United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Clark Retail Enterprises, Inc.

Bankruptcy No. 02 B 40045

Adversary Caption: Marathon Ashland Petroleum, LLC

Adversary No. 03 A 00703

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Judge: John H. Squires

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 11
CLARK RETAIL ENTERPRISES, INC., f/k/a OTG, INC., d/b/a CLARK OF ILLINOIS; CLARK OF WISCONSIN,	)	Bankruptcy No. 02 B 40045
	)	Judge John H. Squires
Debtor.	)	
MARATHON ASHLAND PETROLEUM LLC,	)	
Plaintiff,	)	
v.	)	Adversary No. 03 A 00703
CLARK RETAIL ENTERPRISES, INC.,	)	
Defendant.	)	
CLARK RETAIL ENTERPRISES, INC.,	)	
Counter-Plaintiff,	)	
v.	)	
MARATHON ASHLAND PETROLEUM LLC.,	)	
Counter-Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Clark Retail Enterprises, Inc. ("Clark") for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on the complaint filed by Marathon Ashland Petroleum,

LLC ("MAP") to recoup the sum of $840,565.76, which was transferred to Clark based upon alleged representations and failure to disclose material facts, made or omitted to induce MAP to extend unsecured credit to Clark. For the reasons set forth herein, the Court denies the motion.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. §1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. APPLICABLE STANDARDS

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith 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.

Fed.R.Civ.P. 56(c). *See also Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 402 (7th Cir. 1998).

The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. *Trautvetter v. Quick*, 916

F.2d 1140, 1147 (7th Cir. 1990); *Farries v. Stanadyne/Chicago Div.*, 832 F.2d 374, 378 (7th Cir. 1987), *quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis*, 806 F.2d 146, 149 (7th Cir. 1986). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. *ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710*, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourages the use of summary judgment as a means to dispose of factually unsupported claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. *Anderson*, 477 U.S. at 248; *Matsushita*, 475 U.S. at 585-86; *Celotex*, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. *Anderson*, 477 U.S. at 248; *Frey v. Fraser Yachts*, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." *Lohorn v. Michal*, 913 F.2d 327, 331 (7th Cir. 1990). The Seventh Circuit noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. *Opp v.*

Wheaton, 231 F.3d 1060 (7th Cir. 2000); *Szymanski v. Rite-way*, 231 F.3d 360 (7th Cir. 2000).

The party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion, identifying those portions of the "pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings, rather its response must show that there is a genuine issue for trial. *Anderson*, 477 U.S. at 248; *Celotex*, 477 U.S. at 323; *Matsushita*, 475 U .S. at 587; *Patrick v. Jasper County*, 901 F.2d 561, 564-566 (7th Cir. 1990). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial would be on the nonmoving party, the party moving for summary judgment may satisfy Rule 56's burden of production by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. *See Union Nat'l Bank of Marseilles v. Leigh (In re Leigh)*, 165 B.R. 203, 212-13 (Bankr. N.D.

Ill. 1993) (citation omitted). This point is pertinent to the motion at bar because Clark's main contention is that MAP is not entitled as a matter of law to recoup its pre-petition claim for unpaid unbranded petroleum products sold to Clark on credit from the proceeds of collected credit card product purchases made post-petition.

Rule 56(d) provides for the situation when judgment is not rendered upon the whole case, but only a portion thereof. The relief sought pursuant to subsection (d) is styled partial summary judgment. Partial summary judgment is available only to dispose of one or more counts of the complaint in their entirety. *Commonwealth Ins. Co. v. O. Henry Tent & Awning Co.*, 266 F.2d 200, 201 (7th Cir. 1959); *Biggins v. Oltmer Iron Works*, 154 F.2d 214, 216-17 (7th Cir. 1946); *Quintana v. Byrd*, 669 F.Supp. 849, 850 (N.D. Ill. 1987); *Arado v. General Fire Extinguisher Corp.*, 626 F.Supp. 506, 509 (N.D. Ill. 1985); *Capitol Records, Inc. v. Progress Record Distributing, Inc.*, 106 F.R.D. 25, 28 (N.D. Ill. 1985); *In re Network 90/, Inc.*, 98 B.R. 821, 823 (Bankr. N.D. Ill. 1989); *Strandell v. Jackson County*, 648 F.Supp. 126, 136 (S.D. Ill. 1986). Rule 56(d) provides a method whereby a court can narrow issues and facts for trial after denying in whole or in part a motion properly brought under Rule 56. *Capitol Records*, 106 F.R.D. at 29.

