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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: MEGA-C POWER CORPORATION, Debtor.	BAP Nos. NV-06-1060-BSJ NV-06-1078-BSJ (Related Appeals) Bk. No. 04-50962-GWZ Ref. Nos. 06-05 06-06
LEWIS "CHIP" TAYLOR; JARED TAYLOR; COLIN TAYLOR; CHIP TAYLOR IN TRUST; ELGIN INVESTMENTS, INC., Appellants, v. MEGA-C POWER CORPORATION; UNITED STATES TRUSTEE; WILLIAM N. NOALL, Chapter 11 Trustee; UNAFFILIATED SHAREHOLDERS; AXION POWER CORPORATION; AXION POWER INTERNATIONAL, INC.; SALLY FONNER, Appellees.	**M E M O R A N D U M**[1]
UNAFFILIATED SHAREHOLDERS, Appellant, v. MEGA-C POWER CORPORATION; UNITED STATES TRUSTEE; TAYLOR GROUP; WILLIAM N. NOALL, Chapter 11 Trustee; AXION POWER CORPORATION; AXION POWER INTERNATIONAL, INC.; SALLY FONNER, Appellees.	

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

Argued and Submitted on September 13, 2006
at Sacramento, California

Filed - September 29, 2006

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Gregg W. Zive, Chief Bankruptcy Judge, Presiding

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Before: BRANDT, SMITH and JURY,[2] Bankruptcy Judges.

The bankruptcy court approved the chapter 11[3] trustee's proposed settlement of adversary proceedings and other disputes, the effect of which was to bring shares of stock held in a shareholder's trust into the bankruptcy estate, to be liquidated to fund a plan of reorganization and costs of administration. Two shareholder groups appeal the same order, arguing that the bankruptcy court abused its discretion in approving the settlement because the value of the stock is unknown, and the settlement is either an asset sale not complying with § 363, or a sub rosa plan of reorganization entered into without the protections of the plan confirmation process.

The major settlement terms do not become operative until the effective date of the confirmed plan; others were effective immediately upon entry of the bankruptcy court's order approving the settlement. As

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[2] Hon. Meredith A. Jury, United States Bankruptcy Judge for the Central District of California, sitting by designation.

[3] Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which the adversary proceeding and these appeals arise was filed before its effective date (generally 17 October 2005).

All "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "FRCP" references are to the Federal Rules of Civil Procedure.

plan confirmation has not yet occurred, we DISMISS as interlocutory that portion of the appeal relating to the terms contingent upon plan confirmation, and AFFIRM the balance.

I. FACTS

The facts are not in dispute. Debtor Mega-C Power Corporation ("MCP" or "Debtor") is a Nevada corporation formed in 2001. Previously, C & T Co., Inc., obtained patents on a lead-acid-carbon energy storage device, referred to throughout these proceedings as the "Technology." In 1999 C & T entered into a joint venture agreement with Chip Taylor in Trust to license a limited class of stationary applications of the Technology to a corporation organized to hold the license, Mega-C Technologies, Inc. ("MCT"). MCP was later formed to commercialize the license.

On 2 April 2002 C & T, MCT, and MCP entered into an Agreement of Association pursuant to which C & T granted MCP a license to the Technology for stationary applications subject to certain royalties.

Over the next year and a half MCP raised approximately $5 million by selling stock. At the same time, the Taylor Group (Chip Taylor, Chip Taylor in Trust, Jared Taylor, and Elgin Investments, Inc.) and Pardo and Usling (shareholders, officers and directors of MCP) transferred more than $6 million of MCP's stock through their own accounts. These transactions came to the attention of the Ontario Securities Commission, which commenced an investigation.

In June of 2003 MCP asserted a declaration of default by MCT as to the Agreement of Association; C & T asserted a notice of termination of its joint venture agreement with Chip Taylor in Trust and MCT. As a result of this and other disputes, three lawsuits and one arbitration

were filed in Canada. Issues in these lawsuits included conflicting claims regarding ownership of MCP stock and rights to the Technology. Shortly thereafter a group of MCP's shareholders agreed to transfer control of Mega-C Ontario, a subsidiary of MCP, to MCP's original investors ("Investors") and Kirk Tierney, MCP's former general manager.

In an attempt to obtain a new license from C & T, and to move control away from MCP, in September 2003 the Investors, Tierney, and the president of C & T formed Axion Power Corporation ("Axion Ontario"). Axion Ontario thereafter took over MCP's operations, allegedly misappropriating the Technology. Axion Ontario then entered into a Development and License Agreement with C & T.

In December, as the result of a reverse merger, an entity previously known as Tamboril Cigar Company acquired the majority of outstanding shares of Axion Ontario (Tamboril became Axion Power International, Inc. ("Axion") in June 2004). Also in December of 2003 MCP's board authorized it to terminate the Agreement of Association and grant Axion the right to exploit the Technology. In January 2004 C & T, Axion Ontario, and Axion entered into an amended license agreement which provided that Axion would purchase all C & T's right, title and interest in the Technology.

As part of the reverse merger, an irrevocable trust ("Shareholders Trust") was created for the benefit of MCP's creditors and equity security holders. The Shareholders Trust was funded with 117,239,736 shares of Axion stock; a subsequent reverse stock split reduced the number of shares to 7,327,500 ("Initial Axion Stock"). The trust's purpose

> is to preserve the potential equitable interests of the Mega-C Shareholders in the lead-acid-carbon battery technologies that the Grantor [Axion] intends to develop while insulating the Grantor from the potential litigation risks associated with the prior business of Mega-C and the alleged unlawful

activities of certain directors, officers and stockholders of Mega-C.

Trust Agreement for the Benefit of the Shareholders of Mega-C Power Corporation, ¶ 2.4.

The original trustee of the trust was Benjamin Rubin, a Canadian lawyer who had previously represented both MCP and MCT. On 24 March 2004, Sally Fonner, who was president and CEO of MCP, and who had significant ties to Axion, was appointed successor trustee.

On 6 April 2004 Axion Ontario, Axion, and Thomas Granville (one of the Investors) filed an involuntary chapter 11 petition against MCP. A few days later, Fonner, with the consent of MCP's directors, consented to entry of an order for relief, which was entered 13 May 2004.

On 26 February 2005 Fonner and Axion entered into an amended trust agreement which increased the shares of Axion stock held by the trust from 7,327,500 to 7,827,500.

William N. Noall was appointed chapter 11 trustee ("Trustee") on 2 March 2005. In status reports filed with the court, the Trustee indicated his belief that the Axion shares in the Shareholder Trust are property of the estate, and while the most meaningful source of recovery would be sale of the Technology, the Debtor could not viably exploit it. Accordingly, the Trustee intended to recover the Axion stock held in the Shareholders Trust. The Trustee's status reports also alleged that Fonner and others had engaged in a pattern of activity by which they caused Axion and the Investors to abscond with most of the Debtor's assets other than the stock in the Shareholders Trust. The Trustee caused the debtor to be deregistered in order to cease violating applicable securities laws and regulations.

On 7 June 2005 the Trustee filed an adversary proceeding against Fonner as trustee of the Shareholders Trust, seeking declaratory and injunctive relief that would have the effect of bringing the Initial Axion Stock into the estate, and requiring Fonner to account for and turn over that stock (Noall v. Fonner, No. 05-5042). Fonner filed various pleadings (including an answer, motion to dismiss, and response to trustee's motion for summary judgment) denying many of the factual allegations in the complaint and material facts set forth in the trustee's motion for summary judgment. The proceedings were continued pending settlement negotiations.

On 27 July 2005 Axion and Axion Ontario filed an adversary proceeding against the Trustee and Fonner as trustee of the Shareholders Trust (Axion and Axion Ontario v. Trustee and Fonner, No. 05-5082). The plaintiffs sought a declaratory judgment as to various issues, the effect of which would be to insulate them from any avoidance action or allegations that they violated the automatic stay. The parties agreed to continue the proceedings pending settlement negotiations.

