

SIGNED.



Dated: April 02, 2006

1 RYLEY CARLOCK & APPLEWHITE

2 One North Central Avenue, Suite 1200

3 Phoenix, Arizona 85004-4417

4 Telephone: 602/258-7701

5 Telecopier: 602/257-9582

Charles G. Case, II
CHARLES G. CASE, II
U.S. Bankruptcy Judge

6 John J. Fries – 007182

7 Attorney for Maureen Gaughan, Chapter 7 Trustee

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:

ROBERT A. RUSSELL

Debtor.

Chapter 7 Proceedings

Case No.: 2-03-12950-PHX-CGC

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW
ON ORDER APPROVING
SETTLEMENT AGREEMENT**

Upon the Court's consideration of the Trustee's motion for approval of a Settlement Agreement between the Trustee, the Debtor and Deborah Russell entered into as of January 4, 2006, and the objections to the approval of the settlement filed by Lawrence J. Deutsch and Jerry Monkarsh, after hearing held on February 22, 2006 and an evidentiary hearing on March 29, 2006, the Court enters the following Findings of Fact and Conclusions of Law:

1. On or about July 23, 2005, the Trustee filed the Adversary Proceeding No. 05-005577-CGC ("Adversary Proceeding") against the Debtor, Deborah Russell and other defendants seeking, among other relief, to deny the Debtor's discharge, to avoid certain transfers, to compel turnover of property, to subordinate

1 certain interest to determine the Bankruptcy Estate's interest in property, and to disallow
2 claims.

3 2. The Trustee is currently holding \$2,500.00 that was payable to the
4 Debtor from the Bankruptcy Court's prior order approving the Denver Loop Settlement
5 after appropriate notice to creditors and parties-in-interest.

6 3. The Trustee is holding \$9,363.00 as a final distribution from RST I,
7 LLC in which the Debtor and Deborah Russell claim an interest.

8 4. Deborah Russell ("DRussell"), the Debtor's wife, holds 240 shares
9 in Concierge, representing approximately 2.199% of the outstanding shares in
10 Concierge.

11 5. DRussell has filed a claim number 35 against the Bankruptcy
12 Estate in the amount of \$1,794,633.81.

13 6. The Internal Revenue Service has filed claim number 27
14 (\$586,285.41), claim number 43 (\$179,794.41), claim number 70 (\$227,675.44) (the
15 "IRS Claims").

16 7. Prior to the bankruptcy filing, the Debtor lent money to Concierge
17 directly and received three individual notes in the face amount of \$1,000,000.00,
18 \$69,000.00 and \$65,000.00 ("Concierge Notes").

19 8. The Concierge Notes have not been repaid. The Debtor invested
20 \$650,000.00 in Concierge Mezzanine Investors, LLC ("Concierge Mezzanine"), which
21 was established to provide a loan to Concierge in the total amount of \$1,300,000.

22 9. The Debtor holds one-half of the \$1,300,000.00 that Concierge
23 Mezzanine lent to Concierge.

24 10. The Concierge Notes and the loan by Concierge Mezzanine were
25 properly authorized by Concierge.

26

1 11. Prior to the Bankruptcy, the Debtor made a prepetition collateral
2 assignment of the Concierge Notes to nine creditors ("Assigned Concierge Notes"), as
3 security for debts owed to them by the Debtor.

4 12. The Trustee has sought to overturn the Debtor's prepetition transfer
5 of the Assigned Concierge Notes to these nine creditors.

6 13. The Court has entered orders approving settlements between the
7 Debtor and Jones, Schneider, Imhoff and Stone, among others.

8 14. The Debtor has paid Jones and Schneider in full under their
9 settlement agreement.

10 15. Under the Jones and Schneider settlement agreements, the Debtor
11 has acquired Jones' and Schneider's interest in the Assigned Concierge Notes.

12 16. The Debtor has partially funded the Stone settlement and under the
13 agreement reached with Stone, the Debtor will receive a partial assignment from Stone
14 in the Assigned Concierge Notes after Stone receives the first \$55,000.00 from the
15 Assigned Concierge Notes.

