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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re)	Case No. 01-19647-B-11
Coast Grain Company,)	
Debtor.)	
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Greg Braun, Plan Agent,)	Adversary Proceeding No. 03-1446
Plaintiff,)	DC No. AP-2
v.)	
Paul Huizenga Dairy,)	
Defendant.)	
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**FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON MOTION FOR SUMMARY JUDGMENT**

Justin D. Harris, Esq., of Walter Law Group, appeared on behalf of Greg Braun, Plan Agent (the "Plaintiff").

Ronald N. Sarian, Esq., of Astor & Phillips, appeared on behalf of Paul Huizenga Dairy ("PHD").

These findings of fact and conclusions of law are based on two Summary Judgment motions in this adversary proceeding. The court ruled for PHD in both motions. Plaintiff's Motion for Partial Summary Judgment was heard on April 28, 2005, and denied for reasons stated in the record. That order was entered on May 2, 2005. PHD's Motion for Summary Judgment, or, in the Alternative, Partial Summary Judgment was heard on September 21, 2005, and was granted, again for reasons stated on the record. These findings of fact and conclusions of law are intended to supplement and consolidate both of the court's rulings for purposes of entering a final judgment in favor of PHD. The following material facts appear to be undisputed:

1 1. Paul Huizenga Dairy is a family owned dairy cattle business entity. In
2 addition to other commodities, PHD feeds its cattle brewer's malt, or wet malt, a by-
3 product of the beer brewing process.

4 2. In 2001, and prior years, Coast Grain Company ("Coast Grain") was in the
5 business of buying, selling and delivering grain and other livestock feed products,
6 including wet malt, to customers in the agricultural industry, primarily dairies, located in
7 Arizona and the Chino and Central Valley areas of California.

8 3. Coast Grain did not produce wet malt. Instead, it contracted to purchase wet
9 malt directly from breweries. In these contracts, Coast Grain committed to buy wet malt
10 produced by the brewery and remove it from the brewery's premises as it was produced.

11 4. Wet malt cannot be stored for any extended period of time, and neither the
12 breweries nor Coast Grain had storage facilities for wet malt. Coast Grain, therefore,
13 needed a reliable market for reselling the wet malt as it was produced.

14 5. Gary Lodi was the Regional Sales Manager at Coast Grain. Mr. Lodi was
15 responsible for contracting with Coast Grain's dairy customers to sell wet malt and to
16 create a reliable source for disposition of the wet malt as it was removed from the
17 breweries.

18 6. PHD began doing business with Coast Grain in late 1998 when it contracted
19 to purchase wet malt for delivery during 1999. In December 1999, Mr. Lodi and PHD's
20 owner, Paul Huizenga, again entered into a contract whereby PHD agreed to purchase
21 \$120,000 of wet malt for delivery throughout the year 2000.

22 7. In December 2000, PHD entered into another contract with Coast Grain to
23 purchase \$120,000 of wet malt for delivery throughout 2001. Mr. Lodi and Mr.
24 Huizenga negotiated an estimated price, an estimated quantity to cover PHD's usage for
25 the entire year, and an estimated delivery schedule (the "2001 Contract").

26 8. As in prior years, Mr. Lodi was to drive by PHD's facility on a regular basis
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1 to monitor its wet malt inventory and make sure that PHD did not run out of wet malt.
2 When Mr. Lodi determined that another shipment of wet malt was needed, he was
3 authorized to order it and facilitate its delivery without any further instructions from
4 PHD.

5 9. On or about December 22, 2000, PHD tendered a check to Coast Grain in the
6 amount of \$120,000 which Coast Grain, received, accepted, and deposited into its general
7 operating bank account. Upon deposit, Coast Grain credited PHD's account to reflect the
8 balance paid on the 2001 Contract.

9 10. The 2001 Contract was a binding enforceable "requirements" contract as that
10 term is used in Cal.Comm.Code § 2306.

11 11. PHD fully performed its obligations under the 2001 Contract by tendering
12 the \$120,000 to Coast Grain in December of 2000 and thereafter accepting all deliveries
13 of wet malt as scheduled by Mr. Lodi.

14 12. In early 2001, Coast Grain began performance of the 2001 Contract.
15 Approximately sixteen loads of wet malt were delivered each month to PHD. With each
16 delivery, Mr. Lodi submitted the appropriate documentation to Coast Grain's accounting
17 department and the cost was debited against the credit balance in PHD's account. At the
18 end of each month, Coast Grain sent to PHD a monthly statement showing each delivery
19 of wet malt and the amount debited from PHD's credit account.

