

FILED & ENTERED

NOV 28 2016

CLERK U.S. BANKRUPTCY COURT
Central District of California
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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:

eCLARIS, INC.

Debtor.

Case No. 2:14-bk-11510-RK

Chapter 7

**MEMORANDUM DECISION ON MOTION
OF CARL W. COOPER TO CLARIFY
THE COURT'S PRIOR ORDER ON SALE
OF ESTATE ASSETS**

Pending before the court is the Motion of Carl W. Cooper ("Cooper") to Clarify the Court's Prior Order on Sale of Estate Assets (the "Motion"), ECF 66, filed on August 23, 2016, requesting that the court clarify its Order Granting [Trustee's] Motion to Confirm Sale of Estate's Right, Title and Interest in Property of the Estate and to Approve Settlement of Claims, ECF 38, filed and entered on April 17, 2015. Through the Motion, Cooper seeks a determination that the settlement agreement that he entered into with Richard K. Diamond, the Chapter 7 Trustee ("Trustee") for

1 the bankruptcy estates of Debtor eClaris, Inc. ("Debtor") and eClaris Software, Inc.
2 ("Related Debtor"), to purchase the assets of Debtor and Related Debtor, eClaris
3 Software, Inc. and settle claims (the "Settlement Agreement"), ECF 30, included a
4 derivative cross-claim of breach of fiduciary duty against Debtor's principal,
5 Jacques Nack Ngue ("Ngue" or "Nack"), ECF 66 at 3.

6 Having considered the moving and opposing papers and the oral arguments
7 of the parties, and the other papers and pleadings before the court, the court
8 determines that the Motion should be granted because the express contractual
9 language of the Settlement Agreement between the Trustee and Cooper is unclear
10 and ambiguous as to the treatment of the cross-claim asserted by Cooper against
11 Ngue as a derivative claim on behalf of Debtor for breach of fiduciary duty in the
12 state court action, *eClaris Inc. v. Omega Equipment, et al.*, Case No. GC050458
13 (Superior Court of California, County of Los Angeles). as part of the settlement
14 between the Trustee and Cooper.

15 The Motion asks the court to construe the Settlement Agreement, a contract
16 between Cooper and the Trustee for sale of assets of Debtor and Related Debtor
17 and settle claims, to include the sale of Debtor's derivative claim against Ngue for
18 breach of fiduciary duty, which presents a matter of contractual interpretation.

19 Because the Settlement Agreement is governed by California law, the court
20 applies the law of contracts of California to the Settlement Agreement. Settlement
21 Agreement attached as Exhibit 4 to Cooper's Supplemental Submission, ECF 76,
22 filed on September 27, 2016, Exhibit 4, ¶¶ 21 at 9-10. "When considering a question
23 of contractual interpretation, the court applies the following rules. 'A contract must
24 be so interpreted as to give effect to the mutual intentions of the parties as it
25 existed at the time of contracting, so far as the same is ascertainable and lawful.'
26 ([Cal.] Civ. Code, § 1636.) "The language of a contract is to govern its
27 interpretation, if the language is clear and explicit, and does not involve an
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1 absurdity.” (Civ. Code, § 1638.) “When a contract is reduced to writing, the
2 intention of the parties is to be ascertained from the writing alone, if possible....”
3 (Civ. Code, § 1639.)” *WYDA Associates v. Merner*, 42 Cal.App.4th 1702, 1709
4 (1996).

5 When the language of the contract is ambiguous, may parol or extrinsic
6 evidence be admitted. “Parol or extrinsic evidence is admissible to resolve an
7 ambiguity. In such cases, the court engages in a two-step process: ‘First, the court
8 provisionally receives (without actually admitting) all credible evidence concerning
9 the parties’ intentions to determine ‘ambiguity,’ i.e., whether the language is
10 ‘reasonably susceptible’ to the interpretation urged by a party. If in light of the
11 extrinsic evidence the court decides the language is ‘reasonably susceptible’ to the
12 interpretation urged, the extrinsic evidence is then admitted to aid in the second
13 step-interpreting the contract.” *Id.* at 1710, *citing inter alia, Garcia v. Truck Ins.*
14 *Exchange*, 36 Cal.3d 426, 435 (1984); *Winet v. Price*, 4 Cal.App.4th 1159, 1165
15 (1992); [Cal.] Code Civi. Proc., § 1856(g).

16 Cooper argues that the Settlement Agreement should be interpreted to
17 include the sale of the derivative claim against Ngue in the sale by the Trustee of
18 “Debtors’ right, title and interest in and to the eClaris Assets and the eClaris
19 Software Assets (collectively, the ‘Property’), including, without limitation”
20 Reply Memorandum of Carl W. Cooper of Points and Authorities in Support of
21 Motion to Clarify the Court’s Prior Order on Sale of Estate Assets, filed on
22 September 6f, 2016, ECF 72 at 2. In opposition, Ngue and Debtor argue that the
23 Settlement Agreement should be interpreted not to include the derivative claim
24 against Ngue in the sale by the Trustee because the derivative claim against Ngue
25 was not expressly listed in the definitions of the eClaris Assets and eClaris
26 Software Assets in the Agreement. Opposition of Debtor eClaris, Inc., and Jacques
27 Ngue to Carl W. Cooper’s Motion to Clarify the Court’s Prior Order on Sale of
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1 Estate Assets; Declaration of Jacques Ngue in Support thereof, filed on August 30,
2 2016, ECF 71 at 7.

3 The court's order approving the Settlement Agreement and sale of assets by
4 the Trustee to Cooper, ECF 38, filed and entered on April 17, 2015, authorized the
5 Trustee "to sell, on the terms stated in the [Settlement] Agreement attached to the
6 Trustee's Declaration appended to the Motion, the estate's right, title and interest in
7 the property identified in the Agreement (the 'Property'), to Carl W. Cooper." ECF
8 38 at 2.

9 The operative provisions of the Settlement Agreement for the transaction
10 between the Trustee and Cooper were in the Stipulation Section of the Settlement
11 Agreement, including the sale of assets in Paragraph 9 which stated as follows: "9.
12 Sale of Assets. The Trustee will file with the Court a motion to sell, pursuant to
13 Bankruptcy Code § 363 of all of the Debtors' right, title and interest in and to the
14 eClarix Assets and the eClarix Software Assets (collectively, the 'Property'),
15 including without limitation: . . . [various categories of intellectual property rights].";
16 and (2) the settlement and release of claims by the Trustee and Cooper in
17 Paragraph 13 which stated as follows:

18
19 13. Releases. a. Upon Bankruptcy Court approval of this Agreement, in
20 consideration for the provisions of this Agreement, the Trustee, for himself,
21 the Debtors, their respective estates, and their respective successors,
22 predecessors, [etc.] (the 'Trustee Releasing Parties') does hereby fully and
23 finally compromise and settle, and forever release, remise, relieve, waive,
24 relinquish and discharge any and all claims, complaints, rights, manner of
25 action or actions, cause or causes of action, suits, debts, [etc.], which the
26 Trustee Releasing Parties, or any of them, ever had, now have, or may
27 claim to have against Cooper and Omega, or any of them, [etc.] (the
28 'Trustee [Cooper/Omega] Released Parties'), or any of them, now accrued
or hereafter accruing, except for any claims arising out of the enforcement
of rights, obligations, and duties arising out of this Agreement.

b. Upon Bankruptcy Court approval of this Agreement, in consideration for
the provisions of this Agreement, the Cooper and Omega, for himself and
itself, and each of their respective successors, predecessors, [etc.] (the
'Cooper/Omega Releasing Parties') does hereby fully and finally
compromise and settle, and forever release, remise, relieve, waive,
relinquish and discharge any and all claims, complaints, rights, manner of

1 action or actions, cause or causes of action, suits, debts, [etc.], which the
2 Cooper/Omega Releasing Parties, or any of them, ever had, now have, or
3 may claim to have against the Trustee and the Debtors (the 'Trustee
Released Parties'), or any of them, now accrued or hereafter accruing,
except for any claims arising out of the enforcement of rights, obligations,
and duties arising out of this Agreement.

