

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 01-10162-JMD
Chapter 11RDX Acquisition Corp. d/b/a RMTI,
Debtor

Steven M. Notinger, Esq.
DONCHESS & NOTINGER P.C.
Attorney for Debtor

Geraldine B. Karonis, Esq.
ASSISTANT UNITED STATES TRUSTEE

Janet Bashford, Pro Se

MEMORANDUM OPINION

I. INTRODUCTION

On December 19, 2001 the Court held a hearing on dueling motions filed by the Debtor (Doc. No. 76) and the Bashford Group (Doc. No. 72) (respectively the “Debtor’s Motion to Compel” and the “Bashford Motion to Compel”) each asking this Court to compel the other party to comply with the terms of the Order Confirming Debtor, RDX Acquisition Corp. d/b/a RMTI, Plan of Reorganization entered on September 25, 2001 (Doc. No. 61) (the “Confirmation Order”). The dispute framed by the dueling motions is related to, but distinct from, the Motion to Alter and Amend Order Confirming Debtor, RDX Acquisition Corp. d/b/a RMTI’s Plan of Reorganization and/or to Obtain Relief From the Order Due to Mistake, Inadvertence or Excusable Neglect filed on October 4, 2001 (Doc. No. 62) (the “Motion to Amend”).¹ The dueling motions both deal with the dispute between the Debtor and the Bashford Group pertaining to those

¹ The Motion to Amend is scheduled for a two day evidentiary hearing beginning on April 29, 2002.

provisions of the Confirmation Order and the Debtor's Chapter 11 plan of reorganization which incorporated and implemented the compromise between those parties approved by this Court on March 16, 2001 (Doc. No. 23) (the "Compromise Order").

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Dispute

The Debtor operated a computer service and maintenance business with offices in Nashua, New Hampshire and Vancouver, British Columbia, Canada. Substantially all of the Debtor's revenue was generated through the licensing, support, and maintenance of software the Debtor developed. The Debtor was unable to sustain its business or obtain new capital and filed a voluntary Chapter 11 petition on January 19, 2001. The Debtor determined that the customer relations necessary to its software licensing and support business would not be sustainable under Chapter 11. Accordingly, on February 12, 2001 the Debtor filed an application to enter into certain software license and support contracts and to sell certain property (Doc. No. 8) and a motion to establish bidding procedures (Doc. No. 9). If granted, the application would authorize the transfer of substantially all of the assets and customers of the Debtor to i Messaging Systems, Inc. ("i Messaging"), a new entity controlled by the Debtor's former president. The Debtor would be left with ownership of the software it developed and would utilize the stream of licensing payments from i Messaging to fund a plan of reorganization.

On February 15, 2001 the Court held a hearing on the motion to establish bidding procedures. At that hearing it became apparent that several unresolved disputes existed between the Debtor and its primary secured creditors, Brownstone Construction Corp., The Eric Rainer Bashford Charitable Remainder

Unitrust, the Eric Bashford IRA, Eric Bashford (individually), and Janet Bashford (individually) (collectively the “Bashford Group”). The disputes involved the validity, priority, and amount of the Bashford Group’s alleged secured claim based upon various theories alleged by the Debtor, including fraudulent transfer, equitable subordination, re-characterization and breach of fiduciary duty. On February 16, 2001 the Court entered an Order (Doc. No 12) establishing a bidding procedure, approving a breakup fee, approving the form of notice, and scheduling a hearing on the Debtor’s application to sell for March 20, 2001. The Court also required the Debtor to file a motion setting forth its dispute with the Bashford Group on or before February 26, 2001. The Debtor’s motion was to include procedures and deadlines for the Debtor and the Bashford Group to follow prior to a hearing scheduled for March 13, 2001. At the March 13, 2001 hearing the Court would determine if a bona fide dispute existed between the Debtor and the Bashford Group and establish what credit bid rights, if any, the Bashford Group could exercise at the sale hearing on account of its secured claim. The deadline for the Debtor to file its motion regarding its dispute with the Bashford Group was extend twice by the Court (Doc. Nos. 16 and 19). On March 2, 2001 the Debtor filed a motion to approve compromise and settlement of dispute with the Bashford Group (Doc. No. 20) (the “Compromise Motion”).

