UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

MICHIGAN BIODIESEL, LLC,

Debtor.
_______________________________________/

Case No. DK 10-05786
Hon. Scott W. Dales
Chapter 7

THOMAS R. TIBBLE, Chapter 7 Trustee,

Plaintiff,

v.

MICHIGAN PROTEIN, INC.,

Defendant.
_______________________________________/

Adversary Pro. No. 12-80339

ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

I. INTRODUCTION

Michigan Protein, Inc. (the "Defendant") filed a motion for summary judgment (the "Motion," DN 31) seeking to dismiss the complaint of Thomas R. Tibble (the "Plaintiff"). The Plaintiff is the chapter 7 trustee for the bankruptcy estate of Michigan BioDiesel, LLC (the "Debtor"). In his complaint, the Plaintiff asserts that while the Debtor remained in possession of estate property, it sold inventory to the Defendant at such a significant discount that the transactions fell outside the ordinary course of the Debtor's business. Accordingly, the Plaintiff sued the Defendant to avoid the discounted sales as unauthorized post-petition transfers under § 549. For the following reasons, the court will deny the Motion.

II. BACKGROUND

Before and after filing its voluntary petition for relief under chapter 11, the Debtor was in the business of producing biodiesel fuel, a process that included reclaiming and refining glycerin, methanol and free fatty acids (the "Fats"). (Brief to the Motion,[1] Exh. A, Oakley Aff. ¶3, April 2, 2013, DN 32-1; Exh. O, Tibble Dep. 6:12-22, May 21, 2013, DN 33-42). Given the nature of the Fats, the Debtor had to store them at elevated temperatures in tanks inside its plant. Otherwise, the Fats would congeal, rendering them unmarketable. (Exh. S, Oakley Dep. 27:25-28:3, 77:25-80:7, June 5, 2013, DN 33-48 and 33-49; Exh. T, Castine Dep. 58:6-19, May 23, 2013, DN 33-51). Because most of the Debtor's storage tanks were outside and unheated, appropriate storage tank space was limited, forcing the Debtor to sell the Fats at a consistent pace to avoid cessation of production resulting in costly plant shutdowns. (Oakley Dep. 94:22-96:18, DN 33-49; Castine Dep. 58:16-59:8; Oakley Aff. ¶4).

The market price for Fats fluctuated greatly and the Debtor negotiated prices and entered into separate transactions with its customers on a weekly basis. (Oakley Aff. ¶5). Initially, the Debtor looked to an index provided by the United States Department of Agriculture ("USDA") as a guideline. (Oakley Dep. 20:12-24, DN 33-48). Because the USDA index did not specifically list the kind of Fats sold by the Debtor, as a starting point, the Debtor looked to the price for yellow grease and then reduced that price by approximately $0.05 per pound. (Oakley Dep. 20:12-21:23, DN 33-48; Castine Dep. 23:18-24:17). Once the Debtor determined this price guideline, on any given day, the Debtor would negotiate the terms of each sale based upon the overall strength of the regional marketplace, as well as a purchaser's payment history, its reliability of pick-ups, financial strength, and reputation within the industry. (Oakley Aff. ¶6; Exh. C, Castine Aff. ¶4, April 10, 2013, DN 32-3; Exh. V, Weihe-Storlie Aff. ¶3, April 12, 2013,

[1] Unless otherwise indicated, all citations are to the Defendant's Brief to Motion for Summary Judgment. (DN 32).

DN 33-53). Supply and demand and seasonality also impacted the price of Fats. (Oakley Dep. 20:25-22:6, DN 33-48; Weihe-Storlie Aff. ¶3). When negotiating price, the Debtor also looked to publications from the Chicago Mercantile Exchange ("CME") and The Jacobsen as guidelines. (Tibble Dep. 39:8-11, DN 33-42; Castine Dep. 23:20-24:8; Oakley Dep. 23:25-24:17, DN 33-48).

