

In re Se. Eye Ctr. (Pending Matters); In Re Se. Eye Ctr. (Judgments), 2016 NCBC Order 1.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

COUNTY OF WAKE

15 CVS 1648

IN RE SOUTHEASTERN EYE CENTER-
PENDING MATTERS

**ORDER ON RECEIVER'S MOTION TO
CONFIRM KEPES PURCHASE OF
JUDGMENT AND CLAIMS
(ALL MATTERS)**

COUNTY OF GUILFORD

12 CVS 11322

IN RE SOUTHEASTERN EYE CENTER-
JUDGMENTS

1. **THIS MATTER** is before the Court upon Receiver Gerald A. Jeutter, Jr.'s ("Receiver") Motion to Confirm KEPES Purchase of Judgment and Claims (the "Motion") in the above-captioned cases. After considering the Motion, briefs in support of the Motion, the objections to the Motion filed by Greer Geiger, M.D. ("Dr. Geiger"), Lee Thomas ("Ms. Thomas"), and John Matthews, M.D. ("Dr. Matthews") (collectively, "Objectors"), and the arguments of counsel for the Receiver, the Objectors, and various parties at a duly noticed hearing held on November 20, 2015, and after reviewing the Purchase Agreement between KEPES Newco, LLC ("KEPES") and the Estate of John T. Harriott, M.D. (the "Harriott Estate") (the "Purchase Agreement"), and after considering the facts and circumstances and the rights and interests of all parties and all creditors, the Court finds that the Receiver's Motion should be **GRANTED**, and that the Purchase Agreement should be **CONFIRMED** and **APPROVED**. The Court further finds and concludes as follows:

2. The Receiver was appointed by Order of this Court dated July 14, 2015 ("KEPES

Appointment Order”) as receiver for KEPES. Pursuant to that Order, the Court also approved a transaction in which Bessie K. Epes (“Mrs. Epes” and, collectively with C. Richard Epes (“Dr. Epes”), the “Epeses”) transferred substantially all of her assets to KEPES and in which KEPES assumed the then-existing liabilities of Mrs. Epes, which transaction has been consummated.

3. The KEPES Appointment Order provides:

The Receiver shall make available for inspection *by counsel* for the parties, within ninety (90) days from the date hereof, or such other time as the Court may order, an itemized and detailed list of all property owned by the Receivership Entities, *with estimated cost or values*, and identifying so far as he can determine, all debts and obligations of the Receivership Entities or encumbrances related to the property in his possession. The Receiver shall make an interim list of such property, debts and obligations available for inspection within forty-five (45) containing such information as is reasonably available to him as of that time.

(KEPES Appointment Order 14) (emphasis added). The Court finds that the Receiver made the described information available to counsel for the parties before the hearing on the Motion.

4. The KEPES Appointment Order further provides:

The purpose of forming the companies [including KEPES] and transferring assets and debts [in lieu of placing the Epeses into Receivership individually] is to as near as possible maintain the status quo of the legal rights to the assets, or proceeds from the assets, of the various creditors of the Epeses while transferring control of the assets and resolution of the claims against those assets to the Receiver. . . . An additional benefit of the settlement and this approach is to avoid the Epeses expending considerable resources defending claims when those resources could be better deployed toward resolving claims.

(KEPES Appointment Order 3.)

5. On or about September 10, 2012, Dr. John T. Harriott (“Dr. Harriott”) obtained a final judgment against Central Carolina Surgical Eye Associates, P.A. (“CCSEA”) in the total amount of \$1,835,084.51, plus post-judgment interest at the legal rate from date of judgment until fully paid (Forsyth County Judgment Book JMT, Page 001) (the “Harriott Judgment”), in the case styled

John T. Harriott, M.D., v. Central Carolina Surgical Eye Associates, P.A., 10 CVS 8690, General Court of Justice Superior Court Division, Forsyth County North Carolina (“2010 Civil Action”).

6. Thereafter, Dr. Harriott filed a civil action in this Court, now styled *The Estate of John T. Harriott v. Central Carolina Surgical Eye Associates, P.A., C. Richard Epes, M.D., J. Mark McDaniel, Bessie K. Epes, and Southeastern Cataract Laser Center, PLLC*, 14 CVS 9982 (“2014 Civil Action”), which was consolidated with claims and lawsuits pending in this Court, in an action styled *In Re Southeastern Eye Center – Pending Matters*, 15 CVS 1648, per the June 19, 2015 Order on Motion to Consolidate (“Consolidated Southeastern Eye Pending Action”) and the Court’s Case Management Order of June 22, 2015.

7. Responsibility for defending against any liability arising out of the 2014 Civil Action seeking to obtain payment from Mrs. Epes of the judgment from the 2010 Civil Action is upon the Receiver. As provided in the KEPES Appointment Order, the Receiver is charged with defending actions against the Receivership Entities¹. The 2014 Civil Action is such a legal action.

