

**United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division**

**Transmittal Sheet for Opinions for Posting**

**Will this opinion be Published? No**

**Bankruptcy Caption: In re Intersweet, Inc.**

Bankruptcy No. 98 B 12950

**Adversary Caption: The Custom Companies v. Intersweet, Inc.**

Adversary No. 98 A 02009

**Date of Issuance: March 6, 2000**

**Judge: John H. Squires**

**Appearance of Counsel:**

Attorney for Plaintiff: Charles F. Vihon, Esq., Arnstein & Lehr, 120 South Riverside Plaza, Suite 1200, Chicago, IL 60606-3913

Attorney for Trustee: Thomas W. Goedert, Esq., David J. Frankel, Esq., Deutsch, Levy & Engel, Chartered, 225 West Washington, Suite 1700, Chicago, IL 60606

Trustee: Leonard M. Groupe, Esq., Groupe &Katz, 175 West Jackson Boulevard, Suite A-1710, Chicago, IL 60604

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

IN RE:	)	
INTERSWEET, INC.,	)	Chapter 7
	)	Bankruptcy No. 98 B 12950
Debtor.	)	Judge John H. Squires
_____	)	
	)	
THE CUSTOM COMPANIES,	)	
	)	
Plaintiff/Counterdefendant,	)	
	)	
v.	)	Adversary No. 98 A 02009
	)	
INTERSWEET, INC.,	)	
	)	
Defendant/Counterplaintiff.	)	

**MEMORANDUM OPINION**

This matter comes before the Court on the motion of The Custom Companies (“Custom”) for summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056. 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. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (C), (E), (F), (K) and (O).

## **II. APPLICABLE STANDARDS FOR SUMMARY JUDGMENT**

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 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7<sup>th</sup> Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourage 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 Electric 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 1990).

Local Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. The 402.M 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." Id. Custom filed a 402.M statement that substantially complied with the requirements of Rule 402.M; it contained numbered paragraphs setting out uncontested facts with reference to parts of the record. Additionally, Custom furnished an affidavit in support of the motion.

The party opposing a summary judgment motion is required by Local Rule 402.N to

respond (“402.N statement”) to the movant’s 402.M 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. 402.N. 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. 402.N(3)(a). The Debtor, Intersweet, Inc. (“Intersweet”), has complied with this rule.

### **III. FACTS AND BACKGROUND**

Intersweet was a manufacturer of confectionary products which it sold directly and through numerous brokers, to its customers, clients, vendors and accounts (collectively, the “consignees”) nationwide. Intersweet arranged for delivery and shipment of some of its products to such consignees through Custom, which either shipped Intersweet’s products itself or arranged for another transport company to do so. Custom is a motor carrier which, during the ordinary course of its business generally, and specifically with Intersweet, carried and delivered goods to consignees designated by Intersweet. In exchange for rendering such services to Intersweet, Custom was entitled to payment from Intersweet for shipping charges.

On February 11, 1998, Custom filed a complaint in the Circuit Court of Cook County, Illinois against Intersweet. See Trustee’s Exhibit C. The complaint is premised upon an alleged balance due and owing by Intersweet to Custom for the shipment of such goods in the amount of \$174,886.29. Id. at ¶ 3. Thereafter, on April 27, 1998, an involuntary bankruptcy

petition was filed against Intersweet in this Court. On July 2, 1998, this Court entered an order for relief under Chapter 7, and the United States Trustee subsequently appointed Leonard M. Groupe as the Chapter 7 trustee for the bankruptcy estate (the "Trustee").

