UNITED STATES BANKRUPTCY COURT
Eastern District of California
Fresno Division

In re Coast Grain Company, Debtor.	Case No.	01-19647-B-11
Greg Braun, Chapter 11 Plan Agent, Plaintiff, v. Schakel Dairy, Defendant.	Adv. No. DC No.	03-1432 WLG-2

MEMORANDUM DECISION REGARDING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Christina R. Pfirrman, Esq., of Drummond & Associates, appeared on behalf of Greg Braun, Plan Agent (the "Plaintiff").

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

David R. Albers, Esq., of Albers, Barnes & Kohler, LLP, appeared on behalf of Schakel Dairy (the "Defendant" or "Schakel").

Plaintiff's Motion for Partial Summary Judgment was argued before the undersigned on February 23, 2005. The parties were asked to submit supplemental briefs and the matter was taken under submission on April 2, 2005. Plaintiff seeks summary adjudication of its second and fourth claims for relief under 11 U.S.C. §§ 553(b) and 542 respectively. The Defendant asks for summary adjudication of its affirmative defense of recoupment. The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and 11 U.S.C. §§ 553 and 542. This is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(E) & (O). Based on the following analysis, the court finds and concludes that Plaintiff is not entitled to judgment on his second and fourth claims for relief as a matter of law. Accordingly, Plaintiff's motion will be denied. Partial

summary judgment will be granted on Defendant's recoupment defense to the second and fourth claims for relief.

Findings of Fact

The following facts appear to be without material dispute. For more than sixty years, Coast Grain was in the business of buying, processing, and selling grain and other livestock feed products. Most of Coast Grain's business involved the sale of its products to dairies in Arizona, Central California, and Southern California.

One of the products which Coast Grain sold was brewer's malt, a byproduct of the beer production process. Brewer's malt is effective in increasing milk production. In 2001, Coast Grain had a contract with Anheuser-Bush Company to purchase and remove all of Anheuser-Bush's output of brewer's malt. Anheuser-Bush had no facilities to store brewer's malt. Gary Lodi was Coast Grain's regional sales manager with the responsibility of finding buyers for the brewer's malt and making sure that Coast Grain had places to deliver the brewer's malt as it was produced by Anheuser-Bush.

Fred Schakel is the owner and operator of defendant Schakel Dairy, a dairy farm that produces milk. From approximately two years prior to Coast Grain's bankruptcy, Schakel purchased brewer's malt and other "wet feed" products from Coast Grain. Schakel Dairy was specially equipped with concrete "pits" designed for the temporary storage of wet feed. From time to time, Coast Grain and Schakel would agree to substitute or include deliveries of wet citrus, molasses, and other wet feed products with the brewer's malt.

In December 2000, Mr. Schakel met with Mr. Lodi to discuss Schakel's need for brewer's malt in 2001. They agreed upon an estimated quantity, delivery schedule and an estimated price. Based thereon, Schakel delivered to Coast Grain a check for $200,000 which Coast Grain deposited into its general operating bank account on December 28, 2000. Approximately $23,787 was applied to Schakel's outstanding

account balance. The remaining $176,213 was carried as a credit balance in Schakel's account. On April 30, 2001, Schakel paid an additional $76,000 which Coast Grain also deposited into its general operating bank account and credited to Schakel's account.

Mr. Lodi was responsible for monitoring Schakel's inventory of wet feed, including brewer's malt, and dispatching deliveries to ensure that Schakel would not run out of these commodities. In 2001, Coast Grain delivered approximately twenty loads per month to Schakel. Mr. Lodi had authority to perform these duties without any further instruction from Schakel. For each delivery Mr. Lodi prepared an invoice and Coast Grain's accounting department deducted the amount of the invoice from the credit balance in Schakel's account.

This bankruptcy commenced on October 17, 2001. Ninety days prior to commencement of the bankruptcy, the credit balance remaining in Schakel's account was approximately $85,603.59. After that date, Coast Grain delivered $51,182.97 of brewer's malt and other feed products to Schakel. At least $34,406.94 of these sales were debited against the credit balance in Schakel's account. It is unclear from the record whether the remaining $16,776.03 was debited against Schakel's account or separately invoiced to Schakel. However, that determination is not material to the court's ruling because the doctrine of recoupment will apply to all transactions between the parties during this time.