B. Settlement

After notice and a hearing on March 16, 2001 the Court entered the Compromise Order (Doc. No. 23) approving the Compromise Motion which incorporated a Settlement Term Sheet executed by counsel for the Debtor and the Bashford Group on March 1, 2001 (hereinafter the Compromise Order, the Compromise Motion, and the Settlement Term Sheet are collectively the “Settlement”). Under the terms of the Settlement the Bashford Group was to have an allowed secured claim in the amount of \$400,000.00 (the “Bashford Secured Claim”) and an allowed unsecured claim in the amount of \$250,000.00 (the “Bashford Unsecured Claim”).

The Bashford Secured Claim would be paid through the Bashford Group’s right to credit bid for ownership of the Debtor’s software with the amount of such credit bid to be applied against its secured

claim. The minimum credit bid would be in the amount of \$250,000.00. The transfer was to be “as is, where is,” except for the Debtor’s representation that it had good title, subject to the proposed licensing of the software to i Messaging. The Bashford Group, or its nominee, was to have no liability to any licensee or other claimant of the Debtor and the royalty payments from i Messaging would be paid to the Debtor under the terms of the proposed licensing agreement for distribution by the Debtor in accordance with a plan of reorganization. The remaining balance of the Bashford Group’s Secured Claim would be paid quarterly without interest by the Debtor from royalty payments to be paid by i Messaging. The Bashford Unsecured Claim would be subordinated to all other allowed administrative, priority and unsecured claims and would be paid at the same level as preferred shareholder interests. At that level, payments would be allocated 80% to the preferred shareholders and 20% to the Bashford Group.

In addition, the Settlement provided that: (i) i Messaging would enter into a service agreement with the Bashford Group or its nominee (the “Service Agreement”); (ii) the i Messaging license agreement would be amended by the approval of the Settlement to provide that the Bashford Group and the Debtor would receive title to improvements to the licensed software developed by i Messaging; (iii) neither the Bashford Group nor i Messaging would be the successor in interest to the Debtor or would assume any obligations as licensor ; (iv) the Bashford Group, and each member of the Bashford Group, would not object to and would consent to the transactions contemplated between the Debtor and i Messaging that were scheduled for hearing on March 20, 2001; (v) the parties to the Settlement, the Bashford Group and the Debtor, would execute mutual releases; (vi) the parties to the Settlement were to draft and execute documents in accordance with the settlement term sheet attached to the Compromise Order approving the Settlement; and (vii) the Court would “retain jurisdiction to resolve any disputes regarding the terms of any document drafted as a result of” the Settlement (the “Retained Jurisdiction”).

On March 20, 2001, the Court authorized the Debtor to enter into the software license and support agreement, and other transactions contemplated between the Debtor and i Messaging, as described in the

motion for authority to enter into such transactions filed February 20, 2001 (Doc. No. 13) as amended by the Settlement (the “i Messaging License”).

C. Confirmation

The Debtor’s disclosure statement was approved on August 13, 2001. The Debtor’s plan of reorganization provides for the Debtor to continue to exist post-confirmation, subject to certain modifications, and, through the Disbursing Agent, to collect the i Messaging royalty payments during the five year term of the i Messaging License and make the plan payments. The payment terms under the plan are consistent with the terms of the Settlement.

By the deadline for objecting to confirmation of the plan of reorganization, September 17, 2001, the parties had not yet resolved the disagreements between them over the terms of the documents necessary to effectuate the Settlement. Accordingly, on September 17, 2001 the Bashford Group filed a Reservation of Rights and Response of Bashford Group with Respect to the Debtor’s Amended Plan of Reorganization (Doc. No. 56) (the “Reservation”). In its Reservation, the Bashford Group confirmed its understanding that this Court retained jurisdiction over all disputes regarding the terms of the documents implementing the Settlement. The Bashford Group had no objection to the confirmation of the Debtor’s plan of reorganization which incorporated the terms of the Settlement, but expressed concern about effectuating the settlement. The confirmation hearing was held on September 24, 2001. At that hearing counsel for the Bashford Group indicated that the Reservation was not an objection to confirmation, but rather was filed because of the failure to date of the parties to effectuate the terms of the Settlement upon which the plan was based. However, counsel for the Debtor and the Bashford Group were confident that only a few matters needed to be resolved and that the plan should be confirmed. Accordingly, the Court confirmed the plan and directed counsel for the Debtor to submit a proposed confirmation order. The proposed order submitted by Debtor’s counsel was signed by the Court and entered as the Confirmation Order on September 25, 2001.

