

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILSON DIVISION**

<p>IN THE MATTER OF:</p> <p>National Gas Distributors, LLC,</p> <p style="text-align: center;">Debtor</p>	<p>Case No. 06-00166-8-ATS Chapter 11</p>
<p>Richard M. Hutson, II, Trustee for National Gas Distributors, LLC, f/k/a Paul Lawing, Jr., LLC,</p> <p style="text-align: center;">Plaintiff</p> <p>v.</p> <p>The Smithfield Packing Company, Incorporated,</p> <p style="text-align: center;">Defendant</p>	<p>Adv. Pro. No. 06-00267-8-ATS</p>
<p>Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Strike Affidavit of Claire P. Gotham</p>	

Now comes Richard M. Hutson, II, Trustee for National Gas Distributors, LLC, f/k/a Paul Lawing, Jr., LLC, Plaintiff in this proceeding, and files this Memorandum in opposition to Defendant’s Motion to Strike Affidavit of Claire P. Gotham (the “Motion to Strike”). As summarized in the Motion to Strike and Defendant’s Memorandum filed in support thereof, Defendant has pending before this Court its Motion to dismiss or, in the alternative, for summary judgment (the “Motion to Dismiss”), and each party has filed memoranda in support of or in opposition thereto, respectively.

In Defendant’s memorandum in support of the Motion to Dismiss, Defendant argues that (i) the contractual arrangements between the Debtor and the Defendant fall within the definition of “forward contract” as set forth in § 101(25), (ii) a “forward contract” is the same as a “forward agreement” and is thus a “swap agreement” as defined in § 101(53B), (iii) the Trustee may not avoid a transfer under the constructive fraud provisions of § 548(a)(1)(B), due to the limitations

of § 546(g) if the transfer was made by or to a swap participant, under or in connection with a swap agreement, and (iv) the Trustee may not recover a transfer which is avoidable under the actual fraud provisions of § 548(a)(1)(A), due to the limitations of § 548(d)(2) on the basis that a swap participant takes for value to the extent of a transfer received in connection with a swap agreement.

In Plaintiff's memorandum in opposition to the Motion to Dismiss, Plaintiff argues that even if the contractual arrangements between the Debtor and Defendant could be characterized as a "forward contract" as that term is defined in § 101(25), the contractual arrangements between the parties could not be characterized as a "swap agreement" and thus the limitations of § 546(g) and § 548(d)(2) are inapplicable and the Motion to Dismiss must be denied. In support of this argument, Plaintiff submitted the affidavit of Claire Gotham, the expert retained by Plaintiff in respect to this and other pending litigation involving the same issues. The Gotham Affidavit provides information to assist the Court in analyzing the contractual arrangements at issue here in the context of the financial marketplace, the meanings ascribed by the market to the terms used in the Bankruptcy Code, and whether the market would consider such arrangements to be a swap agreement.

Defendant has moved to strike the Gotham Affidavit on the basis that (i) the Affidavit is irrelevant, as the Court can determine that the contractual arrangements were swap agreements by the plain language of the Bankruptcy Code, or (ii) the Affidavit impermissibly intrudes on the Court's province by attempting to construe the statute. The Motion to Strike should be denied, as the Gotham Affidavit provides competent, relevant and material information and expert opinions to the Court based on the expert's knowledge and experience, upon which the Court may rely for guidance in construing and applying the statute to the facts at hand.

ARGUMENT

Defendant argues that the contractual arrangements between the Debtor and Defendant each constitute a “forward contract,”¹ that a “forward contract” is also a “forward agreement” as the term is used but not defined in §101(53B), and thus a forward contract *ipso facto* is a swap agreement.

The first problem with this analysis is that, nothing else appearing, Congress defined and used the term “forward contract” in numerous places in the Bankruptcy Code, the term “forward contract” does not appear in the definition of swap agreement, and a forward contract is thus not one of the transactions listed as an *ipso facto* swap in §101(53B)(A)(i)(I-X). The second problem with this analysis is that the use of the term “forward agreement” in lieu of “forward contract” in the definition of swap agreement at §101(53B)(A)(i)(VII) is not explained in the statute or legislative history, nor is there any language in the Bankruptcy Code which states that a forward agreement in the context of a swap agreement is identical to a forward contract, which is defined as a contract for the delivery of a commodity to an end user more than two days in the future.