In December 2005 the Trustee moved for approval of a settlement agreement between the estate and numerous parties, including, among others, Mega-C Ontario, Axion, Axion Ontario, C & T, the Founders (as defined in the settlement agreement), the Investors, Fonner, and the Shareholders Trust. The relevant terms of the settlement are:

1. The agreement designates 5.7 million shares of the Axion stock in the Shareholders Trust as "Plan Funding Shares." The remaining 2,127,500 shares are designated "Axion Settlement Shares."
2. Effective upon approval of the agreement, Fonner is authorized to liquidate up to one million of the Plan Funding Shares to

fund fees and costs of administration and supply the cash required to confirm the plan, the effective date conditions of the plan, and the balance of classified and unsecured claims. The liquidation is to be done in consultation with the Trustee and Axion, and the proceeds are to be placed in an account held jointly by Fonner and the Trustee pending further orders of the bankruptcy court.

3. On the effective date of the Plan, a liquidation trust is to be established to hold sufficient Plan Funding Shares to fund the items listed above. The Liquidation Trust Agreement is to be an attachment to the Trustee's proposed Plan of Reorganization.

4. On the effective date of the Plan, the Shareholders Trust will be amended and restated. The Amended and Restated Agreement is to be provided as an attachment to the Trustee's proposed Plan of Reorganization. That so-called Second Amended Shareholders Trust ("SAST") will retain the balance of Plan Funding Shares. The fees and expenses of the Liquidation Trust and the SAST will be expenses of the estate to be paid from the liquidation of Plan Funding Shares.

5. The SAST shall distribute the Axion Settlement Shares to Axion, which will use its best efforts to resolve the rights and claims of the Founders (of Axion) and Investors to those shares, after which the Founders and Investors agree to cancel all shares not used to pay costs of the SAST (but not less than 1.5 million shares).

6. As of the effective date of the plan, Axion and Axion Ontario are to withdraw all but two of their claims, and those two

shall be subordinated to all other creditors' claims; C & T and C & T Scientists are to withdraw their claims.

7. On the effective date, the adversary proceedings filed by the Trustee against Fonner and by Axion and Axion Ontario against the Trustee and Fonner shall be dismissed.

8. The plan will provide that all rights to the Technology are to be transferred to Axion.

Both Appellants opposed the settlement, but after a lengthy hearing, the bankruptcy court approved it. The bankruptcy court's observations and findings in approving the settlement include:

1. All parties to the settlement agreement negotiated and acted in good faith regarding the agreement.

2. The Debtor has no substantial assets other than those related to the Technology.

3. The Debtor does not have the ability to fund continued research, promotion, sale or development of the Technology. To obtain rights to the Technology it must win the litigation, which it does not have the ability to fund, and the Ontario Securities Commission investigation adds another layer of complexity.

4. As there are no other significant assets in the estate, the value of the stock is not dispositive.

5. In entering into the settlement, Fonner acted in accord with her powers as trustee of the Shareholders Trust. The settlement does not give Fonner unfettered control over the stock, and if she does not comply with the terms of the settlement, the bankruptcy court could find her in contempt.

6. Notwithstanding the settlement, the bankruptcy court retains jurisdiction to review the distribution of administrative expenses; fee awards are subject to disgorgement if appropriate, and the court retains discretion to approve the plan or not.

7. The estate benefits from the settlement in that it saves millions of dollars, gets tangible assets, and the Trustee is able to prepare a disclosure statement and plan of reorganization; if the plan is not fair and equitable, that can be dealt with at confirmation.

8. Finally, the settlement is fair and equitable and in the best interests of the estate.

Transcript, 5 January 2006, pp. 221-232.

The order approving the settlement provides: "the remaining terms of the Settlement Agreement [other than the provisions that take effect immediately upon approval of the agreement] are subject to further order of this Court and the Effective Date of the Plan." Order Approving Motion to Approve Settlement Agreement . . . ("Order"), page 4.

The Unaffiliated Shareholders and the Taylor Group each timely appealed. The separate appeals were heard together.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2)(A) and (O), and we do under 28 U.S.C. § 158(c).