D. Dispute Redux

Shortly after the entry of the Confirmation Order, the Debtor filed the Motion to Amend seeking to alter or amend the Confirmation Order to remove the term “Derivative Software Products” from the provisions of paragraph 18.A of the Confirmation Order because the term was inserted either in error or by mistake. The Bashford Group filed an objection to the Motion to Amend and a two day evidentiary hearing is scheduled to begin on April 29, 2002. Contemporaneously with the filing of its objection to the Motion to Amend the Bashford Group filed its initial motion to compel compliance with the Confirmation Order (Doc. No. 67) which was superceded by the Bashford Motion to Compel on December 3, 2001. In order to maintain symmetry, the Debtor responded with an objection to the Bashford Motion to Compel (Doc. No. 75) and the Debtor’s Motion to Compel one week later.

After a hearing on December 19, 2001, the Court issued a procedural order on December 20, 2001 (Doc. No. 82) (the “Procedural Order”). The Procedural Order required the parties to submit to the Court on or before January 15, 2002 (i) a memorandum of law containing the points and authorities which supported their respective motions to compel, (ii) a list of the documents and other deliverables each party believed was necessary to consummate the plan of reorganization together with the identity of the party which must provide such document or deliverable, and (iii) copies of the documents which it believed it must proffer to consummate the plan of reorganization. The parties also had the option to submit any objection or response to the other party’s memorandum on or before January 30, 2002.

Immediately after the entry of the Procedural Order counsel for the Bashford Group moved to withdraw citing the alleged filing of a motion by Eric Bashford, without the knowledge of counsel, of a motion to terminate their representation, a breakdown of communication, and substantial unpaid fees and expenses (Doc. No. 84). After an expedited hearing on January 3, 2002 the motion to withdraw was granted (Doc. No. 89) and the withdrawing counsel was directed by the Court to advise the Bashford Group members of the need to obtain new counsel and to abide by the deadlines contained in the Procedural Order. In an Order dated January 4, 2002 the Court also advised Eric Bashford of the limitations on *pro se* representation (Doc. No. 90). On January 15, 2002 Janet Bashford, a member of the Bashford Group, filed

her appearance *pro se* (Doc. No. 92) together with the memorandum of law required by the Procedural Order (Doc. No. 93) (the “Janet Bashford Memorandum”). The Debtor timely filed its memorandum (Doc. No. 94) (the “Debtor’s Memorandum”). On January 30, 2002 the Debtor timely filed its response to the Janet Bashford Memorandum (Doc. No. 95) (the “Debtor’s Response”). On January 31, 2002 Janet Bashford timely filed her response to the Debtor’s Memorandum (Doc. No. 96) (the “Janet Bashford Response”). On February 1, 2002 the Debtor filed a supplemental response to the Janet Bashford Response (Doc. No. 97) (the “Debtor’s Supplemental Response”).

III. DISCUSSION

A. The Bashford Group (except for Janet Bashford)

Since the withdrawal of counsel for the Bashford Group on January 3, 2002 only Janet Bashford has filed an appearance and complied with the terms of the Procedural Order. Brownstone Construction Corp., The Eric Rainer Bashford Charitable Remainder Unitrust, the Eric Bashford IRA, and Eric Bashford (individually) have failed to appear or respond to the Procedural Order. In the Bashford Memorandum Janet Bashford repeatedly uses the word “we” in her discussion of her position of the form and content of documents that are either acceptable or unacceptable. However, the use of the plural pronoun “we” does not alter the fact that her appearance was *pro se*, on behalf of herself only, and not on behalf of the other members of the Bashford Group.²

The members of the Bashford Group, other than Janet Bashford, have failed to appear and prosecute the Bashford Motion to Compel or the objection to the Debtor’s Motion to Compel filed by their prior counsel. Accordingly, the Bashford Motion to Compel shall be denied and the Debtor’s Motion to

² Indeed, the local rules of the United States District Court for the District of New Hampshire prohibit individuals who are not admitted to practice by the court from appearing on behalf of any person or entity other than themselves. See Local Rule of the United States District Court for the District of New Hampshire 83.2(d).