16 17. The Debtor has entered into a settlement agreement with Bruce and
17 Judith Moore, subject to approval of the Bankruptcy Court.

18 18. Under the Jones, Schneider and Moore settlement agreements, the
19 Debtor is entitled to receive an assignment from Jones, Schneider and Moore of their
20 interest in the Assigned Concierge Notes upon certain payments by the Debtor to Jones,
21 Schneider and Moore as set forth in greater detail in the settlement agreements that have
22 been filed with the Court.

23 19. The Settlement Agreement provides substantial consideration to the
24 Estate including, among other things, the following:

25 a. cash payment from the Debtor of \$1,000,000 (subject to a
26 pre-payment discount if paid early);

1 b. payment of the priority, administrative fees of Lewis &
2 Roca in the amount of approximately \$154,000.00;

3 c. payment of the tax claims of the IRS which has filed claims
4 of \$586,285.00, \$179,794.00, and \$227,675.00, that would be entitled to a priority claim
5 against the Estate in the amount allowed;

6 d. the transfer to the Estate of interest in various entities
7 including 240 shares of stock in Concierge Care Nursing Centers, Inc. owned by
8 Deborah Russell;

9 e. The payment to the Estate of a distribution of \$9,363.00
10 from RST I, LLC.

11 f. the distribution of \$2,500.00 otherwise payable to the
12 Debtor through a previous Court-approved settlement;

13 g. a mechanism for the transfer to the Estate of third parties
14 interest in certain collateral assignments of certain Concierge Notes in the face amount
15 in excess of \$1,700,000 that the Debtor has obtained through assignment from various
16 settlement agreements with creditors, including Imhoff, Stone, Jones, Schneider, and
17 Moore; and

18 h. The potential reduction of claims of approximately
19 \$6,000,000.00 against the Estate, including the absolute waiver of the claim of Deborah
20 Russell against the Estate in an amount of \$1,794,633.81.

21 20. In connection with the Settlement, the Trustee is settling a claim to
22 deny the Debtor his discharge and waiving, subject to performance by the Debtor under
23 the Settlement Agreement, certain claims against Deborah Russell for alleged avoidable
24 transfers.

25 21. The Court finds that prior to entering into the Settlement
26 Agreement, the Trustee made a thorough investigation of the claims, considered the
interests of creditors, analyzed the strengths and weaknesses of the claims, the costs of

1 pursuing the claims, the likelihood of success, the possible delay in the administration
2 of the Estate, and the potential difficulty in collection if successful.

3 22. The Court finds and concludes that the consideration provided to
4 the Estate is reasonable, fair and adequate to support approval of the Settlement
5 Agreement.

6 23. The litigation is very complex and the expense, inconvenience and
7 delay associated with continuing the litigation would be substantial.

8 24. Fraud and avoidance claims are difficult to prove and the Trustee
9 would be required to establish fraudulent intent and insolvency in various transfers and
10 would face significant evidentiary burdens in reconstructing the Debtor's financial
11 condition at various times over a number of years.

12 25. There is significant uncertainty in the outcome.

13 26. Even if successful, the Trustee would face significant difficulty in
14 collecting funds for the benefit of the creditors from the Debtor's post-petition earnings
15 or from the Debtor's wife, whose earning potential is closely tied to her husband's
16 continued real estate development.

17 27. The interests of the creditors, as a whole, will be advanced by the
18 approval of the settlement, which might provide a distribution to them.

19 28. Monkars and Deutsch filed objections to the approval of the
20 Settlement Agreement. On February 24, 2006, this Court entered an Order Setting
21 Evidentiary Hearing on Proposed Settlement Agreement ("Order to Supplement"),
22 which directed Monkars and Deutsch to file a supplement to their objections that
23 identified the nature, amount and support for any claim they had against the Estate, that
24 described the effect that the approval of the Settlement would have upon their claims
25 against the Bankruptcy Estate and that provided additional detail and elaboration on the
26 specific nature of their objection to the Russell Settlement.

1 29. Jerry Monkarsh has not filed a proof of claim in the bankruptcy
2 case within the time set by the Court for filing proofs of claim.

3 30. Jerry Monkarsh is a shareholder of Concierge Care Nursing
4 Centers, Inc. ("Concierge"), but does not hold or assert a claim against Robert Russell's
5 Bankruptcy Estate.

6 31. Larry Deutsch and his wife Devora, filed proofs of claim for an
7 unspecified amount at claim numbers 15, 16 and 68 against the Bankruptcy Estate.

8 32. The Deutschs' also hold certain shares of stock in Concierge.

9 33. Lewis & Roca served as Chapter 11 counsel for the Debtor as
10 debtor-in-possession and filed a final fee application seeking reimbursement of fees and
11 costs in the amount of \$154,107.49.

12 34. Monkarsh was not listed as a creditor in the Debtor's schedules, has
13 not filed a proof of claim against the Bankruptcy Estate and has not provided any
14 information to the Court on his claim as directed by the Court.

15 35. Monkarsh does not have standing to object to a settlement as a
16 creditor of the Estate.

17 36. Monkarsh did not file a supplement to his objection as required by
18 the Court and is therefore deemed to have waived any objection to the Settlement.

19 37. Even if the Court were to consider his objection, the Monkarsh
20 objection does not provide any basis for his objection and is therefore overruled.

21 38. Although Deutsch did file a claim in the Bankruptcy Estate,
22 Deutsch has failed to present evidence that proves the amount of his claim or to show
23 how his recovery on that claim would be impaired if the settlement were approved as
24 directed by the Court in its Order to Supplement.

25 39. Deutsch filed a supplement to his objection arguing that the
26 consideration paid to the Estate in the settlement is insufficient because (a) it
undervalues the litigation involving Concierge Care Nursing Centers, Inc. and Houston

1 Concierge Care Nursing Centers, Inc. (collectively "Concierge") and the Trustee is
2 settling prematurely; and (b) the settlement is only sufficient to pay the professional
3 fees. Deutsch's objection that the consideration paid by the Debtor in the Settlement
4 Agreement is inadequate is overruled. Although the Concierge litigation is not yet
5 resolved, the Court finds and concludes that the Settlement Agreement is not premature
6 as the Trustee has adequately provided for the uncertainties in Concierge litigation by
7 providing that the Debtor continues to remain liable to the Estate for the settlement
8 proceeds regardless of the outcome of the Concierge litigation. The Settlement
9 Agreement provides certainty and avoids continuing litigation with the Debtor and
10 minimizes expenses for the Estate.

11 40. Deutsch also makes several arguments regarding Key Bank
12 (actually Key Corporate Capital, Inc. ("KCCI")) that KCCI should have collected its
13 debt from the personal guaranty of the Debtor; that KCCI should not have loaned
14 Concierge money, which would increase the value of the lawsuit; and that the Debtor
15 should not have caused Concierge to assign 70% of the net recovery after payment of a
16 contingency fee of 40% to the attorneys prosecuting the Concierge litigation. Deutsch
17 objects that the Trustee should force the Debtor to pay KCCI in full because the Debtor
18 had guaranteed the debt to KCCI. The Court finds that Deutsch objections are not well
19 taken and are overruled, including for the following reasons:

20 a. There is no showing that KCCI could be forced to collect
21 money from the Debtor and not Concierge;

22 b. There is no evidence to support the Debtor having financial
23 resources to pay the approximately \$10,000,000.00 judgment owed to KCCI;

24 c. Assuming arguendo that the Debtor had approximately
25 \$10,000,000.00, that money should be made available to all creditors of the Bankruptcy
26 Estate and could not be used to pay the KCCI guaranty in violation of the priority
scheme established by the Bankruptcy Code; and

1 d. Had the Debtor or the Estate paid KCCI, the Debtor, or the
2 Estate, would be entitled to be equitably subrogated to the rights of KCCI to collect the
3 debt against Concierge. Because of this subordination, Concierge shareholders would
4 not improve their position.

