SIGNED this 02 day of May, 2005.

FRANK R. MONROE
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	X	CASE NO. 02-12741-FRM
	X	
GARY L. BRADLEY	X	CHAPTER 7
	X	
DEBTOR	X	
	X	

MEMORANDUM OPINION

The Court held a hearing on January 25, 2005 in connection with the Chapter 7 Trustee's Motion to Compromise and Settle Controversy in Adversary No 03-1031 FM styled Gary Bradley ("Bradley"), Lazarus Development L.P., SH 45 Development GP, Inc. and SH 45 Development, L.P. ("Bradley Entities") v. Harriet "Hatsy" Heep Shaffer ("Mrs. Shaffer"). At the conclusion of the hearing, the Court took the matter under advisement and requested briefing from the parties. This Memorandum Opinion is being issued as written Findings of Fact and Conclusions of Law as required by Bankruptcy Rule 7052 as made applicable to contested matters under Bankruptcy Rule 9014.

Procedural History of the Adversary Proceeding

On February 22, 1999 Bradley and the Shaffers entered into a Letter Agreement regarding the formation of a limited partnership to own, develop and market a 1/3 interest in and to the Heep Ranch owned, directly or indirectly, by Mrs. Shaffer (the "Property"). Paragraph 1 of this Letter Agreement states:

> This letter sets forth and confirms certain understandings and agreements in principle, and certain binding agreements, between you and me (hereafter referred to as "Developer" [Bradley] with regard to (a) the partition and division of the undivided 1/3 interest (the "Subject Property") in and to the Heep Ranch owned, directly or indirectly, by Hatsy Heep Shaffer ("Owner"), (b) the formation of a limited partnership (the "Partnership") between Owner and Developer (or affiliates of Developer) for the ownership, development, marketing and sale of the Subject Property, and (c) the purchase by Developer from Owner of approximately 80 acres of land out of the Subject Property. This letter is intended to reflect the general intent of the parties and confirm the understanding regarding the business terms which will form the basis of a final agreement providing for the matters described in the preceding sentence.

After execution of the Letter Agreement, Bradley, as Developer, was to prepare for execution by Mrs. Shaffer, Owner, and himself as Developer a limited partnership agreement in accordance with the terms set out in the Letter Agreement. The parties summarized some of the terms of the proposed partnership in the Letter Agreement as well as agreed that other terms could be incorporated in connection with finalizing the deal. The terms specifically discussed in the Letter Agreement were partition and division of the Subject Property, formation of the limited partnership, certain terms of the partnership agreement, distributions to Owner and treatment of certain creditors' claims.

Paragraph 4 of the Letter Agreement delineates the purchase of the 80 acres (mentioned in Paragraph 1) as follows:

> Purchase of 80 Acres Tract. Following the partition and division of the Heep Ranch, and provided that such portion of the Heep Ranch is partitioned and conveyed to Owner,

> Developer, or an affiliate of Developer, will purchase a tract or parcel of land out of the Development Property (the "80 Acres Tract") containing approximately 80 acres of land, which tract will be bounded on the south by the future north right-of-way line of State Highway 45, on the east by the future west right-of-way line of IH-35 and on the west by the future east right-of-way line of Old San Antonio Road. . . . The sale of the 80 Acres Tract will occur concurrently with the formation of the Partnership and the contribution and conveyance of the Development Property to the Partnership. All net proceeds from the sale of the 80 Acres Tract will be distributed by the Partnership to Owner.

Prior to finalizing the partnership agreement, Bradley fulfilled certain duties under the terms of the Letter Agreement that included negotiating a partition of the Property between Mrs. Shaffer and her sisters, resolving regulatory issues with the government in order to develop the Property, and paying half of the ad valorem taxes. Negotiations ensued thereafter in connection with formulation of a partnership agreement, however, these negotiations deteriorated and Mrs. Shaffer discontinued efforts to finalize a partnership agreement and refused to go forward.

On August 31, 2000 Bradley and the Bradley Entities sued Mrs. Shaffer in the 201st Judicial District Court of Travis County, Texas in Cause No. GN 002676. All of Bradley's claims arise out of the Letter Agreement and are predicated on its enforceability. First, pursuant to the Texas Declaratory Judgment Act, Bradley requested the state court to declare that (1) Shaffer and Bradley are partners in a limited partnership, (2) that Mrs. Shaffer's "agreement" to contribute the "Development Property" is an enforceable promise, (3) Mrs. Shaffer is currently holding the partitioned real estate in trust for the alleged partnership, (4) Mrs. Shaffer is obligated to execute a written limited partnership agreement containing certain provisions and (5) Mrs. Shaffer is obligated to convey the partitioned real estate to the alleged partnership. Next, pursuant to the Texas Revised Limited Partnership Act, Bradley asks this Court to order Shaffer to execute (1) a written limited partnership agreement and (2) any documents necessary to convey the partitioned real estate to the alleged partnership. Third, Bradley asserts breach of contract causes of action against Mrs. Shaffer

for allegedly failing to comply with the terms of the Letter Agreement. Bradley also asserts causes of action against Mrs. Shaffer for statutory fraud alleging that she made promises in the Letter Agreement including a promise to convey the Developmental Property that she never intended to keep.