Prior to bankruptcy, the Debtor regularly sold Fats to the Defendant, negotiating price for each truckload. (Exh. B, Gibbons Aff. ¶5, April 3, 2013, DN 32-2). Typically, when the Debtor needed to empty its storage tanks, it would contact a broker and make an offer to sell Fats on certain terms. (Oakley Aff. ¶8; Gibbons Aff. ¶6; Castine Aff. ¶6). This third-party would then relay the offer to the Defendant who would have the opportunity to accept or reject it. (Oakley Aff. ¶8; Castine Aff. ¶6). Between September 1, 2009 and April 29, 2010,[2] the Debtor and Defendant entered into 30 separate transactions, for which the Defendant paid between $0.03 and $0.205 per pound for the Fats. (Exh. E, DN 32-6). From May 4, 2010 to April 13, 2011, the Debtor and Defendant completed 67 transactions, for which the Defendant paid between $0.19 and $0.41 per pound. (Exh. G, DN 33). According to the Debtor, during this same period, it sold all of its Fats to every other customer for about $.04 to $.08 per pound below the USDA market price for yellow grease. (Response to Motion, Doster Aff. Exh. A, column 9, at 11-34, item nos. 64-200, July 19, 2013, DN 42-2). Other than price, all contract terms and performance by the parties remained largely the same post-petition and prepetition. (Oakley Aff. ¶13; Castine Aff. ¶10).

Restaurant Recycling, Inc. ("Restaurant Recycling") started purchasing Fats from the Debtor on or about December 1, 2009. (Response, Exh. 3, Longstreth Aff. ¶5, July 8, 2013, DN

[2] The Debtor filed a voluntary chapter 11 bankruptcy petition on May 2, 2010.

42-13;[3] Oakley Aff. ¶15; Tibble Dep. 13:20-14:22). Between September 2010 and September 2011, the Debtor and Restaurant Recycling entered into 97 transactions for the sale of Fats at rates between $0.22 and $0.425 per pound. (Exh. I, DN 33-20). In 2011, Restaurant Recycling requested that the Debtor give it a right of first refusal on the purchase of Fats. (Response, Longstreth Aff. ¶11). The Debtor claims to have agreed, but only if Restaurant Recycling paid a premium for that right. (Oakley Dep. 22:12-21, 37:4-14, DN 33-48). Restaurant Recycling on the other hand, was under the impression that it always paid the going market price, (Response, Longstreth Aff. ¶7), and was never the sole purchaser of the Fats. (Response, Longstreth Aff. ¶11). Nevertheless, the Debtor claims that before entering into an agreement with Restaurant Recycling, the Debtor contacted the Defendant to offer it a right of first refusal at a premium price, but the Defendant declined to pay any premium. (Oakley Dep. 47:13-19, DN 33-48).

Sometime in early 2011, the Defendant became concerned about the price of the Fats, which had risen over time. (Castine Dep. 60:22-61:17). As a result, it told the Debtor it was no longer interested in purchasing the Fats. (Oakley Aff. ¶16; Gibbons Aff. ¶13; Castine Aff. ¶13; Exh. U, Gibbons Tr. 78:16-80:7, May 22, 2013, DN 33-52). The Debtor thought the arrangement with Restaurant Recycling relegated the Defendant to the status of "customer of last resort," (Oakley Dep. 37:15-25, DN 33-48) and after consulting its board of managers, the Debtor offered to sell Fats to the Defendant according to a unique pricing structure. (Oakley Dep. 69:8-70:8, DN 33-48). For half of each truck load, the Debtor would charge the Defendant