On November 20, 1998, pursuant to 28 U.S.C. § 1452 and Federal Rule of Bankruptcy Procedure 9027(a)(2), the Trustee filed a notice of removal of the lawsuit pending in the Circuit Court of Cook County. In addition, the Trustee filed a multi-count counterclaim against Custom for an accounting, equitable subordination under 11 U.S.C. § 510(d) and the avoidance and recovery of certain preferences under 11 U.S.C. §§ 547 and 550, which was subsequently amended on August 17, 1999. The thrust of the amended counterclaim is that Custom's communications with and collection from Intersweet's consignees resulted in Custom diverting accounts receivable otherwise owed to Intersweet for which it should be accountable; that such conduct was inequitable and should result in equitable subordination of Custom's claims against the bankruptcy estate; the collections resulted in Custom receiving avoidable preferences to the detriment of other unsecured creditors of Intersweet; and Custom's conduct constituted intentional interference with Intersweet's contractual rights with its consignees and actionable tortious interference with Intersweet's prospective economic advantage with its customers. Custom filed an answer and several affirmative defenses thereto.

On January 11, 2000, Custom filed the instant motion for summary judgment. Custom contends that the Trustee's counterclaim is premised on the theory that Custom's contact of consignees to whom it had delivered goods for the account of Intersweet and

collection from those consignees of the cost of carriage of such goods was improper. Custom maintains that all counts of the Trustee's amended counterclaim are dependent for their efficacy upon the validity of that theory which Custom concludes is incorrect, flawed and without foundation. Custom contends that Intersweet failed and refused to tender payments due and owing Custom for services rendered. Custom contends that it was entitled to seek collection of freight monies due and owing it from Intersweet from the consignees of such shipments pursuant to Custom Cartage, Inc. Tariff 100, Section 1, effective December 4, 1995 (the "Tariff"). The Court notes that Custom did not attach a copy of the Tariff to its motion for summary judgment. That failure alone constitutes grounds for denial of the motion because the Court is unable to determine Custom's rights or Intersweet's duties thereunder. Fortunately for Custom, the Trustee provided the Court with a copy of the Tariff. See Trustee's Group Exhibit D.

Pursuant to the unrebutted affidavit of Steven J. Laue, vice-president of operations for Custom, the costs, terms and conditions of freight for the carriage of good contracted for by Intersweet during the period January 1, 1997 through the commencement of the bankruptcy case, were pursuant to the Tariff. See Affidavit of Steven J. Laue at ¶s 3 and 4. Included in the Tariff is "Item 440, Collection and Payment of Charges," which provides that Custom may seek from consignees payment of freight charges if the shipper is obligated (on freight prepaid bills of lading) to and does not pay them. Id. at ¶ 5. During this carriage period, Custom delivered goods to Intersweet consignees who received and accepted those goods. Id. at ¶ 7. As it did throughout the time Intersweet was a customer of Custom,

Custom billed Intersweet for freight charges within twenty-four hours of its having shipped goods to Intersweet's consignees. Id. at ¶ 8. Intersweet did not pay Custom for freight charges for shipments made during this carriage period. Id. at ¶ 9. On many occasions, when it did not receive payment of freight charges from shippers other than Intersweet, pursuant to the Tariff, Custom sought and obtained from the consignees of those shippers payment of the freight charges. Id. at ¶ 10. The Trustee contends that Custom failed to credit Intersweet with certain payments made to it totaling \$121,997.38, nor has Custom applied such payments to the invoices for which it sought payment from Intersweet's consignees. See Trustee's Response Brief in Opposition to the Motion for Summary Judgment at p. 8.

#### **IV. DISCUSSION**

Custom contends that it was entitled to seek collection of freight monies due and owing it from Intersweet from its consignees of such shipments pursuant to the Tariff. Paragraph (E) of the Tariff, provides in relevant part that "[c]arrier reserves the right to bill and collect freight charges from the consignee or third party on prepaid shipments and from the shipper or third party on collect shipments in the event full payment of freight charges is not received." See Trustee's Group Exhibit D. In part, the Trustee contends that the motion for summary judgment must be denied because copies of the Tariffs that were attached by Custom to certain of its correspondence to Intersweet's consignees were issued to entities named "Custom Cartage, Inc." and "Petros, Inc. D/B/A CCS." Id. The Trustee argues that Custom was not a party to the Tariffs upon which it sought collection, which violates 49

U.S.C. § 13702(b)(2)'s requirement that "at a minimum tariffs must identify plainly--(A) the carriers that are a party to it." Thus, the Trustee concludes Custom is attempting to improperly insulate itself from liability arising from improper collection efforts. Whether Custom acted properly in the collection of freight charges from Intersweet's consignees is a material issue of fact that cannot be decided on this limited record. For this reason, Custom's motion for summary judgment must be denied.