Bradley's alternative claims are made under general partnership law. All of these claims arise from Bradley's threshold assertion that a partnership came into existence under the Letter Agreement. Among these claims is a repetition of the claim for breach of the Letter Agreement as well as a breach of the duty of loyalty and care and a wrongful withdrawal claim. Finally, Bradley asserts that the Letter Agreement was an agreement to form a partnership and that Mrs.Shaffer breached this agreement by refusing to contribute the Development Property to such partnership and failing to execute a written partnership agreement.

Bradley filed Chapter 7 on July 19, 2002 and Ron Ingalls was appointed the Chapter 7 Trustee, and Shaffer, along with her husband, David E. Shaffer, filed Chapter 11 on November 25, 2002. Greg Milligan has since been appointed the Chapter 11 Trustee of the Shaffers' estate. Mrs. Shaffer subsequently removed the suit to the bankruptcy court on February 10, 2003 after both she and Bradley had filed their respective bankruptcies. On or about June 20, 2003, Littlefield Corporation, a lien holder on the Property, intervened in the adversary and asserted claims adverse to the claims of Ingalls and the Bradley Entities.

Mrs. Shaffer filed a Motion for Summary Judgment on May 20, 2003 claiming that all of the causes of action asserted by the Bradley Entities were actually owned exclusively by Bradley for although he had assigned these claims to SH45 Development GP, Inc., he did so with a reservation of the exclusive right to control the claims himself. Lazarus Development L.P., the limited partner

in SH45 Development, L.P. was the only Bradley entity that responded to this Motion for Summary Judgment. At the hearing on this motion on June 18, 2003, the Court determined that although Bradley had assigned the claims to SH45 Development GP, Inc., he had done so with the reservation of rights in himself to control the claims. The Court therefore ruled that SH45 Development GP, Inc. as well as Lazarus Development, L.P.[1] had no standing to pursue the claims asserted in the adversary proceeding, that the causes of action were property of Bradley's bankruptcy estate as he had exclusively reserved those rights to himself and that Ingalls, Bradley's Chapter 7 Trustee, was the only party with standing to pursue the claims against Shaffer. The Court then entered an Order granting Shaffer's Motion for Summary Judgment on July 3, 2003. The Shaffers filed a Motion for Judgment Pursuant to Federal Rule of Civil Procedure 54(b) requesting that final judgment be entered against all parties but Bradley. On July 14, 2003, the judgment dismissing the Bradley Entities became final. Amazingly, this judgment was not appealed as everything else has been. The remaining parties to the litigation were thus Ingalls, as plaintiff, Milligan, as defendant and Littlefield Corporation ("Littlefield") as intervenor and counter-plaintiff.

Littlefield and Mrs. Shaffer then each filed original motions for summary judgment and Littlefield filed a supplemental motion for summary judgment prior to any proposed compromise of the litigation. The various motions for summary judgment are based on the following three grounds:

1) That the letter agreement is executory, and as such was rejected in Bradley's bankruptcy

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[1]Pursuant to the assignment to SH45 Development GP, Inc., Bradley reserved the claims for his "sole and exclusive use, benefit and account" and he would have "full power and authority, without the joinder, consent or approval of assignee[SH45] to exercise, pursue, enforce, realize upon, settle, release, assert, make demand on, deal with and otherwise take any action" with respect to the claims "in any manner, and for any reason," that Bradley in "his sole and absolute discretion" elected. Bradley made no assignment of the Shaffer claims to Lazarus Development L.P.

since Ingalls did not assume it within the time allowed by §365(d)(1) of the Bankruptcy Code;

2) that the Letter Agreement is not enforceable under the Statute of Frauds; and

3) that the Letter Agreement cannot form the basis of a partnership and cannot be enforced by specific performance.

Compromise & Settlement

On September 18, 2003, the Shaffers filed an Application to Compromise and Settle Controversy in this adversary. Ingalls filed a substantially identical application in Bradley's bankruptcy. Both applications requested approval of settlement of the claims requiring Shaffer to pay Ingalls $350,000 in cash within 20 days of approval of the settlement in return for Ingalls' dismissal of all claims against the Shaffers and the Property.