Issues Presented

The Plaintiff contends that all invoices debited against Schakel's credit account within 90 days before the bankruptcy constituted setoffs. The Plaintiff moves for summary adjudication on its second claim for relief to avoid the purported setoffs pursuant to Bankruptcy Code § 553(b) in the amount of $51,182.97. Alternatively, the Plaintiff moves for summary adjudication on its second claim for relief to avoid debits made in the amount of $34,406.94, and on its fourth claim for relief, pursuant to Bankruptcy Code § 542, to collect for invoices which may not have been debited against

Schakel's account in the amount of $16,776.03.

In response, Schakel argues that it had a preexisting contract with Coast Grain for the purchase of brewer's malt, that it has already performed that contract by payment for all product delivered within 90 days before the bankruptcy, and that the doctrine of recoupment is a complete defense to the Plaintiff's claims. The threshold issue therefore is the application of Schakel's affirmative defense of recoupment.

In a similar adversary proceeding against another of Coast Grain's customers, involving similar claims, *Braun v. Bouma Dairy (In re Coast Grain Co.)*, 317 B.R. 796 (Bankr. E.D. Cal. 2004), this court has already analyzed the recoupment issue, and its application to the prepayment of dairy feed products in this bankruptcy case. The recoupment issue has been fully briefed and argued in both the moving papers and the opposition papers. Summary adjudication of the recoupment defense in favor of the nonmoving party is appropriate because both parties have been provided with a "full and fair opportunity to ventilate the issues in the motion." *United States v. Real Property Located at 25445 via Dona Christa, Valencia, California*, 138 F.3d 403, 407 n.4 (9th Cir. 1998) (citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982)).

Summary Judgment Standard

Summary judgment is appropriate, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages." Fed.R.Civ.P. 56(c) (made applicable in this adversary proceeding by Fed.R.Bankr.P. 7056).

A material fact is one that might affect the outcome of the suit under the governing law and irrelevant or unnecessary factual disputes will not be considered in a

motion for summary judgment. *Anderson, et al. v. Liberty Lobby, Inc., et al.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

The moving party bears the burden of showing that there is no genuine dispute as to each issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986). However, the party adverse to a motion for summary judgment cannot simply deny the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). More precisely, "[i]t is not enough that the nonmoving party point to disputed facts; rather, they must make a sufficient showing to establish the existence of a triable issue of material fact as to an element essential to the moving party's case." *In re Powerburst Corporation*, 154 B.R. 307, 309-310 (Bankr.E.D.Cal. 1993) (citing *Lake Nacimiento Ranch v. San Luis Obispo County*, 830 F.2d 977, 979-980 (9th Cir.1987), cert. denied 488 U.S. 827, 109 S.Ct. 79, 102 L.Ed.2d 55 (1988)).

The parties may use summary judgment to dispose of all or any part thereof the opponents claim or cross claim. Fed.R.Civ.P. 56(a) & (b). The court may sua sponte grant summary judgment in favor of a nonmoving party as long as the moving party was provided a "full and fair opportunity to ventilate the issues in the motion." *United States v. Real Property Located at 25445 via Dona Christa, Valencia California*, 138 F.3d 403, 407, n.4 (9th Cir. 1998) (citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982)). The filing of a formal cross-motion is not necessary. *Local 453, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. Otis Elevator Company*, 314 F.2d 25, 27 (2d Cir.1963).

Analysis and Conclusions of Law

A. Recoupment

Plaintiff seeks to recover the value of pre-petition sales of feed products to Schakel using the avoiding powers under § 553(b). In the alternative, Plaintiff moves for

recovery of the pre-petition deliveries of feed products under § 542. Schakel "prepaid" Coast Grain an amount which exceeds the value of the product which plaintiff seeks to recover. In *In re Coast Grain Co.*, a different adversary proceeding with similar "prepay" claims and legal issues, this court ruled that the doctrine of recoupment will apply when there is a "legally cognizable relationship" between the defendant's pre-payment and Coast Grain's subsequent deliveries of goods and services. 317 B.R. at 809. Based thereon, if this court determines that a legally enforceable contract was formed between Coast Grain and Schakel at the time Schakel prepaid its account in December 2000, and again in April 2001, then such a contractual arrangement will be sufficient to support the recoupment defense.