Compel shall be granted with respect to each member of the Bashford Group with the exception of Janet Bashford.

B. The Documents

Janet Bashford, individually, (hereinafter “Bashford”) and the Debtor agree that four documents need to be executed by themselves, or their nominee, and delivered to consummate the plan of reorganization. Although the parties have styled their respective motions to compel as pertaining to the confirmed plan of reorganization, what they are actually seeking is to compel the other party’s compliance with the terms of the Settlement as approved by this Court on March 16, 2001. The agreements which they agree require execution and delivery are required under the terms of the Settlement. While it is true that the plan of reorganization requires the execution of all documents associated with the plan of reorganization as a condition subsequent to confirmation, the requirements for execution of all of the disputed documents arise from the terms of the Settlement. The four documents which need to be executed and delivered shall be separately discussed below.

1. Release of Debtor by Bashford

Janet Bashford states that she is prepared to deliver to the Debtor a release in the form proposed by her former counsel on March 23, 2001. See Janet Bashford Memorandum at 2 and Exhibit A. The Debtor states that the dispute over the form of the releases pertains to a demand by the Bashford Group concerning the scope of the release to be executed by the Debtor. See Debtor’s Memorandum at page 2. Although Bashford and the Debtor do not appear to have a dispute over the terms of the release to be delivered to the Debtor, the drafts attached to their respective memoranda do differ from each other in three respects.

The form proposed by the Debtor inserts the words “a corporation organized under the laws of _____” after the words Brownstone Construction Corp. in the first, and only, sentence in the first paragraph. Since this addition does not pertain to Bashford, but more precisely identifies Brownstone Construction Corp., a member of the Bashford Group who has been defaulted, the sentence shall be included in the form of release to be executed by the corporation.

The form proposed by the Debtor covers the period from “the beginning of the world through the date of the Settlement, March 1, 2001.” Bashford’s form covers the period from “the beginning of the world through the date of this release.” If the releases had been executed and delivered shortly after the approval of the Settlement, this difference would be insignificant. The delay of a year in the execution and delivery of the releases could make a difference, but neither party has identified any such issues. Accordingly, the language proposed by Bashford shall be included in the final form of the release to the Debtor.

The language in the second paragraph of the releases differ in the form of their description of the obligations excluded from the release. Both forms exclude the obligations under the Compromise Order approving the Settlement. The Debtor’s form modifies that description by adding the words “as such settlement was incorporated into the Confirmed Plan.” The Bashford form modifies that description by adding the words

and the Settlement Term Sheet annexed thereto, and the Order Authorizing Debtor to (a) Enter Into Software License and Support Agreements Including Assumption and Assignment of Contracts; and (b) Sell Certain Personal Property of the Estate Free and Clear of Lien, Claims and Encumbrances Pursuant to 11 U.S.C. § 363(b) and (f), entered by the Bankruptcy Court on March 20, 2001, and any documents to be executed in connection therewith to effectuate the transactions and settlement provided for under the above-referenced Orders.

It is not clear that there is any substantive differences between the each party’s proposed language because the plan does not alter the obligations of the parties under the Settlement, it only specifies the manner and timing for the payment of the allowed claims described in the Settlement. Since the Bashford language was drafted before confirmation of the plan it does not refer to the plan. In addition, the Bashford language does not appear to expand the scope of the obligations excluded beyond the Settlement, as approved by the Court. Since the plan does define the timing of the Debtor’s obligations to make the payments contemplated by the Settlement, the Court will adopt the Debtor’s proposed language.

2. Release of Bashford by Debtor

Although the Debtor contends that the Bashford Group previously insisted that their release from the Debtor also include a release from the shareholders of the Debtor, Bashford is not pressing that demand and has agreed to the form of release proposed by the Debtor on April 12, 2001. See Janet Bashford Memorandum at 3 and Exhibit C. The form of this release shall conform to the language proposed by the Debtor on April 12, 2001 with the same language on the scope of the exclusions approved in section B.1 above.