On September 30, 2003, Ingalls filed a "Motion to Approve Sale of Claims against Harriet Heep Shaffer in Adversary 03-1031-FM and Related Assets to Jim Ray, Trustee," in which Ingalls offered instead to sell the claims asserted as well as the estate's alleged partnership interest in a property known as the Heep Ranch to Jim Ray, Trustee for $600,000. Alien, a creditor in the Shaffers' bankruptcy and a former Bradley owned entity, filed a response objecting to the Motion to Compromise in the Bradley bankruptcy and requesting that the Court grant the Motion to Approve Sale.

On October 22, 2003, the Court held a hearing in the Shaffer bankruptcy on the Application to Compromise and Settle Controversy in this adversary. At this hearing, the Court stated an auction would be conducted on the claims owned by Ingalls in the Bradley bankruptcy and that bids would be entertained to compare them to the proposed settlements at a hearing to be set November 6, 2003.

On November 6, 2003, the Court held a hearing in the Bradley and Shaffer bankruptcies on

the compromise applications filed in both cases as well as the Motion to Approve Sale filed by Ingalls in Bradley's bankruptcy. Alien appeared at the hearing through counsel. Neither Bradley nor the Bradley Entities entered a formal appearance on the record. At the hearing, counsel for Kaye Bradley, Bradley's sister, offered $400,000 to Ingalls to purchase the claims against Shaffer. The court declined to accept the $400,000 offer, declared moot the Motion to Approve Sale, and accepted the Motions to Compromise in both the Bradley and Shaffer bankruptcies. The Court approved the settlement based on representations made by the Chapter 7 Trustee and its own observations that the purchase of the claims was going to result in more litigation and was not going to timely resolve anything. In fact, such purchase would only exacerbate the costs of this litigation which were at that time already excessive. On December 15, 2003 the Court executed the Orders approving the compromise in both bankruptcies.

Alien filed a motion for reconsideration of this Order in the Shaffer bankruptcy, which the Court denied on December 30, 2003. Alien, Bradley, Lazarus Development L.P. and the Lazarus Exempt Trust filed their motions for reconsideration in Bradley's bankruptcy which the Court also denied.

Alien, Bradley, Lazarus Development L.P. and the Lazarus Exempt Trust then appealed the approval of this compromise to the United States District Court claiming that this Court did not entertain any evidence in making its decision to approve the compromise and that such was an abuse of its discretion. The District Court reversed this Court's Orders approving the settlements in both bankruptcies and remanded with instructions that this Court consider evidence and make the requisite findings required for compromise and settlement under Fifth Circuit precedent.

Ingalls then refiled his Motion to Compromise and Settle Controversy in Bradley's

bankruptcy on August 17, 2004, and Milligan filed his Application to Approve Compromise and Settlement in the Shaffer bankruptcy on August 19, 2004. The settlement now basically provides for a $350,000 administrative claim in the the Shaffer estate in exchange for a release of all of Bradley's claims against Mrs. Shaffer in this adversary at the time of payment on the claim. No objections were filed with respect to the application filed in the Shaffers' bankruptcy, and the Court entered an Order approving the compromise in that bankruptcy on September 14, 2004. Bradley, Lazarus Development L.P. and Bradley Beutel, as trustee for the Lazarus Exempt Trust, filed objections to the Motion to Compromise filed in Bradley's bankruptcy. After numerous continuances of this matter at the request of the parties, the Court finally heard the Motion on January 25, 2005.

Findings of Fact

Bradley, Lazarus Development L.P. and Bradley Beutel, as Trustee of the Lazarus Exempt Trust, have objected to this compromise as they allege it in no way represents an appropriate resolution of the claims asserted by Bradley, and that there is no way based on the record made at the hearing that this Court could apprise itself of all necessary facts to make an intelligent, objective and educated evaluation of the merits of the compromise.

In support of the compromise, Ingalls offered his own testimony. He testified that he evaluated the likelihood of success in this proceeding with his independent counsel, including each of the legal arguments raised by the additional motions for summary judgment that have been filed by Mrs. Shaffer and Littlefield in the adversary. He testified in detail regarding the legal issues presented by the litigation and the risks the specific defenses raised by the opposing party posed to his being successful at trial. On cross, however, Ingalls verified that he had formed his opinion

without 1)interviewing Bradley, 2) interviewing any other fact witnesses, 3)reading any deposition testimony taken while the suit was pending in state court, 4) interviewing Bradley's counsel in the state court proceeding, 5) reading any of the underlying documentary evidence, except the Letter Agreement, 6) interviewing prospective counsel concerning their willingness to undertake representation in the adversary proceeding on a contingency fee basis or 7) conducting any discovery in the adversary or any other independent evaluation of the facts involved in this proceeding. The objecting parties claim that his decision to seek approval appears to be based solely upon his own experience as a lawyer, Mrs. Shaffer's litigious nature, and his assessment that the legal basis for the claims asserted were questionable, and that this evidence is insufficient to allow the Court to determine whether the settlement is fair and equitable.