B. Schakel and Coast Grain Formed a Binding Requirements Contract for the Sale of Brewer's Malt

Plaintiff argues that no contract was formed between Schakel and Coast Grain in December 2000 because the parties did not agree on a fixed quantity and fixed price for the brewer's malt which Coast Grain was to deliver throughout 2001. Plaintiff's argument is not supported by applicable law. A contract for the sale of goods that is silent or indefinite about price and quantity is not invalid for indefiniteness. California Commercial Code section 2204(3) provides that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." Cal. Com. Code § 2204(3).[1] In fact, the official Uniform Commercial Code Comment to

[1] The Official California Code Comment to section 2204(3) notes that although there was no statute comparable to section 2204(3) prior to California's adoption of the Uniform Commercial Code, California courts had formulated a similar rule. At least one California court of appeal has stated:

> [a]lthough the terms of a contract need not be stated in the minutest detail, it is requisite to enforceability that it must evidence a meeting of the minds upon the essential features of the agreement, and that the scope of

section 2204(3) indicates that

> [i]f the parties intend to enter into a binding agreement, [section 2204(3)] recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy[, and] [t]he test is not certainty as to what the parties were to do nor as to the exact amount of damages due [to] the plaintiff.

Cal. Com. Code § 2204(3) cmt. Uniform Commercial Code.

The parties' "agreement" is their bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance. *Id.* § 1201(3). "Course of dealing, trade usage, and course of performance are all factors which are relevant to give particular meaning to and supplement or qualify terms of an agreement." *Expeditors Int'l of Washington, Inc. v. Official Creditors Comm. of CFLC, Inc. (In re CFLC, Inc.)*, 209 B.R. 508, 513 (B.A.P. 9th Cir. 1997). "Course of dealing evidence cannot create the agreement, but it may supplement the agreement by providing evidence of the parties' intentions." *Id.* The parties course of dealing "is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Cal. Com. Code § 1205(1). With respect to course of performance, "[w]here the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection . . . by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." Cal. Com. Code § 2208(1).

> the duty and limits of acceptable performance be at least sufficiently defined to provide a rational basis for the assessment of damages.

Ellis v. Klaff, 96 216 P.2d 15, 20 (Cal. Ct. App. 1950).

Despite the fact that price is an important term of any contract, the California Commercial Code expressly recognizes the validity of contracts that intentionally leave the price term open. The Commercial Code states "[t]he parties if they so intend can conclude a contract even though the price is not settled."[2] *Id.* § 2305(1). If the parties conclude a contract and the price is not settled, "the price is a reasonable price at the time of delivery if: (a) [n]othing is said as to price; or (b) [t]he price is left to be agreed by the parties and they fail to agree; or (c) [t]he price is to be fixed in terms of some agreed market or other standard . . . ." *Id.* Moreover, if a buyer or seller is charged with fixing the price, the price must be fixed in good faith. *See id.* § 2305(2).

The California Commercial Code also recognizes contracts with open quantity terms–this type of contract is either a requirements contract or an output contract. *See id.* § 2306. The Commercial Code expressly provides:

> [a] term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

Id. at 2306(1).