III. ISSUES

A. Whether the appeals should be dismissed on jurisdictional grounds.

B. Whether the bankruptcy court abused its discretion in approving the settlement agreement.

IV. STANDARDS OF REVIEW

We review a bankruptcy court's order approving a trustee's application to compromise for abuse of discretion. In re A & C Properties, 784 F.2d 1377, 1380 (9th Cir. 1986); In re Mickey Thompson Entm't Group, Inc., 292 B.R. 415, 420 (9th Cir. BAP 2003); likewise, a bankruptcy court's order approving a sale outside the ordinary course of business. In re Lahijani, 325 B.R. 282, 287 (9th Cir. BAP 2005).

A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1991). Under the abuse of discretion standard, we must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached before reversal is proper. In re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998).

V. DISCUSSION

A. Jurisdiction

No party raised a jurisdictional issue, but we have an independent duty to examine our jurisdiction. In re Birting Fisheries, Inc., 300 B.R. 489, 496-97 (9th Cir. BAP 2003). The circumstances of this appeal raise issues of finality and mootness.

1. Finality/Ripeness

A final order is one that "1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." In re Frontier Properties, Inc., 979 F.2d 1358, 1363 (9th Cir. 1992) (citation omitted). The Order approves provisions that are contingent upon further order of the bankruptcy court, specifically, plan confirmation. As to those provisions, it is not final.

Although neither appellant requested leave to appeal, we may treat a notice of appeal as a motion to grant leave. Rule 8003(c); In re Belli, 268 B.R. 851, 857-58 (9th Cir. BAP 2001). Granting leave is appropriate "to avoid wasteful litigation and expense where the appeal presents a meritorious issue on a controlling question of law and an immediate appeal would materially advance the ultimate termination of the litigation." Id. at 858 (citation omitted). But immediate appeal is not warranted in this instance because the provisions at issue may never become effective: they are dependent upon confirmation of an implementing chapter 11 plan, which has not yet occurred. Competing plans are pending; only the trustee's proposed plan would fully effectuate the settlement agreement. That may never happen.

And "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Texas v. U. S., 523 U.S. 296, 300 (1998)(internal quotations and citation omitted). As to the contingent provisions, the order is neither final nor ripe for adjudication.

Accordingly, we DISMISS these appeals as to that portion of the Order which approves settlement terms which do not become effective until plan confirmation.

2. Mootness

Other provisions of the settlement agreement are effective immediately. Specifically, the settlement calls for immediate liquidation of up to one million shares of Axion stock to fund administrative expenses, raising the possibility that execution of these provisions could render this portion of the appeal moot. See In re Onouli-Kona Land Co., 846 F.2d 1170, 1171-72 (9th Cir. 1988).

In supplemental briefing, the Taylor Group indicated that the stock had not yet been sold, and that an amended plan had been proposed wherein the stock would not be sold but instead would be pledged as collateral for a loan. To the extent the stock could not be sold, the remainder of this appeal would also be moot. However, at oral argument Axion's counsel made clear that the stock has not been sold to date only because Axion is still in the process of obtaining from the Securities & Exchange Commission a "post-effective amendment" updating the stock registration. That process is expected to be completed shortly, and the parties fully intend to proceed with the stock sale. Accordingly, the appeal is not moot.

B. Merits

The party proposing a compromise has the burden of persuading the bankruptcy court that it is fair and equitable:

> In determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider: (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986) (citations omitted).

1. Record

Both appellants argue that there was an insufficient record on which the bankruptcy court could properly evaluate the settlement. To the contrary, the record reflects that the bankruptcy court gave ample consideration to the relevant factors. The court reviewed numerous documents and stated many reasons (set forth above) why the settlement was in the best interests of the estate. Neither appellant takes issue with the bankruptcy court's factual findings.

