by Judd L. Welliver and Anne Welliver to or for the benefit of David B. Welliver after David B. Welliver made transfers to Judd L. Welliver and Anne Welliver; the payments were made in the ordinary course of financial affairs of Judd L. Welliver, Anne Welliver and David B. Welliver and payments were so made pursuant to a good faith effort by Judd L. Welliver and Anne Welliver to rehabilitate David B. Welliver.
>
> 12. That insofar as antecedent debt to Judd L. Welliver and Anne Welliver prior to the bankruptcy filings exceeded $358,000.00, new value after the repayments by David B. Welliver to Judd L. Welliver and Anne Welliver exceeded $300,000.00 and the total amount of cash and car lease value included in the repayments to Judd L. Welliver and Anne Welliver did not

> exceed $341,370.52, Defendants had an excellent likelihood of success on the merits.

Affidavit Of Dennis L. O'Toole, April 27,2001, pp 2 and 3.

While the discussion regarding antecedent debt might present a somewhat persuasive argument for the settlement proposal if the action was limited to Minn. Stat. Section 513.44, it has no leverage in an action based on Section 513.45(b). The reference in paragraph 12 to "new value" exceeding $300,000 furnished by Judd and Anne Welliver after their receipt of the payments from David B. Welliver likewise seems without significant leverage because the substantial portion of the new value appears to have been paid to David B. Welliver for his personal benefit after the filing of his bankruptcy case. See *footnote 5*.

Based on the foregoing discussion, it appears highly likely that the trustee would prevail on the merits of the fraudulent transfer litigation against Judd and Anne Welliver, with judgment resulting substantially in excess of the $25,000 settlement proposal.

Difficulty In Collecting A Judgment.

The trustee states in her response to the objection to the proposed settlement:

> 10. In addition to the risks associated with litigating this matter, trustee is concerned about the collection of any judgment which would be obtained. The defendants are both aged and in poor health. Over the years, the debtor has dissipated hundreds of thousands of their assets, most, if not all, of which will never be recovered. To the best of trustee's knowledge, the defendants have no current source of non-exempt income, and are currently living off of limited resources, which are being rapidly depleted. As a result, collecting a judgment from them may prove to be very difficult.

Trustee's Response To Objection To Settlement, pp 2 and 3.

Counsel for Judd and Anne Welliver states in his affidavit:

> 14. That Affiant has sufficient confidential information from his clients to present

> to the Court the difficulty in collection any judgment obtained, but Affiant's clients are extremely reticent to place their personal financial situation upon the public record.

Affidavit Of Dennis L. O'Toole, p3.

No such information has been furnished the Court, and the general concerns expressed by the trustee present little more than speculation and conjecture. Based on the present record, the Court is unable to determine whether there might exist difficulty in collecting a judgment against Judd and Anne Welliver.

The Complexity Of The Litigation And The Expenses, Inconvenience, And Delay Which May Be Caused By It.

Discovery in the adversary proceeding is closed and the matter was scheduled for trial on February 12, 2001. It appears that much of the relevant facts are not in dispute. The trustee has expressed concern over the complicated dealings of Debtor David B. Welliver as potentially adding layers of complexity to a trial.

> 9. Furthermore, trustee believes that a trial on the merits would be costly and difficult. The debtor appears to have comingled *[sic.]* his personal and corporate funds, and without extensive testimony by the debtor, it may be difficult, if not impossible to fully understand all of the relationships between the parties. If *[sic.]* was for that specific reason that these estates were substantively consolidated. The settlement of this adversary proceeding will eliminate the need for the estate to bear the cost of litigating the issues.

Trustee's Response To Objection To Settlement, p 2.

However, the cases were substantively consolidated in recognition that the prepetition affairs of Debtor David B. Welliver and of his wholly owned corporate Debtors were conducted by David B. Welliver without regard or accounting for any distinction among and between them. In her unopposed motion to consolidate, the trustee alleged:

> Substantive consolidation is necessary because it appears that the debtors operated their various businesses without regard to the distinction between corporate and personal entities. Funds from one debtor were routinely transferred to the other debtors for a variety of purposes. Trustees believe that it will be impossible to separate all of the transfers between the various entities. Trustees cannot from the books and records available determine which entity payments were made to, or on behalf of, with any degree of certainty. As a result, it will be nearly impossible for the trustees to analyze the inter-company transactions. Furthermore, the debtors' bankruptcy schedules reflect numerous common debts. It would take great expense and the creation of broad fictions to determine which debts are owed by which of the debtors to which creditor and in what amount. This difficulty is more than just a practical nuisance; it is a near impossibility created by the fact that the debtors basically operated their businesses as a single entity.