4 c. The Parties hereby acknowledge that it is their intention that the releases
5 set forth above shall be effective as a full and final release of and a bar with
6 prejudice to each and every claim as forth above that the Trustee Releasing
7 Parties and the Cooper/Omega Releasing Parties (collectively, the
8 'Releasing Parties') have or had against the Trustee Released Parties and
9 the Cooper/Omega Released Parties (collectively, the 'Released Parties').
10 In connection with such waiver and relinquishment, the Parties acknowledge
11 that their attorneys may hereafter discover facts different from or in addition
12 to the facts that they now know or believe to be true with respect to the
subject matter of this Agreement, but that it is their intention to hereby fully,
finally, absolutely, and forever release any and all claims released above,
which now do exist, may exist or heretofore have existed between them,
and that in furtherance of such intentions the release as given herein by the
Parties, shall be and remain in effect as a full and complete release of the
claims released above, notwithstanding the discovery of any such different
or additional facts.

13 Settlement Agreement attached as Exhibit 4 to Cooper's Supplemental
14 Submission, ECF 76, filed on September 27, 2016, Exhibit 4, ¶ 9 at 2-4 and ¶ 13 at
15 6-8.

16 The terms "eClaris Assets" and "eClaris Software Assets" are specifically
17 described in the Recitals Section of the Settlement Agreement. Settlement
18 Agreement attached as Exhibit 4 to Cooper's Supplemental Submission, ECF 76,
19 filed on September 27, 2016, Exhibit 4, ¶ 3 at 1. Paragraph 3 of the Settlement
20 Agreement in the Recitals Section stated:

21 Among the assets listed in the eClaris bankruptcy schedules are the
22 following (the 'eClaris Assets'):

- 23 a. Shares in eClaris Software;
- 24 b. Claims against Omega and Cooper for Declaratory Relief, Intentional
25 Interference with Prospective Economic Advantage and Breach of
26 Fiduciary Duty, pursuant to that certain lawsuit entitled, eClaris Inc. v.
Omega Equipment, et. al., Los Angeles Superior Court Case No.
GC050458 (the 'Omega Lawsuit'); and
- 27 c. Trademarks for 'eClaris' and 'Classify, Process & Review' (collectively,
28 'eClaris IP').

1 Settlement Agreement attached as Exhibit 4 to Cooper's Supplemental
2 Submission, ECF 76, filed on September 27, 2016, Exhibit 4, ¶ 3 at 1. Thus, the
3 "eClaris Assets" were defined in the Settlement Agreement as these three
4 separately listed categories of property, a., b., and c. *Id.* The eClaris Assets were
5 similarly described in the Trustee's motion to approve the Settlement Agreement.
6 The Trustee's Notice of Motion and Motion to Confirm Sale of Estate's Right, Title
7 and Interest in Property of the Estate and to Approve Settlement of Claims;
8 Memorandum of Points and Authorities; Declaration of Richard K. Diamond in
9 Support thereof, ECF 30, filed on February 11, 2015, ¶ 3 at 6.

10 Paragraph 4 of the Settlement Agreement in the Recitals Section stated:
11 "Among the assets listed in the eClaris Software bankruptcy schedules are the
12 following (the 'eClaris Software Assets'): a. Certain intellectual property identified
13 as 'Phigrid Software'; and b. Certain intellectual property identified as 'System and
14 Method for Controlling Access to Electronic Data (Patent Pending).'" Settlement
15 Agreement attached as Exhibit 4 to Cooper's Supplemental Submission, ECF 76,
16 filed on September 27, 2016, Exhibit 4, ¶ 4 at 1-2. Thus, the "eClaris Software
17 assets" were defined in the Settlement Agreement as these two separately listed
18 categories of property, a., b. and c. *Id.* The eClaris Software Assets were similarly
19 described in the Trustee's motion to approve the Settlement Agreement. The
20 Trustee's Notice of Motion and Motion to Confirm Sale of Estate's Right, Title and
21 Interest in Property of the Estate and to Approve Settlement of Claims;
22 Memorandum of Points and Authorities; Declaration of Richard K. Diamond in
23 Support thereof, ECF 30, filed on February 11, 2015, ¶ 4 at 6.