[3] Dirk Longstreth is the General Manager and part owner of Restaurant Recycling. The allegations made in his affidavit executed on July 8, 2013 raise factual disputes about the business judgment used by the Debtor in determining the prices applied to the Defendant's purchases throughout the period in question. However, in his deposition taken on October 4, 2013, (Defendant's Corrected Response, Exh. C, DN 54-4 through 54-8), Mr. Longstreth significantly undermines the sworn statements in his affidavit. Although this should raise grave credibility concerns for the Plaintiff, as it does for the court, "lack of credibility of a non-movant's affidavit, when offered in opposition to a summary judgment motion, cannot suffice to discredit that testimony and pave the way for success on the motion." *Rose Marine Transportation, Inc. v. Kaiser Aluminum & Chemical Corp.,* 758 F. Supp. 1218, 1222 (N.D. Ill. 1990).

the premium price it charged Restaurant Recycling, and for the other half, the Debtor would charge the maximum amount the product would cost the Debtor as a crude product -- apparently $0.06 per pound. (Oakley Dep. 38:1-25, DN 33-48; Response, Doster Aff. Exh. A, column 6 at 34-62). This discounted flat price ($0.06 per pound) was between $0.295 and $0.41 per pound less than the USDA market price for yellow grease during the relevant period (*Id.* at column 9) and $0.265 and $0.36 per pound less than the Debtor was charging for all its other Fats. For convenience, the court will refer to this discounted pricing as "Split Load Pricing" as the Plaintiff does in his Response.

Nevertheless, the Defendant argues the Debtor came to this rate based upon its cost to purchase the raw materials; its continued profitability when selling the Fats at this rate; the glut of Fats on the market; and its desire to maintain a good relationship with the Defendant because it had the ability to purchase Fats on short notice. (Oakley Dep. 64:13-25, 41:8-17, 55:13-56:3, 58:7-59:11, 98:8-16, DN 33-48 and 33-49). According to the Debtor's management, this agreement also enabled the Debtor to continue its operations, and had the added benefit of allowing it to honor its supposed agreement with Restaurant Recycling, even though management believed that Restaurant Recycling had come to be undependable in its payments and pick-ups. (Oakley Dep. 41:10-17, 98:8-16, DN 33-48 and 33-49). The Plaintiff denies that Restaurant Recycling was an unreliable customer. (Response, Longstreth Aff. ¶9).

The Defendant was happy with the Split Load Pricing structure and agreed to the terms. (Castine Dep. 51:9-53:7). The parties did business according to these terms from April 19, 2011 through November 15, 2011 at blended rates for each truckload, between $0.192 and $0.239 per pound. (Gibbons Aff. ¶13; Castine Aff. ¶13). In this period, the Defendant purchased a total of

1,027,300[4] pounds of Fats for what the Plaintiff alleges is $364,147.04 less than the Debtor would have received if it had sold all of its Fats during the same period without the special discount extended to the Defendant. (Response, Doster Aff. Exh. A, columns 2 and 5 at 34-62). In other words, if the court credits the Longstreth affidavit, the Debtor might have sold a higher volume of Fats to Restaurant Recycling at a higher price. Even so, the sale of Fats to the Defendant during this time-frame was profitable. (Tibble Dep. 12:4, 15:21-24; Oakley Dep. 98:5-16, DN 33-49).

On November 22, 2011, as ordered, the United States Trustee appointed the Plaintiff as trustee, thereby removing the Debtor as debtor in possession. The very next day, the Plaintiff sent the Defendant a bill in the amount of $364,147.04 stating that it was for "incorrect billing." The Plaintiff filed an adversary proceeding against the Defendant on October 8, 2012 seeking to avoid and recover $834,314.45, comprising the aggregate value of the transfers in question.[5] On December 12, 2012, the court converted the Debtor's chapter 11 reorganization to a chapter 7 liquidation. The Defendant filed its Motion on June 11, 2013.