20 13. On or about August 24, 2001, Coast Grain stopped debiting the cost of the
21 wet malt shipments against PHD's account. Instead, Coast Grain began to debit the cost
22 of the wet malt shipments to a separate "open" account for PHD and carried that amount
23 on its books as a balance due from PHD. PHD did not consent to this change in the
24 administration of its account with Coast Grain or to modification of the 2001 Contract.

25 14. Notwithstanding Coast Grain's change in accounting procedures, it
26 otherwise continued to deliver wet malt to PHD pursuant to the 2001 Contract.

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1 credit balance that existed in PHD's credit account on July 19, 2001, yields a net
2 difference of \$7,157.04.

3 22. On January 11, 2002, PHD paid an additional \$7,157.04 to Coast Grain (total
4 deliveries – \$120,000 paid on the 2001 Contract). Coast Grain has therefore received
5 from PHD, funds equal to the full value of all deliveries of wet malt made during 2001,
6 plus all delivery and service charges. PHD ceased doing business with Coast Grain after
7 2001.

8 **The Adversary Proceeding.**

9 Plaintiff filed this adversary proceeding on July 24, 2003. Plaintiff seeks, through
10 various theories, to recover the value of the wet malt deliveries made to PHD after
11 commencement of the 90-day "avoidance period" on July 19, 2001.

12 The complaint states six claims for relief which the court has resolved in favor of
13 PHD as follows:

14 **First Claim – Avoidable Preferential Transfers (11 U.S.C. § 547).**

15 Plaintiff contends in the First Claim for relief that Coast Grain's pre-petition
16 performance of the 2001 Contract, each delivery of wet malt after July 19, 2001, was an
17 avoidable preference under 11 U.S.C. § 547. PHD denied the material allegations and
18 raised defenses under § 547(c)(1) & (2) (ordinary course of business and
19 contemporaneous exchange for new value). PHD also asserted the affirmative defenses
20 of setoff and recoupment.

21 On December 4, 2004, this court ruled in a similar adversary proceeding, that
22 Plaintiff could not prevail on its preference claim; that Coast Grain's pre-petition sales of
23 product to customers with credit accounts, were not avoidable as preferential transfers.
24 That decision was published for reference in this and other similar adversary proceedings
25 at *Braun v. Bouma Dairy (In re Coast Grain Company)*, 317 B.R. 796 (Bankr. E.D. Cal.
26 2004) (the "Bouma Dairy Decision"). The Bouma Dairy Decision is currently on appeal
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1 to the Bankruptcy Appellate Panel, but it was not stayed pending appeal. As such, it
2 remains applicable to the First Claim for Relief in this adversary proceeding. The
3 material facts of this case, as they relate to the § 547 claim, are substantially similar to
4 the facts in the Bouma Dairy Decision; defendant prepaid its credit account with Coast
5 Grain, Coast Grain subsequently shipped goods to the defendant within 90 days before
6 the bankruptcy, and Coast Grain debited those sales against the defendant's credit
7 account. Based on the analysis set forth in the Bouma Dairy Decision, this court
8 concludes that Plaintiff cannot prevail on its First Claim for Relief herein as a matter of
9 law.

10 **Second Claim – Disallowance of Setoff (11 U.S.C. § 553) and Fourth Claim –**
11 **Turnover of Property (11 U.S.C. § 542).**

12 Plaintiff contends in the Second Claim for relief that the accounting debits against
13 PHD's credit account, made during the phase-one period (July 19, 2001, to August 24,
14 2001) were avoidable as setoffs pursuant to 11 U.S.C. § 553(b). Plaintiff contends in the
15 Fourth claim for relief that PHD is still obligated to pay for wet malt deliveries made
16 during the phase-two period, August 24, 2001, to October 17, 2001, because Coast Grain
17 stopped debiting the cost of those shipments against PHD's credit account, and the setoff
18 rules do not apply to the phase-two period.

19 On December 14, 2004, this court ruled in a similar adversary proceeding, Braun
20 v. Walter H. Jensen Cattle Co., adversary proceeding no. 03-1419 (unpublished), that
21 Plaintiff could not prevail on these claims against defendant's recoupment defense if the
22 defendant's advance payment to Coast Grain, and the subsequent shipments of product,
23 satisfied the "logical relationship" test and were, therefore, part of the "same transaction"
24 for recoupment purposes. *Newbery Corporation v. Fireman's Fund Ins. Co. (In re*
25 *Newbery Corp.)*, 95 F.3d 1392 (9th Cir. 1996); *Sims v. United States Department of*
26 *Health and Human Services (In re TLC Hospitals, Inc.)*, 224 F.3d 1008 (9th Cir. 2000).
27 The recoupment analysis applicable to this case was also set forth in the Bouma Dairy

1 Decision, 317 B.R. 796.

2 On April 28, 2005, Plaintiff moved for partial summary judgment on its Second
3 and Fourth claims for Relief. The court ruled in favor of PHD in a statement of decision
4 made on the record. This court ruled based on its analysis in the Bouma Dairy Decision,
5 that recoupment here was a complete defense to the Second and Fourth Claims for Relief.