3. Bill of Sale

Bashford stated that she would accept the form for the bill of sale proposed by the Debtor on April 12, 2001 with the addition of the name of her nominee as purchaser and the inclusion of copyrights in the description of items included in the sale. See Janet Bashford Memorandum at 2-3. However, the Debtor contends that since April of 2001 the Bashford Group has raised issues and interpretations of the Settlement which are outside of the compromise approved by the Court and should be resolved in order to avoid future litigation. See Debtor's Response at 1-2. The Debtor included a revised bill of sale with the Debtor's Memorandum which incorporates the changes the Debtor believes are appropriate. Bashford objects to all changes from the April 12, 2001 version of the bill of sale. See Janet Bashford Response at 2-4.

Bashford alleges that the April 12, 2001 bill of sale was authorized by the Debtor's board of directors and executed on behalf of the Debtor. Unfortunately, Bashford did not include in any of her papers a copy of the April 12, 2001 bill of sale which she now indicates is acceptable. The Janet Bashford Memorandum only included the text of language on the identity of the nominee and the inclusion of copyrights, neither of which is disputed by the parties. Even if the April 12, 2001 bill of sale was authorized by the Debtor's board of directors, it was apparently not accepted by the Bashford Group and was the subject of further negotiations between the parties. Accordingly, the Court can only review the form for the bill of sale submitted with the Debtor's Memorandum and Bashford's specific objections to its terms.

Bashford objects to the language contained in paragraphs 2(a) and 2(b) of the bill of sale proposed by the Debtor. Bashford contends that the language in these two paragraphs "was never agreed to" and was

“apparently taken verbatim” from a draft bill of sale prepared by counsel for i Messaging last November. Bashford also contends that these changes are “unnecessary” and not in accordance with this Court’s order approving the Settlement. She also objects to the deletion of the acknowledgment that the board of directors of the Debtor has authorized or approved the revised bill of sale. See Janet Bashford Response at 2-4.

The starting point for the Court’s review of Bashford’s objections to the January 15, 2002 form for the bill of sale is the Settlement. The Compromise Order approving the Settlement specifically incorporated by reference the Settlement Term Sheet executed by the Debtor and the Bashford Group, which had been attached to the Compromise Motion. See Doc. No. 23. Paragraph 1.E of the Settlement Term Sheet provides in part

Neither Bashford nor i Messaging, however, will be the successor in interest to RDX, nor will they assume any obligations RDX may have to anyone. To the extent RDX has any obligations as a licensor, those obligations will remain the sole obligations of RDX notwithstanding the sale of the Software to Bashford, who shall obtain title thereto pursuant to this agreement.

See Doc. No. 20 attachment (emphasis added). Paragraph 1.F of the Settlement Term Sheet provides that

[t]he Bashford Group, and all of them, either directly or indirectly, shall not object to, and in fact shall consent to, the transactions contemplated by the Debtor . . . relative to the sale and licensing of its assets and shall support the Debtor’s efforts at the sale hearing scheduled for March 20, 2001 to obtain approval for the i Messaging Agreements.

Id. (emphasis added). The so-called i Messaging Agreements had been filed with the Court prior to the execution of the Settlement Term Sheet. In fact, the Settlement Term Sheet was intended to resolve a dispute between the Debtor and the Bashford group over the amount, perfection, and priority of their secured claim and how that secured claim would impact approval of the sale and licensing transactions contemplated by the i Messaging Agreements. Both the Debtor and the Bashford Group were aware of the provisions of those agreements when they executed the Settlement Term Sheet, sought Court approval of the Settlement, and sought confirmation of the plan of reorganization.

Attached to the Debtor's motion seeking approval of the sale and licensing transaction with i Messaging is a copy of the proposed Software License and Support Agreement. See Doc. No. 13 at Exhibit 1. Article 5.7 of that agreement requires i Messaging to maintain complete and accurate books and records which contain all information necessary to compute payments due to the Debtor under the terms of the agreement. The Debtor has the right to audit those books and records at its expense unless the audit finds that the royalties paid to the Debtor are less than ninety percent of the royalties due to the Debtor for the period audited. Under the terms of the Settlement the Debtor was to transfer bare title to certain assets to the Bashford Group, or its nominee, but would retain the rights to all royalty income derived from the licensing of the software to i Messaging for use in funding a plan of reorganization to pay the claims of its creditors, including the Bashford Group.