In its response to the Motion, the Plaintiff states that with the exception of the transfers in question, the Debtor never sold Fats for significantly less than $0.05 per pound below the USDA market price for yellow grease to anyone (Response, Doster Aff. Exh. A, column 9; Oakley Dep. 46:12-13, 93:25-94:10, DN 33-49); it never sold Fats for less than $0.091 under the market price to the Defendant before April 2011 (Response, Doster Aff., Exh. A); it never sold Fats to anyone for as little as $0.06 per pound; and it never charged two separate prices for a single truckload of Fats. (Oakley Dep. 65:1-5, DN 33-48; Response, Exh. 2, Leonard Aff. ¶10-12, July 11, 2013,

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[4] The Plaintiff alleges that the Defendant purchased 1,001,020 pounds of Fats between April 20, 2011 and November 15, 2011. Upon closer examination of Exh. A to Exh. 1 of the Plaintiff's Response, the court calculates that the amount of Fats the Defendant purchased between those dates was 1,027,300 pounds.

[5] The Plaintiff has indicated a willingness to give the Defendant credit for the $470,167.41 it paid for the Fats.

DN 42-11; Response, Doster Aff. Exh. A). Finally, the Plaintiff asserts that the Debtor, as debtor-in-possession, did not receive court authority to sell the Fats to the Defendant for $0.06 per pound.

All of these circumstances, according to the Plaintiff, take the transactions outside the ordinary course of business, using the vertical dimension test (which asks whether the transaction subjects a creditor to economic risk different than what it accepted when deciding to do business with the debtor) or the horizontal dimension test (which asks whether similar businesses would engage in the transaction in their ordinary course of business). *See, infra,* at pp. 9-10. The Plaintiff contends, albeit without offering an expert witness, that the sale of Fats to the Defendant using the Split Load Pricing falls outside the ordinary course of the Debtor's business.

The Defendant, on the other hand, argues that the transactions at issue were consistent with the course of business between the parties throughout their entire relationship, and a hypothetical creditor who extended credit pre-petition would have understood the economic risk facing the Debtor if it failed to unload the Fats, thus satisfying the vertical dimension test. In addition, relying in part on Ms. Wendy Weihe-Storlie as its expert witness, the Defendant asserts that the transfers were made in accordance with normal industry standards and therefore pass the horizontal dimension test. In making its argument, the Defendant contends that the Debtor had perfectly good business reasons, involving plant capacity and the nature of the Fats themselves, for selling Fats to the Defendant using the Split Load Pricing formula.

III. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056 (incorporating Fed. R. Civ. P. 56); *McCafferty v. McCafferty, (In re McCafferty),* 96 F.3d 192, 195 (6th Cir.

1996) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)). The evidence and all reasonable inferences must be construed in a light most favorable to the nonmoving party, here the Plaintiff. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,*475 U.S. 574, 587 (1986); *Redding v. St. Edward,* 241 F.3d 530, 532 (6th Cir. 2001).

"Production of a 'mere scintilla of evidence in support of an essential element will not forestall summary judgment.'" *Daugherty v. Vanguard Charter School Academy*, 116 F. Supp.2d 897, 904 (W.D. Mich. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)); *see Livingston Care Center v. United States Dept. of Health and Human Services*, 388 F.3d 168, 173 (6th Cir. 2004). And, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Daugherty*, 116 F. Supp.2d at 904 (quoting *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Nevertheless, courts must draw reasonable inferences in favor of the non-moving party, and a motion for summary judgment does not give the court license to weigh evidence or judge credibility. Instead, such a motion permits the court only to spot disputed issues of fact, not resolve them.

Under the rules, if a court does not grant all the relief requested in a summary judgment motion, the court may enter an order identifying any material fact that is not genuinely in dispute and treat it as established. *See* Fed. R. Civ. P. 56(g).

IV. ANALYSIS

Because the transactions occurred postpetition, the Plaintiff invokes § 549, which provides in relevant part that the Plaintiff "may avoid a transfer of property of the estate . . . that occurs after the commencement of the case; and that is not authorized under this title or by the court." 11 U.S.C. § 549(a). Trustees, like the Plaintiff, who challenge post-petition transfers

must prove that: (1) the debtor made a "transfer" as defined in § 101(54); and (2) the transfer comprised property of the estate. 11 U.S.C. § 549. Assuming the Plaintiff shoulders this burden of proof, the Defendant must establish the validity of the challenged transfers by a preponderance of the evidence. *See* Fed. R. Bankr. P. 6001 (assigning burden of proof involving postpetition transfers); *Grogan v. Garner*, 498 U.S. 479 (1991) (preponderance of evidence standard generally applies in bankruptcy proceedings).