24 Paragraph 5 of the Settlement Agreement in the Recitals Section stated:
25 "Cooper and Omega filed a cross-complaint in the Omega Lawsuit, and between
26 them, they have asserted claims against the Debtors [i.e., Debtor eClaris, Inc., and
27 Related Debtor, eClaris Software, Inc.] for Breach of Contract, Conversion,
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1 Inspection of Books and Records, Breach of Fiduciary Duty and Involuntary
2 Dissolution of Corporation (the 'Cross-Claims')." Settlement Agreement attached
3 as Exhibit 4 to Cooper's Supplemental Submission, ECF 76, filed on September 27,
4 2016, Exhibit 4, ¶ 5 at 2. The Cross-Claims were similarly described in the
5 Trustee's motion to approve the Settlement Agreement. The Trustee's Notice of
6 Motion and Motion to Confirm Sale of Estate's Right, Title and Interest in Property
7 of the Estate and to Approve Settlement of Claims; Memorandum of Points and
8 Authorities; Declaration of Richard K. Diamond in Support thereof, ECF 30, filed on
9 February 11, 2015, ¶ 5 at 6. However, as indicated by the actual cross-complaint
10 of Cooper and Omega, not all of the causes of action between them and Debtor
11 eClariss, Inc., were cross-claims against Debtor eClariss, Inc., but also, cross-claims
12 against Ngue, which were derivative claims through Debtor eClariss, Inc. Third
13 Amended Verified Cross-Complaint of Omega Equipment Leasing Co., and Carl W.
14 Cooper, versus eClariss, Inc., Jacques Nack Ngue and Roes 1 through 20, Case
15 No. GC 054458 (Superior Court of California, County of Los Angeles), filed on
16 December 24, 2013, attached as Exhibit 2 to Cooper's Supplemental Submission,
17 ECF 76, filed on September 27, 2016. This Cross-Complaint had seven causes of
18 action: the first through fourth causes of actions against Debtor eClariss, Inc., and
19 Roes 1 through 20, were for breach of lease (two causes of action), breach of
20 implied-in-law contract and conversion, the fifth cause of action against Debtor
21 eClariss, Inc., Ngue and Roes 1 through 20 was to enforce right of inspection of
22 books and records of eClariss, Inc., pursuant to California Corporations Code §
23 1601, 1603 and 1604, the sixth cause of action against Ngue and Roes 1 through
24 20, but against eClariss, Inc., nominally, was for breach of fiduciary duty by Ngue as
25 to his obligations of trust, loyalty, good faith and due care to eClariss, Inc., and its
26 shareholders, and the seventh cause of action against Ngue and Roes 1 through
27 20, but against eClariss, Inc., nominally, was for involuntary dissolution of eClariss,
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1 Inc., based on alleged management by Ngue and his alleged breaches of his
2 obligations of trust, loyalty, good faith and due care to eClaris, Inc., and its
3 shareholders. *Id.*

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5 Paragraph 11 of the Settlement Agreement in the Stipulation Section stated:

6 Cooper agrees, as part of the Consideration for the releases to be granted
7 hereunder the settlement of the Cross-Claims, to make a lead bid of \$10,000
8 for the Property (the 'Lead Bid') and the Trustee has accepted the Lead Bid
9 by Cooper as an opening bid for the Property. Cooper understands that the
10 Trustee will seek other financially qualified bidders who may potentially be
11 interested in acquiring some or all of the Property. The Trustee agrees that
12 the bid procedures to be utilized for any sale of the Property shall call for a
13 minimum bid increment of \$1,000 and that any bid accepted over the Lead
14 Bid would have to be a minimum of \$11,000. Cooper shall deliver to the
15 Trustee a check for the full amount of the Lead Bid concurrently with the
16 execution of this agreement (the 'Deposit'). The Trustee shall hold the
17 Deposit until either the sale of the Property to Cooper has been approved by
18 the Court or the Trustee accepts the bid of another bidder as the winning bid
19 for the Property. Should Cooper be the winning bidder, the amount of his
20 winning bid shall be allocated 50% for the eClaris Assets and 50% for the
21 eClaris Software Assets. Should Cooper not be the winning bidder, the
22 \$10,000 Deposit shall be returned to him within five (5) business days of the
23 Trustee's acceptance of the bid of another bidder as the winning bid.

24 Settlement Agreement attached as Exhibit 4 to Cooper's Supplemental
25 Submission, ECF 76, filed on September 27, 2016, Exhibit 4, ¶ 11 at 5.

26 The Settlement Agreement between the Trustee and Cooper was not self-
27 executing, but required approval of this court pursuant to Federal Rule of
28 Bankruptcy Procedure 9019. To obtain the necessary court approval of the
Settlement Agreement, the Trustee filed his motion to confirm the sale of the
Property to Cooper and to approve the settlement of claims with Cooper. The
Trustee's Notice of Motion and Motion to Confirm Sale of Estate's Right, Title and
Interest in Property of the Estate and to Approve Settlement of Claims;
Memorandum of Points and Authorities; Declaration of Richard K. Diamond in
Support thereof, ECF 30, filed on February 11, 2015.

1 In the Trustee's declaration in support of his motion to confirm sale of
2 property to Cooper and approve settlement of claims, the Trustee described the
3 transaction with Cooper for which court approval was sought as follows:

4
5 8. Cooper has agreed to purchase, and I have agreed to sell to
6 Cooper the estates' right, title and interest in the eClarix Assets and the
7 eClarix Software Assets (collectively, the "Property"), "as is and "where is,"
8 subject to all liens, claims and encumbrances for \$10,000 cash. As further
9 consideration for the sale, Cooper, Omega and I shall provide each other with
mutual general releases with respect to the claims and the Cross-Claims in
the Omega Lawsuit. The terms of the sale are summarized in the Notice
portion of this pleading and are set forth in full in the [Settlement] Agreement
attached to the Trustee's Declaration

10 Declaration of Richard K. Diamond, attached to the Trustee's Notice of Motion and
11 Motion to Confirm Sale of Estate's Right, Title and Interest in Property of the Estate
12 and to Approve Settlement of Claims; Memorandum of Points and Authorities;
13 Declaration of Richard K. Diamond in Support thereof, ECF 30, filed on February
14 11, 2015, ¶ 8 at 15. The Trustee in his declaration further explained his intent in
15 entering into this transaction:

16
17 10. I am informed that Cooper, the buyer, was a creditor who provided
18 financing to the Debtor to create and market the technology. Accordingly, he
19 has a proprietary interest in the property that I believe propelled him to make
20 the subject offer. In addition, Cooper has an interest in my providing a
21 release of the pending claims, which will save Cooper in legal fees in
disposing of that matter. As discussed in greater detail below, I have
analyzed the claims in the Omega Lawsuit and believe that they are of
inconsequential value and benefit to the estate, such that but for this sale, I
would either abandon the claims or leave them un-administered.

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23 13. I understand, based upon information and belief, that the dispute
24 between the Debtor and Cooper/Omega is as follows: Cooper was the father-
25 in-law of the Debtor's principal. Cooper, either individually or through his
26 company, Omega, purchased equipment and leased it to the Debtor. The
27 Debtor alleges that in one such transaction, Cooper/Omega in fact provided
28 unsecured financing rather than a lease of the equipment. The Debtor
attempted to sell the company but the sale could not be completed in light of
a UCC-1 Financing Statement recorded by Cooper/Omega. The Debtor
contends that the UCC-1 filing was fraudulent and sued Cooper/Omega for
Intentional Interference with Prospective Economic Advantage and Breach of
Fiduciary Duty. Cooper/Omega cross-claimed for Breach of Contract,

1 Conversion, Inspection of Books and Records, Breach of Fiduciary Duty and
2 Involuntary Dissolution of Corporation.

3 14. I have investigated the subject lawsuit and have taken an
4 extensive 341(a) examination of the Debtor. Based thereon, and in light of
5 the Cross-Claims, I believe that the claims against Cooper/Omega are of
6 inconsequential value or benefit to the estate, absent the sale/settlement set
7 forth herein. I would have no means to pursue said claims and I do not
8 believe that I would be able to locate counsel to take the case on a
9 contingency. Accordingly, the proposed settlement, which will provide
10 \$10,000 to the estates, is fair and reasonable and in the best interests of the
11 estates.

12 *Id.*, ¶¶ 10, 13 and 14 at 15-16.

13 The transactional documents for the sale of the assets of Debtor eClariss, Inc.
14 and Related Debtor eClariss Software, Inc., to Cooper and the settlement and
15 release of all claims between the Trustee and Cooper and his company, Omega,
16 were meant to resolve all disputes between these parties, the transactional
17 documents, through the sale of the assets of Debtor and Related Debtor, including
18 the litigation assets, i.e., the claims in the Omega Lawsuit, and the settlement and
19 mutual release of all claims between the parties. The Trustee stated in his
20 declaration in support of the sale and compromise with Cooper that he had
21 investigated the claims in the Omega Lawsuit and determined that they had
22 inconsequential value or benefit to the estate, absent the sale to and settlement
23 with Cooper, and that he had no means to pursue the claims, and that but for the
24 sale to Cooper, he would abandon the claims or leave them un-administered.
25 Thus, the Trustee contemplated the sale/settlement transaction with Cooper would
26 transfer any and all rights in the Omega Litigation to Cooper, though the
27 transactional documents, notably, the Settlement Agreement, did not expressly
28 refer to the derivative claim that Cooper on behalf of Debtor eClariss, Inc., had
against Ngue for breach of fiduciary duty with Debtor being a nominal defendant.
Based on this provisionally received credible extrinsic evidence of the parties'
intentions to determine ambiguity, the language of the Settlement Agreement to sell

1 the eClariss Assets to Cooper is reasonably susceptible to the interpretation urged
2 by Cooper, and thus, may be admitted in aid in the second step of interpreting the
3 Settlement Agreement as a contract. *WYDA Associates v. Merner*, 42 Cal.App.4th
4 at 1709-1710 (citations omitted).

5 The lack of a specific reference to the derivative claim in the Settlement
6 Agreement does not mean that the Trustee intended to exclude that claim from the
7 sale/settlement transaction because there is no such express exclusion of that
8 claim from the transaction in the documents, and the documents indicate that there
9 would have been no reason to exclude such claim from the transaction because the
10 Trustee represented to the court that the Debtor's rights in the Omega Lawsuit
11 were of inconsequential value or benefit to the estate, that the only value they had
12 were to Cooper in purchasing such rights and that the Trustee did not intend to
13 make use of such rights since he intended to abandon or leave them un-
14 administered but for the sale to Cooper. Thus, the court determines that the lack
15 of specific reference to the derivative claim in the Settlement Agreement makes the
16 Agreement does not render the contract unambiguous as to the treatment of the
17 derivative claim, and the court may admit parol or extrinsic evidence to interpret the
18 contract between the Trustee and Cooper in the Settlement Agreement as to give
19 effect to the mutual intentions of these parties as it existed at the time of
20 contracting.