The plain meanings of the terms “forward contract” and “swap agreement” are separate and distinct, both in the English language and in the financial marketplace. Otherwise, there would be no need for separate terms or distinctly different treatment of forward contracts and swap agreements in Section 546, among other sections of the Bankruptcy Code. As a result, the Court must look to the balance of §101(53B) to determine whether a particular transaction not appearing in the *ipso facto* list might still be treated as a swap. This is where the section brings

¹ § 101(25) provides:

The term "forward contract" means--

(A) a contract . . . for the purchase, sale, or transfer of a commodity . . . which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into. . . .

derivative transactions within the definition of a swap when the contract is one that is presently or in the future becomes the subject of recurrent dealings in the swaps or other derivatives markets, and is a forward, swap, future, option or spot transaction on one or more rates, currencies, or commodities.²

The key provision for purposes of the Motion to Strike is the definitional requirement that the transaction must be one that is “the subject of recurrent dealings in the swap or other derivatives markets.” Here Congress recognized that it could not anticipate in a list of *ipso facto* transactions the full range of swap transactions the rapidly changing financial markets might create, and directed the Courts to look to how the marketplace treats a transaction in determining whether it is a swap. Insulating Markets from Bankrupt Debtors and Bankruptcy Judges, 13 Am. Bankr. Inst. L. Rev. 641, 651 (2005). Whether the marketplace treats a transaction as a swap is a factual question on which the Court may properly look to expert opinion evidence under Federal Rules of Evidence 702 and 704 without usurping the Court’s province as the ultimate arbiter of questions of fact and law.

The legislative history is quite clear that Congress intended to provide certain protections for true swap agreements, in whatever forms developed by the financial markets, but that other contractual arrangements could not be so sheltered simply because the parties purport to

² § 101(53B) (A)(ii) dealing with non *ipso facto* swaps provides:

(ii) any agreement or transaction that is similar to any other agreement or transaction referred to in this paragraph and that--

(I) is of a type that has been, is presently, or in the future becomes, the subject of recurrent dealings in the swap or other derivatives markets (including terms and conditions incorporated by reference therein); and

(II) is a forward, swap, future, option, or spot transaction on one or more rates, currencies, commodities, equity securities, or other equity instruments, debt securities or other debt instruments, quantitative measures associated with an occurrence, extent of an occurrence, or contingency associated with a financial, commercial, or economic consequence, or economic or financial indices or measures of economic or financial risk or value; (Emphasis Added).

document or label the transaction as a swap agreement. H.R. Rep. No. 109-31(I), at 121 (2005).

The task before the Court is thus to determine whether the agreement between the Debtor and the Defendant, in substance rather than in form, is or is not a swap agreement. Rather than interpreting the statute as Defendant contends, Ms. Gotham uses her affidavit to detail her knowledge of the financial and physical natural gas markets as the basis for her expert, factual opinion that no markets would recognize the transactions in question in this case as swap agreements. This is exactly the information which the Court will need, and the Gotham Affidavit is clearly permissible under Rules 702 and 704.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Strike the Affidavit of Claire P. Gotham should be denied.

RESPECTFULLY submitted on behalf of the Trustee, this the 30th day of March, 2007.

/s/ John A. Northen
Counsel for the Trustee

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the below date, the undersigned served a copy of the foregoing electronically and/or by depositing the same, enclosed in a post paid wrapper, properly addressed to the following parties in interest, at their last known addresses as shown below, in a post office or official depository under the exclusive care and custody of the United States Postal Service:

Thomas E. Cabaniss
Dion W. Hayes
Robert A. Cox, Jr.
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This the 30th day of March, 2007.

By: /s/ John A. Northen
Counsel for the Trustee

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