5 41. Deutsch has also filed with the Court copies of correspondence
6 between Deutsch and the Trustee's special counsel in Texas, who was retained to
7 prosecute collection of notes held by the Estate against Concierge and a copy of a
8 grievance letter sent by Deutsch to the State Bar of Arizona, the Office of Disciplinary
9 Counsel in Ohio, the Ohio Department of Commerce and Key Corp concerning the
10 alleged violation of legal and fiduciary duties of the trustee, various professionals and a
11 creditor. There has been no showing to the Court that the Trustee or her counsel
12 violated any legal or ethical duties and the Court specifically overrules Deutsch
13 objections and finds that the Trustee and her counsel have fulfilled their legal and
14 ethical duties in this case.

15 42. The Court finds that the Trustee has entered into the Settlement
16 Agreement to provide a return to the Estate and to minimize continuing litigation
17 expenses. The Court finds Deutsch arguments that the Trustee has entered into the
18 Settlement Agreement to provide payment for herself and her counsel and not for the
19 benefit of the Estate are incorrect and overruled.

20 43. Deutsch objects to the Workout Agreement and Security
21 Agreement that were entered into prior to the bankruptcy filing by Concierge and the
22 Debtor. Deutsch complains that the Trustee "failed to break" the agreement with KCCI.
23 The Court finds that the Deutsch objection is overruled because the Settlement
24 Agreement does not involve the waiver of any claims by the Estate regarding these
25 agreements.

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1 44. The Court finds that the Deutsch objection is based upon their
2 interest as shareholders in Concierge, and not by reason of any claims against the
3 Bankruptcy Estate.

4 45. The Deutsch objection complains about a contingency fee that
5 Concierge entered into with KCCI. Deutsch's objection is misplaced as the settlement
6 does not address the contingency fee approved by Concierge prior to the bankruptcy
7 filing and not by the Trustee or this Court.

8 46. The Deutsch objection complains that the Trustee should have
9 recovered assets from AD Development. The Trustee has dutifully made inquiry into
10 AD Development, which is a development company with very few fixed assets and
11 virtually no liquidation value. Deutsch's argument that the Trustee could pursue
12 recovery of claims against AD Development for the benefit of the Estate is overruled.

13 47. Deutsch objects that the Trustee failed to consider claims to certain
14 artwork that were arguably undervalued by the Debtor. The Court finds and concludes
15 that the Trustee has made a diligent investigation into the artwork through several art
16 experts, has considered its value, the cost of establishing the claims to the artwork, the
17 time and expense of liquidating the artwork, and other potential claims to the artwork
18 and has properly taken those factors into account in entering into the Settlement
19 Agreement on behalf of the Estate. Deutsch's objection is overruled.

20 48. The Court finds and concludes that the Trustee has properly
21 analyzed the value of any collection against AD Development as part of her analysis in
22 entering into the Settlement Agreement.

23 49. Deutsch objects that the Trustee should punish, sanction and
24 reprimand Lewis & Roca, counsel for the Debtor. Deutsch's objection is misplaced as
25 the settlement does not approve any of the fees for the Debtor's counsel, which issue
26 was specifically reserved to the Court.

1 50. Deutsch complains that the Trustee has failed to take into account
2 claims against Deborah Russell involving Denver Loop 101 and Estancia Golf Club.
3 The Court specifically overrules this objection as the Trustee has previously entered into
4 a specific settlement with Deborah Russell regarding these matters, which settlement
5 was approved by the Court on notice to all creditors and parties-in-interest and no
6 objection was raised by Deutsch.

7 51. Deutsch argues that the Trustee approved the Debtor's settlements
8 with Jones, Schneider, Stone, Imhoff and Moore. Deutsch's objection is overruled. The
9 Trustee did not approve any of those settlements and, in fact, objected to the settlement
10 of the Jones and Schneider settlement. Deutsch never objected to any of these
11 settlements, and the Court, not the Trustee, has the responsibility for approving the
12 settlements.

13 52. Many of the claims that Deutsch argues the Trustee should pursue
14 are weak, meritless, or highly suspect and Deutsch has made no showing that the
15 continued litigation of these claims will produce a greater recovery to the Estate.

16 53. The Court has considered and overruled all of the objections as
17 meritless and unsubstantiated.

18 The Court will enter an order approving the Settlement Agreement
19 consistent with these findings of fact and conclusions of law.

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21 DATED this _____ day of _____ 2006.

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24 _____
Charles G. Case, II
United States Bankruptcy Judge