The Unaffiliated Shareholders argue that the bankruptcy court did not afford the parties adequate time to conduct discovery regarding the settlement agreement. The Trustee's motion was filed 12 December 2005, with responses due within 15 days pursuant to local rule, and was noted for hearing on 5 January 2006. The Unaffiliated Shareholders moved for enlargement of time to respond to the Trustee's motion, contending that they needed time to "ask questions under oath that the Trustee has not, in order to insure that settlement versus litigation is the best option for the Estate." But they did not formally request discovery, although they could have done so without leave of the bankruptcy court at any time, as the opposed motion was a contested matter. Rule 9014; In re Khachikyan, 335 B.R. 121, 126 (9th Cir. BAP 2005). The Taylor Group requested a Rule 2004 examination of the Trustee, which the bankruptcy court granted, albeit limiting it to three hours.

As the Unaffiliated Shareholders never attempted to conduct any discovery, we cannot say that the bankruptcy court abused its discretion

in denying their motion for continuance, or that it did not afford time for "meaningful" discovery regarding the settlement.

At oral argument, the Taylor Group noted that their discovery requests made during settlement negotiations had been met with motions for protective orders, which the bankruptcy court granted. This does not explain why the Unaffiliated Shareholders did not propound any discovery requests once the settlement motion was filed, or why the protective orders precluded meaningful discovery.

2. Sub Rosa Plan/Asset Sale

Both appellants argue that the settlement was a de facto or sub rosa plan of reorganization, citing In re Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983) and In re Continental Airlines, Inc., 780 F.2d 1223 (5th Cir. 1986). In each of these cases the court found the transaction to be a sub rosa plan because it dictated plan terms, essentially binding creditors to a particular distribution scheme. See Braniff, 700 F.2d at 939-40; Continental, 780 F.2d at 1227-28. We need not address that argument in the limited remaining scope of this appeal, which regards only the immediately effective terms. We do note that the settlement agreement does not dictate potential distributions to creditors or shareholders - that will be governed by whatever plan (if any) is confirmed.

The Taylor Group argues that the settlement was actually an asset sale subject to the standards of § 363, citing In re Mickey Thompson Entm't Group, Inc., 292 B.R. 415 (9th Cir. BAP 2003) and Lahijani, 325 B.R. at 284. In an asset sale under § 363, the bankruptcy court must "assure that optimal value is realized by the estate under the circumstances." Id. at 288. This and appellants' remaining arguments

relate primarily to the lack of evidence of stock value or of the consideration given. Moreover, the Taylor Group points out, under the "fair and equitable" settlement standard, the bankruptcy court should have "consider[ed] the alternative of permitting the objecting creditors to sue in the name of the trustee at their own risk and expense . . . ." Id. at 291.

The Taylor Group has not set forth a coherent argument as to why the § 363 sale standards were not met; thus we need not consider it in great detail. See In re Jodoin, 209 B.R. 132, 143 (9th Cir. BAP 1997). However, even if the settlement is deemed as asset sale under § 363, the bankruptcy court's findings satisfy the "optimal value" standard: the bankruptcy court observed that, other than the Technology, there were no meaningful assets in the estate, and that attempting to obtain rights to the Technology would be both costly and fruitless given the debtor's lack of funds to either litigate the issue or develop the Technology if it prevailed. And the record indicates that the issues in the adversary proceedings and other disputes were highly contested; even if there were a chance of success on the merits, the evidence supports the conclusion that such would be costly and time-consuming, and perhaps to no avail.

Appellants' contention that they offered to fund the litigation is misleading. The Taylor Group brought a motion to prosecute claims in the name of the Trustee, but withdrew that motion on 27 October 2005. In the concluding paragraph of their opposition to the settlement motion, the Unaffiliated Shareholders offered, in the absence of a reasonable settlement, to "pick up the litigation now, and on their nickel, to continue the litigation as opposed to taking the non-existent benefit apparently being offered through the Proposed Settlement Agreement." However, they never formally offered or moved to fund the litigation.

VI. CONCLUSION

The portion of this appeal concerning settlement terms that do not become operative until the effective date of a chapter 11 plan is interlocutory; we therefore DISMISS that portion of the appeal.

Respecting the immediately effective terms, appellants have not shown that the bankruptcy court clearly erred in its determination of the relevant factors in assessing the proposed settlement, or applied an erroneous legal standard. There was no abuse of discretion in approval of the settlement agreement, either as a compromise or as a sale. Accordingly, we AFFIRM.