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WRITTEN DECISION – NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) BK CASE NO. 10-14198-MM11
)
ISE CORPORATION,) CHAPTER: 11
)
Debtor,) MEMORANDUM DECISION REGARDING
) MOTION TO ENFORCE THE AMENDED
) ORDER (A) GRANTING DEBTOR'S
) MOTION (1) APPROVING THE SALE OF
) ASSETS; AND (2) AUTHORIZING THE
) ASSUMPTION AND ASSIGNMENT OF
) CERTAIN EXECUTORY CONTRACTS;
) AND (B) APPROVING THE SALE
) TRANSACTION AND THE TRANSACTION
) DOCUMENTS FILED BY MAXWELL
) TECHNOLOGIES, INC.
)
) DATE: September 1, 2011
) TIME: 3:30 PM
) CRTRM: 1
)
) JUDGE: Margaret M. Mann

1 **I. INTRODUCTION**

2 Before the petition in this case, ISE Corporation (the "Debtor") and Maxwell Technologies,
3 Inc. ("Maxwell") collaborated on research and development of certain technology, and ISE purchased
4 products from Maxwell for integration into ISE's products. At the Debtor's bankruptcy auction of
5 substantially all of its assets ("Auction"), Maxwell entered a bid that included a release of claims in
6 exchange for \$250,000 ("Settlement"), which was accepted by the Debtor and included as part of the
7 order authorizing sale ("Sale Order"), subject to the requirement that the Debtor obtain Court approval
8 of the Settlement in a motion to be brought pursuant to Bankruptcy Rule 9019 ("9019 Motion").

9 Before bringing the 9019 Motion, both the Debtor and the Official Committee of Unsecured
10 Creditors ("Committee") in this case claim to have learned new facts that changed their minds as to
11 whether the Settlement was in the best interests of the estate. The Debtor declined to bring the 9019
12 Motion, causing Maxwell to bring a motion to enforce the Sale Order by compelling the Debtor to
13 bring the 9019 Motion ("Enforcement Motion").¹

14 Prior to the September 1, 2011 hearing on the Enforcement Motion, the Court filed a Tentative
15 Ruling which is incorporated by reference in this Memorandum Decision. The Tentative Ruling
16 concluded that the Settlement was not complete, the sale had no preclusive effect, the estate was not
17 estopped by the Sale Order from challenging the Settlement, and the Court need not engage in
18 meaningless tasks by compelling the Debtor to bring the 9019 Motion given the facts before it. After
19 argument at the hearing, the Court adopted the Tentative Ruling, subject to entry of a final order on the
20 Enforcement Motion.

21 Before entry of a final order denying the Enforcement Motion, the Court requested further
22 evidence and briefing from the parties on whether the record sufficiently supported its tentative
23 conclusion that requiring the Debtor to bring a 9019 Motion as contemplated by the Sale Order would
24 be a pointless act. Maxwell timely provided this evidence in the form of declarations and further

25 ¹ The Enforcement Motion was formally titled "Motion to Enforce the Amended Order (A) Granting
26 Debtor's Motion (1) Approving the Sale of Substantially all Assets of the Estate Free and Clear of
27 Liens, Claims, and Interests Pursuant to 11 U.S.C. § 363; and (2) Authorizing the Assumption and
28 Assignment of Certain Executory Contracts; and (B) Approving the Sale Transaction and the
Transaction Documents."

1 briefing, arguing that the Settlement was in the best interests of the estate since the estate's preference
2 claims against it were defensible and valueless. Both the Debtor and the Committee opposed the
3 supplemental briefing by filing oppositions and declarations supporting their business judgment that
4 the preference claim against Maxwell should not be settled, both because it is likely to have a value in
5 excess of \$250,000, and because the Settlement would also create problems with the estate's efforts to
6 resolve pending issues with Bluways USA, Inc. ("Bluways").² That the Debtor is opposing its own
7 settlement is not unprecedented. *See e.g., In re New Strand Theatre, Inc.*, 109 F. Supp. 350 (SD NY
8 1952), *aff'd* 201 F.2d 889 (2nd Cir. 1953), *cert. den. sub nom. Ratett v. Kaplan*, 345 U.S. 995, 97 L.
9 Ed. 1402, 73 S. Ct. 1137 (1953).

10 Upon consideration of the additional evidence submitted in support of the Enforcement Motion
11 the Court concludes that its Tentative Ruling was sound, and a final order should be entered denying
12 the Enforcement Motion. The Court cannot find that the Settlement is in the best interests of creditors,
13 since the creditors' best business judgment, which the Court finds was responsibly exercised, is that the
14 Settlement is against their interests. It is not the Court's role to substitute its judgment for that of the
15 estate representatives without good reason, and no such reason exists here. The Court agrees with the
16 Debtor's and Committee's analysis that the estate's claims against Maxwell are likely to be successful
17 on the merits, and can be easily collected without the estate incurring unreasonable expenses.
18 Approving the Settlement will also hinder the resolution of the Bluways' claims against the interests of
19 the estate. Since the Court has fully considered and would deny the 9019 Motion if it were to be
20 brought, compelling the motion to be formally filed is a pointless act that the Court will not order the
21 Debtor to undertake.