Memorandum In Support Of Motion For Substantive Consolidation, June 23, 2000, p 3.

In other words, the cases were substantively consolidated on the unchallenged premise that his corporations were simply Mr. David B. Welliver's *alter ego*. All cases were filed as no asset cases, and, with minimal exceptions, they scheduled the same debt. It seems that the substantive consolidation by order of this Court July 21, 2000, would work in the trustee's favor in this litigation. In any event, the trustee has not explained why it would be necessary "to fully understand all of the relationships between the parties."

The Court is not persuaded that complexity of the litigation mitigates in favor of the proposed settlement.

The Paramount Interest of Creditors.

Claims totaling more than $20,000,000 have been filed in the consolidated cases. The creditors objecting to the proposed settlement hold more than $15,000,000 of those claims. The consolidated estates have assets of at least $60,000 to fund the adversary litigation to judgment. Under these circumstances, in light of the trustee's probability of success

discussed earlier, the proposed settlement is not in the best interests of creditors.

Whether the Conclusion of the Litigation Promotes the Integrity of the Judicial System.

> 10. ...The defendants are both aged and in poor health. Over the years, the debtor has dissipated hundreds of thousands of their assets, most, if not all, of which will never be recovered. To the best of trustee's knowledge, the defendants have no current source of non-exempt income, and are currently living off of limited resources, which are being rapidly depleted.

Trustee's Response To Objection To Settlement, pp 2 and 3.

> 15. That given the severe distress which has been placed upon Judd L. Welliver and Anne Welliver and in particular the exacerbation of Anne Welliver's medical conditions because of this litigation and actions taken by some of the creditors, it is Affiant's firm conviction that the prompt conclusion of this litigation would promote the integrity of the judicial system.

Affidavit Of Dennis L. O'Toole, p3.

The general health and financial circumstances of Judd and Anne Welliver are not documented in the existing record. While these matters might be relevant to consideration of reasonableness of a proposed settlement in light of the ability of the estates to realize on a judgment, they do not significantly factor into a determination of whether a particular proposed settlement would promote the integrity of the judicial system.

There is undoubtedly a great number of individuals behind the more than $20,000,000 in claims filed in these consolidated cases who suffered financially and otherwise in connection with the dealings that led to these bankruptcies. While the plight of Judd and Anne Welliver might be unfortunate, they were volunteers in the financial assistance they provided David B. Welliver over the years that spanned his two bankruptcies. The financial dealings they had with their son were presumably consummated with knowledge of his own

circumstances and the risks involved. That cannot be said for many, perhaps most, of the other numerous individuals behind the claims in these cases.

The proposed settlement would not promote the integrity of the judicial system. The integrity of the judicial system is best served by adherence to the priority provisions of the Bankruptcy Code in the allocation of losses among the numerous affected parties, without special regard for the impact that the allocation might have on particular individuals.

III.

Based on the forgoing, it is hereby ordered that the proposed settlement of Adversary Proceeding No. 00-3138 by the payment of $25,000 to these consolidated estates by Judd and Anne Welliver is not approved, and the matter will be reset for trial.

Dated: May 22, 2001

By the Court:

/e/ Dennis D. O'Brien
Judge, United States Bankruptcy Court

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Sandra K. McMackins, hereby certify: That I am the Case Administrator for Judge Dennis D. O'Brien of the United States Bankruptcy Court for the Third Division of the District of Minnesota, at St. Paul, Minnesota; that on May 22, 2001, true and correct copies of the annexed **ORDER** were placed by me in individually stamped official envelopes; that said envelopes were addressed individually to each of the persons, corporations, and firms at their last-known addresses appearing hereinafter; that said envelopes were sealed and on the day aforementioned were placed in the United States mails at St. Paul, Minnesota, to:

U. S. TRUSTEE
1015 U. S. COURTHOUSE
300 S 4TH STREET
MINNEAPOLIS, MN 55415

MARY JO JENSEN-CARTER ESQ
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DENNIS L O'TOOLE
515 NE 2ND AVE
GRAND RAPIDS, MN 55744

DAVID B WELLIVER
4921 BIRCH LAKE CIR
WHITE BEAR LAKE, MN 55110

and this certificate is made by me.

/e/Sandra McMackins

filed On 05/22/1
Patrick G. De Wane, Clerk
By skm , Case Administrator