UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ICS CYBERNETICS, INC. CASE NO. 88-00478

Debtor Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Before the Court is the motion of ICS Cybernetics, Inc. ("Debtor") seeking to expunge the claim of Ciba-Geigy Corporation ("Ciba") filed with the Clerk of this Court on August l, l99l.

The motion was initially scheduled for argument at a motion term of the Court held at Syracuse, New York on September 24, l99l, but was thereafter adjourned and actually argued at Syracuse, New York on October 8, l99l.

Following argument, the parties were given until November l, l99l to file memoranda of law. Both parties filed memoranda and this contested matter was finally submitted for decision on that date.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this core proceeding pursuant to 28 U.S.C. §§1334(b), l57(a), (b)(l) and (b)(2)(K). (West Supp. l992).

FACTS

The parties have stipulated to a statement of facts which are to be utilized only for the purpose of considering the instant motion.

The stipulated facts are set forth in the Memorandum of Law filed with this Court by Ciba's counsel on November l, l99l and will not be reiterated herein.

Further, the parties agreed, at oral argument, that the Court would limit its consideration of Debtor's motion only to its contention that Ciba's claim was be disallowed solely on the basis of §502(e)(l)(B) of the Bankruptcy Code (ll U.S.C. §§l0l-l330) ("Code").

ARGUMENTS

Debtor contends that Code §502(e)(l)(B) should be accorded its plain meaning and that Ciba's claim being one for reimbursement of any amounts awarded to Lefac International S.A. ("Lefac") in the action presently pending in the U.S. District Court for the Southern District of New York, is clearly contingent and must be disallowed.

Debtor argues that Ciba's claim meets all three of the tests initially laid down in In re Provincetown-Boston Airlines, Inc., 72 B.R. 307 (Bankr. M.D.Fla. l987) and generally regarded as controlling by other courts interpreting Code §502(e)(l)(B). See In re Allegheny International, Inc., l26 B.R. 9l9, 92l (W.D.Pa. l99l); In re A & H, Inc., l22 B.R. 84, ___ (Bankr. W.D.Wisc. l990).

Debtor asserts that as indicated Ciba alleges 1) a claim for reimbursement of any damages awarded to Lefac in the District court action; 2) that its liability, if any, to Lefac must be shared with or fully reimbursed by the Debtor; and 3) its claim against the Debtor is as yet unliquidated, since the District Court action has not as yet proceeded to trial.

Conversely, Ciba argues that the Court must visit the legislative intent supporting Code §502(e)(l)(B) and conclude that the statute is intended to exclude the contingent claims of co-debtors, sureties or guarantors unless the claim of the primary creditor has been paid in full by the co-debtor, surety or guarantor, thus, preventing competition between the primary co-creditor and

contingent claimants for the debtor's assets.

Ciba asserts that to accept Debtor's interpretation of Code §502(e)(l)(B) would bring about the denial of every contingent indemnification or reimbursement claim asserted by a creditor in a bankruptcy case.[1]

DISCUSSION

It is clear that it was not the intent of Congress in enacting Code §502(e)(l)(B) to disallow every claim for reimbursement or contribution which was contingent or unliquidated at the commencement of the case. If that were its intent, then Code §502(c), which allows the bankruptcy court to estimate contingent or unliquidated claims, would be superfluous.

Clearly, Code §502(e)(l)(B) is aimed at a claim for reimbursement or contribution held by a specific entity who is said to be "liable with the debtor, or has secured the claim of such creditor." See Code §502(e)(l).

As observed at 3 COLLIER ON BANKRUPTCY ¶502.05 (l5th Ed. l99l)

> While section 502(e)(l)(B), facially would seem at war with Section 502(c) dealing with estimation for purpose of allowance of contingent claims, it must be viewed from the standpoint of the surety or person secondarily liable with which it deals rather than from the standpoint of the debtor's creditor with which section 502(c) obviously deals.

Thus, in the instance where the claim being asserted is concededly one for reimbursement or contribution and contingent in nature, the court must examine the relationship between the claimant and the debtor in order to determine whether or not Code §502(e)(l)(B) applies or whether the claim should be estimated and allowed pursuant to Code §502(c).

As was the case in In re Allegheny Intern., Inc., supra, l26 B.R. 9l9, 92l, the dispute here really centers upon the second factor enunciated by Bankruptcy Judge Paskay in In re Provincentown-Boston Airlines, Inc., supra, 72 B.R. at 309.

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[1] Ciba also relies on two additional arguments, the first being that the Court should delay ruling on its claim until the District Court action is resolved, and the second, that its claim arose post-petition and, therefore, must be considered under Code §503(b) not Code §502(e)(l)(B). While those arguments obviously have relevance, the parties agreed at the argument of the motion to limit the Court's review to a consideration of the application of Code §502(e)(l)(B).

