IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: M&G USA CORPORATION, *et al.*, Debtors.	Chapter 11 Case No. 17-12307 (BLS) (Jointly Administered)
M&G Polimeros Brasil S.A., Plaintiff, v. M&G Polymers USA, LLC and Comerica Bank, Defendants.	Adv. Pro. No. 18-50007 (BLS) **Re: Docket Nos. 16-19, 21-23**

MEMORANDUM ORDER

M&G Polimeros Brasil S.A. ("Brasil" or "Polimeros"), an affiliate of the Debtors, is the plaintiff in this adversary proceeding. By way of its Amended Complaint [AP Docket No. 16], Brasil hopes to recover roughly $10 million in proceeds that are currently being held by M&G. Brasil contends that those proceeds belong to it under principles of consignment. The defendants dispute that there is any consignment relationship, and that Brasil simply holds an unsecured claim. Presently, before the Court is a Motion to Dismiss (the "Motion") under Rule 12(b)(6) filed by Comerica Bank ("Comerica") [AP Docket No. 17] that M&G Polymers USA ("M&G" or the "Debtors," and together with Comerica, the "Defendants") has joined [AP Docket No. 19]. For the reasons that follow, the Court will DENY the Motion.

I. Background[1]

Brasil supplies polyethylene terephthalate ("PET") to customers both in Brazil and in the United States. Brasil worked in conjunction with M&G regarding the U.S. sales. According to the Amended Complaint, their arrangement functioned as follows: Brasil would manufacture and ship PET to M&G; M&G would then deliver the product to U.S. customers and collect payment from them. M&G would thereupon remit to Brasil money it had collected for the PET, less an agreed administrative fee charged by M&G. Brasil found this arrangement to be optimal considering M&G's superior logistics and administrative capabilities and its location in the U.S. In essence, Brasil asserts that M&G merely served as a middleman on Brasil's behalf to Brasil's U.S. customer base.

In the three months leading up to these Chapter 11 cases, M&G sold approximately $25 million of PET product on Brasil's behalf. Of that amount, M&G currently holds roughly $10 million of proceeds. Brasil argues that those proceeds belong to it because, according to the arrangement, M&G functioned only as a conduit and had no ownership of or right to the monies from customers. More specifically, Brasil contends that M&G acted as its consignee and that M&G had no ownership interest in either the PET or the proceeds therefrom. Brasil alleges that it always retained ownership of the product and any proceeds. Therefore, Brasil has sued M&G and demands that it remit the proceeds back to Brasil.

Comerica is a secured lender to M&G on a revolving note of $50 million. The security agreement provides that Comerica holds a security interest in M&G's "collateral," which is defined as

[1] The facts and allegations taken from the Amended Complaint are viewed in light most favorable to Brasil, according to the Rule 12(b)(6) standard set forth *infra*.

> all of the following property Debtor now or later owns or has an interest in, wherever located: all Accounts and Accounts Receivable ... all Inventory ... all cash ... of or pertaining to the above Collateral, ... and all of Debtor's vendor data customarily supplied with the goods, product specifications and material safety data sheets pertaining to the Debtor's Accounts, Accounts Receivable and Inventory.

Amended Complaint, ¶ 48. M&G defaulted on that loan, and soon thereafter, Comerica filed a complaint in federal district court seeking the appointment of a receiver. Prior to the appointment of a receiver, M&G filed its petition for Chapter 11 relief. It is Comerica's position that the $10 million at issue here is its collateral, subject to its first-priority security interest.

The Amended Complaint references but does not attach invoices that document some of the transactions between the parties. It also mentions the "documentary material attached to Comerica's responsive pleading," Amended Complaint, ¶ 13, which includes invoices, purchase orders, and bills of lading. Those documents constitute the primary documentation memorializing the business relationship between Brasil and M&G provided thus far. Brasil attaches great weight to the fact that the invoices designate M&G as a "consignee" at the top of the document. Exhibit A of Comerica's Opening Brief in Support [AP Docket No. 18-1]. Defendants acknowledge that the invoices label M&G as a "consignee," but stress that there are no facts alleged in the Amended Complaint or documentation otherwise referenced or attached showing that Brasil filed a UCC-1 or gave notice to other creditors.

This is a dispute over ownership of the proceeds held by M&G.[2] By its Amended Complaint, Brasil seeks to impose a constructive trust against M&G and Comerica, it claims unjust enrichment against the two parties, and it seeks a declaratory judgment in its favor. Amended Complaint, ¶¶ 53-93. Comerica filed this Motion on March 15, 2018, which M&G joined. The Court will now turn to the arguments.

[2] According to Brasil, the proceeds are currently being held by Comerica in an identifiable bank account. Polimeros' Brief in Opposition, 1[AP Docket No. 21].

II. The Parties' Arguments

a. Brasil's Arguments

Brasil argues that the Motion should be denied. Under the Rule 12(b)(6) standard, Brasil is not required to show that it will prevail. Rather, it need only show that it is entitled to provide evidentiary support to its claims. To get to that point, the claims merely need to be deemed plausible, which Brasil contends that they are.

Brasil's primary argument is that the proceeds belong to it, rather than Comerica, because the business relationship was a consignment. Brasil contends that there was no contract between it and M&G, and that the invoices identified by the Defendants do not constitute a contract. In the absence of a contractual relationship, Brasil contends that its remedy lies in a claim for unjust enrichment. Brasil also contends that Comerica had knowledge of the consignment relationship because of the invoices. Brasil thus alleges that Comerica's security interest could never have attached to the proceeds because M&G never owned those proceeds. Brasil further argues that, absent imposition of a constructive trust in its favor over the $10 million proceeds, Comerica will be unjustly enriched with property to which it has no legal or contractual right.

b. The Defendants' Arguments

The Defendants argue that Brasil fails to state a claim to support the extraordinary remedy of a constructive trust. Parsing through the various invoices and other documentation that they attach to their Motion (but which are not attached to the Amended Complaint), they argue that M&G *purchased* PET from Brasil (rather than merely holding the product) and then sold PET to its U.S. customers. Defendants assert that their invoices and purchase orders between the parties evidence a contractual relationship in the normal course of business: M&G

issued purchase orders for PET, Brasil submitted invoices to M&G, and Brasil shipped the PET accompanied by bills of lading.

Because there was a contract between the parties, Defendants contend that Brasil cannot bring a claim for unjust enrichment, so that Counts 2 and 3 of the Amended Complaint must be dismissed. Comerica also argues that any evidence of an arrangement regarding administrative convenience is barred because the invoices and purchase orders are contracts and any evidence of a collateral side agreement is barred by the Parol Evidence Rule, as well as the Statute of Frauds. In sum, Comerica stresses that if a constructive trust were imposed in this case, Comerica's rights to its collateral–evidenced by timely filed financing statements–would be vitiated and Brasil would be the entity that is unjustly enriched, not Comerica.

III. Discussion[3]

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotations omitted).

[3] Jurisdiction and venue are not in dispute in this case. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334(b). Venue is proper in this Court under 28 U.S.C. § 1409. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (B), and (K).

"A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to the plaintiff, plaintiff is not entitled to relief." *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (citation omitted). "In deciding a motion to dismiss, a court must take well-pleaded facts as true but need not credit a complaint's 'bald assertions' or 'legal conclusions.'" *Id.* at 1429-30 (quoting *Glassman v. Computervision Corp.*, 90 F.3d 617, 628 (1st Cir. 1996)). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 804 F.3d 633, 638 (3d Cir. 2015) (internal quotation omitted). In that same vein, the question of plausibility "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal activity." *Twombly*, 550 U.S. at 556. Moreover, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable ... ." *Id.*

The primary issue before the Court in this Motion is whether Brasil has alleged sufficient facts in the Amended Complaint to support a plausible claim for unjust enrichment. In order to establish a claim for unjust enrichment under Delaware law,[4] Brasil must allege: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010) (citations omitted). The fifth factor–whether a remedy at law is available–is at the heart of this dispute. If there is a contract, Brasil may seek

[4] The Court finds that Delaware law applies to this case. *See generally Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.)*, 493 F.3d 345, 358 (3d Cir. 2007) ("As a federal court exercising jurisdiction over state-law claims, we apply the choice-of-law rules of Delaware, the forum state.") (citation omitted). At least initially, Comerica argues that Texas law applies based on the "conditions of sale" document. But, Comerica eventually proceeds under Delaware law making the same argument in its Reply. Reply, 3 n.4.

damages for breach of the contract but cannot pursue a claim for unjust enrichment. Conversely, if there is no contract, then Brasil's remedy is for unjust enrichment.

Taking Brasil's well-pleaded facts as true, the Court is satisfied that Brasil has carried its burden under the applicable pleading standards to defeat this Motion. The Amended Complaint alleges that the transactional relationship with M&G was a consignment. If that allegation is true, Brasil's claims for unjust enrichment become plausible, thus satisfying the *Twombly* standard. The parties place heavy emphasis on the interpretation of the numerous documents provided by the Defendants. Those issues are better addressed in the summary judgment context under Rule 7056, and not at this early stage of the proceeding.[5] Thus, the Court finds that the facts alleged in the Amended Complaint are sufficient to defeat the Motion.

IV. Conclusion

For the foregoing reasons, the Court finds that Comerica has not carried its burden under Bankruptcy Rule 7012. Accordingly, it is hereby

ORDERED, that the Motion to Dismiss is **DENIED**.

Dated: Wilmington, Delaware
August 29, 2018

Brendan Linehan Shannon
United States Bankruptcy Judge

[5] "To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record." *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (internal quotation omitted). "However, an exception to the general rule is that a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment." *Id.* (internal quotations omitted). While this exception may allow the Court to reference documents extraneous to the Amended Complaint, it does not *require* the Court to do so. The Court is not satisfied that a thorough review of the documents provided by the Defendants is appropriate at this stage absent further development of the record and such discovery as may be appropriate.

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