Additionally the objecting parties point out that there are higher and better offers that were made for these claims and therefore the proposed compromise cannot be in the best interest of the estate. However, all of such "higher and better" offers have long since been withdrawn and do not exist. Lazarus Development L.P. also claims that such a compromise would be a breach of Ingalls' duty to Lazarus Development as Ingalls serves as a fiduciary for Development's interests in the litigation and would likely subject Bradley's estate to administrative claims in excess of the value of the proposed compromise. Such argument appears specious since pursuant to the assignment, Bradley, and now Ingalls as his trustee, have the exclusive right to dispose of the claims.

Issue Presented

Is the evidence adduced at the hearing sufficient for this Court to make the requisite findings

under Fifth Circuit precedent to approve this Motion for Compromise and Settlement? And, should the Compromise and Settlement be approved?

Conclusions of Law

The court derives its authority to approve compromise and settlements involving bankruptcy estates from FED. R. BANKR. P. 9019(a). The court will approve a compromise and settlement only if it is fair and equitable and in the best interest of the estate. *Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.),* 68 F.3d 914, 917 (5th Cir. 1995). The purpose for requiring the court to approve a settlement agreement under Rule 9019(a) is to protect creditors of the debtor estate against improvident settlement that might be made by the trustee acting alone. *See Continental Airlines, Inc. v. Airlines Pilots Ass'n, Int'l,* 907 F.2d 1500, 1509 (5th Cir. 1990). When determining whether a compromise is fair and equitable and in the best interest of the estate and creditors, the court considers these three factors:

> (1) the probability of success in the litigation, with due consideration of the uncertainty in fact and law,
>
> (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
>
> (3) all other factors bearing on the wisdom of the compromise.

Id.; American Can Co. v. Herpel (In re Jackson Brewing Co.), 624 F.2d 605, 607 (5th Cir. 1980). The court gives deliberate and comprehensive consideration to the factors, and makes its determination after careful evaluation of the relevant laws and facts and any objections made. *In re Jackson Brewing*, 624 F.2d at 608. Whether or not to approve a compromise is within the sound discretion of the court. *United States v. Aweco, Inc. (In re Aweco, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984). In undertaking this review required by FED. R.BANKR. P. 9019(a), the central concern of

this Court is protecting the bankruptcy estate for the benefit of the creditors. *See Continental Airlines,* 907 F.2d at 1509. As such, even if the terms of the settlement are unfair or disadvantageous to Bradley, the more important question for this Court, under Rule 9019(a) is whether the settlement is fair to the debtor's estate. We must also remember that compromises are "a normal part of the process of reorganization," *Case v. Los Angeles Lumber Products Co.,* 308 U.S. 106, 130, 60 S.Ct. 1, 14, 84 L.Ed. 110, 128 (1939), *quoted in TMT Trailer Ferry Inc., v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1, 9 (1968), oftentimes desirable and wise methods of bringing to a close proceedings otherwise lengthy, complicated and costly. *Florida Trailer and Equipment Co. v. Deal,* 284 F.2d 567, 571 (5th Cir. 1960).

First of all the only evidence presented at the hearing on this compromise was Ingalls' testimony. He testified that as a lawyer and a Chapter 7 Trustee he had evaluated, along with his independent counsel, the merits of the claims asserted in this adversary and that given the likelihood of success in the litigation, the cost and delay attendant to such litigation, and Mrs. Shaffer's mercurial nature, which would exacerbate the costs and drag out the case, that the compromise was in the best interests of Bradley's estate. Other than cross-examination of Ingalls calling into question the thoroughness of his investigation into Bradley's claims, Bradley, Lazarus Development L.P. and the Lazarus Exempt Trust did not offer any evidence (not one shred) to refute Ingalls' testimony. The objecting parties merely provided this Court with argument.

If there is other evidence that reflects the inappropriateness of the settlement to Bradley's creditors [the IRS and the FDIC], then Bradley, et. al. had their opportunity to present it and failed to do so. One logical conclusion from such failure, especially since those parties are represented by such capable counsel, is that such evidence does not exist. Therefore, this Court believes the

evidence adduced is sufficient to approve this compromise as Ingalls did provide an evaluation of the legal issues confronted in this case and the likelihood of success if such claims were pursued as well as evidence with respect to the complexity and expense of this litigation should it continue. Ingalls is an experienced trustee familiar with litigation involving Bradley having sued the Lazarus Exempt Trust in Adversary Proceeding 02-1183 which case took two years to get to trial and took two weeks to try. He testified regarding numerous discussions with his counsel evincing careful consideration of the uncertainties of Bradley's claims and the expenses related to this litigation.

However, notwithstanding this evidence, this Court requested briefing by the parties as to the fair and equitable nature of this settlement and will evaluate each factor taking into consideration not only the evidence provided by Ingalls at the hearing but the arguments provided by the briefing of the parties, the motions for summary judgment on file and the Court's own independent legal research.

1. Factor One–Probability of success in the litigation

With respect to this first factor, it is unnecessary to conduct a mini-trial to determine the probable outcome of any claims waived in the settlement. "The judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision. . . " *LaSalle Nat'l Bank v. Holland, (In re American Reserve Corp.),* 841 F.2d 159, 163 (7th Cir. 1987) Further as explained in *Florida Trailer and Equipment Co.,* 284 F.2d at 571:

> Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. . . . The very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements.

Littlefield in its Motion for Summary Judgment currently on file claims that if the Letter

Agreement is actually a contract then it is an executory contract and Ingalls had 60 days from the date of the order for relief to assume or reject such. Ingalls did not do so, and the Letter Agreement was therefore deemed rejected under §365(d)(1). As a consequence the rejection is deemed as a breach of the contract by Bradley immediately before the date of the filing of the petition. 11 U.S.C. §365(g). As such, Mrs. Shaffer's obligation, if any, to perform under the Letter Agreement has been discharged, and Ingalls cannot enforce Bradley's claims against Milligan or Mrs. Shaffer.

If the Letter Agreement is an executory contract that means that performance remains due, to some extent, by both parties. An agreement is executory if, at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party. *In re Murexco Petroleum, Inc.,* 15 F. 3d 60 (5th Cir. 1994); *See, In re Liljeberg Enterprises, Inc.,* 304 F.3d 410 (5th Cir. 2002).

The Letter Agreement mentions the following matters that would occur after the date of execution which would easily lead one to believe it is still executory in nature:

1. The Property would be partitioned and conveyed to Mrs. Shaffer;
2. The parties would agree on the terms for a limited partnership;
3. The parties would form a limited partnership;
4. The Property would be conveyed to the limited partnership;
5. Bradley or an entity controlled by him would manage the limited partnership;
6. Bradley would be paid a management fee;
7. Bradley would arrange for funds and monies necessary to operate the partnership;
8. Distributions would be made to Shaffer;
9. Bradley would buy the 80 Acre Tract;
10. Other opportunities of Bradley would be transferred to the partnership; and
11. The parties would perform other duties pertaining to payment of costs, confidentiality and further assurances.

The only portion of the Letter Agreement that had occurred or been performed prior to the filing of Bradley's bankruptcy was the partition of the Property. Therefore, Littlefield's claim that the Letter Agreement remained executory and subject to assumption or rejection by Ingalls appears

to be a viable claim and one not readily addressed by either Bradley, Lazarus Development L.P. or the Lazarus Exempt Trust in their briefing.

Bradley in his brief filed in connection with this compromise claims that the Property subject to the executory contract is not residential real property and therefore appears to argue that §365(d)(1) simply does not apply. Bradley incorrectly reads §365(d)(1). Section §365(d)(1) applies to executory contracts or unexpired leases of residential real property. "Residential real property" only modifies unexpired leases not executory contracts. Thus, Bradley has provided the Court no authority in opposition to Littlefield and Shaffer's argument. Likewise, Lazarus Development L.P. and the Lazarus Exempt Trust provided no authority in contravention to the executory contract claim leaving this Court to surmise that a defense to this claim is questionable if the Letter Agreement is actually a contract.

More difficult is the claim that the Letter Agreement is not enforceable under the Statute of Frauds doctrine. *Tex. Bus. and Com. Code §26.01.* The Statute of Frauds requires that a contract for the sale of real estate be in writing and signed by the person to be charged. *Tex. Bus. and Com. Code §26.01.* To be sufficient, the writing must furnish within itself, or by reference to some other existing writing, the means or data by which the land to be conveyed may be identified with reasonable certainty. *Morrow v. Shotwell,* 477 S.W. 2d 538, 539 (Tex. 1972). Whether an agreement falls within the Statute of Frauds is a question of law.