The District Court in In re Allegheny Intern., Inc., supra, observed at page 922 "The natural reading of this language (Code §502(e)(l)) demonstrates that Congress intended to exclude claims where the claimant and the debtor are jointly liable to a third party." The District Court concluded that Code §502(e)(l)(B) was not intended to exclude direct contingent claims.

The District Court in In re Allegheny Intern., Inc., supra, was considering a claim filed in that debtor's Chapter ll case by a creditor who alleged that the debtor was liable for response costs incurred pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The District Court analyzed whether the creditors' claim was a direct claim for reimbursement of costs incurred by the creditor in the toxic waste cleanup pursuant to the applicable provisions of CERCLA or whether the claim sprung from the co-liability of the creditor and the debtor to the Environmental Protection Agency ("EPA") for the response cost. The District Court observed that under the facts therein, it was critical as to who performed the actual cleanup - if the response cost was incurred by EPA then both the creditor and the debtor would incur joint liability to EPA. However, if the creditor performed the cleanup, its claim for response costs would be a direct claim for reimbursement, not excludable under Code §502(e)(l)(B). The District Court observed at page 923, "Section 502(e)(l)(B) is not a means of immunizing debtors from contingent liability, but instead protects debtors from multiple liability on contingent debts.

In the instant contested matter, there is no joint liability existing between the Debtor and Ciba running in favor of Lefac for the damages Lefac seeks in the District Court action. While it is true that but for the automatic stay imposed pursuant to Code §362(a), Lefac might assert a claim against the Debtor directly. This Court is of the opinion that that claim would arise out of the sale of computer equipment and the assignment of Equipment Schedule #6 in November l987 from Debtor to Lefac and not from the subsequent alleged default by Ciba under the Equipment Schedule, as well as alleged refusal to certify the number of remaining payments to Lefac.

While the Court acknowledges the principle that the joint liability interest is satisfied by any type of liability, be it contract or tort, that is

shared by Ciba and Debtor, there must be a singular theory of liability on which both the debtor and the creditor are jointly liable. See In re A & H, Inc., supra, l22 B.R. 84, 86; In re Wedtech Corp., 87 B.R. 279, 284 (Bankr. S.D.N.Y. l988); In re Wedtech Corp. , 85 B.R. 285, 290 (Bankr. S.D.N.Y. l988); In re Baldwin-United Corp., 55 B.R. 885, 890 (Bankr. S.D.Ohio l985).

As was observed by Bankruptcy Judge Buschman in In re Wedtech, supra, 85 B.R. 290, "Thus, the co-liability requirement is to be interpreted to require a finding that causes of action in the underlying lawsuit assert claims upon which, if proven, the debtor could be liable but for the automatic stay." Here a review of Lefac's complaint attached to the motion papers, asserts no claim against the Debtor, nor even suggests any wrongdoing on the Debtor's part. Furthermore a review of the (CHECK THIS) claims register in this case reveals no claim by Lefac against the Debtor arising out of the sale of computer equipment and assignment of the Equipment Schedule in November of l987 that would suggest any exposure of the Debtor to double liability arising out of that transaction.

Clearly,, if Lefac has any claim against the Debtor arising out of the sale and assignment in November l987, it has not asserted it nor can it now presumably assert such a claim in light of the passage of the claims bar date on October 3l, l989. Were that not the case, however, the Court cannot reach the conclusion that the Debtor is liable with Ciba on the claims asserted in the District Court action. A review of the Complaint suggests that Ciba executed a Notice of Assignment and Lessee's Acknowledgement obligating it to make some forty-eight monthly lease payments, but thereafter refused to make the forty-seventh and forth-eighth payments, thereby allegedly having perpetuated an anticipatory breach of the Notice of Assignment and Lessee's Acknowledgement as well as an allegedly fraudulent misrepresentation. (See the First and Third Claims in Lefac's Complaint attached to the motion papers.) The two remaining claims asserted by Lefac merely seeks a declaratory judgment as to Ciba's obligations under the assigned Equipment Schedule and a breach of a contract allegedly entered into between Lefac and Ciba post-assignment relating to an upgrade of computer equipment.

There is no suggestion anywhere in the complaint that the Debtor is jointly liable to Lefac by virtue of the sale of the computer equipment and

assignment of the Ciba lease. The Court cannot speculate on the existence of any such claims. Thus, the Court cannot conclude that "but for the automatic stay" the Debtor would be liable to Lefac.

The specter of multiple claims upon the same debt which Congress sought to prohibit in enacting Code §502(e)(l)(B) is not present herein and cannot serve as a basis to disallow Ciba's claim.

The Court, however, makes no finding on the additional contentions made by Ciba that its claim is administrative in nature and falls not under Code §502, but rather under Code §§507(a)(l) and 503(b)(l)(A) or that this Court should withhold consideration of Ciba's claim until the District court action has been concluded.

IT IS SO ORDERED.

Dated at Utica, New York
this day of March, l992

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STEPHEN D. GERLING
U.S. Bankruptcy Judge