Additionally, the official comment to section 2306 makes it clear that requirements contracts are not indefinite because such contracts mean the actual good faith requirements of the buyer. Cal. Com. Code § 2306 cmt. 2 Uniform Commercial Code. Moreover, requirements contracts do not lack mutuality because the party who will determine its requirements must operate his business in good faith and according to

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[2] A contract will not exist, however, if the parties do not intend to be bound unless the price is fixed or agreed, and the price has not been fixed or agreed upon. Cal. Com. Code § 2305(4). There is no evidence before the court that indicates that the parties did not intend to be bound unless a price was fixed or agreed upon.

commercial standards of fair dealing so that its requirements will approximate a reasonably foreseeable figure. *Id.*

Here, the undisputed facts support the conclusion that in December 2000, Coast Grain and Schakel entered into a legally enforceable contract for the sale of brewer's malt as required by Schakel in 2001. Schakel performed the contract by making an initial estimated payment of $200,000. Coast Grain, in turn, was obligated to provide Schakel with as much brewer's malt as Schakel needed on a regular basis. Mr. Lodi would regularly visit Schakel to monitor the dairy's inventory of brewer's malt and molasses, so Coast Grain could make deliveries in a timely fashion before Schakel ran out of these commodities. Coast Grain delivered to Schakel approximately twenty loads of brewer's malt per month. Mr. Lodi scheduled all deliveries of brewer's malt to Schakel without any instruction from or communication with any representative of Schakel. The fact that different "wet feed" products were substituted or added to the shipments of brewer's malt from time to time does not change the result. The relevant inquiry, for purposes of the recoupment analysis, is whether Schakel's "prepayment" was connected to an enforceable contract.

C. The Statute of Frauds Does Not Defeat the Requirements Contract Because Schakel Fully Performed the Contract at its Inception

The Plaintiff argues that the statute of frauds requires that a contract between Coast Grain and Schakel for the sale of goods of more than five hundred dollars must be in writing. The Commercial Code's statute of frauds requires that certain contracts must be in writing. In particular,

> a contract for the sale of goods for the price of five hundred dollars ($500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . .

Cal. Com. Code § 2201(1)

Nevertheless, a contract for the sale of goods of five hundred dollars ($500) or

more that is not in writing, but is valid in other respects, is enforceable "[w]ith respect to goods for which payment has been made and accepted or which have been received and accepted . . . ." *Id.* § 2201(3)(c). This is the partial performance exception to the statute of frauds. "Partial performance is a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted." Cal. Com. Code § 2201 cmt. 2 Uniform Commercial Code. Further, "[r]eceipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists." *Id.* The buyer of goods can partly perform by delivering part payment if the seller accepts such payment. *Id.*

In this case both Coast Grain and Schakel both *fully* performed their respective obligations up until commencement of Coast Grain's bankruptcy. Schakel paid Coast Grain $200,000 for brewer's malt in December 2000 and an additional $76,000 in April 2001. Coast Grain delivered brewer's malt as needed by Schakel during 2001. Consequently, the parties' mutual performance nullified the statute of frauds for purposes of these transactions.

Conclusion

Based on the foregoing, the court finds and concludes that in December 2000, Schakel and Coast Grain entered into a binding "requirements" contract, as that term is used in Cal.Comm.Code§ 2306, for the purchase and sale of brewer's malt. Schakel fully performed that contract by "prepaying" Coast Grain in an amount that was greater than the value of all goods delivered to Schakel prior to commencement of the bankruptcy. The product was delivered to Schakel during the year 2001, according to Defendant's requirements. Both parties fully performed that contract up until commencement of the bankruptcy. Based on this court's analysis in *Braun v. Bouma Dairy*, 317 B.R. 796 regarding application of the recoupment defense, and the

prepayment of dairy feed products, this court finds and concludes that Schakel's affirmative defense of recoupment is a complete defense to the Plaintiff's second and fourth claims for relief. The recoupment issue has been fully briefed and argued in both the moving papers and the opposition papers. Summary adjudication of the recoupment defense in favor of the nonmoving party is appropriate because both parties have been provided with a "full and fair opportunity to ventilate the issues in the motion." *United States v. Real Property Located at 25445 via Dona Christa, Valencia, California*, 138 F.3d 403, 407 n.4 (9th Cir. 1998) citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982). Accordingly, Plaintiff's motion for summary adjudication of the second and fourth claims for relief will be DENIED. Partial summary judgment will be GRANTED in favor of Schakel Dairy on its affirmative defense of recoupment as a complete defense to the second and fourth claims for relief.

Dated: August _____, 2005

/s/ W. Richard Lee
W. Richard Lee
United States Bankruptcy Judge