The Motions for Summary Judgment claim that there are two separate aspects of the Letter Agreement that violate the Statute of Frauds: the provisions purporting to require Mrs. Shaffer to contribute the "Development Property" and the provisions regarding the sale of the "80-Acres Tract". These provisions are believed to be fatally deficient and inseparable from the remainder of

the Letter Agreement, and therefore none of Bradley's claims can survive a determination that the Letter Agreement is unenforceable since all of the claims are dependent on the validity of the Agreement as a contract.

Littlefield and Mrs.Shaffer claim in their Motions for Summary Judgment that the Letter Agreement fails to comply with the Statute of Frauds in describing either of the two parcels of real property to which it refers. They allege that the Letter Agreement never legally describes the Property to be developed in the partnership. Instead, the Letter Agreement refers to a one-third interest in the Heep Ranch, which it defines as the "Subject Property" and to a portion of the Heep Ranch which might some day be partitioned and conveyed to Mrs. Shaffer, which it describes as the "Development Property". It describes neither the Heep Ranch nor the Development Property by metes and bounds or by reference to platted lots or even by the county in which they are located and therefore fails to provide within itself or by reference to another document the means to identify the land to be conveyed with reasonable certainty. One cannot identify the shape, acreage, or specific location of the "Development Property" to be taken out of the Heep Ranch from the description. In fact, it is undisputed that no partition agreement had been reached at the time the Letter Agreement was made, and that neither Mrs. Shaffer nor Bradley knew what Mrs. Shaffer's portion of the Heep Ranch would be.

Littlefield and Mrs. Shaffer also claim that the Letter Agreement fails to describe with reasonable certainty the "80 Acres Tract" to be purchased by Bradley. It is described in Paragraph 4 of the Letter Agreement as "approximately 80 acres of land, which tract will be bounded on the south by the future north right-of-way line of State Highway 45, on the east by the future west right-

of-way of IH-35 and on the west by the future east right-of-way of Old San Antonio Road". The three boundary lines did not exist on the date of the Letter Agreement and do not exist currently.

"If contractual provisions within the Statute of Frauds are not severable from those outside the statute, the entire contract is unenforceable unless it satisfies the Statute of Frauds. Contractual provisions that are dependent upon one another are not severable for purposes of the Statute of Frauds." *Walker v. Tafralian,* 107 S.W.3d 665 (Tex. App.–Ft. Worth 2003 pet. denied)(citing *Upson v. Fitzgerald*, 103 S.W.2d 147, 150 (Tex. 1937)). Mrs. Shaffer and Littlefield allege that the obligation to contribute the "Development Property" was a key provision of the Letter Agreement and a key provision of any alleged partnership whether that partnership was created by the Letter Agreement or created in some other manner. And, because the entire agreement basically revolves around this contribution, it is not severable from the remainder of the Letter Agreement and the Letter agreement is unenforceable.

Mrs. Shaffer and Littlefield therefore assert that all of Bradley's claims must fail as without an enforceable agreement, there can be no contract, nor partnership and no partnership duties. Even the fraud claims fail since the Statute of Frauds bars a fraud claim to the extent the plaintiff seeks to recover as damages the benefit of a bargain that cannot otherwise be enforced because it fails to comply with the Statute of Frauds. *Haase v. Glazner,* 62 S.W.3d 795, 799 (Tex. 2001). When fraud claims arise out of a contract "which is unenforceable under the Statute of Frauds, the Statute of Frauds bars the fraud claims as well as the contract claims." *Roberts v. First Valley Bank,* 2003 WL 21283154 Tex. App-Corpus Christi (June 5, 2003, no pet.).

On the other hand, Bradley claims that the descriptions are legally sufficient, and they contain enough information so that a person familiar with the area can set apart the premises with

reasonable certainty. *Gates v. Asher,* 280 S.W.2d 247, 248-49 (Tex. 1955). "The purpose of a description is to 'afford a *means of identification,'* not necessarily to identify." *Butlet v. Benefield,* 589 S.W.2d 778, 780 (Tex. App.–Dallas 1979, writ ref'd n.r.e.)(emphasis added). Even a commonly known name for a property may be sufficient if there is no confusion regarding which property is subject to the conveyance. *Butlet,* 589 S.W.2d at 780; *Henderson v. Priest*, 591 S.W.2d 635, 636 (Tex. App.–Dallas 1979, writ. ref'd n.r.e.)(street address sufficient when considered with extrinsic evidence showing only one tract of land could meet description); *Krueger v. W.K Ewing, Co.,* 139 S.W.2d 836, 839 (Tex. App.–El Paso 1940, no writ)("San Gabriel Apartments" sufficient when building so known for twelve years and date line of offer to purchase listed San Antonio, Texas); *Scorsby v. Thom,* 122 S.W.2d 275, 277 (Tex. App.–Galveston 1938, writ dism'd)("Black Island Plantation" and "Cordsen Rock Island Ranch tract" sufficient when property known as such for twenty-five years).

Bradley, Lazarus Investments L.P. and the Lazarus Exempt Trust claim that the Letter Agreement provides ample description of the Subject Property to enable it to be reasonably identified as the "Heep Ranch" is a commonly known name and Mrs. Shaffer does not own any other "undivided 1/3 interest" in real estate with which this parcel might be confused. *See Pickett v. Bishop,* 223 S.W.2d 222 (Tex. 1949)("my land," "my property" or "owned by me" is sufficient if supported by evidence that the party owned only one tract fitting description).

Further, Bradley claims that the "Development Property" can be identified as well as the Letter Agreement memorialized an agreement to partition the undivided 1/3 interest from other owners and convey this Property into the partnership making two identifying features to the Property: (i) the "Heep Ranch" description and (ii) more particularly, the part of the Ranch that is

owned by Mrs. Shaffer as opposed to her sisters. Mrs. Shaffer was conveying her entire tract–not merely a portion-that she, individually, would own. *See Texas Builders v. Keller,* 928 S.W. 2d 479 at 482-83 (Tex. 1996)("a contract that provides for sale of 'my ranch of 2200 acres' is sufficient, where extrinsic evidence shows that the grantor owned one ranch, which indeed contained 2200 acres"); *Matney v. Odom,* 210 S.W.2d 980 at 983 (Tex. 1948) (contract providing for sale of "a ten acre block" was insufficient when no words in the contract facilitated identification by stating that a party only owned a smaller tract in the survey).

And, notwithstanding the foregoing, Bradley, Lazarus Development L.P. and the Lazarus Exempt Trust claim that Mrs. Shaffer is estopped from asserting the Statute of Frauds. The defense is unavailable when a party seeking to rely on the defense recognizes the challenged agreements, acts under their provisions, accepts benefits under them and even performs under them over a long period of time without complaint or action claiming they are invalid. *626 Joint Venture v. Spinks,*873 S.W.2d 73 (Tex. App.-Austin 1993, no writ). These parties claim that upon execution of the Letter Agreement, Mrs. Shaffer consistently accepted benefits of the partnership and should therefore be estopped from taking an inconsistent position to avoid her corresponding obligations. Bradley acted as her exclusive agent in the partition negotiations of the Property, which resulted in its conveyance to Mrs. Shaffer by Partition Deed dated June 9, 2000, ending a nine-year dispute between she and her sisters over the Property. Bradley resolved complex land use and regulatory issues with the local government in an effort to prepare the Property for development. And, Bradley paid half of Mrs. Shaffer's property taxes on the Property during this time.

What the foregoing arguments show is that the outcome on the Statute of Frauds issue is far from certain, although it appears weighted in Mrs. Shaffer's favor.

If the Letter Agreement is not unenforceable due to the Statute of Frauds, Bradley's claim that the Property is owned by a partnership or that the Property is subject to a claim for specific performance must also fail according to Mrs. Shaffer and Littlefield. A limited partnership agreement cannot be formed unless it is signed by the general partner and the limited partners. *Texas Uniform Partnership Act, §2.01.* Shaffer nor Bradley ever signed a limited partnership agreement nor did they agree on the terms. *See* Scarborough Deposition attached to Littlefield Motion for Summary Judgment, page 40, lines 1-15 (no agreement on the 80 Acres Tract) and pages 72-77 (no agreement on other partnership terms). Contrary to this, Lazarus Development L.P. and the Lazarus Exempt Trust claim that the Texas Revised Partnership Act allows for oral limited partnership agreements and only requires that certain information be in writing. *See Tex. Rev. Civ. Stat. Ann. Art. 6132a-1, §1.07(a)(4)(Vernon Supp. 2004).* They claim the Letter Agreement satisfies the statutory law.

Even if there were an agreement to form a partnership, that agreement would not constitute a partnership agreement and would not form a partnership. Bradley's remedy would be damages rather than a claim for specific performance. An agreement to enter into a partnership cannot be specifically enforced. *White v. McNeil,* 294 S.W. 928, 932 (Tex. Civ. App. 1927, no writ).

Further, Ingalls testified that the Letter Agreement is couched in future terms reflecting that it is an agreement to agree. And, the Letter Agreement itself does specifically state that it "sets forth and confirms certain understandings and agreements in principle". It was intended to "reflect the general intent of the parties and confirms the basis of a final agreement providing for the matters described in the preceding sentence." Developer was to have a limited partnership agreement prepared based not only on the terms in the letter but such other terms as were to be agreed to by the

parties. These references make this agreement more apt to be a letter of intent and as such weighs again in the favor of Mrs. Shaffer.

