

1 settlement are proposed in good faith under § 363(m).
2 Accordingly, and for the reasons discussed below, the Court
3 grants the Trustee's motion and approves the proposed sale and
4 settlement.

5 **MOTION**

6 The Trustee proposes to sell the bankruptcy estate's rights,
7 title and interest in and to certain assets particularly
8 described in the Asset Purchase Agreement between L-3 and the
9 Trustee (the APA). In particular, L-3 proposes to buy all of the
10 estate's right, title and interest in and to certain intellectual
11 property which is the subject of the ongoing litigation between
12 L-3 and Aries ("Intellectual Property"). In addition, L-3
13 proposes to purchase certain equipment ("Included Equipment"),
14 documents ("Purchased Documents"), and causes of action
15 (collectively, the "Assets"). The proposed sales price is
16 \$150,000 and was subject to overbid. The proposed sale is free
17 and clear of liens.

18 The Conrad Parties¹ object primarily on the ground that the
19 Assets were not owned by Aries, and hence are not assets of the
20 Aries bankruptcy estate. Rather, argue the Conrad Parties, Aries
21 holds a conditional, non-exclusive right to use the Assets and
22 its ownership is conditional on repayment to Conrad and Cole of

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25 ¹ Oppositions have been filed on behalf of Dr. Conrad, Dr. Cole and Aries. The Trustee
26 argues that the Aries Trustee alone has standing to take a position on behalf of Aries. Since the
objections are nearly identical and overruled, the Court need not determine whether the Aries
opposition was properly filed.

1 \$1.8 million, which has not occurred. In a word, the Trustee has
2 nothing to sell.

3
4 **BACKGROUND**

5 Since January of 2009 Aries and L-3 have been engaged
6 in litigation in district court over ownership of certain
7 decontamination technology (the "CDCA Litigation"). Generally
8 speaking, Aries contends that its principal, Dr. Conrad, created
9 the decontamination technology for chemical and biological
10 weapons which he eventually called "AeROS," and that at least as
11 of the date of the complaint, that technology was owned by Aries:

12 ARIES is the owner of certain patents, trademarks,
13 and trade secrets protecting ideas and technology used
14 in chemical and biological decontamination systems ...
15 ARIES is the owner of certain patents, trademarks, and
16 trade secrets protecting its AeROS... technologies used
17 in chemical and biological decontamination systems.

18 Corrected First Amended Complaint, L-3's Request for Judicial
19 Notice (RJN) Ex. 3 at 2:13-20. In the CDCA Litigation, Aries,
20 through Dr. Conrad, contended that development of what would
21 become the AeROS technology began with Dr. Conrad's work at
22 Chromagen, Inc., and that in March, 2005, he and Dr. Cole formed
23 Aries and assigned to it all rights in the Chromagen technology.
24 See L-3's RJN Ex. 4. In the March 2, 2009, Declaration of
25 Michael J. Conrad, PH.D., in Support of Aries Associates, Inc.'s
26 Motion for Preliminary Injunction, he reiterated under oath:

Pursuant to a secured credit agreement dated March 29,
2005, Chromagen assigned certain intellectual property
rights, including patents, trademarks and trade

1 secrets, to my wife Dr. Cole, and me. We, in turn,
2 assigned these rights to ARIES. To acquire Chromagen's
3 intellectual property, ARIES agreed to assume
responsibility for certain Chromagen debts of
approximately \$2.7 million.

4 See L-3's RJN Ex. 2 at 6:26-7:3.

5 L-3, on the other hand, has contended that the technology
6 was created while Dr. Conrad was working for L-3 under "Work for
7 Hire Contracts" and thus belongs to L-3. This battle was being
8 waged in the CDCA Litigation when this bankruptcy case was filed.

9 On March 18, 2010 Aries filed its chapter 7 petition.
10 Debtor scheduled the Intellectual Property as an asset of the
11 estate. The Trustee was able to negotiate a sale of the assets
12 of the Aries bankruptcy estate, including the AeROS technology
13 and the claims against L-3 asserted in the CDCA Litigation, to
14 L-3, approval of which the Trustee seeks in the present Motion.

15 In response to the Motion the Conrad Parties now argue that
16 Aries does not own the Intellectual Property or any of the
17 Assets. Rather, contend the Conrad Parties, Aries has a mere
18 "conditional assignment" of the technology which is contingent
19 upon payment to Conrad and Cole of the obligations assumed from
20 Chromagen. They also argue that to the extent Aries owns the
21 property, it is subject to a first-priority security interest in
22 favor of the Conrads² and that the Conrads were given a right of
23 first refusal.

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25 ² As in the CDCA Litigation, Dr. Conrad and Dr. Cole are referred to collectively as the
26 Conrads.

1 DISCUSSION

2 The Trustee moves to sell under § 363(b)(1) which, under
3 certain circumstances, authorizes a trustee to sell "property of
4 the estate." The Conrad Parties' primary objection to the sale
5 is that the Assets, particularly the Intellectual Property,
6 are not property of the Aries bankruptcy estate. Rather, assert
7 the Conrad Parties, the transfer from Chromagen to Aries was
8 conditional on the payment of the Conrads' \$1.8 million claim.
9 Further, any transfer from Chromagen to Aries was subject to a
10 first priority security interest in favor of the Conrads. Thus,
11 Chromagen and/or the Conrads own the beneficial interest in the
12 Intellectual Property and other Assets, and the Aries estate has
13 nothing to sell.

14 Before allowing a Trustee to sell assets of the estate,
15 the Court must find that the estate owns the property to be sold.
16 In re Popp, 323 B.R. 260 (9th Cir.BAP 2005); In re Rodeo Canyon,
17 362 F.3d 603 (9th Cir. 2004). Aries' Schedules, attested to
18 under penalty of perjury by Dr. Conrad, state that Aries owns
19 all of the Assets. The Trustee is entitled to rely on a debtor's
20 schedules. Hebring v. U.S. Trustee, 463 F.3d 902, 908-09
21 (9th Cir. 2006).

22 A party asserting a competing interest in property to
23 be sold under § 363 has the burden of proof on the issue of
24 the validity, priority, or extent of such interest. 11 U.S.C.
25 § 363(p)(2). The sole evidence upon which the Conrad Parties
26 base their assertion that Aries does not own the beneficial

1 interest in the Intellectual Property is a document entitled
2 "Secured Debt Agreement" dated July 5, 2006 (SDA) and the
3 declarations of Drs. Conrad and Cole based thereon.

4 The Trustee and L-3 object to the admission of the SDA
5 asserting the "best evidence rule." The original of the SDA,
6 a signed copy of which first surfaced in connection with the
7 Motion, has not been produced.

8 The Federal Rules of Evidence (FRE) govern evidentiary
9 matters in bankruptcy cases. FRE 101; Fed.R.Bankr.P. 9017.
10 Under the Federal Rules of Evidence, a party seeking to prove the
11 content of a writing must normally produce the original writing.
12 FRE 1002 provides:

13 An original writing, recording, or photograph is
14 required in order to prove its content unless
15 these rules or a federal statute provides otherwise.

16 As intimated, FRE 1002 is qualified by other rules of
17 evidence which permit a duplicate or other secondary evidence to
18 be introduced to prove the content of a writing. See, e.g.,
19 FRE 1003 (exception for duplicates); 1005 (exception for public
20 records); 1006 (exception for summaries); 1007 (exception for
21 party admissions).

22 In the case at hand, the Conrad Parties have not produced
23 the original SDA. Rather, the Conrad Parties rely upon a
24 purported duplicate of the SDA. FRE 1003 governs the
25 admissibility of duplicates and provides:

26 A duplicate is admissible to the same extent
as the original unless a genuine question is
raised about the original's authenticity or

1 Intellectual Property and other assets from Chromagen to Aries.³
2 The Trustee and L-3 suspect that the SDA was created more
3 recently in an effort to derail the proposed sale to L-3.

4 There is a genuine question as to the authenticity of the
5 SDA. First, there is the fact that this document, ostensibly
6 created in 2006, has not surfaced in the extensive discovery
7 and litigation between the Conrad Parties and L-3 which has
8 been ongoing since January 6, 2009. Not only has the SDA not
9 appeared, but the Conrad Parties have identified no other
10 document or correspondence which refers to the SDA in the
11 numerous pages of documents produced. As noted above, in the
12 CDCA Litigation Dr. Conrad declared that the assets were
13 transferred from Chromagen to Aries "[p]ursuant to a secured
14 credit agreement" He made no mention of the SDA.

15 The Conrad Parties argue that Aries' \$1.8 million obligation
16 to the Conrads is supported by many other documents. This indeed
17 appears to be the case. However, neither the *fact of* nor the
18 *amount of* the obligation is in question. Rather, it is the newly
19 raised assertion of a security interest in favor of the Conrads
20 and a beneficial interest in favor of Chromagen for which there
21 is no evidence other than the copy of the SDA.

22 Second, the position taken by the Conrad Parties in reliance
23 upon the SDA is completely inconsistent with the position they
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25 ³ Dr. Conrad explains that though they exercised their right under the SCA to obtain the
26 Chromagen assets in April 2005, the Conrads agreed to defer transfer of ownership to permit
Chromagen to resolve certain litigation, which did not occur until March 2006.

1 have taken for the last several years in the CDCA Litigation and
2 in this bankruptcy case.

3 As noted above, in its complaint in the CDCA Litigation,
4 Aries alleged:

5 ARIES is the owner of certain patents, trademarks,
6 and trade secrets protecting ideas and technology
7 used in chemical and biological decontamination systems
8 . . . ARIES is the owner of certain patents,
9 trademarks, and trade secrets protecting its AeROS
10 . . . technologies

11 In the CDCA Litigation, Aries, through Dr. Conrad, contended that
12 development of what would become the AeROS technology began with
13 Dr. Conrad's work at Chromagen, Inc., and that in March, 2005,
14 he and Dr. Cole formed Aries and assigned to it all rights in
15 the Chromagen technology. See L-3's RJN Ex. 4. In the
16 March 2, 2009, Declaration of Michael J. Conrad, Ph.D., in
17 Support of Aries Associates, Inc.'s Motion for Preliminary
18 Injunction, he reiterated under oath:

19 Pursuant to a secured credit agreement dated
20 March 29, 2005, Chromagen assigned certain
21 intellectual property rights, including patents,
22 trademarks and trade secrets, to my wife Dr. Cole,
23 and me. We, in turn, assigned these rights to
24 ARIES. To acquire Chromagen's intellectual property,
25 ARIES agreed to assume responsibility for certain
26 Chromagen debts of approximately \$2.7 million.

See L-3's RJN Ex. 2 at 6:26-7:3.

27 The Conrad Parties took the same position in connection with
28 the bankruptcy case. Dr. Conrad signed the Aries petition which
29 provided "I declare under penalty of perjury that the information
30 provided in this petition is true and correct, and that I have

1 been authorized to file this petition on behalf of the debtor."
2 In Schedule B - Personal Property, Aries listed "three patents,
3 a US patent application and a foreign patent application." In
4 Schedule D - Creditors Holding Secured Claims, Debtor listed no
5 secured claims. In Schedule F - Creditors Holding Unsecured
6 Nonpriority Claims, Debtor listed Dr. Conrad and Dr. Cole with
7 an *unsecured* claim for "Loans" in the amount of \$800,000.00 and
8 Dr. Conrad with an *unsecured* claim for "Loans and money owing" in
9 the amount of \$1,800,000.00. In Schedule G - Executory Contracts
10 and Unexpired Leases, Debtor listed only the office lease with
11 Rexford Industrial. Dr. Conrad signed the Declaration Concerning
12 Aries' Schedules as President of the Debtor again declaring under
13 penalty of perjury that the schedules "are true and correct to
14 the best of my knowledge, information, and belief."

15 In the Statement of Financial Affairs under the heading
16 "Property held for another person," Aries listed only "Two
17 fogging machines belonging to Curtis Dyna-Fog." As with the
18 schedules, Dr. Conrad signed a declaration under penalty of
19 perjury that the statement of financial affairs was true and
20 correct to the best of his knowledge, information and belief.

21 Finally, on March 17, 2010, Dr. Conrad signed a Declaration
22 Re: Electronic Filing of Petition, Schedules & Statements in
23 which he declared "that the information I have given my attorney
24 and the information provided in he electronically filed petition,
25 statements, and schedules is true and correct."

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1 Neither the Schedules nor Statement of Financial Affairs
2 have been amended. At the hearing counsel for the Conrads
3 attempted to justify the numerous allegations that the
4 Intellectual Property was owned by Aries on the ground that it
5 made no difference - Aries' and the Conrads' interests were
6 aligned. The Court finds the argument strained with respect to
7 the CDCA Litigation, and completely inapplicable to the
8 statements made in the bankruptcy case. In the bankruptcy case
9 on the question of ownership of the Intellectual Property the
10 positions of Aries and the Conrads were in no ways aligned. In
11 the Schedules as filed, the Conrads were equity holders with at
12 most a hope of a reversionary interest if all creditors were paid
13 in full. Under the newly alleged arrangement under the SDA, the
14 Conrads would either be secured creditors or the beneficial
15 owners of the Intellectual Property.

16 The position taken in the Aries Schedules and Statement of
17 Financial Affairs is consistent with the position taken by
18 Dr. Conrad in his personal bankruptcy case. In his Schedule B,
19 Dr. Conrad included under "Accounts receivable," "Money owing by
20 Aries Associates, Inc. for patent licenses. Face amount approx.
21 \$1,800,000." The entry was amended to "Money owing by ARIES
22 Associates, Inc. for patent and patent application assignments.
23 Face amount approx. \$1,800,000." However, in neither version is
24 there an indication the claim is secured or that Dr. Conrad
25 asserted a beneficial interest in the underlying Intellectual
26 Property. Conrad's Schedule B also provided "Mr. Conrad may

1 have rights intellectual property formerly owned by Chromagen,
2 Inc. as a result of the corporate dissolution of that company,"
3 but the specific Intellectual Property, including AeROS, was not
4 scheduled. Dr. Conrad scheduled no executory contracts. Nor
5 was any putative asset in the form of a security interest, as
6 required to be disclosed by a debtor.

7 In support of the joint opposition filed by Dr. Conrad and
8 Dr. Cole, Dr. Cole declared:

9 Pursuant to the Secured Debt Agreement, ARIES agreed to
10 assume Chromagen, Inc.'s unpaid debt that was owed to
11 my husband and me in the principal amount of \$1.8
12 Million in exchange for the transfer of ownership of
13 certain consumable assets ... and the grant of a
14 license and/or conditional assignment to ARIES for
15 certain intellectual property assets identified
16 therein. (Dr. Conrad and Dr. Cole are referred to
17 collectively as the CONRADS in the Secured Debt
18 Agreement). According to the Secured Debt Agreement,
19 the CONRADS were granted a first-priority security
20 interest in these assets. No ownership rights were
21 granted to ARIES in these intellectual property assets.

22 As noted above, however, this is entirely inconsistent with
23 the schedules in this case as well and in the personal case
24 of Dr. Conrad as well as with the behavior of Drs. Conrad and
25 Cole in both bankruptcy cases. Aries' schedules, which were
26 signed by Dr. Conrad, included the Intellectual Property with no
27 indication that anyone else had any interest therein. The same
28 is true of Aries' Statement of Financial Affairs. Neither
29 Dr. Cole nor Dr. Conrad were scheduled as secured creditors, and
30 neither filed proofs of claim.

31 The recent appearance of the SDA, combined with the numerous
32 statements of the Conrad Parties which are contrary to the terms

1 now asserted based thereon raise a genuine question as to the
2 authenticity of the SDA.

3 The Court also finds that the circumstances of the case
4 render it unfair to allow the Conrad Parties to rely on the SDA.
5 The Conrad Parties assert that the SDA was created over 5 years
6 ago in 2006. As noted, the Trustee and L-3 suspect that the
7 SDA was created far more recently in response to the proposed
8 sale. Had the original been produced, the parties could conduct
9 forensic inspections of the ink and paper from which the
10 origination date might have been established. It would be unfair
11 for the Court to accept the duplicate and the Conrad Parties'
12 bare assertion of its age in a circumstance where the Trustee and
13 L-3 could not test the theory.

14 The only evidence proffered in support of the Conrad
15 Parties' argument that Aries does not own the Assets is the
16 SDA and the declarations of Drs. Conrad and Cole based solely
17 thereon. Since the SDA will not be admitted under FRE 1002
18 & 1003, the Conrad Parties have not met their burden under
19 11 U.S.C. § 363(p)(2).

20 The Conrad Parties also argue that the sales price is
21 insufficient. However, the sale was widely publicized and
22 noticed and was subject to overbid, and neither the objecting
23 parties nor anyone else submitted one. A public auction subject
24 to overbid is an acceptable and common method of determining the
25 market value of assets. In re Abbotts Dairies of Penn., Inc.,
26 788 F.2d 143, 149 (3d. Cir. 1986). Notice of the sale was

1 published and the parties most likely to be interested in the
2 assets, including the Conrads, received notice of the proposed
3 sale and an opportunity to overbid. The Conrad Parties submitted
4 neither an overbid nor evidence of the value of the Assets. As
5 counsel for the Trustee declared, Dr. Conrad had stated that he
6 believed the patents had no value due to the cost of litigating
7 with L-3 and others. The Court finds the sales price is fair and
8 reasonable.

9 Likewise, there is no evidence that the deal struck between
10 L-3 and the Trustee was other than a good faith arm's length
11 deal. The Trustee has declared that the sales price and
12 settlement were the result of negotiations with L-3, and the
13 Court has no evidence or cause to discount that testimony.

14 The same is true of the Included Equipment. Aries'
15 Schedules included office equipment at the Roselle St. address,
16 lab and development equipment at the Roselle St. address, and
17 inventory and supplies. Furthermore, as additional evidence that
18 Aries owned the equipment, Aries had depreciated the equipment
19 for tax purposes.

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CONCLUSION

For all of the foregoing reasons, the Court grants the Trustee's Motion and approves the sale of the Assets to L-3 and the related settlement. Counsel for the Trustee or L-3 shall submit an order consistent herewith within thirty (30) days of the entry of this Order.

IT IS SO ORDERED.

DATED: APR 27 2012



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court