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

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| **In re:** | ) | |
| | ) | |
| **NATIONAL GAS DISTRIBUTORS, LLC,** | ) | **Case No. 06-00166-8-ATS** |
| | ) | **Chapter 11** |
| **Debtor.** | ) | |
| _____ | ) | |
| | ) | |
| **RICHARD M. HUTSON, II, TRUSTEE FOR NATIONAL AS DISTRIBUTORS, LLC, f/k/a Paul Lawing, Jr., LLC,** | ) | **Adversary Proc. No. 06-00267-8-ATS** |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | |
| **THE SMITHFIELD PACKING COMPANY, INCORPORATED,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| _____ | ) | |

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE AFFIDAVIT OF CLAIRE P. GOTHAM**

NOW COMES Defendant The Smithfield Packing Company, Incorporated ("Defendant"), by and through counsel, and files this Memorandum (the "Supporting Memorandum") in Support of Defendant's Motion to Strike Affidavit of Claire P. Gotham (the "Motion"). In support of the Motion, Defendant respectfully states as follows:

## I. INTRODUCTION AND BACKGROUND

The above-captioned plaintiff ("Plaintiff") filed the Affidavit of Claire P. Gotham (the "Affidavit") as an exhibit to Plaintiff's memorandum in response (the "Response") to Defendant's motion to dismiss or, in the alternative, for summary judgment (the "Motion to Dismiss"), filed in the above-captioned adversary proceeding (the "Adversary Proceeding").

Because the Affidavit is not relevant to any fact at issue in the Motion to Dismiss and contains inadmissible legal conclusions, the Court should strike it from the record and not consider it on the Motion to Dismiss.

Plaintiff's sole rationale for submitting the Affidavit is premised on an erroneous reading of the Bankruptcy Code's definition of "swap agreement." Specifically, Plaintiff asserts that swap agreements "are now defined in § 101(53B) as those transactions that (i) fall squarely within one of the specific transactions listed within the definition or similar agreements, ***and*** (ii) are of a type that is presently or in the future becomes the subject of recurrent dealings in the swaps or other derivatives markets, ***and*** (iii) are a forward, swap, future, option or spot transaction on one or more rates, currencies, commodities etc." See Plaintiff's Response at 8 (emphasis added) (Plaintiff's emphasis omitted). The Affidavit relates only to the second and third prongs of this paraphrase. Plaintiff's recital of section 101(53B), however, is incorrect and in direct conflict with the actual language of the Bankruptcy Code.

Contrary to Plaintiff's claim, the Code's definition of swap agreement contains no requirement that any agreement specifically identified in section 101(53B)(A)(i) must also be traded in a financial market or be premised on one or more rates, currencies, or commodities. To the contrary, under the plain and unambiguous language of the statute, agreements specifically identified in section 101(53B)(A)(i) constitute swap agreements *ipso facto* without further analysis. The second and third prongs of Plaintiff's analysis are thus completely inapposite where, as in this case, the contract in question is specifically identified in section 101(53B)(A)(i).

A commodity forward agreement is one type of contract specifically identified in section 101(53B)(A)(i) as a swap agreement. The agreements governing the transactions that underlie this Adversary Proceeding (the "Agreements") are commodity forward agreements—a fact not

disputed by Plaintiff in his Response. Because the Agreements are commodity forward contracts, and because such contracts *ipso facto* are included in the definition of "swap agreements" under a proper reading of the Bankruptcy Code, the Agreements are swap agreements as a matter of law.

In the Affidavit, Plaintiff's proposed expert asserts that forward contracts such as the Agreements would not be considered "swap agreements" as defined by "any market" of which she is aware. Even if true, this assertion is irrelevant to this case because the Bankruptcy Code plainly *does* consider the Agreements at issue in this case to be swap agreements. Plaintiff's proposed expert's understanding of the marketplace's definition of "swap agreement" thus has no bearing on the purely legal question of whether the Agreements meet the statutory definition of a swap agreement. The opinion of an expert on an irrelevant point cannot supplant the text of the Bankruptcy Code to establish the meaning of a defined term.

Because the marketplace's characterization of the Agreements is of no consequence, the Affidavit is not relevant and thus inadmissible. Accordingly, Defendant respectfully requests that the Court strike the Affidavit from the record of this Adversary Proceeding.

## II. APPLICABLE STANDARDS

Pursuant to Federal Rule of Evidence 401, evidence is relevant only if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." FED. R. EVID. 401 (emphasis added). "Evidence which is not relevant is not admissible." FED. R. EVID. 402. "If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial." MCCORMICK ON EVIDENCE § 185, at 729 (6th ed. 2006) (noting that evidence must be material to be relevant and admissible). In other words, to be admissible, evidence, including

expert evidence, must be material to a fact at issue in the case. See FED. R. EVID. 702 (expert evidence only admissible to assist the trier of fact in determining "a fact in issue").

An affidavit submitted in opposition to a motion for summary judgment should be considered by the Court only if the testimony is relevant, based on personal knowledge, and otherwise admissible. See Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(e); Evans v. Technologies Applications & Servs. Co., 80 F.3d 954, 962 (4th Cir. 1996). The Court should strike an expert affidavit if the affidavit is irrelevant or otherwise inadmissible under Federal Rule of Evidence 702. See Ruffin v. Shaw Indus., 149 F.3d 294, 303 (4th Cir. 1998) (striking expert affidavit where testimony inadmissible under Federal Rule of Evidence 702).

## III. ARGUMENT

### A. The Affidavit Is Not Relevant.

The principal question before this Court on the Motion to Dismiss is whether the Agreements constitute "swap agreements" as defined by section 101(53B) of the Bankruptcy Code. If the Agreements are "swap agreements" under section 101(53B), then, under sections 546(g), 548(c), and 548(d)(2)(D) of the Code, Plaintiff's actual and constructive fraudulent transfer claims fail as a matter of law and must be dismissed. See Defendant's Memorandum in Support of Motion to Dismiss (Docket No. 8). This definitional issue is a purely legal question that can be easily resolved by reviewing the plain language of the Agreements and the unambiguous definitions of the Bankruptcy Code, without the benefit of any alleged expert report. See United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'") (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

As described more fully in the Motion to Dismiss, the Agreements are forward contracts

as defined in the Bankruptcy Code. See 11 U.S.C. § 101(25)(A) (defining forward contract as "a contract (other than a commodities contract) for the purchase, sale, or transfer of a commodity . . . with a maturity date more than two days after the date the contract is entered into . . . ."); Motion to Dismiss, at 13-16.[1] The terms of the Agreements confirm that they are forward contracts. See Motion to Dismiss, Ex. A, General Terms and Conditions Base Contract for Sale and Purchase of Natural Gas § 10.5 ("The parties agree that the transactions hereunder constitute a 'forward contract' within the meaning of the United States Bankruptcy Code . . . .").

Plaintiff does not dispute that the Agreements are forward contracts within the meaning of the Bankruptcy Code. Rather, Plaintiff argues that, regardless of whether the Agreements are forward contracts, they are not swap agreements. See Plaintiff's Response, at 20 ("The agreements at issue between the Debtor and the Defendant may indeed be forward contracts, if the essential components of a forward contract can be established, but that conclusion would not make these agreements swap agreements . . . ."). The unambiguous language of section 101(53B), however, plainly contradicts Plaintiff's argument:

> The term "swap agreement"—
> (A) means—
> (i) any agreement, including the terms and conditions incorporated by reference in such agreement, which is—
> . . .
> (VII) a commodity index or a commodity swap, option, future, or forward agreement.
> . . .

11 U.S.C. § 101(53B)(A)(i)(VII). Section 101(53B) contains no exclusions, exceptions, limitations, or additional requirements with respect to commodities forward agreements—such

[1] Plaintiff does not contend, nor can he, that the Agreements are "commodity contracts" and should thus be excepted from the definition of "forward contract." Under the relevant provision of 11 U.S.C. § 761(4), a "commodity contract" is defined as a "contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade." A principal-to-principal forward agreement that is not subject to the market, such as the Agreements at issue in this case, is therefore not a "commodity contract" under the Code. See Williams v. Morgan Stanley Capital Group (In re Olympic Natural Gas Co.), 294 F.3d 737, 740-41 (5th Cir. 2002).

contracts are *ipso facto* swap agreements under the Bankruptcy Code. Therefore, Plaintiff's contention that Defendant "misses the true definitional requirement of § 101(53B)(A)(ii)(II) that a swap be a contract based on one or more underlying rates or prices" is simply wrong. See Plaintiff's Response at 13. The text of the Bankruptcy Code contains no restriction that a commodity forward agreement must be purely financial in nature or traded in a market to constitute a "swap agreement" as defined thereby. See F.C.C. v. NextWave Personal Communications Inc., 537 U.S. 293, 302 (2003) ("[W]here Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly.").

In In re Olympic Natural Gas Co., 294 F.3d 737 (5th Cir. 2002), the Fifth Circuit considered and expressly rejected an interpretation of the Bankruptcy Code similar to the one advanced here by Plaintiff. See id. at 742. In that case, the plaintiff argued that the safe harbor provisions of section 546(e) were designed only to "prevent disruptions in the securities markets, and therefore off-exchange sales transactions between private parties should not be exempt from avoidance, as they are not conducted on an exchange, and do not impact the financial derivatives market." Id. at 742 n.5. Concluding that the definition of "forward contract" included both financial contracts and physically settled contracts, the Fifth Circuit found "no reason to adopt the interpretation the Trustee advocates, and distinguish between 'financial' forward contracts, and 'ordinary purchase and sale' forward contracts, when the statutory language makes no such distinction." Id. at 742. Similarly, in our case, because section 101(53B)(A)(i) does not distinguish between financial contracts and physically settled contracts, there is no basis for this Court to distinguish between the two.

In addition to conflicting with the plain language of the statute, Plaintiff's suggested interpretation of section 101(53B) would render the definition internally inconsistent and

generally unworkable. According to Plaintiff and his alleged expert, a contract cannot constitute a swap agreement unless such contract is purely financial in nature and generally traded in a financial market. See Plaintiff's Response, at 14; Plaintiff's Affidavit, at ¶ 10. The distinguishing characteristics of a standard forward agreement, however, are that such agreement contemplates physical delivery of a commodity and is not traded in the marketplace. See, e.g., Olympic Natural Gas Co., 294 F.3d 737, 740-41 (5th Cir. 2002) ("The commodities market is divided into only two categories: (1) on-exchange futures transactions; and (2) off-exchange forward contracts."); BCP Liquidating LLC v. Bridgeline Gas Mktg., LLC (In re Borden Chemicals & Plastics Operating L.P.), 336 B.R. 214, 218 (Bankr. D. Del. 2006) ("[G]enerally speaking, forward contracts are contracts for the future purchase or sale of commodities that are not subject to the rules of a contract market or board of trade.") (quotation omitted); see also BLACK'S LAW DICTIONARY (7th ed.) (definition of "forward contract") ("Unlike a futures contract, a forward contract is not traded on a formal exchange."). Therefore, a forward contract could never be a swap agreement under Plaintiff's interpretation of section 101(53B). Yet Congress undeniably included forward agreements among the various types of contracts that constitute swap agreements under section 101(53B)(A)(i). Because forward agreements are included among the contracts that constitute swap agreements under the Bankruptcy Code, the definition of swap agreements clearly is not limited to purely financial agreements traded in a market.[2]

In the Affidavit in support of Plaintiff's Response, Plaintiff's proposed expert asserts that the marketplace would not characterize the Agreements as swap agreements. However, given that the Bankruptcy Code expressly defines swap agreements to include forward agreements, the

[2] The inclusion in section 101(53B)(A)(i) of various option agreements, which also may contemplate actual delivery of a commodity, further supports a reading of the definition of swap agreement to include physically settled contracts.

question addressed by the Affidavit—whether forward contracts are traded in a marketplace—is totally irrelevant to the Court's analysis. Congress chose to define the term "swap agreement" more broadly than the marketplace, but there is no reason to believe Congress did not mean what it said. See Ron Pair, 489 U.S. at 246. As the Mirant bankruptcy court noted in rejecting an expert's asserted market definition of "forward contract" that conflicted with the Bankruptcy Code's definition:

> [The expert's] affidavit is not consistent with the definition of "forward contract" adopted by the court. . . . [T]he court must follow the meaning of the words chosen by Congress in construing statutory language. ***That Congress might frame a statutory definition in terms broader than those common in the market place is not surprising or unusual (e.g., the definition of "claim" in Code § 101(5) is broader than the ordinary definition; see, similarly, the definition of "transfer," § 101(54)).***

Mirant Americas Energy Mktg., L.P. v. Kern Oil & Refining Co. (In re Mirant Corp.), 310 B.R. 548, 566 n.27 (Bankr. N.D. Tex. 2004).

Here, Congress chose to define the term "swap agreement" broadly under the Bankruptcy Code so as to include the Agreements. It is thus irrelevant whether the market perceives the term swap agreement to also include commodities forward contracts. Because the Affidavit is not relevant to any fact at issue in this case, it is inadmissible under Federal Rule of Evidence 401. Therefore, Defendant respectfully requests that this Court strike it from the record.

B. The Affidavit Contains Inadmissible Legal Conclusions

To the extent the Affidavit suggests that the Code-based definition of "swap agreement" set forth section 101(53B)(A)(i) should be supplanted with a market-based definition of swap agreements, the Court should strike the Affidavit. Under Federal Rules of Evidence 702 and 704, expert testimony containing legal conclusions is not admissible. See Adalman v. Baker, Watts & Co., 807 F.2d 359, 366-68 (4th Cir. 1986). Thus, expert testimony is not admissible to offer an interpretation of a controlling statute. See id. at 368 (stating that expert testimony

cannot be permitted "to usurp the province of the judge").

In the Affidavit, Plaintiff's proposed expert opines that, "in my opinion, the transactions are not swap agreements." Affidavit, at ¶ 13. This assertion appears to be intended to instruct this Court in its interpretation of section 101(53B) of the Bankruptcy Code. Expert testimony regarding the meaning of the Bankruptcy Code, however, should be "excluded because the trial judge does not need the judgment of witnesses." United States v. Zipkin, 729 F.2d 384, 387 (6th Cir. 1984) (excluding expert testimony regarding interpretation of the Bankruptcy Code). Accordingly, for purposes of the Motion to Dismiss, the Court must determine its own interpretation of the definition of "swap agreement" set forth in section 101(53B) and should not consider the unqualified and irrelevant legal conclusions set forth by Ms. Gotham (a non-lawyer) in her Affidavit.

## IV. CONCLUSION

For the reasons stated above, Defendant respectfully requests that the Court grant the Motion, strike the Affidavit in support of Plaintiff's Response, and grant Defendant such other and further relief the Court deems appropriate.

Respectfully submitted, this the 28th day of March, 2007.


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