The executory contract issue, if in fact the Letter Agreement is deemed a contract, appears to be a slam dunk for Mrs. Shaffer and Littlefield. The outcome of the other claims is however somewhat more uncertain and this uncertainty adds support to a compromise of these claims so as not to risk an adverse decision to either estate at the expense of that estate's creditors.

2. Factor Two–The complexity and likely duration of the litigation and attendant expenses

We need not belabor this factor. The case is highly complex. It is not just a simple breach of contract claim. It involves the executory contract issue, Statute of Frauds and equitable exceptions to this defense, partnership law and contract claims as well as claims for specific performance and damages. According to Ingalls, the litigation could cost $250,000+. The Court believes this is a conservative estimate. Based on this Court's past involvement with both Mrs. Shaffer, Bradley and the Bradley Entities, and their counsel, the trial and subsequent appeals therefrom [Bradley and the Bradley Entities, as well as the Shaffer's always appeal adverse decisions] would be excessively expensive. Further, both estates would be needlessly put in limbo while these two overly aggressive personalities "duke it out". The objections to the settlement appear to be Bradley's attempt to control his Chapter 7 case to the detriment of his creditors. Clearly, any claims that he is trying to help them in this objection is absurd.

The Trustee also testified as to Mrs. Shaffer's litigiousness and her mercurial nature which would make proceeding with the litigation even more difficult as well as to cause significant delays in actually trying this case. Additionally, Mrs. Shaffer's inability to get along with any attorney representing her for any length of time (she has already had two bankruptcy attorneys and has hired

a third) will exacerbate the delay in trying this case. Further, after conducting a two week trial involving Bradley and the Lazarus Exempt Trust, this Court knows that Bradley is no more credible a witness than Mrs. Shaffer. Given all these factors, settlement is advisable.

3. Factor Three–Any Other Factors

The objecting parties argue that the settlement amount is outside the range of reasonable settlement given the likely cost associated with the litigation, *Henderson v. Casciato-Northrup,* 2001 WL 681578, *8,9 (Bankr. W.D. Tex. 2001) and that this Court must determine whether the value of the proposed compromise is reasonably equivalent to the value of the potential claim. *Matter of Energy Co-op, Inc.*, 886 F.2d 921, 929 (7th Cir. 1989). The parties argue that Mrs. Shaffer valued the Property in her schedules at $10 million (although an offer was made on the Property well in excess) and that based on the $10 million valuation that Bradleys' estate if successful in the litigation could recover at least $5 million if not more. They therefore claim that the $350,000 proposed as settlement is strikingly disproportionate to the potential value of the claims. However, neither Bradley nor the Bradley Entities produced any evidence to support their claim that the $350,000 is so disproportionate to the potential recovery that the settlement should not be approved. The Trustee could easily spend $350,000 or more trying the case [with Bradley and his counsel constantly looking over his shoulder and second-guessing his every move] and still get no recovery. The primary creditors [the IRS and the FDIC] don't want to play roulette here–only Bradley and the Bradley Entities; and Bradley has already had his discharge denied under §727(a)(2)(A).

The objecting parties also point out that several parties have indicated an interest in purchasing Bradley's claims against Mrs. Shaffer, and that several offers were made that indicate that the claims are at least worth substantially more than the offer by the Shaffers' estate. However,

all of these offers have been withdrawn, and there was no evidence at the hearing of a current, viable offer for Bradley's claims and no evidence at all from the objecting parties as to what a reasonable offer would be.

The objecting parties also allege that the settlement amount of $350,000 is merely a promise to pay and that Ingalls has provided no evidence that the Shaffer estate has the liquidity or the ability to pay the claim in a timely fashion. The Shaffer estate is a solvent estate. And, contra to Bradley's aforesaid argument on liquidity and ability to pay, Bradley acknowledges in his Objection to the compromise that more than enough value exists to pay all the Shaffers' creditors even if Shaffer were to lose this adversary proceeding.

The only objecting parties were Bradley, Lazarus Development L.P., the proposed limited partner to the development, and the Lazarus Exempt Trust, which filed a claim in Bradley's bankruptcy, the appropriateness of which has yet to be determined. Bradley is the debtor and the other two entities are at least affiliated with Bradley in some form or fashion. The Court will therefore give deference to the fact that no other creditors objected to this settlement. The compromise will be approved.

Conclusion

Based on the foregoing factors, this Court holds that the settlement is fair and equitable. Bradley's prospects for success in this litigation although plausible are unlikely and the cost, complexity and attendant delay of the litigation staggering. The settlement was the result of arms length bargaining, and the overall interests of the creditors will be well served by such.