Summary judgment is appropriate in cases involving the interpretation of contractual documents. *Stenograph Corp. v. Fulkerson*, 972 F.2d 726, 728 (7th Cir. 1992); *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). "[S]ummary judgment should be entered only if the pertinent provisions of the contractual documents are unambiguous; it is the lack of ambiguity within the express terms of the contract that forecloses any genuine issues of

material fact." *Ryan*, 877 F.2d at 602 (citation omitted). Construing the language of a contract is a question of law appropriate for summary judgment, unless the contract is ambiguous. *Reaver v. Rubloff-Sterling*, L.P., 303 Ill. App. 3d 578, 581, 708 N.E.2d 559, 561 (3rd Dist.), *appeal denied*, 184 Ill. 2d 573, 714 N.E.2d 533 (1999); *Ford v. Dovenmuehle Mortgage, Inc.*, 273 Ill. App. 3d 240, 244, 651 N.E.2d 751, 754 (1st Dist.1995) (citations omitted).

Local Bankruptcy Rule 7056-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Illinois, which deals with summary judgment motions, was modeled after LR56.1 of the Local Rules of the United States District Court for the Northern District of Illinois. Hence, the case law construing LR56.1 and its predecessor Local Rule 12 applies to Local Bankruptcy Rule 7056-1.

Pursuant to Local Bankruptcy Rule 7056-1, a motion for summary judgment imposes special procedural burdens on the parties. Specifically, the Rule requires the moving party to supplement its motion and supporting memorandum with a statement of undisputed material facts ("7056-1 statement"). The 7056-1 statement "shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Local Bankruptcy Rule 7056-1B.

Clark filed a 7056-1 statement that substantially complies with the requirements of the Rule. It contains numbered paragraphs setting out uncontested facts with specific references to attached exhibits and the affidavit of Karl Goodhouse ("Goodhouse"). Goodhouse is the vice

president of petroleum and business development for Clark and has been in that position since November 2001. *See* Goodhouse Affidavit at ¶ 2. In his current capacity, Goodhouse is responsible for managing Clark's day-to-day petroleum supply and distribution, including the supply of gasoline to Clark's stations and relationships with fuel suppliers. *Id.* He is familiar with the terms of Clark's various contracts and arrangements with MAP, including the arrangement pertaining to the Marathon brand credit card, the contract between Clark and MAP for MAP's supply of Marathon brand petroleum products to Clark, and the terms on which Clark purchased unbranded petroleum products from MAP. *Id.* Goodhouse further states that MAP is a refiner and marketer of petroleum products, including the wholesale distribution of branded and unbranded gasoline. *Id.* at ¶ 6. He states that MAP supplied petroleum products to Clark before Clark commenced its bankruptcy petition. *Id.*

Moreover, Goodhouse avers that Clark and MAP have an arrangement whereby Clark permits its customers to pay for their purchases at Clark locations by using a credit card issued by MAP and carrying its brand name, as well as other credit cards approved for acceptance by MAP (the "Marathon Processed Cards"). *Id.* at ¶ 7. Clark's customers use Marathon Processed Cards to pay for a variety of merchandise at Clark's locations, including food, drinks, cigarettes, gasoline, motor oil and other merchandise. *Id.* at ¶ 9. According to Goodhouse, the credit card arrangement works as follows: first, a customer offers an approved credit card as payment, and Clark accepts the card as payment for a transaction. *Id.* at ¶ 10. Next, the payment is processed at the point of sale and transmitted to and received by MAP. *Id.* at ¶ 11. MAP then credits Clark's bank account for the valid and authorized purchases

made on a Marathon Processed Card. *Id.* at ¶ 12. Goodhouse states that the Marathon Card Proceeds are transmitted by MAP to Clark's bank account by means of an automatic clearinghouse payment. *Id.*

