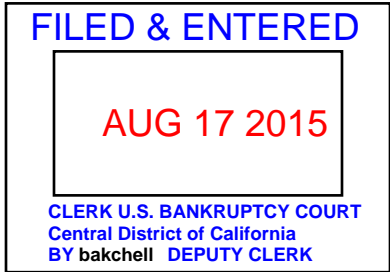


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ORDER NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

JOHN HARVEY WHITNEY, JR.,

Debtor.

Case No. 2:09-bk-30258-RK
Chapter 11

**ORDER DENYING WITHOUT
PREJUDICE DEBTOR'S MOTION TO
APPROVE COMPROMISE AND
FINANCING AND PLAN MODIFICATION
TO EFFECTUATE COMPROMISE**

Date: August 19, 2015
Time: 11:00 a.m.
Place: Courtroom 1675
255 East Temple Street
Los Angeles, CA 90012

Pending before the court is the Debtor's Motion to Approve Compromise, Financing and Plan Modification to Effectuate Compromise ("Motion"). ECF 250. The Motion is noticed for hearing on August 19, 2015 at 11:00 a.m. The Motion requests approval of a compromise between Debtor and secured creditor J.P. Morgan Chase Bank, N.A ("Chase"); authority to obtain financing to effectuate the compromise; and approval of plan modifications to effectuate the compromise.

Having reviewed the Motion, Debtor's Declaration, and the exhibit attached therein, the court determines that the Motion for approval of compromise and related

1 relief cannot be granted because there is insufficient evidence of a compromise (i.e., a
2 properly authenticated copy of an actual settlement agreement executed by the parties to
3 a dispute, which is missing from the moving papers), and thus, Debtor has not made a
4 *prima facie* evidentiary showing for relief to be granted.

5 The moving papers assert: “The salient terms of the Settlement Agreement were
6 read into the Court record in the State Court Action the Debtor filed against Chase, in lieu
7 of proceeding to trial.” Motion at 7. The moving papers further assert: “The Settlement
8 Agreement contemplates that, subject to Bankruptcy Court approval, the Debtor will
9 obtain financing sufficient to pay \$5,600,000 to Chase (in full satisfaction of its secured
10 claim), together with an additional amount sufficient to pay points on the loan and interest
11 only on the takeout obligation for a period of twelve months.” *Id.* at 8. However, the
12 moving papers do not contain the actual terms of a Settlement Agreement agreed to by
13 the settling parties, which could have been submitted either in the form of a transcript of
14 the state court hearing proceedings when it was read into the record or in a written
15 stipulation setting forth the terms of a settlement signed by the settling parties.

16 The only evidence in support of the existence of the Settlement Agreement
17 consists of the conclusory and uncorroborated assertions of Debtor in his declaration that
18 “I can and do attest to the factual accuracy of the statements made in the Motion.”
19 Motion at 18 (Debtor’s Declaration). Regarding the terms of the settlement, Debtor does
20 offer : “If the terms of the Settlement Agreement are reduced to a more complete writing
21 before the August 19, 2015 hearing on the Motion, I will ask my attorneys to file them with
22 the Court under the cover of an authenticating declaration.” *Id.* at 18-19.

23 Regrettably for Debtor as the moving party, because competent and admissible
24 evidence of the actual terms of the Settlement Agreement and of any approval by the
25 other party to the compromise, Chase, is not in the record before the court on the Motion
26 either in the moving papers or elsewhere, the court is not in a position to grant the
27 Motion, finding itself asking how can it approve a settlement without evidence in the
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1 record exactly what it is or whether it exists. This conundrum also raises serious
2 concerns about procedural due process, that is, without evidence of the actual terms of a
3 compromise and of approval by all settling parties, the creditors and other parties in
4 interest, including Wells Fargo Bank, which is supposed to release its junior lien in light of
5 the compromise according to Debtor in the Motion and thus may be adversely affected by
6 the compromise, cannot meaningfully respond to the Motion and therefore are not
7 accorded a fair opportunity for notice and to be heard. See *a/so*, Rule 9019 of the
8 Federal Rules of Bankruptcy Procedure.

9 At this point in time, without competent and admissible evidence of a settlement
10 agreement executed by the parties or placed on the record in other court proceedings in
11 the record before the court on the Motion, there is no compromise for this court to
12 approve, and there is no basis to approve financing to effectuate a compromise and to
13 modify the confirmed reorganization plan to effectuate a compromise, which would be like
14 putting the cart before the horse.

15 If time is of the essence, then Debtor might consider using the procedures for the
16 hearing of a matter on shortened notice under Local Bankruptcy Rule 9075-1 once he is
17 ready to meet the requirements of procedural due process by submitting competent and
18 admissible evidence of a compromise in support of a renewed motion.

19 For the reasons stated above, IT IS HEREBY ORDERED that:

20 1) The MOTION is DENIED without prejudice.

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2) The hearing on the Motion currently set for August 19, 2015 at 11:00 a.m. is vacated and taken off calendar. No appearances are required on August 19, 2015.

IT IS SO ORDERED.

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Date: August 17, 2015



Robert Kwan
United States Bankruptcy Judge