UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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July 3, 2002

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Re: A.P.S., Inc. v. Tomco Auto Products, Inc.
Adv. Proc. No. 99-211

This is with respect to Tomco Auto Products, Inc.'s ("Defendant's") motion (Doc. # 34) for summary judgment and A.P.S., Inc.'s ("Debtor's") motion (Doc. # 29) for partial summary judgment on various counts of the complaint ("Complaint"). I will deny both motions for the reasons discussed below.

Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on February 2, 1998 ("Petition

Date"). (Debtor's Br. (Doc. # 27) at 1.) Prior to the Petition Date, Debtor entered into an agreement ("Pre-Petition Agreement") with Defendant, pursuant to which Debtor agreed to purchase re-manufactured carburetors and throttle body fuel injection units (collectively, "Products") from Defendant. (Id. at 5, 6.) Debtor intended to resell these Products through its network of re-distribution centers. (Id. at 5.) Although it is unclear as to which date the parties actually entered into the Pre-Petition Agreement, the terms thereof are set forth in a letter to Debtor from Defendant dated March 8, 1996 ("Pre-Petition Agreement"). (See App. to Debtor's Br. (Doc. # 30) Ex. D.)

According to Debtor, the process by which the parties conducted business was typical of the industry standard. (Debtor's Br. (Doc. # 27) at 5.) Debtor would send an order to Defendant either via telephone or electronic means, and Defendant would deliver the ordered Products to one of Debtor's distribution centers or company-owned store within 48 hours of receiving the order. (Id.) Defendant would then send Debtor an invoice for the purchased Products which Debtor would have 60 days to pay. (Id.)[1]

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[1] The Pre-Petition Agreement provides in pertinent part:

> 10. BILLING AND PAYMENT TERMS:
>
> Payment terms on all invoices are net 60 days. Tomco's monthly billing period closes on the 25th day of each month and includes shipments to and including the 25th day and any credits for returned cores (entitled to return) received by Tomco through the 20th day of each month.

Under certain circumstances, Debtor could return Products to Defendant in exchange for credit ("Credit") which Debtor could then apply against any outstanding and/or future invoices. (Id.) Such returnable Products included Products which had been returned to Debtor by customers claiming that the Products were defective ("Warranty Returns") and the salvageable core component of certain non-defective Products ("Core Returns").[2] (Id.) In addition,

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> All core, warranty, stock adjustment, and special credits are to be applied on the same terms as invoices.
>
> Payment for each month's net purchases (invoices less all credits issued in the month) must be received on or before the closing date of the subsequent month or the account shall be considered past due. Anticipation of any credits shall not be allowed and there can be no cash refunds for any credit balance.

(Pre-Petition Agreement at 5.)

[2] The Pre-Petition Agreement provides in pertinent part:

> 3. CORE RETURNS FROM SALE OF TOMCO PRODUCT:
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> Tomco's sale of carburetors includes the cores to such carburetors. Cores generated by the sale of TOMCO product may be returned to Tomco subject to the following terms and as specified in the terms and conditions printed on the reverse of each invoice.
>
> All cores must be returned in the original Tomco sales box with the APS store identification number imprinted in the space provided on the box lid.
>
> Individual core credit will be determined by the factory imprinted party number on the box and will be issued at the core prices listed on the Price List in effect at the time of return. Cores can be returned for core credit only. There are no cash core refunds allowed.
>
> * * *
>
> Cores credits are issued against purchases only, and no cash refunds are allowed.

(Pre-Petition Agreement at 2.)

Debtor was also permitted to return a limited amount of new and salable product as obsolescence and stock adjustment returns ("Stock Adjustment Returns" and collectively with the "Warranty Returns" and "Core Returns", "Returns").[3] (Debtor's Br. (Doc. # 27) at 5.) For each Product returned, Debtor would draft a return goods notice ("RGN") indicating the Credit Debtor was to receive in exchange for the Return, and then send the RGN and related Product back to Defendant. (Id.) For each RGN received, Defendant was to then issue a Credit to Debtor in the form of a Credit memo that Debtor could then apply against any outstanding or future invoice. (Id.)

After the Petition Date, Defendant notified Debtor that it was no longer willing to deal with Debtor on the terms set forth in the Pre-Petition Agreement. (Id. at 6.) Consequently, the parties executed a new agreement ("Post-Petition Agreement") which was memorialized in a letter dated February 19, 1998. (Id.) Pursuant to the terms of the Post-Petition Agreement, Defendant set up a new account for Debtor and instituted a new system whereby Debtor was required to pay in advance for Product against the orders that it placed with Defendant. (Debtor's Br. (Doc. # 27) at

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[3] The Pre-Petition Agreement provides in pertinent part:

> 5. OBSOLESCENCE AND INVENTORY ADJUSTMENTS:
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> * * *
>
> There will be no cash refunds against Inventory Adjustment Returns, and merchandise credits may only be earned by purchases of Tomco product as set forth above.

(Pre-Petition Agreement at 4.)

7.) Upon receiving the required pre-payment, Defendant would release the order and have the purchased Products delivered to Debtor. (Id.) With respect to Returns, the Post-Petition Agreement provides that "[Defendant] will not accept any core or merchandise returns for credit until such time as the offset issue is resolved to [Defendant's] satisfaction by the Bankruptcy Court." (Post-Petition Agreement at 1.) This "offset" is apparently a reference to Defendant's position that its pre-petition claim should be satisfied by Return Credits.

On May 29, 1998, the parties entered into another agreement ("§ 546(g)* Agreement" and collectively with the Pre-Petition Agreement and the Post-Petition Agreement, "Agreements") (App. to APS Br. (Doc. # 30) at Ex. F), approved by the Court pursuant to 11 U.S.C. § 546(g)*,[4] pursuant to which Defendant agreed to provide Debtor with a $95,000 post-petition credit line. (Debtor's Br. (Doc. # 27) at 7, n.5.) The 546(g)* Agreement provides in pertinent part:

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[4] Section 546(g)* provides:

> Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

> 1. **Sale and Credit Terms.** During the term of this Agreement, Vendor shall (a) accept orders from the Debtors for the purchase of automotive parts and supplies, and other goods offered by Vendor for sale to distributors ("Vendor Merchandise"), and (b) sell and deliver to the debtors, on credit on open account according to vendors standard credit terms of sale and standard credit policies and procedures including application of all standard discounts and allowances... all Vendor Merchandise ordered by the Debtors, upon the terms set forth herein (which supplement and to the extent inconsistent with, supersede Vendor's standard credit terms, policies and procedures)...

(546(g)* Agreement at 1) (emphasis added). The 546(g)* Agreement further provides:

> 2. **Returns.** During the term of this Agreement, Vendor shall accept from the Debtors returns of any and all Cores, including any and all cores on hand with the Debtors on the Petition Date, in accordance with Vendor's core return policy and practice with respect to others in the same class of trade as the Debtors, except that:
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> (a) **Credit to Vendor's Prepetition Claim.** The Debtors agree to return and deliver, and Vendor agrees to accept the return of, cores relating to goods sold and delivered by Vendor to the Debtors prior to the Petition Date ("Prepetition Cores"), free and clear of all claims and liens, up to the full amount of that portion of the Vendor's claim for goods sold and delivered by Vendor to the Debtors prior to the Petition Date ("Vendor's Prepetition Claim") that gives rise to Prepetition Cores ("546(g)* Limit"). Vendor's Prepetition Claim will correspondingly be reduced... The parties' good faith estimate of the 546(g)* Limit is $95,000.
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> (b) **Credit to Postpetition Account.** All returns of cores that exceed the 546(g)* Limit shall be accepted in accordance with Vendor's normal core return policy and practice (as may be amended from time to time), with respect to others in the same class of trade as the Debtors, and shall be credited to the Postpetition Account in accordance with the Vendor's standard core return policies.

(Id. at 2-3) (emphasis added).

Toward the end of February 1999, Debtor ceased its ordinary business operations and proceeded to liquidate its assets. (Debtor's Br. (Doc. # 27) at 4.) On July 1, 1999, Debtor commenced the instant adversary proceeding against Defendant asserting claims for: (1) breach of contract, conversion and turnover related to Defendant's alleged refusal to refund "overpayments" allegedly made by Debtor in respect of its post-petition Product purchases from Defendant ("Open Account Credit Balance Claim"); and (2) Defendant's alleged failure to issue Credit to Debtor for certain Products that Debtor returned to Defendant during the post-petition period ("RGN Claim" and collectively with Open Account Credit Balance Claim, "Claims").[5] (Id. at 1.) After conducting discovery on the matter, the parties concluded that the Open Account Balance Credit Claim could be determined on cross-motions for partial summary judgment and entered into a Stipulation, the terms of which include the following:

- Defendant made post-petition shipments of merchandise to Debtor of $1,263,000. (Stip. (Doc. # 26) ¶ 1.)
- Debtor made post-petition payments to Defendant in the amount of $805,000 for its post-petition product purchases. (Id. at ¶ 2.)
- Debtor returned merchandise to Defendant post-petition for which it was credited $643,000. (Id. at ¶ 3.)

[5] In addition, Debtor also asserted a claim pursuant to the Robinson-Patman Act, 15 U.S.C. § 13(a); however, pursuant to a stipulation ("Stipulation") executed by the parties, Debtor agreed to waive the Robinson-Patman claim. (Stip. (Doc. # 26) ¶ 7.)

- Of that $643,000, Defendant applied $94,000 to its pre-petition claim pursuant to the 546(g)* Agreement, representing the total amount of cores purchased by Debtor pre-petition and returned by Debtor post-petition. (Id. at ¶ 4.)

- Debtor has a post-petition open account credit balance ("Credit Balance") with Defendant in the amount of $91,000. (Id. at ¶ 5.)

- Defendant claims that Debtor's open account credit balance should be further reduced based on its asserted defense of a "warranty offset". (Stip. (Doc. # 26) ¶ 6.)[6]

- The post-petition payment terms between the parties were different than the pre-petition payment terms. (Id. at ¶ 8.)

Defendant argues that summary judgment is proper with respect to both the Open Account Credit Balance Claim and the RGN Claim, and contends that the sole dispositive issue with respect to both claims is whether Debtor, pursuant to the terms of the Agreements, is entitled to a cash refund for any Credit Balance that remains. (Def.'s Br. (Doc. # 35) at 8.) Citing those portions of the Pre-Petition Agreement and 546(g)* Agreement cited above, see supra, n. 1-3; discussion, supra, pp. 6-7, Defendant contends that the 546(g)* Agreement clearly incorporates the "no cash refund" terms of the Pre-Petition Agreement, and therefore provides

[6] Essentially, Defendant argues that it delivered goods to Debtor for which Debtor never paid, but received Credit, as part of the current balance, upon returning such goods under claimed warranty defects and obtained a credit. Defendant contends that since Debtor never paid for the goods, it is not entitled to an affirmative Credit for returning them. This issue is not being argued in this motion because Defendant contends that the amount of the Credit Balance is irrelevant in deciding its motion for summary judgment. (Def.'s Br. (Doc. # 35) at 1, n.1.)

that the Credit Balance may only be used to purchase new goods which Debtor has chosen not to do because it has closed its business. (Def.'s Br. (Doc. # 35) at 8.)

In response, Debtor disputes that summary judgment is proper with respect to the RGN Claim because genuine issues of material fact remain with respect thereto. (Debtor's Reply (Doc. # 31) at 12.) In particular, Debtor asserts that while Defendant contends that the parties' stipulation as to the $91,000.00 Credit Balance includes all Returns, the parties really intended the stipulation to refer only to the value of post-petition Returns *for which Debtor was credited*. (Id.) In fact, Debtor contends, there is an additional $30,612.17 worth of post-petition Products allegedly returned to Defendant for which Debtor was not credited. (Id.) In light of this factual dispute, Debtor argues, summary judgment on the RGN Claim is not proper. (Id. at 12-13.)

With respect to the Open Account Credit Balance Claim, Debtor contends that the $91,000 Credit Balance does not consist of Credits, but of "overpayments" resulting from Defendant's alleged imposition of "new" payment terms in the Agreements executed post-petition. (Debtor's Br. (Doc. # 27) at 8-9.) Debtor argues that because what it seeks "is not a cash refund for returned product instead of merchandise credit," but rather, "reimbursement of the excess cash that it paid for its post-petition product purchases," the contract provisions cited by Defendant are irrelevant. (Id. at

12.) Debtor argues that because most of the Credit Balance at issue arose during the four months between the Petition Date and the execution of the 546(g)* Agreement, the dispute is governed by the Post-Petition Agreement which in no way limits Debtor's right to recover its "cash overpayment" in the form in which it was made. (Debtor's Reply (Doc. # 31) at 4-5.)[7]

Assuming, *arguendo*, that the 546(g)* Agreement governs the characterization of the Credit Balance, Debtor contends that said agreement sheds no light on the instant dispute because the issue of "cash overpayment" was not addressed therein. (Id. at 5.) In addition, Debtor also argues that if applicable, the 546(g)* Agreement only applies to Core Returns and says nothing with respect to Warranty Returns or Stock Adjustment Returns which are also at issue here. (Id. at 6.) Debtor further argues that although Defendant contends that the parties agreed in the 546(g)* Agreement that Credits would be issued according to Defendant's standard policy, (i) at the time there was no standard policy with respect to "cash overpayments" (as opposed to "credit balances");

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[7] In response to this argument, Defendant points out that the Post-Petition Agreement executed prior to the 546(g)* Agreement expressly provides that "Tomco will not accept any core or merchandise returns for credit until such time as the offset issue is resolved to Tomco's satisfaction by the Bankruptcy Court." (Def. Reply (Doc. # 33) ¶ 1; App. to APS Br. (Doc. # 30) Ex. E at 1, ¶3.) Therefore, Defendant argues, Debtor could not have built up a Credit Balance because Defendant was not accepting returns for Credit until certain issues were resolved. (Def. Reply (Doc. # 33) ¶ 1.)

and (ii) the parties did not contemplate the possibility of a termination and liquidation of the Debtor's business when negotiating the 546(g)* Agreement. (Id. at 6-7.)[8] As such, Debtor contends that it is entitled to summary judgment with respect to its Open Account Credit Balance Claim.

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 judgment as a matter of law." Fed.R.Civ.P. 56(c).[9] In the instant case, despite the fact that the parties agree that summary judgment is proper with respect to the Open Account Credit Balance Claim, I find that genuine issues of material fact exist with respect to both Claims. Therefore, summary judgment on either Claim is not proper.

First, the Post-Petition Agreement expressly provides

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[8] In response to this argument, Defendant points out that the 546(g)* Agreement expressly provides that all sales are made "according to [Tomco's] credit terms of sale and standard credit policies." (546(g)* Agreement at 1.) Defendant contends that its standard credit terms of sale and standard credit policies expressly provide that "[a]ll core, warranty, stock adjustment, and special credits are to be applied on the same terms as invoices... [and that a]nticipation of any credits shall not be allowed and there can be no cash refunds for any credit balance." (Pre-Petition Agreement at 5, ¶ 10.)

[9] Federal Rule of Civil Procedure 56(c) is applicable to contested matters in bankruptcy pursuant to Federal Rules of Bankruptcy Procedure 9014 and 7056.

that "[Defendant] will not accept any core or merchandise returns for credit until such time as the offset issue is resolved to [Defendant's] satisfaction by the Bankruptcy Court." (Post-Petition Agreement at 1.)[10] However, Debtor's position that "much of the cash-credit balance at issue in this case arose during the almost four-month period" in which the Post-Petition Agreement governed the parties' relationship is inconsistent with the above-quoted provision and suggests that Defendant did not implement that provision of the Post-Petition Agreement. Thus, whether Defendant did or did not "accept any core or merchandise returns for credit until such time as the offset issue is resolved to [Defendant's] satisfaction by the Bankruptcy Court" remains a genuine issue of material fact that must be resolved.[11]

In addition, to the extent that 546(g)* Agreement addresses the treatment of Returns, that Agreement speaks only to Core Returns and says nothing with respect to Warranty Returns or Stock Adjustment Returns. Specifically, the 546(g)* Agreement provides that Defendant "shall accept from the Debtors returns of any and all Cores... in accordance with [Defendant's] core return

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[10] Presumably, the offset issue was resolved by the Bankruptcy Court when the parties entered into the Court-approved 546(g)* Agreement in May 1998.

[11] Indeed, Defendant disagrees with Debtor and argues that Debtor could not have built up a Credit Balance because Defendant was not accepting returns for Credit in the post-petition period until the offset issues were resolved. See discussion supra, n.7.

policy and practice with respect to others in the same class of trade as the Debtors". (546(g)* Agreement at 2.) However, the record does not reflect Defendant's standard "core return policy and practice with respect to others in the same class of trade as the Debtors." Nor is there anything on the record to suggest the parties' intent or Defendant's standard policy and practice with respect to either Warranty or Stock Adjustment Returns. Defendant contends that its standard credit terms of sale and standard credit policies, referenced in the 546(g)* Agreement, expressly provide that "[a]ll core, warranty, stock adjustment, and special credits are to be applied on the same terms as invoices... [and that a]nticipation of any credits shall not be allowed and there can be no cash refunds for any credit balance." In contrast, Debtor contends that at the time the 546(g)* Agreement was executed, there was no standard policy with respect to what is at issue in this case, i.e., "cash overpayments". In light of the different positions taken by the parties with respect to this issue, it is clear that genuine issues of material fact remain as to: (i) whether the 546(g)* Agreement speaks to Returns other than Core Returns; and (ii) what is Defendant's standard return policy and practice, regarding all Returns, with respect to others in the same class of trade as the Debtors.

Furthermore, although Debtor has provided the Court with information in regard to all invoices, payments and Credits

exchanged between the parties post-petition, such information, located at Exhibit G of the Appendix (Doc. # 30) to Debtor's opening brief, is presented in such a way that the Court cannot determine exactly what has transpired. Among other problems, I cannot determine from this data how the $95,000.00 line of credit works as it relates to any Credits as compared to the payments made in advance of delivery as they relate, if at all, to any Credits. I find that no accurate analysis of the parties' transactions can be conducted based on the documents before me.

Finally, although Debtor complains that the post-petition "[Defendant]-devised system" of advanced payment "did not allow [Debtor] to realize the value of product it chose to return since [Debtor] was unable to reduce its payments by the amount of the credits issued by [Defendant] for returned product" (Debtor's Br. (Doc. # 27) at 8), the table set forth on page 11 of Debtor's opening post-trial brief indicates that $643,000.00 worth of Credits were issued to Debtor for Product returned post-petition (id. at 11).[12] Debtor provides no explanation for the inconsistency between its argument that the pay-in-advance system prevented Debtor from "realiz[ing] the value of product it chose to return" and the acknowledged $643,000.00 Credit item. For this reason, and the reasons discussed above, I find that genuine issues of material

[12] This table summarizes the amounts of purchases, Credits, payments and reductions agreed to by the parties in the Stipulation (Doc. # 26).

fact remain with respect to both of Debtor's Claims and therefore, both Defendant's motion (Doc. # 34) for summary judgment and Debtor's motion (Doc. # 29) for partial summary judgment are denied.

SO ORDERED.

Very truly yours,

Peter J. Walsh