IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	
AVENTINE RENEWABLE ENERGY HOLDINGS, INC., a Delaware Corporation, et al.,	)	Case No. 09-11214(KG) (Jointly Administered)
Reorganized Debtors.	)	
AVENTINE RENEWABLE ENERGY, INC.,	)	
Plaintiff,	)	
v.	)	Adv. Pro. No. 10-53160(KG)
ACE ETHANOL, LLC, and UNITED STATES DEBT RECOVERY III, LP	)	
Defendants.	)	
	)	**Re Dkt No. 53**

MEMORANDUM ORDER
DENYING PARTIAL SUMMARY JUDGMENT[1]

Reorganized debtor and plaintiff, Aventine Renewable Energy, Inc. (the "Debtor" or "Aventine"), is prosecuting this adversary proceeding against defendants, Ace Ethanol, LLC ("Ace") and United States Debt Recovery III, LP ("USDR" and together with Ace, the "Defendants"). Aventine is also objecting to (1) ACE's proof of claim number 177 ("Claim 177") which USDR holds through assignment, and (2) USDR's related motion for allowance and immediate payment of an administrative expense claim in the amount of $222,070.74 on account of ethanol sold by Ace to Aventine within twenty days prior to the petition date. See

[1] The Court gratefully recognizes law clerk Andrew Mirisis for his excellent work, fellowship and enthusiasm throughout this past year. We wish him well.

Complaint and Objection to Claim ("Complaint" or "Compl."), D.I. 1. In sum, Aventine is claiming that Ace breached its obligations under the January Termination Agreement (defined, *infra*) by: (1) failing to fulfill its obligations to Aventine with respect to Ace's sublease of railcars, as required by Section 5.D. of the January Termination Agreement; and (2) failing to indemnify, defend and hold Aventine harmless from and against all claims, liabilities, damages, costs and expenses arising in connection with the subleased railcars as required by Section 5.E. of the January Termination Agreement. Presently before the Court for decision is Ace's Motion for Partial Summary Judgment on Damages (the "Motion") (D.I. 53). The Court held oral argument on the Motion on August 28, 2012. For the reasons discussed herein, the Court is denying the Motion.

Relevant Facts

On August 1, 1991, Aventine entered into a series of long-term railcar leases (the "Railcar Leases") with Union Tank Car Company ("UTCC") for the transport of ethanol. Compl. ¶¶ 13, 16. The Railcar Leases required Aventine to obtain UTCC's approval for release of Aventine's lease obligation. *Id.* Thereafter, on January 1, 2009, Aventine subleased 47 of the railcars to Ace. Compl. ¶ 15 (the "Sublease" and the "Subleased Railcars").

Ace produces and sells fuel grade ethanol. Compl. ¶ 11. Ace sold its product to Aventine and participated in Aventine's marketing alliance. *Id.* Beginning in January 2009, Aventine and Ace entered into a series of agreements to wind down their business relationship. Compl. ¶ 12. The first step was an agreement between Ace and Aventine,

dated January 1, 2009 (the "January Termination Agreement") which provides, in pertinent part:[2]

> 5. Responsibility for Dedicated Railcars:
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> * * *
>
> B. Notwithstanding the termination of the Original Agreement, on and after the Effective Date ARE hereby subleases to Ace, and Ace hereby accepts such sublease from ARE, the Dedicated Railcars listed on Exhibit A attached hereto (the "Subleased Railcars"). The foregoing subleases shall be subject to the terms and conditions of the respective Railcar Leases applicable to the Subleased Railcars, all of which are incorporated herein by reference. The term of each of the foregoing subleases for each of the Subleased Railcars shall commence on the Effective Date, and shall expire upon the earlier of (i) expiration of the lease term for such Subleased Railcar under the applicable Railcar Lease or (ii) the date on which all of ARE's lease rights and obligations with respect to such Subleased Railcar is transferred to and assumed by Ace as provided in Section 5.D. below through assignment and/or execution of a new lease contract and riders with the applicable lessor of such Subleased Railcar. ARE hereby represents and warrants to Ace that ARE has the authority to enter into the subleases described above and that such subleases will not constitute a default under or violation of any of the Railcar Leases applicable to the Subleased Railcars.
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> * * *
>
> D. The intent of the Parties is to fully transfer to Ace, and for Ace to fully assume, all of ARE's rights and obligations with respect to the Subleased Railcars, on the same terms to Ace as the terms of the Railcar Leases, and to obtain a release of ARE from such obligations from the lessors of such Subleased Railcars as soon as reasonably practicable after the Effective Date. The Parties hereby agree to diligently proceed with all

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[2] The references to "ARE" in the January Termination Agreement are to Aventine.

> reasonable actions to cause this to occur. Such transfers and assumptions shall be effectuated in accordance with the process required by each such lessor with respect to its respective Subleased Railcars, which process may include assignment and/or execution of a new lease contract and riders directly with Ace on substantially the same terms and conditions as the applicable Railcar Lease. Ace shall provide such documents, execute such instruments and take such other actions as are required by the lessors to consummate such transfers to and assumptions by Ace.
>
> E. Ace shall indemnify, defend and hold ARE harmless from and against all claims, liabilities, losses, damages, costs and expenses (including reasonable attorneys' fees) arising out of or in connection with any breach by Ace, its affiliates, or its or their respective employees or agents of (i) the subleases of the Subleased Railcars to Ace hereunder or (ii) any other agreement to which Ace becomes a party with respect to the Subleased Railcars; provided that Ace's obligation to indemnify, defend and hold ARE harmless pursuant to this Section 5E shall only exist to the extent attributable to the period from and after the Effective Date.
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> * * *

Compl. Ex. A. The January Termination Agreement provided for the Sublease and also contained an indemnification provision whereby Ace agreed to indemnify Aventine for any damages in the event Ace breached the Sublease.

After Aventine filed for bankruptcy on April 7, 2009, it rejected the Railcar Leases. UTCC filed a proof of claim for an unsecured claim in the sum of $82,553,987. By a stipulation, dated September 30, 2011, the UTCC Claim was allowed in the reduced amount of $27,562,095 (the "Allowed UTCC Claim") (D.I. 73). Under the Debtors' First Amended Joint Plan of Reorganization (the "Plan") (D.I. 678), which the Court approved on February

24, 2010, the Allowed UTCC Claim was to be treated consistent with distributions made to allowed claim holders in Classes 5 and 6. An analysis of the Allowed UTCC Claim revealed that $830,000 (or approximately 3%) of the Allowed UTCC Claim was allocable to leases covering the 47 Subleased Railcars. Case No. (09-11216, D.I. 74, Order Approving Stipulation for UTCC Claim); Declaration of Neal Kemmet in Support of the Motion ("Kemmet Decl.") (D.I. 53), Exhibit A, ¶ 3, to the Motion. The effective date of the Plan was March 15, 2010.

In October 2011, UTCC received its initial claim distribution (the "Distribution Date") consisting of approximately 350,000 shares of Aventine common stock on account of the Allowed UTCC Claim. Kemmet Decl. ¶ 5. On the UTCC distribution date, the market price of the Aventine stock averaged $10.50 per share. *Id*. at ¶ 6.

Defendant Ace requests partial summary judgment on Aventine's damages claim in the event Ace is found liable for breach of contract and the breach caused Aventine's injury-in-fact. Ace argues that the proper measure of Aventine's damages is the market value of the stock allocable to the 47 Subleased Railcars, as of the date the stock was distributed to UTCC. Ace asserts that on the Distribution Date, the damages amount is no more than $110,250, calculated as $10.50 per share multiplied by 10,500 shares (3% of the 350,000 total shares issued to UTCC).

Aventine argues that instead Aventine is entitled to offset the Ace claim of $222,070.74, against the full $830,000 in damages Aventine suffered as a result of Ace's alleged breaches. Alternatively, Aventine argues that if the Court disagrees with its first

argument, then the damages attributable to Ace's alleged breach is calculated as 3%[3] of the 350,000 total shares issued to UTCC. Aventine argues that if the calculation is based on 3% of the shares issued to UTCC, those shares must be valued on the effective date of the Plan because that is when Aventine placed them in the Unsecured Claims Stock Pool, an irrevocable escrow account for unsecured creditors' benefit.

Therefore the issues in dispute are (1) whether the appropriate measure of Aventine's damages is the full $830,000 amount determined in the Allowed UTCC Claim, or the *pro rata* amount that Aventine paid to UTCC through shares issued to UTCC to satisfy UTCC's Allowed Claim; and (2) if Aventine's damages are measured by a *pro rata* amount of shares issued to UTCC, the appropriate date for valuing the new shares issued to UTCC to determine Aventine's damages. For the reasons discussed below, the Court holds that the appropriate measure of Aventine's damages, if Ace breached its obligations, is determined by a 3% *pro rata* portion of the shares issued to UTCC on account of Ace's alleged breach, multiplied by the share price as of the effective date of the Plan.

Discussion

Defendant Ace seeks partial summary judgment with respect to damages. Pursuant to Federal Rule of Civil Procedure 56(a), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, a court may grant summary judgment where

[3] The parties agree that 3% is correct because $830,000 is 3% of the total $ 27,562,095 UTCC claim. It is logical to conclude that 3% of the total stock issued to UTCC is the portion attributable to Ace's alleged breach. Although the parties agree as to the 3%, they disagree about which date the court should use to determine the value of the stock. Aventine wants the Court to use the effective date of the Plan and ACE argues for the distribution date.

"there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute regarding a material fact is genuine "when reasonable minds could disagree on the result" *Delta Mills, Inc. v. GMAC Comm. Fin., Inc.* (*In re Delta Mills, Inc.*), 404 B.R. 95, 105 (Bankr.D.Del.2009). The moving party bears the burden of demonstrating an entitlement to summary judgment. *McAnaney v. Astoria Fin. Corp.*, 665 F.Supp.2d 132, 141 (E.D.N.Y.2009).

Summary judgment serves to "isolate and dispose of factually unsupported claims or defenses" and avoid unnecessary trial where the facts are settled. *Delta Mills*, 404 B.R. at 104 (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Thus, at the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Pearson v. Component Tech. Corp.*, 247 F.3d 471 (3d Cir. 2001) (*citing Celotex*, 477 U .S. at 317); see also Fed.R.Civ.P. 56(c). In making this determination, the court must view all facts in the light most favorable to the non-movant and must draw all reasonable inferences from the underlying facts in favor of the non-movant. *McAnaney*, 665 F.Supp.2d at 141; *Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508, 512 (3d Cir.1994). Any doubt must also be construed in the non-moving party's favor. *Delta Mills*, 404 B.R. at 105.

Once the moving party provides sufficient evidence, the burden shifts to the non-moving party to rebut the evidence. *Delta Mills*, 404 B.R. at 105. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *McAnaney*, 665 F.Supp.2d at 141 (*quoting Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002)). "[T]he mere existence of some alleged factual dispute between the parties" cannot defeat a properly supported summary judgment motion. *Anderson*, 477 U.S. at 247–48. The dispute must relate to a genuine issue of material fact. *Delta Mills*, 404 B.R. at 105. Thus, a non-moving party cannot defeat a summary judgment motion based on conclusory allegations and denials, but instead must provide supportive arguments or facts that show the necessity of a trial. *McAnaney*, 665 F.Supp.2d at 141.

Summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a).

As a threshold matter, the Court holds that Aventine's damages must be measured by the value of its shares on the effective date, not the distribution date. The Plan and related disclosure statement established an Unsecured Claims Stock Pool comprised of 6.8 million shares to be distributed on a *pro rata* basis to holders of Allowed Class 5 and 6 Claims. (D.I. 678 at 17, 29). Moreover, the Plan provided for the cancellation of any shares remaining in the reserve. *Id.* at 40. As a result, once funded, the shares contributed to the Unsecured Claims Stock Pool were irrevocable and the Debtor was permanently deprived of ownership

and control of those shares. On the effective date, Aventine contributed the shares to the Unsecured Claims Stock Pool for the benefit of creditors in Allowed Classes 5 and 6, which included Ace. Therefore, the date for valuing the shares for determining damages is the effective date of the Plan.

Citing the collateral source rule, Aventine argues that "Ace is not entitled to the benefits of the collateral events of Aventine's intervening bankruptcy and the Plan's distribution provisions to reduce its liability for breaching the January Termination Agreement." Plaintiff Aventine Renewable Energy Inc.'s Memorandum of Law in Opposition to Motion of Defendant ACE Ethanol, LLC for Partial Summary Judgment on Damages, at 9. Conversely, Ace argues that the collateral source rule "does not apply where the benefit received was not from a third party but from plaintiff's own doing, through bankruptcy or otherwise." Defendant ACE Ethanol LLC's Reply Brief in Support of its Motion for Partial Summary Judgment on Damages, at 2, *citing Oliver v. Heritage Mut. Ins. Co.*, 179 Wis. 2d 1, 22, 505 N.W.2d 452 (Ct. App. 1993) (holding that "the collateral source rule was not intended for situations where plaintiff creates the windfall by his own act, such as when a plaintiff's bankruptcy results in discharging of the disputed liability").[4] The Court disagrees with Ace's application of *Oliver* to the present case. Applying *Oliver*, to the present case, it is evident that the plaintiff's recovery is being reduced by a benefit from another source, specifically, the filing of the bankruptcy case. If Aventine did not file for

[4] Aventine and Ace agree that Wisconsin law would govern the January Termination Agreement. Complaint, Ex. A.

bankruptcy, Ace's potential damages exposure for the alleged breach would have been much greater. Aventine's bankruptcy resulted in its settlement with UTCC which, in turn, reduced Ace's potential liability from approximately $3,000,000 to $830,000. As a direct result of the bankruptcy and Plan, the Debtor-plaintiff's benefit was further reduced when it satisfied its creditors' claims with new equity shares. Now, rather than facing a potential damages liability of $3 million or $830,000, Ace's damage exposure has been substantially reduced. For example, assuming that the proper value of the shares on the effective date was $25 per share, the 10,500 shares distributed to UTCC on account of the alleged Ace breach would reduce Ace's potential damages liability from $830,000 to $262,500. The rationale of *Oliver*, is fully operative in the present case. Aventine's damages are being reduced by a benefit it received from the filing of the bankruptcy and that benefit must be extended to Ace. Rather than being able to seek damages from Ace of $3,000,000 or $830,000, Aventine's Plan has reduced Aventine's recovery. The question then becomes whether Ace should be permitted to extend that benefit even further by arguing that the proper valuation date is the later distribution date, when the Aventine shares were trading at a significantly reduced rate. Ace should not have the benefit of the vagaries of the market place. *Oliver* does not require such a speculative measurement.

Ace has not met its burden and established that there is no genuine issue of material fact regarding the share value on the effective date. When viewing the underlying facts in the light most favorable to the non-movant, Aventine, and drawing all reasonable inferences from those facts in Aventine's favor, it is clear to the Court that the share price is a material

fact that is very much in dispute.

Partial summary judgment on damages is inappropriate because there is no established market value or valuation of the shares on the effective date. Aventine's disclosure statement acknowledged there was no established market for the newly issued stock. (D.I. 679 at 88). Nonetheless, Ace relies on the opinion that on April 8, 2010, one week after the effective date, the market price of the Debtors' shares was $ 40.50 a share. *See* Kemmet Decl. ¶ 7. Additionally, in support of confirmation of the Plan, the Debtors' financial advisor, Houlihan Lokey, performed a projected market valuation that was included in the Disclosure Statement. That valuation established an estimated range of equity value for the Reorganized Debtors, of between $191.1 million and $231.1 million, yielding an imputed equity value as of the effective date, ranging between $22.35 and $27.03 per share. *Disclosure Statement*, at 74.

Aventine argues that the discrepancy between the projected market value established by Houlihan Lokey for the disclosure statement, and the market price of the shares one week after the effective date, requires the Court to determine the value on the effective date, aided by expert testimony. The Court agrees with Aventine, and holds that absent actual market value or valuation of the shares on the effective date, there is a material fact in dispute making partial summary judgment inappropriate. The calculation of any potential damages claim will hinge on equity value on the effective date. As a result, the Court will hold an evidentiary hearing to allow the parties to present evidence to establish the actual market value or a valuation analysis of the shares of Aventine on the effective date.

Accordingly, Ace's Partial Summary Judgment Motion is DENIED. The parties are to confer and submit a Scheduling Order for the Court's consideration.

SO ORDERED.

Dated: September 13, 2012

KEVIN GROSS, U.S.B.J.