6 On April 29, 2005, the court supplemented its oral ruling with a written
7 Memorandum Decision Denying Motion for Partial Summary Judgment and an Order
8 Denying Motion for Partial Summary Judgment. In the Memorandum Decision, this
9 Court stated in pertinent part as follows:

10 The Defendant argues, *inter alia*, that Plaintiff's claims are barred by the doctrine
11 of recoupment. The court agrees. In December 2000, the Debtor and the
12 Defendant entered into a binding "requirements" contract, as that term is used in
13 Cal.Comm.Code § 2306, for the purchase and sale of \$120,000 worth of wet malt.
14 The product was delivered to the Defendant during the year 2001, according to
15 Defendant's requirements. Both parties fully performed that contract. Based on
16 this court's analysis in *Braun v. Bouma Dairy (In re Coast Grain Co.)*, 317 B.R.
17 796 (Bankr. E.D. Cal. 2004) regarding application of the recoupment defense, and
18 the prepayment of dairy feed products, this court finds and concludes that
19 Defendant's Third Affirmative Defense of recoupment is a complete defense to
20 the Plaintiff's Second and Fourth claims for relief. The recoupment issue has
21 been fully briefed and argued in both the moving papers and the opposition
22 papers. Summary adjudication of the recoupment defense in favor of the
23 nonmoving party is appropriate because both parties have been provided with a
24 "full and fair opportunity to ventilate the issues in the motion." *United States v.*
25 *Real Property Located at 25445 Dona Christa, Valencia, California*, 138 F.3d
26 403, 407 n.4 (9th Cir. 1998) citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311
27 (9th Cir. 1982).

28 *Memorandum Decision Denying Motion for Partial Summary Judgment*, Page 1, Lines
25-28, Page 2, Lines 1-12.

Fifth and Sixth Claims – Recovery of Post-Petition Transfers (11 U.S.C. §§ 542 & 549).

Plaintiff contends in the Fifth and Sixth claims for relief that PHD is still
obligated to pay for wet malt deliveries made during the phase-three period, after
commencement of the bankruptcy case on October 17, 2001. PHD first moved for
summary judgment on the Fifth and Sixth Claims for Relief on August 18, 2005. The
court denied that motion on the grounds, *inter alia*, that PHD had not offered sufficient

1 evidence to show that post-petition deliveries of goods were part of the 2001 Contract.
2 Plaintiff opposed the motion on those grounds, even though, as PHD subsequently
3 showed in support of this motion, this court had already made a finding on that issue at
4 the hearing on April 28, 2005.

5 On September 21, 2005, PHD brought again this Motion for Summary Judgment
6 asking the court to dispose of all but the Second and Fourth claims for relief, which had
7 already been adjudicated in the prior ruling. The court's prior disposition as to all but the
8 Third, Fifth and Sixth claims is set forth above and on the record. As for the Fifth and
9 Sixth claims, the court has found, based on undisputed facts, that all wet malt deliveries
10 to PHD made after commencement of the bankruptcy, were part of the same 2001
11 Contract. Accordingly, the court finds and concludes, that the doctrine of recoupment,
12 applicable to the Second and Fourth claims, is equally applicable to the Fifth and Sixth
13 claims, for the same reasons articulated in this court's April 28, 2005, ruling and the
14 April 29, 2005 Memorandum Decision.

15 **Third Claim – Disallowance of Claim (11 U.S.C. § 502(d)).**

16 In the Third Claim for relief, Plaintiff seeks to disallow PHD's proof of claim
17 pursuant to 11 U.S.C. § 502(d). Relief under § 502(d) is contingent upon (1) Plaintiff's
18 ability to prevail against PHD on some other claim for relief, and (2) PHD's failure to
19 perform on that judgment. The record does not show that PHD filed a proof of claim in
20 this bankruptcy case so § 502(d) is a moot issue. Further, Plaintiff has not prevailed
21 against PHD on any other claim for relief asserted in this adversary proceeding. Based
22 thereon, the Third Claim for relief should be dismissed.

23 Dated: December _____, 2005

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25 /s/ W. Richard Lee
26 W. Richard Lee
27 United States Bankruptcy Judge
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