Whether Custom was properly entitled to seek payment from Intersweet's consignees pursuant to all the invoices at issue is unclear from the record at this stage. There is a genuine issue of material fact as to whether all the monies claimed were due and owing to Custom by Intersweet, and if so, how much, thus entitling Custom to seek payment from the consignees of Intersweet's goods under the subject Tariff. Specifically, there is a genuine issue of material fact as to whether the claimed payments were made by Intersweet to Custom, and whether such payments were duly credited as made and properly applied to specific Custom invoices. If Custom was in fact paid some or all of the monies it claims are due it, then it may have had no right under the Tariff to seek payment from Intersweet's consignees. According to the Trustee, Custom has denied that Intersweet made payments to it subsequent to July 1, 1997 totaling \$121,997.38. These disputed issues of fact preclude the entry of summary judgment.

Furthermore, attached to Laue's Affidavit are two exemplary bills of lading used by Custom in all the shipments contracted for by Intersweet. See Affidavit of Laue at ¶ 3, Exhibits 1 and 2 thereto. Custom has admitted that its collection efforts and all monies it

received from Intersweet's consignees were derived from those invoices. Some invoices were labeled or printed by Custom bearing the words "PREPAID" or "PPD," an abbreviation which means either prepaid or prepaid delivery. The Trustee contends that applicable case law bars Custom's collection efforts against the consignees upon the invoices at issue. In support of this contention, the Trustee cites, among other authorities, Dependable Cartage and Transp. Co., Inc. v. Sovereign Oil Co., No. 84 C 4949, 1985 WL 2873 (N.D. Ill. Sept. 30, 1985). The Court finds that a material issue of law exists regarding whether Custom was entitled to seek collection from Intersweet's consignees for shipments identified by Custom to those consignees as "PREPAID" or "PPD." Consequently, the motion for summary judgment must be denied.

None of Custom's cited authorities establishes as a matter of law that this conduct complained of by the Trustee is defensible because of its reliance on the Tariff provision. Moreover, it is not at all clear at this point in the litigation that Custom is entitled to summary judgment as a matter of law thereby dismissing all or any of the Trustee's alternative theories of relief sought. Even if Custom properly invoked the subject provision of the Tariff to permissibly collect from Intersweet's consignees, that fact, standing alone, does not necessarily serve as a complete defense to the Trustee's claims that Custom should be accountable for the collections it obtained from the consignees; that Custom did so in inequitable ways that mandate equitable subordination of its claim; that it received avoidable preferences; and that its collection activities subjected it to the alternative contract and tort-based claims asserted by the Trustee. Accordingly, the Court must deny Custom's motion

for summary judgment.

**V. CONCLUSION**

For the foregoing reasons, Custom's motion for summary judgment is denied.

This 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:	)	
INTERSWEET, INC.,	)	Chapter 7
	)	Bankruptcy No. 98 B 12950
Debtor.	)	Judge John H. Squires
_____	)	
	)	
THE CUSTOM COMPANIES,	)	
	)	
Plaintiff/Counterdefendant,	)	
	)	
v.	)	Adversary No. 98 A 02009
	)	
INTERSWEET, INC.,	)	
	)	
Defendant/Counterplaintiff.	)	

**ORDER**

For the reasons set forth in a Memorandum Opinion dated the 6<sup>th</sup> day of March, 2000, the Court hereby denies the motion of The Custom Companies for summary judgment.

**ENTERED:**

**DATE:** \_\_\_\_\_

\_\_\_\_\_  
**John H. Squires**  
**United States Bankruptcy Judge**

cc: See attached Service List