8. In defending such an action the Receiver is further authorized to do such lawful acts as the Receiver reasonably deems necessary for the effective operation and management of the Receivership Entities’ assets, and to perform such other functions and duties as may from time to time be required and authorized by this Court, by the laws of the State of North Carolina, or by the laws of the United States of America and to exercise all powers granted by N.C. Gen. Stat. § 1-501, *et. seq.* Encompassed within these powers is the power to settle pending litigation as reviewed and approved by this Court exercising its discretion. *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 275, 290–91, 300 S.E.2d 230, 239 *aff'd in part, rev'd in part on other grounds*, 309 N.C. 695, 309 S.E.2d 193 (1983).

¹ “Receivership Entities” as used herein is defined as the same is defined in the KEPES Appointment Order. (KEPES Appointment Order 7.)

9. The Receiver has entered into a settlement of pending litigation with the Harriott Estate, subject to the approval of this Court exercising its considered discretion. The Receiver has appeared before the Court and has explained his rationale and reasoning for the settlement, including considerations of the risks associated with litigation, the costs and expenses associated with litigation, the considerable discount that is being accepted by the Harriott Estate for purchase of the Judgment, the reasons for purchasing the Harriott Judgment instead of satisfying it, the status of the Receivership Entities, including KEPES, with regard to other claims and remaining assets after consummation of this resolution of the 2014 Civil Action, and the balancing of risks and benefits that the Receiver has undertaken in concluding that this resolution is fair, reasonable, and in the best interest of KEPES and its creditors as a whole.

10. The Receiver has been candid that his assessment is undertaken in an environment of uncertainty with numerous other unresolved claims and pending actions and that there is no guarantee that this deal, when viewed in hindsight, will turn out to be the “best” possible outcome for KEPES. On the other hand, the Receiver has determined that the transaction eliminates, as to KEPES, over \$1,500,000 of an existing liquidated judgment claim asserted in an existing lawsuit being prosecuted by able and motivated counsel and her client. On balance, the Receiver reports his conclusion and judgment that the settlement of this litigation by purchasing the Harriott Judgment and the claims in the 2014 Civil Action is the better of the available alternatives for resolving this litigation.

11. The Court provided all interested parties an ample opportunity to object and to appear at a hearing on this matter to argue in favor of any such objections. Three parties objected. All other objections are waived.

12. Dr. Matthews objected on the grounds that the Harriott Judgment and 2014 Civil Action claims acquired by KEPES might be used to assert claims against Dr. Matthews that were previously dismissed without prejudice by the Harriott Estate. This Objection is **OVERRULED**. A dismissal without prejudice does not provide a basis for a person against whom such claims were or may be asserted to object to the sale of those claims. Dr. Matthews will have a full and adequate opportunity to present his defenses to any such claims if and when they are asserted by KEPES as successor to the Harriott Estate.

13. Ms. Thomas objected on the grounds that the Receiver has not provided certain information needed by creditors to protect their rights, the disclosure of which was ordered in the Court's KEPES Appointment Order, and therefore has not shown that the proposed settlement is in the best interests of Ms. Thomas or other creditors. In particular, Ms. Thomas contends that the Receiver has not provided required information concerning the intended sources of funds to fund the settlement or the property owned by, and claims asserted against, the Receivership Entities. The Court concludes, however, that the Receiver has made the information required under the KEPES Appointment Order available to counsel for the parties, including counsel for Ms. Thomas. The Receiver also provided the Court and the parties with his assessments of aggregate conservative total asset values and with reasonable upper end estimates of likely claim values. The Receiver explained to the Court the rationale for these aggregate estimates, his decision to disseminate such information on an attorney's eyes only basis, and the need to avoid negatively impacting potential sales values by publicizing competing estimates of values for specific items. Ms. Thomas has also specifically objected to the Receiver's designation of his asset value estimates as attorney's eyes only information. The Court finds the Receiver's limitation on dissemination of specific asset value estimates reasonable and the information available to

creditors consistent with the requirements of the KEPES Appointment Order and sufficient to enable creditors to protect their rights. This objection of Ms. Thomas, therefore, is **OVERRULED**.

14. Both Dr. Geiger and Ms. Thomas object on the grounds that the purchase of the Harriott Judgment and claims is a preference in favor of the Harriott Estate that creates a substantial risk that the Harriott Estate will be paid a disproportionate share of the Receivership Entities' assets. In support of their objection, these Objectors claim that remaining unsecured creditors will be diluted and, therefore, that the Harriott Estate will be preferred. Without deciding that a "preference analysis" is applicable to determining whether a settlement of disputed claims is fair and reasonable to the entity in receivership and its creditors, the Court finds that this resolution of the Harriott litigation does not prefer the Harriott Estate over Dr. Geiger or Ms. Thomas.

15. In open court, the Receiver offered the same terms to Dr. Geiger as are contemplated by the purchase of the Judgment and Claims from the Harriott Estate, i.e. a purchase of Dr. Geiger's Judgment at thirty cents on the dollar. Dr. Geiger, however, appears to seek full payment before others are paid, claims that her judgment is superior to unsecured claims of others including the Harriott Estate, and claims that the Receiver took the assets of KEPES subject to her pre-existing judgment. No issue regarding real estate has been raised by Dr. Geiger or any other party in reference to this settlement.

16. Both Dr. Geiger's and the Harriott Estate's claims against KEPES, as well as numerous other claims presented to the Receiver, are premised upon unfulfilled employment and other promises by CCSEA under Dr. Epes' leadership, and claims of fraudulent transfer of Dr. Epes' assets to his wife under circumstances that make Mrs. Epes, and therefore KEPES, liable for Dr. Epes' liabilities. Given that the Receiver has offered to treat Dr. Geiger equally with the Harriott

Estate, the Court fails to find grounds for concluding that the Receiver is offering the Harriott Estate preferential treatment in comparison to Dr. Geiger.

17. The claims of Ms. Thomas are unliquidated and uncertain as to amount and validity as to KEPES. None of the underlying transactions at issue in Ms. Thomas's claims involved Mrs. Epes. Ms. Thomas's claims of fraudulent transfer to obtain liability against Mrs. Epes and KEPES for the debts of Dr. Epes and Mark McDaniel are similar to Dr. Geiger's and the Harriott Estate's fraudulent transfer claims, with more specificity as to time and circumstances. The bulk of Ms. Thomas's claims are associated with an alleged three-way real estate partnership between her, Dr. Epes, and Mark McDaniel. Accordingly, issues under N.C. Gen. Stat. § 39-23.5(b) are presented as to whether her claim is subordinate to those of other creditors.

18. The Receiver reports that he has considered the claims of Ms. Thomas, as described above and presented in her claim and amended claim, and the claims of other unliquidated claimants, and that, in his judgment, such unsecured, unliquidated, and disputed claims will more likely than not have an opportunity to be resolved on terms at least as favorable as the Harriott Estate's claim, provided that the Receiver subsequently determines that such resolutions are fair and reasonable given the underlying merits (or lack thereof) of the specific claim or claims and given the other circumstances regarding such individualized claims.

19. The Court recognizes the impracticality of resolving all pending litigation simultaneously in complex consolidated matters such as are presented here. The Receiver must start somewhere. He has started with larger claims such as the Broadstone lease claims and with claims to obtain assets such as the claims against Dr. and Mrs. Epes. He now turns to a very large claim that is available for resolution as to KEPES on favorable terms. No Objector has identified a better place for the Receiver to start in working through pending litigation matters seeking

compromise resolutions designed to maximize the value remaining for other creditors and the owners of the Receivership Entities. Such compromise resolutions by agreement are to be encouraged, are judicially efficient, and are better than the alternative of litigating every dispute to the bitter end.

20. Recognizing that business judgments must be made based upon the facts and circumstances presented at the time, the Court finds the Receiver's analysis to be reasonable, sound, and supported by the facts presented. Accordingly, the Court, in the exercise of its discretion, confirms the Receiver's business judgment and **OVERRULES** the objections of Dr. Geiger and Ms. Thomas as to any purported preferential treatment of the Harriott Judgment and further finds that this resolution of the Harriott litigation is fair, reasonable, and in the best interest of KEPES and its creditors.

21. The Receiver acknowledged at the hearing that a purpose of purchasing the Harriott Judgment is to preserve the position of KEPES in relation to CCSEA in the event assets are recovered for the benefit of CCSEA. To balance the interests of the respective creditors, the Receiver has agreed to subordinate the claims of KEPES based upon the Harriott Judgment to the extent of any amount due and owing on that Judgment in excess of the \$750,000 consideration paid to purchase the Judgment and Claims. The Court finds that such subordination is appropriate.

22. **WHEREFORE**, the Court hereby **GRANTS** the Receiver's Motion, **CONFIRMS** and **APPROVES** the Purchase Agreement, and **ORDERS** as follows:

- a. The Receiver is hereby authorized, effective immediately, to consummate the Purchase of the KEPES Judgment and Claims as provided in the Purchase Agreement and to take all actions necessary in furtherance of that transaction.

- b. The claims of KEPES based upon the Judgment and Claims obtained from the Harriott Estate are subordinated to all other claims against CCSEA, SCLC, or DRE Newco, LLC to the extent of any amount due and owing on that Judgment and those Claims in excess of the \$750,000 consideration paid to purchase the Judgment and Claims. A \$750,000 claim based upon the Harriott Judgment and Claims shall not be subordinated at this time.
- c. Dr. Geiger's request that the Court certify this Order as a final judgment pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure is denied.

SO ORDERED, this the 5th day of January, 2016.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases