

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
LIBERTY BRANDS, LLC,)	Case No. 07-10645 (MFW)
)	
)	
Debtor.)	
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)	
MICHAEL JOSEPH, as Liquidating)	
Trustee for Liberty Brands, LLC))	
)	
Plaintiff,)	
)	
v.)	Adv. No. 09-50965 (MFW)
)	
SCOTT FEIT, SJF ASSOCIATES,)	
INC., NATIONAL DISTRIBUTION)	
NETWORK, BARRY GARNER,)	
DISCOUNT TOBACCO WAREHOUSE,)	
INC., A&A OF TUPELO, INC.,)	
d/b/a GLOBE DISTRIBUTING,)	
SUNFLOWER SUPPLY COMPANY, INC.)	
GARY L. HALL, BENTLEY)	
INVESTMENTS OF NEVADA, LLC,)	
HALL RETAINED ANNUITY TRUST I,)	
and THE HALL FAMILY TRUST)	
)	
Defendants.)	
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ADDITIONAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

1. Before the Court is the Motion of Michael B. Joseph (the "Trustee") for New Trial to Amend or Make New Findings of Fact and Conclusions of Law with respect to certain allegedly preferential transfers, which the Trustee asserts the Court failed to address in its prior ruling.

¹ The following constitutes additional proposed findings of fact and conclusions of law of the Bankruptcy Court under 28 U.S.C. § 157(c).

2. The Motion seeks reconsideration of the Court's Proposed Findings of Fact and Conclusions of Law issued on September 25, 2014. (Adv. D.I. 226.)

3. The Trustee should have raised these issues as objections to the Court's Proposed Findings of Facts and Conclusions of Law, pursuant to Rule 9033 of the Federal Rules of Bankruptcy Procedure.

4. In the event that the District Court finds that the Motion is procedurally proper, however, the Court submits the following additional Proposed Findings of Fact and Conclusions of Law with respect to the Motion.

5. The Trustee's Motion concerns only Count II of the Amended Complaint, which alleges that certain transfers to Discount Tobacco Warehouse ("DTW") were recoverable as preferences. (Adv. D.I. 227 at ¶ 9.)

6. The Bankruptcy Court does not have the constitutional authority to enter a final order on the preference action because DTW never filed a claim in this bankruptcy case. See, e.g., Stern v. Marshall, 131 S. Ct. 2594, 2617 (2011) ("a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does not 'become[] part of the claims-allowance process' subject to resolution by the bankruptcy court.") (citations omitted).

7. The Court, however, may submit proposed findings of fact and conclusions of law with respect to the preference count to the District Court for consideration. See Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014).

8. The Trustee asserts that the Court, in its Proposed Findings of Facts and Conclusions of Law issued on September 25, 2014, mistakenly failed to address whether certain transfers (the "DTW Drawdowns") were avoidable preferences pursuant to section 547(b). (Adv. D.I. 227 at ¶ 21.)

9. The Trustee claims that there is no dispute that the DTW Drawdowns were avoidable preferences and that the Remaining Defendants failed to establish any defenses. (Id.)

10. Therefore, the Trustee contends that the Court should order a new trial or amend its findings of facts and conclusions of law with respect to Count II, so as to avoid a miscarriage of justice. (Id.)

11. The Remaining Defendants argue that there has been no miscarriage of justice because they contend that the Court concluded that the DTW Drawdowns were not, in fact, preferential transfers. (Adv. D.I. 228 at 6.)

12. The Trustee claims that the DTW Drawdowns were included in Count II of its Amended Complaint, the only count in which he sought to avoid preferences. (Adv. D.I. 227 at ¶ 10.)

13. Count II of the Amended Complaint alleged that the

Feit/SJF Transfers, NDN Transfers, Garner Transfers, DTW Transfers, DTW Equipment Transfers, A&A Transfers, Sunflower Transfers, and Hall Transfers were avoidable preferences and expressly prayed that each of these transfers be avoided. (Adv. D.I. 122 at ¶¶ 85, 172.)

14. The DTW Drawdowns were not mentioned in Count II or in its prayer for relief. (Id. at ¶¶ 84-89, 172.)

15. The DTW Drawdowns were, however, expressly included (with other transfers) in Counts I, VI, VII, VIII, IX and X of the Amended Complaint. (Id. at ¶¶ 79, 100, 108, 117, 120, 129.)

16. Therefore, the Court finds that the Trustee did not seek to avoid the DTW Drawdowns as preferential transfers in Count II of the Amended Complaint.

17. In the Joint Pre-trial Order submitted by the parties, the Trustee stated his intention to prove at trial that two payments of \$1 million and \$500,000 (the "Hall Transfers") are recoverable as preferences to insiders. (Adv. D.I. 206 at Section VII, Subsection A-2.)

18. The Trustee never mentioned the DTW Drawdowns as avoidable preferences in the Joint Pre-Trial Order. (Id.)

19. Similarly, there is no assertion in the Trustee's Post-Trial Brief that the DTW Drawdowns are avoidable as preferences. (Adv. D.I. 220 at 33-43.)

20. In its Motion for New Trial, the Trustee asserts that

it concentrated its argument in its Brief on the Hall Transfers because those transfers depended on the Remaining Defendants being classified as insiders, while the DTW Drawdowns clearly met the statutory requirements for avoidance. (Adv. D.I. 227 at ¶ 11, n.1.)

21. The Trustee asserts that he addressed the DTW Drawdowns later in the brief, in response to the Defendants' new value and ordinary course of business defenses. (Id.)

22. The Court finds, however, that the DTW Drawdowns are not addressed in those sections either, expressly or by implication.

23. The Trustee's Reply Brief likewise does not mention the DTW Drawdowns as avoidable preferences in Count II. (Adv. D.I. 222 at 10-14.)

24. There is no basis for the Trustee's motion for a new trial or to amend the Court's proposed findings of fact and conclusions of law to address the DTW Drawdowns as preferential transfers.

25. The Motion is procedurally defective, as Rule 9033, not Rule 9023, applies to Proposed Findings of Fact and Conclusions of Law. See e.g., McCarthy v. Giron, 2014 WL 2696660, at *4 (E.D. Va. June 6, 2014) (noting bankruptcy court's dismissal of motion to reconsider proposed findings of fact and conclusions of law because arguments should have been raised as objections to

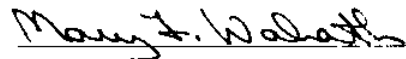
the report and recommendation in district court, pursuant to Rule 9033).

26. Therefore, the Court recommends that the request for new trial be denied and that judgment be entered on behalf of the Remaining Defendants on the preference claim.

27. For the reasons stated above, the Court recommends that the District Court adopt these Additional Findings of Fact and Conclusions of Law.

Dated: December 19, 2014

BY THE COURT:



Mary F. Walrath
United States Bankruptcy Judge

cc: Jason C. Powell, Esquire²

² Counsel shall serve a copy of the accompanying Additional Proposed Findings of Fact and Conclusions of Law on all interested parties and file a Certificate of Service with the Court.

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