Under paragraph 1.E of the Settlement Term Sheet the Bashford Group agreed that it would not become successor in interest of the Debtor and would not incur any of the Debtor's obligations. In fact, if the Bashford Group was an assignee of the license agreement with i Messaging it would not only have the audit rights of the Debtor, but would have an affirmative obligation to the other creditors of the Debtor to monitor and perhaps audit royalty payments. The Bashford Group specifically bargained not to have such rights or obligations. Under the terms of the confirmed plan of reorganization the Debtor continues in existence during the term of the plan. Accordingly, its directors and officers and the disbursing agent appointed by it from time to time have the obligation to monitor and audit, if appropriate, the royalty payment paid by i Messaging. Accordingly, Bashford's objections to paragraphs 2(a) and 2(b) are overruled and the Debtor's language shall be used.

Janet Bashford's remaining objections to the form of bill of sale submitted by the Debtor are all based upon her contention that it includes "a number of material changes that were never agreed to and which are unacceptable" and that such changes "are unnecessary, contrary to the agreement as already executed and approved by the Board of Directors of RDX and as formerly ordered by the Court." See Janet Bashford Response. Since the Janet Bashford Response supplied the Court with little or no detail as

to the specific provisions, other than paragraphs 2(a) and 2(b) which have been dealt with above, the Court has no choice but to review the only form of the bill of sale submitted and consider her general objections.

A general objection based upon the absence of an agreement between the parties raises no issue beyond what is obvious to the Court and is the reason the Court issued the Procedural Order. Likewise, any objections based upon general allegations that provisions in the Debtor's proposed bill of sale are contrary to the Settlement without reference to specific provisions of the Debtor's proposed bill of sale and the Settlement Term Sheet are not especially helpful to the Court or Janet Bashford. In the absence of specification from the objecting party, Janet Bashford, the Court shall review the Debtor's proposed bill of sale to determine if any provisions are contrary to the terms of the Settlement.

Based upon the Court's review of the Debtor's proposed bill of sale, the Court has determined:

1. The first paragraph of the Debtor's proposed bill of sale is substantively identical to the paragraph proposed by Janet Bashford (See Janet Bashford Memorandum at page 3) except for two provisions. The Debtor has deleted the words "and all corrections changes, modifications and enhancements thereto," which were proposed by Janet Bashford. This language appears to the Court to involve the issues which are the subject of the Debtor's Motion to Amend which is scheduled for hearings commencing April 29, 2002. However, Article 4.2(a) of the Court approved Software License and Support Agreement between the debtor and i Messaging dated January 17, 2001 (the "Software License Agreement") does provide that all "Revisions," as defined in Article 1.21 of the agreement, shall be owned by the Debtor. See Doc. No. 13 at Exhibit 1. Accordingly, the first paragraph of the Debtor's proposed bill of sale shall be amended by including such "Revisions" within the definition of "Software." The issues which arise under the Debtor's Motion to Amend and involve the effect of Article 4.2(b) and (c) of the Software License Agreement and Section 1.E of the Settlement Term Sheet are the subject of further proceedings in this Court in connection with the Motion to Amend. The provisions of Paragraph 7 of the Debtor's proposed bill of sale protect the parties respective interests in those proceedings. The remaining portions of paragraph 1 appears to be consistent with the Settlement and the Software License Agreement.
2. The first paragraph under paragraph 2 is inconsistent with the Settlement and the agreement of the parties. It shall be amended to reflect the sale to Bashford's nominee and to delete language regarding the ownership of the nominee. Paragraphs 2(a) and 2(b) have been discussed above. The form of the Service Agreement mentioned in paragraph 2(a)(B) is discussed in section B.4 below.
3. The provisions of paragraph 3 are not contrary to the terms of the Settlement and do not require amendment.