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25 ² These claims relate to a dispute regarding the scope of intellectual property sold to Bluways and the
26 claims released against Maxwell. After entry of the Sale Order, Bluways brought a motion to amend
27 the order. The Court denied this motion, finding the new evidence would not have changed the
28 outcome of the Sale Order. The Court found that the Sale Order provided a viable framework for any
disputes regarding the scope of the intellectual property sold and of the release of the claims against
Maxwell, including an adversary proceeding brought by Bluways that is still pending.

1 **II. ANALYSIS**

2 **A. Merits of the Settlement**

3 To approve a settlement, the bankruptcy court must find it fair and equitable, based upon four
4 necessary findings. *In re A & C Properties*, 784 F.2d 1377, 1382 (9th Cir. 1986), *cert. denied sub*
5 *nom. Martin v. Robinson*, 479 U.S. 854 (1986):

6 (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in
7 the matter of collection; (c) the complexity of the litigation involved, and the expense,
8 inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and
a proper deference to their reasonable views in the premises.

9 *A & C Properties*, 784 F.2d at 1381. These findings must be supported by the evidence (*id.*; *Reynolds*
10 *v. C.I.R.*, 861 F.2d 469, 473 (6th Cir. 1988)) and be examined in light of the circumstances present at
11 the time the settlement is considered. *Pineo v. Turner*, 274 B.R. 675,681 (W.D. Penn. 2002);
12 *Tidewater Group, Inc.*, 13 B.R. at 766. The burden of persuading the Court that the compromise
13 should be approved falls on its proponent. *In re Hallet*, 33 B.R. 564, 564 (Bankr. D. Me. 1983); *see*
14 *also In re Planned Protective Services, Inc.*, 130 B.R. 94, 96 (Bankr. C.D. Ca. 1991).

15 The Court's analysis, based upon the evidence before it, is that the Settlement fails to satisfy at
16 least three of the four elements of the test for approval of a settlement.

17 1. Probability of Success

18 The evidence before the Court establishes that the Debtor has a probability of success on its
19 preference claim against Maxwell under 11 U.S.C. § 547 for \$934,490.61³ of the \$1,307,784 payment
20 it made to Maxwell on June 10, 2010, within 90 days before the case was filed. This payment was for
21 product ordered by the Debtor under seven purchase orders issued between September 16, 2009 and
22 January 18, 2010. The key disputes as to the viability of the preference claim are whether the payment
23 arose under the first or second contract between the parties, and whether the ordinary course of
24 business defense would apply.

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27 ³ In calculating this amount, the Court added the five invoices (#'s CD200900715, CD200900760,
28 CD200900803, CD201000039, and CD20100017) applicable to the five purchase orders dated 9/17/09
to 11/17/09.

1 Maxwell argues the Debtor's chance of success in the preference action is low because the
2 transfer was made pursuant to a contract which the Debtor assumed and assigned to Bluways, the
3 Master UCAP Supply Agreement ("UCAP Agreement") effective as of November 22, 2009 and set to
4 expire on December 31, 2011. The Court concurs, and the Debtor and Committee do not dispute, that
5 a preference action generally cannot be maintained for payments made in connection with an assumed
6 executory contract. *Alvarado v. Walsh*, 12 F.3d 938, 941 (9th Cir. 1993).

7 The Debtor contends that the purchase orders for this payment were not made under the UCAP
8 Agreement, but under the Strategic Development and Supply Agreement ("First Agreement"),⁴ which
9 was not assigned to Bluways. It argues alternatively, that the purchase orders at issue were interim
10 agreements. The first five purchase orders were placed prior to expiration of the First Agreement,
11 although delivery of all product was after the expiration date of the First Agreement. The other two
12 purchase orders were placed after the UCAP Agreement retroactively took effect. The first five
13 purchase orders contain a provision that anticipates the UCAP Agreement, but makes these purchases
14 orders separate from that agreement. The Debtor's position that it has a viable preference claim of
15 \$934,490.61 for these five purchase orders, an amount in excess of the \$250,000 Settlement amount, is
16 well founded.

17 The Debtor and Committee also present evidence that Maxwell cannot rely upon the ordinary
18 course of business defense to a preference claim under 11 U.S.C. § 547(c). Without making a
19 determination on this preference issue either, the Court holds that the Debtor has a probability of
20 success on its preference claim that weighs against the Settlement. *In re Michael*, 183 B.R. 230, 233
21 (Bankr. D. Mont. 1995) (court denied Chapter 7 trustee's 9019 motion for settlement of homestead
22 exemption objection, when trustee had significant probability of success due to debtors' pre-petition
23 failure to file declaration of homestead).

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26 ⁴ In 2001, the ISER Research Corporation ("ISER"), the predecessor in interests to the Debtor, and
27 Maxwell entered into the First Agreement, which provided that Maxwell was to supply ISER ultra
28 capacitor devices to be integrated with power systems for use in hybrid drive systems developed by
ISER. The parties subsequently amended the First Agreement in 2005 and extended the term of the
First Agreement to November 21, 2009.

1 2. Collection Issues

2 The second factor also weighs against approval of the Settlement. The Court does not find that
3 the risk of collection supports a Settlement for \$250,000 based upon the evidence that Maxwell is a
4 financially sound, publicly traded company, with a cash balance of approximately \$30 million. *See*
5 Request for Judicial Notice (Docket # 592).

6 3. Expense and Complexity of Litigation

7 The Debtor and the Committee assert that this preferential transfer action is not complex, and
8 therefore warrants the cost of litigation given the size of the preference claim. As discussed by the
9 Debtor, a substantial portion of the cost of litigation has already been incurred by the estate as a result
10 of counsel's investigation of the claim and applicable law.

11 4. Best Interests of the Creditors

12 Without the support of the Committee or the Debtor, it would be difficult to justify approval of
13 the Settlement. *A & C Properties*, 784 F.2d at 1381, directs this Court to give weight to "the
14 paramount interest of the creditors and a proper deference to their reasonable views in the premises."
15 *See also In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976) (if properly investigated, the court should "give
16 weight to the opinions of the trustee, the parties, and their attorneys.") A "court generally gives
17 deference to a trustee's business judgment in deciding whether to settle a matter." *Goodwin v. Mickey*
18 *Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.)*, 292 B.R. 415, 420 (B.A.P.
19 9th Cir. 2003).

20 The Court finds the Debtor and Committee have reasonably investigated and considered the
21 impact on the Bluways' claims and the merits of the preference action. The Court must give proper
22 deference to their views as to what is in the best interests of the estate and would not approve the
23 Settlement even if it were to be formally brought before it.

24 **B. No Need for Pointless Act of a Motion.**

25 Given the Court's full review of the merits of the Settlement as set forth above, requiring a
26 formal 9019 Motion at this time would be a pointless act that the Court need not mandate. *See e.g. Air*
27 *One Helicopters v. FAA*, 86 F.3d 880, 882 (9th Cir. 1996) (court will not require parties to exhaust
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1 administrative procedures when doing so would be futile, and will treat administrative position as final
2 decision to be ruled on); *St. Clair v. Chico*, 880 F.2d 199, 202 (9th Cir. 1989) (where the pleading
3 made clear that the court lacked jurisdiction, extra discovery on the jurisdictional issue would be
4 useless); *LeMons v. Sven*, 2006 U.S. Dist. LEXIS 90166 *18 (C.D. Ill. 2006) (vacating the debtor's
5 discharge to allow creditor to file non-dischargeability action would be a futile act after consideration
6 of the statute of limitations defense and determination that creditor did not have a timely, meritorious
7 claim; motion to vacate denied).

8 No bankruptcy settlement can be enforced without the approval of the Court. *Providers Benefit*
9 *Life Ins. Co. v. Tidewater Group, Inc.*, 8 B.R. 930, 932 (N.D. Ga. 1981). In *In re: Mickey Thompson*,
10 292 B.R. 415, 418 (9th Cir. B.A.P. 2003), the Ninth Circuit BAP reversed a settlement approved by the
11 bankruptcy court at the reluctant request of the trustee, who mistakenly felt he was contractually bound
12 to present a settlement that was no longer in the best interests of the estate. Although the Debtor and
13 Committee initially supported the Settlement like in *Mickey Thompson* and *Tidewater*, post-settlement
14 developments and both the Debtor's and the Committee's opposition to the Settlement lead the Court to
15 conclude the Settlement is not in the best interests of the creditors. Like the BAP in *Mickey Thompson*,
16 and the court in *In re Tidewater Group, Inc.*, 13 B.R. 764, 766 (Bankr. N.D. Ga. 1981), *appeal*
17 *dismissed*, 734 F.2d 794 (11th Cir. 1984), once it weighed the merits of the Settlement, the Court
18 would disapprove the Settlement if formally presented with it.

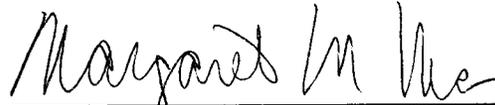
19 Because the Court has now considered the Settlement on two occasions, and determines it
20 could not make the necessary findings to approve it, there is no reason for a formal motion to be
21 brought. The Court has reviewed the merits of the Settlement and has found them to be lacking, and
22 there is no reason to review them a third time.

1 **III. CONCLUSION**

2 The Court will not compel the Debtor to file a 9019 Motion, as the parties have addressed in
3 response to this Court's request for further briefing the factors to be considered if such a motion were
4 brought. Based upon its analysis of the evidence, the Court cannot approve the Settlement. The Court
5 therefore denies the Enforcement Motion.

6 IT IS SO ORDERED.

7 Dated: October 28, 2011



8 MARGARET M. MANN, JUDGE
9 United States Bankruptcy Court