21 As parol or extrinsic evidence of contractual intent of the Trustee and
22 Cooper for the Settlement Agreement, Cooper offered the Trustee's declaration in
23 support of his motion to reopen this bankruptcy case. Declaration of Richard K.
24 Diamond, attached to Motion of Carl W. Cooper to Reopen Chapter 7 Case (Ex
25 Parte), etc., ECF 63, filed on July 1, 2016. In the Trustee's declaration, he stated:

26
27 My intent under the Settlement Agreement was to sell to Mr. Cooper all of the
28 assets of the eCLARIS estate and the eCLARIS SOFTWARE, Inc. estate,
including, but not limited to, the Breach of Fiduciary Duty claim asserted as a

1 cross-claim by Mr. Cooper against Mr. Ngue in the Omega Lawsuit. It was
2 not my intent under the Settlement Agreement to release the Breach of
3 Fiduciary Duty claim asserted against Mr. Ngue and eCLARIS as a nominal
4 defendant.

5 *Id.*, ¶ 7 at 2. The court considers that this parol or extrinsic evidence of the parties'
6 contractual intent to be probative of their intent because it is completely consistent
7 with the Trustee's contemporaneous expressions of his contractual intent in his
8 motion to approve the sale/settlement with Cooper as discussed above. The
9 Trustee was selling the assets of Debtor and Related Debtor, including the estates'
10 litigation rights in the Omega Lawsuit, because Cooper wanted to buy them and the
11 Trustee determined after an extensive investigation that such rights were assets
12 having inconsequential value or benefit to the estates other than through Cooper's
13 offer to buy them for the agreed price.

14 In this regard, the court has considered the arguments of Ngue and Debtor
15 in opposition to the motion that the plain language of the Settlement Agreement
16 which did not expressly refer to the derivative claim governs and that the parties'
17 contractual intent was to exclude that asset. The court does not accept the
18 opposition because there is no evidence in the record to indicate that the Trustee
19 intended to exclude the derivative claim from the transaction since the transactional
20 documents are silent on any such exclusion and to the contrary, the exclusion of
21 the asset would have been contrary to the Trustee's representations to the court in
22 his motion for approval of the sale/settlement transaction with Cooper that the
23 estates' litigation rights or claims in the Omega Lawsuit were of inconsequential
24 value or benefit to the estate and that he would not realize any value from the
25 claims, but for the sale to Cooper. The evidence discussed herein is
26 uncontroverted and indicates that the Trustee was not excluding any litigation claim
27 in the Omega Lawsuit from Cooper as argued by the opposition. Thus, the court
28 concludes that the derivative claim was sold to Cooper in the sale/settlement

1 transaction previously approved by the court in this case, and the motion should be
2 granted to so clarify the prior order approving the transaction by further order to be
3 issued by the court. See, e.g., *In re Chinichian*, 784 F.2d 1440, 1443 (9th Cir.
4 1986)(as a court of equity, the bankruptcy court can modify a prior order as long as
5 no intervening right has become vested in reliance thereon)(citation omitted). The
6 court finds on this record that there was no intervening right vested in reliance
7 thereon as the opposition papers do not describe circumstances to establish this.
8 See, Opposition of Debtor eClaris, Inc., and Jacques Ngue to Carl W. Cooper's
9 Motion to Clarify the Court's Prior Order on Sale of Estate Assets; Declaration of
10 Jacques Ngue in Support thereof, filed on August 30, 2016, ECF 71 at 9-13 (Ngue
11 Declaration saying in hindsight that he would have offered money for the derivative
12 claim during the overbidding process for the Settlement Agreement approval if the
13 claim had been included in the Agreement, but the court gives no credence to this
14 testimony, given the uncontroverted evidence of the intent of the contracting parties
15 that they meant to completely resolve their disputes and claims through approval of
16 the Settlement Agreement).

17 For the foregoing reasons, IT IS HEREBY ORDERED as follows:

- 18 1. The court grants Cooper's Motion to Clarify the Court's Prior Order on Sale
19 of Estate Assets.
- 20 2. Cooper is ordered to submit a proposed final order consistent with this
21 memorandum decision within 7 days of entry of this memorandum decision.

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1 3. The further hearing on the Motion scheduled on November 29, 2016 at 3:00
2 p.m. is vacated. No appearances are required on November 29, 2016.

3 **IT IS SO ORDERED.**

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23 Date: November 28, 2016



24 Robert Kwan
25 United States Bankruptcy Judge
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