4. The provisions of paragraph 4 are not contrary to the terms of the Settlement and do not require amendment.
5. The provisions of paragraph 5 are not contrary to the terms of the Settlement and do not require amendment.
6. The provisions of paragraph 6 are not contrary to the terms of the Settlement, but the Settlement Term Sheet did not contain any mechanism for delivery of the software. Paragraph 6 shall be amended to provide that if the Buyer does not advise the Debtor's counsel where to send the purchased assets within thirty days from the date of the bill of sale, the Debtor shall send them to the last known address of Janet Bashford, which shall be deemed to comply with the terms of the Settlement and the bill of sale.
7. Paragraph 7 shall remain in the bill of sale to protect the interests of the Debtor and the Buyer in connection with the proceedings involving the Motion to Amend.
8. The provisions of paragraph 8 are not contrary to the terms of the Settlement and do not require amendment.

4. Support Agreement

Paragraph 1.D of the Settlement Term Sheet provides that i Messaging and the Bashford Group shall negotiate in good faith the terms of the Service Agreement. See Doc. No. 20. The Service Agreement would consist of two components. First, it was to provide for “consulting services, market support services and installation training services” at 75% of current i Messaging customer rates plus travel expenses, based upon i Messaging's availability at the time of the request. Second, it was to provide “maintenance and technical support” using customary industry standards. Apparently, the maintenance and support services would not be discounted. Finally the Settlement Term Sheet provided that i Messaging would work with the licensee to perform the services and will represent themselves as “contract employees” at the licensee's expense.

Although i Messaging was not a party to the Settlement Term Sheet, the Settlement Term Sheet was incorporated into the Settlement (Doc. No. 23) and the Order approving of the i Messaging License (Doc. No. 27) specifically provided that the license was amended by the terms of the Settlement.

Accordingly, by accepting the terms of the i Messaging License, i Messaging became obligated to negotiate

in good faith with the Bashford Group or to enter into a maintenance and technical support agreement. The i Messaging License provides for worldwide non-exclusive license to i Messaging to use the Licensed Software to perform the obligations under maintenance agreements, develop and distribute Revisions and developing, marketing and selling Derivative Software Products. Although neither party has directly addressed the purpose of the Service Agreement provisions in the Settlement Term Sheet, it appears to the Court that the Service Agreement provision of paragraph 1.D of the Settlement Term Sheet was for the benefit of the Bashford Group in connection with any distribution and licensing of the software it acquired from the Debtor which would not be in violation of the i Messaging License.

Janet Bashford has included in Exhibit F of the Janet Bashford Memorandum a proposed a form of the Service Agreement which essentially incorporates the provisions of paragraph 1.D of the Settlement Term Sheet into a one page document with an attached copy of i Messaging's standard form of maintenance agreement for its customers. The Settlement Term Sheet does not detail the terms and conditions of the Service Agreement other than a statement that "[T]he parties shall work out an agreement regarding maintenance and technical support using customary industry standards." Janet Bashford proposes that the "maintenance and technical support" part of a service agreement utilize the current form of i Messaging's similar agreement with its customers. However, Janet Bashford does not propose any form or content for the consulting services, market support services, and installation training services portion of a Service Agreement beyond the terms of the Settlement Term Sheet.

The Debtor's Memorandum includes a form for a "consulting agreement" which does not address the maintenance and support services portion of the Service Agreement. The Debtor's proposal defines "services" to include training and consulting services. While it does not specifically mention market support or installation services, such services are not excluded from the proposed agreement. The Debtor's proposal provides that i Messaging could undertake to provide services in response to a specific request in its sole discretion (Article 2.3). However, this provision is contrary to paragraph 1.D(1) of the Settlement Term Sheet which only permits discretion in scheduling based upon availability, not discretion in providing

services. The Debtor's proposal permits the service agreement to be terminated by the parties upon written notice without cause (Article 3.2(a)) and with cause (Article 3.2(b)). Termination by i Messaging without cause appears to be contrary to the intent of the Settlement and the i Messaging License which is to provide benefits to Bashford during the term of the i Messaging License.

The Debtor's proposal contains numerous other terms and conditions which have not been objected to by Janet Bashford. In the Janet Bashford Memorandum, Janet Bashford appears to be only interested in an agreement which includes detailed provisions on maintenance and technical support services. In the Janet Bashford Response she points out that the Debtor's proposal does not include maintenance and technical support and questions the Debtor's authority to commit i Messaging to any contract. The Debtor does not directly address the Service Agreement in the Debtor's Memorandum or the Debtor's Supplemental Response, except through submission of the proposed consulting agreement.