There is no genuine issue as to the fact that the Debtor transferred at most 1,027,300 pounds of Fats to the Defendant postpetition, or that the Fats were included within the property of the estate. So, the Plaintiff has met his burden of proof on these issues.

The parties also agree that there is no court order authorizing the Debtor to sell Fats to the Defendant as it did, so the issue becomes whether the Debtor's sale of the Fats was otherwise authorized under title 11. Because the Debtor remained in possession and had authority to operate its business under § 1108, the court must decide whether the sales fell within the class of transactions described in § 363(c)(1), which provides as follows:

> If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). The main issue on this Motion, therefore, is whether the Debtor sold the Fats to the Defendant "in the ordinary course of business." *Id.*

Courts considering ordinary course of business issues generally note that the term is not defined, so they look to two judicially-developed tests -- the vertical test and the horizontal test by which courts have generally separated transactions within the ordinary course of business

from extraordinary transactions. *See e.g., Braunstein v. McCabe*, 571 F.3d 108, 124 (1st Cir. 2009); *In re Straightline Investments, Inc.*, 525 F.3d 870, 879 (9th Cir. 2008); *Med. Malpractice Ins. Ass'n v. Hirsch (In re Lavigne)*, 114 F.3d 379, 384 (2d Cir. 1997); *In re Roth American, Inc.*, 975 F.2d 949, 952-53 (3d Cir. 1992); *Burlington N.R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 705 (9th Cir. 1988); *Cohen v. KBC Fin. Servs., Inc., (In re Miller Mining, Inc.),* 219 B.R. 219 (Bankr. N.D. Ohio 1998); *General Electric Capital Corp. v. Hoerner (In re Grand Valley Sport & Marine, Inc.)*, 143 B.R. 840, 855-56 (Bankr. W.D. Mich. 1992); *In re: Media Central, Inc.,* 115 B.R. 119, 124 (Bankr. E.D. Tenn. 1990).[6] The Defendant concedes for purposes of this Motion that it must meet both tests.

The Defendant's Motion establishes without contradiction that the Debtor was engaged in the business of selling Fats before and after the petition date, on a truckload-by-truckload basis, to the Defendant, at prices generally arrived at through negotiation, and generally through a broker, at least until approximately April 19, 2011. Beginning in April, 2011, the Debtor offered to sell Fats to the Defendant using the Split Load Pricing which involved a formula comprising $0.06 per pound for half the truckload, and half at the "going rate." In the words of Mr. Castine, "one-half of it would be at a relevant price to the time that we were dealing and the other half would be always at 6 cents." (Castine Dep. 52:6-8).[7] The offer remained open until the Debtor gave further notice, thereby relieving the parties of the trouble of negotiating price for each delivery. From April through November 15, 2011, the Defendant purchased 2,054,600 pounds of Fats by the truckload at a "blended rate" that was better than the Defendant's principals "could

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[6] The parties generally cite the same (or similar) authorities for the vertical and horizontal tests, agreeing at least in this respect that the court should consider the ordinariness of the transactions, or not, from the perspective of a hypothetical creditor and the Debtor's industry.

[7] Paraphrasing Mr. Oakley, the now-controversial discounted price was calculated as half at the Debtor's cost, and half at the premium rate the Debtor charged Restaurant Recycling. (Oakley Dep. 38:1-25, DN 33-48).

ever have imagined." (Castine Dep. 52:16-21). The Plaintiff notes the Defendant's principal's admitted glee at the unexpectedly low price. *Id.* 52:16 ("I said, 'Yippee.'").

Despite the opportunity for discovery, however, there is no supportable suggestion in the record of collusion between the Debtor or Mr. Oakley (and his affiliates) on the one hand, and the Defendant or its principals on the other. Indeed, without contradiction, though pressed during his deposition, the Defendant's principal, Ramon Castine, testified that he had no relationship or connection with the Debtor aside from their business dealings in connection with the purchase of Fats, and his company made no payments to Mr. Oakley or his seed company. (Castine Dep. 40:4-42:8; 45:4-46:25; 47:17-18; 56:4-17).

Based on the summary judgment record, there is no genuine dispute that the transactions were arms-length sales of the Debtor's inventory, with deliveries on a truckload-by-truckload basis, on the same payment terms, before and after the petition date. The ordinary, arms-length *nature* of the transactions under review is undisputed,[8] and the fact that the Debtor's sale of the Fats was profitable, notwithstanding the discount and Split Load Pricing, is not in contention. This is not a case in which a debtor in desperation begins selling off capital assets in addition to inventory, for example, or venturing into previously untested lines of business, or in which the Debtor engaged in unprofitable transactions to curry favor with a friend or allied entity. *See Chomakos v. Hilton (In re Chomakos),* 170 B.R. 585, 593 (Bankr. E.D. Mich. 1993)(arms-length transaction involves actions of unrelated, willing parties each being free to act in their own self-interest and whose actions are voluntary and take place in an open market).

[8] At oral argument, the Plaintiff abandoned any challenge to the *bona fides* of the sales to the Defendant by narrowing the issue on this Motion to questions of price and the use of the Split Load Pricing formula incorporating a fixed price for half of each truck load. *See* Transcript of Hearing Held on January 8, 2014, 35:20-36:19, DN 65.

Instead, after months of discovery, only two aspects of the transactions between April 19 and November 15, 2011 arguably take them outside the ordinary course of the Debtor's business: (1) the Debtor had a standing offer to sell the Defendant Fats at a fixed price that the Debtor dictated based on its Split Load Pricing formula (rather than a per load negotiation based on an established index), and (2) for half of the volume purchased on and after April 20, 2011, the Defendant received a discount below what the Debtor charged its other main customer, Restaurant Recycling.

The Plaintiff's opposition to the Motion depends on the court's willingness to say that what is indisputably a profitable, arms-length transaction may be attacked because the parties struck a bargain resulting in a blended rate that surprised and delighted the Defendant, but that the Debtor could live with. (Oakley Dep. 98:5-16, DN 33-49; Castine Dep. 51:9-53:7). It would not be unreasonable to view this state of affairs as commonplace or ordinary in a marketplace in which the participants "win some and lose some," and raise or lower prices in exchange for other terms or concessions. Moreover, separating one term of a transaction from the totality of the circumstances may justly be criticized as taking a too-narrow view of the issue. *See In re Atlanta Retail, Inc.,* 287 B.R. 849, 857 (Bankr. N.D. Ga. 2002) (rejecting as "too narrow" an ordinary course of business argument premised on a contractual term that "reflected the relative bargaining positions of the parties, but did not affect whether the transaction was within the ordinary course").

Here, the testimony of Messrs. Oakley and Castine, and the Defendant's expert (Ms. Weihe-Storlie), if credited, would permit the court to find a perfectly good business reason for offering favorable terms to a good and dependable customer who paid and took delivery promptly, while permitting the Debtor to meet cash flow and tank storage needs, and maintain a

profit. Indeed, it would not be unreasonable to infer at trial that Mr. Oakley's pricing decisions (as to the Defendant and Restaurant Recycling both) ensured that the Defendant would be available to relieve pressure on the limited indoor storage tanks that, unless emptied consistently, and sometimes on short notice, threatened to shut down the Debtor's operations.

More generally, permitting a trustee to use his avoidance power to second-guess the business judgment of the estate's prior manager -- even one who may have struck a bad bargain -- is anathema to the goal of reorganization and contractual expectations (irrespective of bankruptcy considerations).[9] The customer of a chapter 11 debtor-in-possession intends to buy goods and services, not a lawsuit, and a finding by the court encouraging such challenges may chill the willingness of suppliers or customers to do business with a chapter 11 debtor-in-possession.

Nevertheless, although the court's view of legislative policy choices may ultimately inform its decision, unless the policy choices permit the court to rule as a matter of law, a court that is considering a summary judgment motion must confine itself to the task of identifying genuine factual disputes requiring trial. Here, the court concludes that the Debtor's asserted justification for the Split Load Pricing formula it applied to the Defendant's transactions is to some extent controverted, albeit by Mr. Longstreth.

V. CONCLUSION

The court will treat the following facts as established. *See* Fed. R. Civ. P. 56(g). First, the Debtor had limited storage capacity inside its plant for the Fats that needed to be stored at a certain temperature in order to remain liquid, make them marketable, and to keep the plant from shutting down. Second, the dollar amount at issue is not more than $364,147.04, which

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[9] *Committee of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (The Bankruptcy Code "favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor's management decisions.").

represents the discounted price the Defendant paid for half of the Fats it purchased between April 20, 2011 and November 15, 2011. Third, the Defendant has passed the horizontal dimension test because the Plaintiff has failed to adequately challenge the Defendant's expert and other evidence, offering no expert of his own or otherwise raising any genuine issue of material fact as to whether similar businesses would offer discounts in their ordinary course of negotiations. Dirk Longstreth's affidavit shows that his business experience is limited to this Debtor, and that his company (unlike the Debtor) is a purchaser of fats, not a refiner and supplier. He claims no personal knowledge of the industry as a whole, and because he has not been identified as an expert in the industry, the court will not permit him to opine on the question. Fourth, the issues involving the satisfaction of the vertical dimension test are narrowed to whether the Debtor was justified in offering the Defendant the discount. The affidavits and depositions offered within the Motion and Response show that, in general, parties within the industry negotiate price. There is also no dispute that the Defendant was purchasing the same type of inventory, in the same manner, post-petition as pre-petition. There is no genuine issue that the transactions between the Debtor and the Defendant were at arms-length. Indeed, at the hearing on the Motion, the parties agreed that the discounted price and the Split Load Pricing formula were the only aspects of the transactions that allegedly took them out of the ordinary course of business.

Therefore, if the court finds, after listening to the evidence at trial, that the Debtor exercised reasonable business judgment in lining up a back-up buyer at a discounted price, the court will make the determination that the hypothetical creditors, under the vertical dimension test, would believe that they were under no greater economic risk than what they accepted when deciding to do business with the Debtor. If, on the other hand, the court rejects the Debtor's

business reasons, it will find that the Split Load Pricing formula and the discount given to the Defendant caused the creditors to undertake a greater risk than they bargained for, and therefore that the transactions fell outside the ordinary course of business. For these reasons, and to this extent, the court will deny the Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (DN 31) is DENIED.

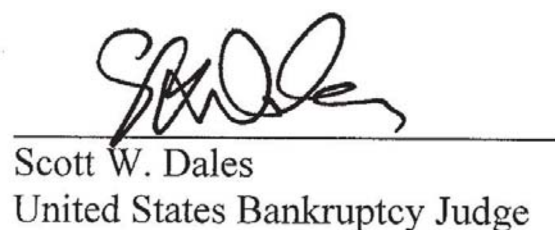
IT IS FURTHER ORDERED that the Clerk shall schedule a final pretrial conference in this adversary proceeding, at which the parties will discuss a trial plan, possible stipulation to admit exhibits, trial and briefing deadlines, motions *in limine* and other matters contemplated within Fed. R. Civ. P. 16(e).

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order upon John T. Gregg, Esq., and John T. Piggins, Esq., pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4.

[END OF ORDER]

IT IS SO ORDERED.

Dated February 4, 2014



Scott W. Dales
United States Bankruptcy Judge