Goodhouse further avers that Clark does not use the Marathon Card Proceeds to purchase petroleum products or any other products from MAP. *Id.* at ¶ 14. Additionally, he states that MAP does not use the Marathon Card Proceeds to offset any debts that Clark owes to MAP and that MAP and Clark have not agreed to permit such setoffs. *Id.* According to Goodhouse, on April 17, 2001, MAP and Clark entered into a contract denominated the "Product Sales Agreement - Marathon Brand." *Id.* at ¶ 15. The agreement had a term of one year, which was extended on December 20, 2001 on a month-by-month basis. *Id.* Goodhouse states that paragraph 10 of the agreement, which is titled "Credit Cards," does not authorize setoff between Clark and MAP. *Id.* at ¶ 18. In particular, paragraph 10 does not authorize the setoff of Marathon Card Proceeds against any debts Clark owed to MAP. *Id.*

Goodhouse states that prior to the petition date, Clark purchased unbranded petroleum products from MAP on credit. *Id.* at ¶ 19. Clark would pay for these purchases by means of a wire transfer to MAP of the amount representing the previous day's purchases less the amount of the line of credit MAP extended. *Id.* According to Goodhouse, each business day, Clark wire-transferred to MAP the amount MAP was due for Clark's purchases of unbranded products the day before. *Id.* at ¶ 20. Clark used funds from its own accounts to complete the wire transfer. *Id.* Goodhouse avers that Clark did not purchase the unbranded petroleum products with Marathon Card Proceeds. *Id.*

Goodhouse also contends that on October 16, 2002, the day after Clark filed its bankruptcy petition, in accordance with its usual procedure, MAP transmitted three automatic clearinghouse payments to Clark's bank account in the aggregate amount of $229,372.73. *Id*. at ¶ 21. These payments represented the valid and authorized Marathon Processed Card transactions occurring at Clark's stores on October 10, 11, 12 and 13, 2002–all before the bankruptcy filing. *Id*. On October 18, 2002, MAP made three withdrawals from Clark's bank account totaling $229,372.73. *Id.* at ¶ 22. MAP did not seek Clark's approval to withdraw the funds; Clark did not give its approval to MAP to withdraw the funds; and MAP did not provide Clark with any reason for the withdrawal. *Id.*

The party opposing a summary judgment motion is required by Local Rule 7056-2 to respond ("7056-2 statement") to the movant's 7056-1 statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr.R. 7056-2. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr.R. 7056-2A(2)(a). Most importantly, "[a]ll material facts set forth in the [7056-1] statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party." Local Bankr.R. 7056-2B.

MAP has complied with this Rule in part. It responds to Clark's 7056-1 statement paragraph by paragraph and contains specific references to attached exhibits. However, MAP

did not attach the "Reseller Product Sales Terms," Exhibit J of MAP's proof of claim, which it references in its response to paragraphs 13 and 17 of Clark's 7056-1 statement. MAP likewise failed to attach the "MAP Credit Card Handbook" which it references in paragraphs 6 and 20 of its 7056-2 statement. While the 7056-2 statement indicates that the handbook was not attached "as voluminous," to the extent MAP specifically refers to portions of the handbook, those portions should have been attached to the 7056-2 statement. The 7056-2 statement also contains specific references and a response to the affidavit of Karl Goodhouse, as well as a counter affidavit from Steven Poehler ("Poehler").

Poehler is the commercial credit manager for MAP. He avers that as of January 1, 2002 and continuing through October 15, 2002, MAP supplied Marathon brand and unbranded petroleum products to Clark. *See* Poehler Affidavit at ¶ 1. According to Poehler, during January 2002 and continuing through Clark's bankruptcy filing, MAP and Clark discussed the possibility of continuing and expanding their relationship, by converting additional Clark operated locations to the Marathon brand and by supplying additional Marathon unbranded petroleum products to other locations operated by Clark. *Id.* at ¶ 2. Poehler states that as an inducement for Clark to continue discussions and with the expectation that an agreement would be forthcoming, MAP made available to Clark $2,000,000.00 in unsecured credit for Marathon brand purchases and for unbranded purchases, $250,000.00 in unsecured credit and $250,000.00 in credit supported by a letter of credit. *Id.* at ¶ 3.

Poehler further avers that as of early October 2002, MAP and Clark reached an agreement in principle as to a proposed contract for the continuation and expansion of their

relationship for Marathon brand and unbranded products, subject only to negotiations on the amount of credit that would be available to Clark. *Id.* at ¶ 4. According to Poehler, on October 9, 2002, MAP agreed in a telephone conversation that it would make $2,000,000.00 in unsecured credit available to Clark for Marathon brand purchases under a proposed contract, but would require a $4,500,000.00 standby letter of credit to support unbranded purchases under the proposed contract. *Id.* at ¶ 5. Clark asked for time to consider the proposal and promised a response by October 11, 2002. *Id.* Poehler states that during the October 9, 2002 telephone conversation, MAP also expressed concerns about its unbranded credit exposure to Clark and stated that, in any event, unless additional credit support, such as the $4,500,000.00 letter of credit, was provided promptly, MAP intended to change Clark's current unbranded terms to "prepayment only," but would not do so before Clark's October 11, 2002 telephone call to MAP. *Id.* at ¶ 6.

Poehler states that in the October 11, 2002 telephone call, Clark agreed to the $4,500,000.00 amount for the letter of credit and expressed a high degree of confidence that it had the ability to obtain such a letter of credit from a bank within a few days and that the proposed contract would be finalized promptly. *Id.* at ¶ 7. Clark did not disclose to MAP that Clark's board of directors had discussed the filing of a bankruptcy petition. *Id.*

According to Poehler, the October 11, 2002 telephone conversation and the failure to disclose a material fact by Clark, induced MAP to continue unbranded product sales on credit to Clark for the three-day weekend beginning on the evening of October 11, 2002 and ending at the close of business on Monday, October 14, 2002. *Id.* at ¶ 8. Poehler contends that

MAP would not have extended unsecured credit to Clark had MAP known that Clark was planning to file bankruptcy. *Id.* Poehler states that following the telephone call on October 11, 2002 and continuing through the close of October 14, 2002, Clark purchased $840,576.76 in unbranded product from MAP and $385,009.04 in Marathon brand product. *Id.* at ¶ 9.

Poehler states that upon learning of Clark's bankruptcy filing, MAP took the following actions. On October 15, 2002, MAP withheld payment of $65,890.55 due Clark for pre-petition credit card transactions, placing the amounts on "administrative hold" pending the filing of an adversary proceeding to determine MAP's right to retain the funds. *Id.* at ¶ 11a. MAP subsequently filed a motion for relief from the automatic stay to allow it to set off such amounts against amounts owed to Clark. *Id.* Additionally, Poehler avers that on October 16, 2002, he directed that MAP contact its bank and attempt to reverse three automated clearinghouse payments totaling $229,372.73 that MAP had initiated on October 15, 2002 as payment to Clark for pre-petition credit card assignments. *Id.* at ¶ 11b. Poehler states that at the time he made this direction, he did not know whether the three payments were under Clark's control. *Id.* He contends that his intent was to halt the automatic clearinghouse transfer of funds into Clark's account before any such transfer took effect and while such transfer order was in the hand of MAP's bank or an intermediary bank. *Id.* Poehler further states that the purpose of this reversal, if successful, was to reclaim funds that had not yet become property of the Clark

bankruptcy estate and place them on "administrative hold" pending the filing of a motion to lift the stay to take a setoff. *Id.*

Poehler contends that during the period October 15, 2002 through the present, MAP continued to process post-petition credit card transactions from Clark under the Marathon brand agreement. *Id.* at ¶ 11c. MAP paid Clark the value of these credit card assignments less the amount of $840,576.76, which represented some of the unsecured credit that MAP extended to Clark in reliance on the October 11, 2002 telephone call as described above. *Id.*

Further, MAP's 7056-2 statement contains additional facts. MAP states that on October 11, 2002, Clark's board of directors passed a resolution that Clark file for Chapter 11 protection. *See* 7056-2 statement at pp. 8. It also states that at no time prior to its bankruptcy filing did Clark disclose to MAP the Clark board of directors' resolution that Clark file for Chapter 11 protection. *Id*.

III. UNDISPUTED FACTS AND BACKGROUND

Based upon MAP's 7056-2 statement and the 7056-1 statement of Clark, the Court finds the following facts are undisputed. Clark is engaged in the business of operating retail convenience stores and attached gasoline stations. *See* 7056-1 statement at ¶ 1. Clark filed a voluntary petition under Chapter 11 of the Bankruptcy Code on October 15, 2002. *Id*. at ¶ 2.

MAP is a wholesaler and distributor of petroleum products, including branded and unbranded gasolines, and it provides those products to a variety of retailers, including Clark. *Id*. at ¶ 5. Before Clark filed its bankruptcy petition, MAP supplied Clark with petroleum

products, and MAP is now an unsecured creditor of the bankruptcy estate. *Id*.

Clark and MAP have an "arrangement" whereby Clark permits its customers to pay for their purchases at Clark retail locations by using credit cards approved for acceptance by MAP, including the MAP brand name credit card, Master Card, VISA, Discover, American Express, and others (the "Marathon Processed Cards"). *Id*. at ¶ 6. Clark's customers use these credit cards to pay for any merchandise available at Clark's retail locations, including food, drinks, cigarettes, magazines, gasoline and other merchandise. *Id*. at ¶ 8. Clark customers are not required to purchase Marathon brand gasoline, unbranded gasoline provided by MAP or any MAP-provided products when using their Marathon Processed Card. *Id*. Further, MAP does not limit the amount of Marathon Processed Card charges that Clark may process and submit to MAP for reimbursement. *Id*.

Pursuant to the credit card "arrangement," a customer pays for a transaction at one of Clark's retail locations with the Marathon Processed Card, which Clark accepts as payment. *Id*. at ¶ 9. Next, the payment is processed at the point of sale and transmitted and received by MAP. *Id*. at ¶ 10. After receiving the payment, MAP verifies that the credit card transaction was processed and authorized properly. *Id*. MAP then credits Clark's bank account for the valid and authorized purchases made on the Marathon Processed Card, less a processing fee which MAP retains. *Id*. at ¶ 11. The net credits are transmitted to Clark's bank account by means of an automatic clearinghouse ("ACH") payment. *Id*. MAP usually transmits an ACH payment to Clark's bank account every business day, with the transmitted payment comprising the amounts of the Marathon Processed Card proceeds that accumulated during the previous

two to three days. *Id*. at ¶ 12.

On April 17, 2002, MAP and Clark entered into a contract denominated the "Product Sales Agreement - Marathon Brand" (the "Marathon Brand PSA"). *Id*. at ¶ 14. The Marathon Brand PSA had a term of one year, which was extended on December 20, 2001 on a month-by-month basis. *Id*. Under the Marathon Brand PSA, MAP agreed, among other things, to supply Marathon-branded petroleum products to Clark, and Clark agreed, among other things, to purchase minimum quantities of Marathon-branded petroleum from MAP. *Id*. at ¶ 15. The Marathon Brand PSA dealt exclusively with Clark's purchase of MAP's Marathon-brand petroleum products, and did not deal with the unbranded petroleum products supplied and delivered by MAP. *Id*. at ¶ 16.

Prior to the petition date, Clark purchased unbranded petroleum products from MAP on credit. *Id*. at ¶ 18. On October 15 or 16[1], 2002, MAP initiated a transmission of three or four[2] ACH payments to Clark's bank account in the aggregate amount of $229,372.73. *Id*. at ¶ 20. On October 18, 2002, MAP made three or four[3] withdrawals from Clark's bank

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[1] The Court notes that the 7056-2 statement and Poehler Affidavit indicate that the transaction occurred on October 15, 2002. *See* 7056-2 statement at ¶ 20; Poehler Aff. at ¶ 11. The 7056-1 statement and Goodhouse Affidavit indicate that the transaction occurred on October 16, 2002. *See* 7056-1 statement at ¶ 20; Goodhouse Aff. at ¶ 21. The Court finds that this issue is one material fact with respect to whether the claimed transfers were part of the "same transaction" for purposes of MAP's recoupment claim.

[2] The Court notes that the 7056-2 statement and Goodhouse affidavit indicate that there were three, rather than four transactions as indicated in the 7056-1 statement. The Court does not find this issue as one of material fact for purposes of the instant motion.

[3] *See* note 2, *supra*.

account (via the ACH system) which amounted to $229,372.73. *Id*. at ¶ 21. MAP did not notify Clark that it would be recalling the funds nor did MAP provide Clark with any justification or reason for recalling the funds. *Id*. Clark did not give its approval to MAP to recall the funds. *Id*.

On October 15, 2002, Clark filed a voluntary Chapter 11 petition. On March 11, 2003, MAP commenced the instant adversary complaint against Clark seeking recoupment in the sum of $840,565.76 for unbranded petroleum products sold to Clark pre-petition on credit between October 11, 2002 at 5:00 p.m. through October 14, 2002 at 11:59 p.m. Clark has denied that MAP can properly seek recoupment and has asserted various defenses and has counterclaimed against MAP on several theories, including: breach of contract; unauthorized post-petition transfers in violation of 11 U.S.C. § 549; turnover pursuant to 11 U.S.C. § 542(b); for unjust enrichment by which a constructive trust should be imposed; conversion; and violation of 11 U.S.C. § 362 for MAP's alleged seizure of credit card payment proceeds. One of the other major creditor's of the estate, Canadian Imperial Bank of Commerce (the "Bank"), as a pre-petition lender, has intervened as a party defendant and contends that MAP's recoupment claim should be denied as a matter of law. The Bank contends that Clark's alleged fraud on MAP relates to its promise to deliver a letter of credit for gasoline purchases, and thus has nothing to do with the credit card receivables that are sought to be recouped. Therefore, the Bank argues, the existence of such a fraud cannot make gasoline sales part of the "same transaction" as credit card receipts, and without that, there can be no recoupment. Further, the Bank contends that recoupment is inappropriate because it is not

supported by the existing contractual relationship between Clark and MAP and is not likely to be supported by any proposed contractual relationship.

IV. DISCUSSION

MAP seeks recoupment based on Clark's alleged misrepresentation of its financial condition and ability to perform. MAP's subsequent reliance on those representations induced MAP to continue to grant unsecured credit to Clark. MAP seeks to recoup the sum of $840,565.76, which it extended as unsecured credit to Clark for Clark's purchase of unbranded product based on Clark's misrepresentations and failure to inform MAP of its bankruptcy plans.

Clark alleges that days before it filed its bankruptcy petition, it purchased unbranded petroleum products on credit from MAP, which amount to $840,565.76. Clark argues that MAP, at best, has an unsecured claim against its estate with respect to those purchases. Clark further states that before and after the petition date, MAP received proceeds of valid and authorized credit card transactions that Clark processed in its retail stores on credit cards authorized and accepted by MAP, namely the Marathon Card Proceeds. Clark contends that the Marathon Card Proceeds not yet paid to Clark by MAP total $1,145,314.90. Clark argues that MAP seeks to recoup a pre-petition debt relating to gasoline purchased by Clark by garnishing the post-petition Marathon Card Proceeds that it improperly has retained. Clark posits that MAP cannot recoup its pre-petition claim for unpaid unsecured credit extended out of post-petition collateral proceeds constituting property of the estate from collected credit card

payment proceeds.

Under the doctrine of recoupment, a defendant can meet a plaintiff's claim with a countervailing claim that arose out of the same transaction as the plaintiff's claim or cause of action, for the purpose of abatement or reduction of such claim. *Steinberg v. Ill. Dept. of Mental Health and Dev. Disabilities (In re Klingberg Schools)*, 68 B.R. 173, 178 (N.D. Ill. 1986), *aff'd*, 837 F.2d 763 (7th Cir. 1988); *Davidovich v. Welton (In re Davidovich*), 901 F.2d 1533, 1537 (10th Cir. 1990); *Rooster v. Roy (In re Rooster, Inc.)*, 127 B.R. 560, 567 (Bankr. E.D. Pa. 1991). Recoupment is a non-bankruptcy common law doctrine established through precedent which is not codified in the Bankruptcy Code. *Solow v. American Airlines, Inc. (In re Midway Airlines, Inc.)* 221 B.R. 411, 461 (Bankr. N.D. Ill. 1998), *citing A and C Elec. Co., Inc. v. Meade Elec. Co., Inc*. (*In re A and C Elec. Co., Inc.*), 211 B.R. 268, 273 (Bankr. N.D. Ill. 1997) (citation omitted). It "is a defense whereby the creditor claims that a debtor's claim is based on a transaction in which the creditor has a claim against the debtor, and equity demands that the debtor's claim cannot be considered without taking account of the creditor's claim." *Chapman v. Charles Schwab & Co. et al. (In re Chapman)*, 265 B.R. 796, 807 (Bankr. N.D. Ill. 2001).

"The justification for the recoupment doctrine is that where the creditor's claim against the debtor arises from the same transaction as the debtor's claim, it is essentially a defense to the debtor's claim against the creditor rather than a mutual obligation, and application of the limitations on set-off in bankruptcy would be inequitable." *Midway Airlines, Inc.*, 221 B.R. at 462, *citing Klingberg Schools*, 68 B.R. at 178 (N.D. Ill. 1986), *aff'd*, 837 F.2d 763 (7th Cir.

1988) (citation omitted). The transaction upon which the debtor's claim is based must be so closely intertwined with the creditor's claim that the amount of the former cannot be fairly determined without resolving the latter. *Chapman*, 265 B.R. at 807, *citing St. Francis Physician Network, Inc. v. Rush Prudential HMO, Inc. (In re St. Francis Physician Network, Inc*.), 213 B.R. 710, 719 (Bankr. N.D. Ill. 1997).

The requirements for recoupment are based on common law pleading rules. *Chapman,* 265 B.R. at 807, *citing Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1440 (7th Cir. 1993) (recoupment is the ancestor of the compulsory counterclaim). The doctrine of recoupment must be narrowly construed because it alters the Code's policy favoring equal treatment of creditors. *Id*., *citing In re McMahon*, 129 F.3d 93, 97 (2d Cir. 1997). "The doctrine of recoupment has been applied in the bankruptcy context to allow creditors to recoup amounts owed by the debtor for pre-petition debts from payments to debtor for post-petition earnings." *Klingberg Schools,* 68 B.R. at 178. Recoupment differs from setoff because it requires that the same transaction be involved in the debts. *Midway Airlines*, 221 B.R. at 462, *citing St. Francis Physician Network, Inc.*, 213 B.R. at 716. The key difference between recoupment and setoff is that a setoff may (although it does not necessarily) involve different transactions, but the essential element of recoupment is that it is a demand arising from the same transaction as the debtor's claim. *Id*.

The weight of authority holds that recoupment does not violate the automatic stay. *Chapman,* 265 B.R. at 807, *citing McMahon*, 129 F.3d at 96 (citation omitted); *Megafoods Stores, Inc. v. Flagstaff Realty Assoc. (In re Flagstaff Realty Assoc.)*, 60 F.3d 1031, 1034

(3rd Cir. 1995); *Holford v. Powers (In re Holford),* 896 F.2d 176, 178-79 (5th Cir. 1990); *Ashland v. Appel* (*In re B & L Oil Co.*), 782 F.2d 155, 157 (10th Cir. 1986) (creditor allowed to recoup pre-petition overpayments from payment for post-petition purchase); *St. Francis*, 213 B.R. 710, 716; (recoupment is not subject to same limitations of setoff); *Schachter v. Tolassi (In re 105 East Second Street Assoc.)*, 207 B.R. 64, 69-70 (Bankr. S.D.N.Y. 1997); *In re Norsal Industries, Inc.*, 147 B.R. 85, 88 (Bankr. E.D.N.Y. 1992); *Rooster*, 127 B.R. at 570 (Bankr. E.D. Pa. 1991); *Visiting Nurse Ass'n of Tampa Bay, Inc. v. Sullivan (In re Visiting Nurse Ass'n. of Tampa Bay, Inc.)*, 121 B.R. 114, 119 (Bankr. M.D. Fla. 1990); *American Central Airlines, Inc. v. Dep't of Transp.* (*In re American Central Airlines, Inc.*), 60 B.R. 587, 590 (Bankr. N.D. Iowa 1986). The right of a creditor to bring an action for recoupment is determined by state law. *Id*., *citing McMahon,* 129 F.3d at 96. Illinois law allows recoupment both in tort and contract. 735 Ill. Comp. Stat. § 5/2-608. 735 Illinois Compiled Statute section 5/2-608(a) states "[a]ny claim by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim." *Id*.

The Court must determine whether the alleged claims arose out of the same transactions, or alternatively, transactions so intertwined that the amount of one cannot be determined without resolving the latter. For the purposes of recoupment, "same transaction" is a term of art that must be narrowly defined. *Conoco, Inc. v. Styler (In re Peterson*

Distributing, Inc.), 82 F.3d 956, 959 (10th Cir. 1996). The same transaction requirement ensures that equitable reasons exist before a creditor may attain priority over other creditors by recoupment. *Id*. at 960. A single contract does not necessarily resolve the issue of whether there is a single transaction. *Id*. A "same contract equals same transaction" rule would be overly simplistic. *Id*. Therefore, the doctrine is applicable in cases where claims are so closely intertwined that the remedy of recoupment would comport with the Code's notion that all unsecured creditors share equally in the debtor's estate. *Id*., *citing University Medical Ctr. et al. v. Sullivan (In re University Medical Ctr.)*, 973 F.2d 1065, 1081 (3rd Cir. 1992).

In the instant case, MAP posits that the transaction at issue for purposes of recoupment analysis should encompass the negotiations leading to a new arrangement or contract superceding the previously expired Marathon Brand PSA. MAP likens the negotiations between MAP and Clark to the case of *In re Holford*, where a claimant used rental payments due under a lease to recoup losses caused by fraud in the inducement. 896 F.2d at 178. In that case, the Tenth Circuit found that withholding the rental payments was part of the lease execution and was thus part of the same transaction. *Id*. In the instant case, to determine whether MAP's actions arose out of the same transaction, at issue is whether MAP's withholding of the $840,565.76 was performed under the original Marathon Brand PSA as extended monthly, whether it was part of a new arrangement, or whether it was part of negotiations toward a formal contract superceding the Marathon Brand PSA. Whether the withholding was part of the same transaction is a genuine issue of fact inappropriate for determination on the motion before the Court.

In the instant case, the Court denies Clark's motion for summary judgment because material issues of fact exist. Specifically, the Court finds genuine issues of material fact as to whether the obligations arose out of the same agreement, and whether the alleged setoff was part of the same transaction and thus appropriate recoupment by MAP. Pursuant to the 7056-1 and 7056-2 statements, the Court finds that whether such transactions were permissible under the contract in the form of setoffs is material to the issue of whether they were part of the "same transaction" for purposes of recoupment analysis. Further, the Court finds that the issue of the date of when MAP recalled the funds, either October 15 or 16, 2002, is a genuine issue of material fact such that its resolution may be determinative of whether the transfer was made pre or post-petition, thereby determining whether recoupment is an available remedy.

The Court also finds a material issue of fact exists regarding whether there was an "agreement" to permit setoffs pursuant to the "Reseller Product Sales Terms" in the MAP Proof of Claim. MAP, in it's 7056-2 response, fails to include a copy of this document therein which it has referred. Therefore, based on the limited record, the Court finds a material issue of fact as to whether such an "agreement" permitted setoffs under the contract, and if the transfers at issue were part of the same transaction, thereby warranting the equitable remedy of recoupment. Based on this limited record, the Court cannot make a finding that Clark is entitled to summary judgment such that MAP is not entitled to retain the funds as setoffs pursuant to the "agreement."

Pursuant to the 7056-1 and 7056-2 statements, there is a genuine issue of material fact as to whether Clark uses the Marathon Card Proceeds to purchase branded or

unbranded petroleum products or any other products from MAP, and whether MAP may use the Marathon Card Proceeds to offset any debts that Clark owes to MAP. Thus, the Court finds that such fact resolution is outcome determinative of the applicability of the recoupment doctrine to the instant case. Clark has not demonstrated that setoffs were impermissible pursuant to the PSA, nor has it demonstrated that MAP's recalling of the funds was not part of the "same transaction" as Clark's purchase of unbranded petroleum products on credit between October 11 and October 14, 2002. As such, Clark has not demonstrated that the doctrine of recoupment is inapplicable to MAP's claim and Clark has not demonstrated that it is entitled to summary judgment in its favor on MAP's claim of recoupment. Thus, the Court denies Clark's motion for summary judgment.

V. CONCLUSION

For the foregoing reasons, the Court denies Clark's motion for summary judgment against MAP's claim of recoupment. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting this adversary proceeding for a pretrial conference on October 21, 2002 at 8:30 a.m.

The Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List|

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 11
CLARK RETAIL ENTERPRISES, INC., f/k/a OTG, INC., d/b/a CLARK OF ILLINOIS; CLARK OF WISCONSIN,	)	Bankruptcy No. 02 B 40045
	)	Judge John H. Squires
Debtor.	)	
MARATHON ASHLAND PETROLEUM LLC,	)	
Plaintiff,	)	
v.	)	Adversary No. 03 A 00703
CLARK RETAIL ENTERPRISES, INC.,	)	
Defendant.	)	
CLARK RETAIL ENTERPRISES, INC.,	)	
Counter-Plaintiff,	)	
v.	)	
MARATHON ASHLAND PETROLEUM LLC.,	)	
Counter-Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 19th day of August 2003, the Court denies the motion of Clark Retail Enterprises, Inc. for summary judgment. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting this adversary proceeding for a pretrial conference on October 21, 2002 at 8:30 a.m.

ENTERED:

DATE: _____ _____

John H. Squires

United States Bankruptcy Judge

cc: See attached Service List