The Court finds that the proposal included as Exhibit F of the Janet Bashford Memorandum, with one amendment, meets the requirements of the maintenance and technical support portions of the contemplated Service Agreement. Janet Bashford's proposal shall be amended by striking out the first page which only refers generically to a consulting agreement and replacing it with language substantially in the following form:

Agreement by and between i Messaging Systems, Inc. (a New Hampshire Corporation) ("IM") and Breakfast Served LLC (a _____ Limited Liability Company) ("BS"). IM shall provide maintenance and technical support services to BS and its customers and assigns for the software licensed to IM by RDX Acquisition Corp. d/b/a RMTI pursuant to an order of the United States Bankruptcy Court for the District of New Hampshire (Bk. No. 01-10192-JMD) (the "i Messaging License") upon the same terms and conditions, and at the same price, as IM provides such services to its customers. This agreement shall terminate upon the termination of the i Messaging License.

The current IM customer Maintenance Agreement is annexed.

The agreement shall be executed by i Messaging and the Bashford Group's nominee.

Bashford only supplied the Court with a generic reference to consulting services in the support agreement which she included with the Janet Bashford Memorandum. Her proposal is devoid of any form

or content for a consulting services agreement. Accordingly, the only form of a consulting agreement before the Court is the one submitted by the Debtor. Therefore the Court will review the Debtor's proposed consulting agreement to determine if any of its provisions are contrary to the terms of the Settlement.

Based upon the Court's review of the form of consulting agreement submitted with the Debtor's Memorandum, the Court has determined:

1. The provisions of Article 1.0 are not contrary to the terms of the Settlement and do not require amendment.
2. The provisions of Article 2.3 under which i Messaging is only required to undertake performing services in its sole discretion is contrary to the provisions of paragraph 1.D(1) of the Settlement Term Sheet which provides for scheduling based upon "availability at the time of the request." In addition, the proposed thirty day response to requests appears calculated to avoid providing services and not a proposal "negotiated in good faith" as required by the Settlement Term Sheet. The agreement should be revised to reflect a ten day response time and an agreement by i Messaging to schedule such services subject only to availability at the time of the request. The other provisions of Article 2.0 are not contrary to the terms of the Settlement and do not require amendment.
3. The provisions in Article 3.0 which permit termination by either party, without cause, upon thirty days written notice is contrary to the spirit and intent of the Settlement because it would permit i Messaging to simply walk away from the consulting arrangement at any time. Article 3.0 shall be amended to provide that the consulting agreement shall continue for the duration of the i Messaging License, but may be terminated for cause after thirty days prior written notice. The other provisions of Article 3.0 are not contrary to the terms of the Settlement and do not require amendment.
4. The provisions of Article 4.3 are internally inconsistent. The balance owed for a project under Article 4.3(b) shall be due thirty days after receipt of each such invoice. The other provisions of Article 4.0 are not contrary to the terms of the Settlement and do not require amendment.
5. The other provisions of Article 5.0 are not contrary to the terms of the Settlement and do not require amendment.
6. The other provisions of Article 6.0 are not contrary to the terms of the Settlement and do not require amendment.
7. The other provisions of Article 7.0 are not contrary to the terms of the Settlement and do not require amendment.
8. The other provisions of Article 8.0 are not contrary to the terms of the Settlement and do not require amendment.

IV. CONCLUSION

The Debtor shall prepare amended documents which conform to the rulings in this Memorandum Opinion and shall submit them to the Court and Bashford in accordance with a separate order issued herewith. For the reasons set forth in this Memorandum Opinion the Bashford Motion to Compel is denied in full with respect to all members of the Bashford Group except Janet Bashford and is granted in part and denied in part with respect to Janet Bashford. Similarly, the Debtor's Motion to Compel is granted in full with respect to all members of the Bashford Group except Janet Bashford and is granted in part and denied in part with respect to Janet Bashford.

This opinion constitutes the Court's findings of fact and conclusions of law to date in accordance with Federal Rule of Bankruptcy Procedure 7052. After compliance by the parties with the separate order issued with this Memorandum Opinion, the Court shall enter an order determining the final form of the documents and will issue a separate final order consistent with this opinion.

DATED this 23rd day of April, 2002, at Manchester, New Hampshire.

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge