

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

In re: MET-COIL SYSTEMS CORPORATION, Debtor.	Chapter 11 Case No. 03-12676 (MFW)
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TRAVELERS' REPLY IN SUPPORT OF ITS MOTION TO DEFER RULING

Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company, and The Travelers Indemnity Company of Illinois (collectively "Travelers"), for their Reply in Support of their Motion to Defer Ruling, state as follows:

INTRODUCTION AND BACKGROUND

On April 28, 2003, Travelers, Debtor and Debtor's parent and Plan proponent, Mestek, Inc. ("Mestek") reached a tri-partite settlement of their pre-petition insurance coverage dispute. Mestek's senior counsel and a single outside law firm represented both Debtor and Mestek in all settlement negotiations and in agreeing to the settlement. Likewise, the written form of the settlement, correspondence relating to the settlement, and pleadings the parties filed in the underlying pre-petition cases clearly establish that the settlement is a three-party agreement amongst Travelers, Debtor and Mestek, which would not exist, but for all three parties' participation therein¹.

Shortly before Debtor filed for bankruptcy, Debtor's and Mestek's outside counsel

¹ Travelers' Response to Mestek's Limited Objection to the Motion to Assume or Approve, which is filed Under Seal, specifically addresses Mestek's false assertions that it is not a party to the settlement, and it attaches correspondence regarding the settlement negotiations, the written form (and drafts) of the agreement, and the pleadings the parties have filed evidencing that the parties entered a three-party settlement.

informed Travelers that Debtor intended to file for bankruptcy and thus, that Mestek no longer intended to abide by the settlement. In response, and prior to Debtor's bankruptcy filing, Travelers filed a Motion to Enforce Settlement in the pre-petition action pending in Illinois (the "Illinois Action"), seeking enforcement of the settlement as to all three parties. Rather than awaiting prompt resolution of the matter in the Illinois Action, which was scheduled for November 24, 2003, Debtor removed the Illinois Action and a parallel action pending in Iowa state court (the "Iowa Action"), to federal court on October 14, 2003. Soon thereafter, on October 17, 2003, Debtor filed a Motion to Transfer the Illinois Action to this Court. After being informed of Travelers' intent to file a Motion for Abstention and Remand, United States District Judge St. Eve in the Illinois Action denied Debtor's Motion to Transfer (without prejudice) and ruled that the court would address Traveler's Motion for Abstention and Remand first. The Illinois Action was referred to the United States Bankruptcy Court for the Northern District of Illinois pursuant to an Internal Operating Procedure, where Travelers' Motion for Abstention and Remand remains pending with briefing to conclude on December 11, 2003².

On October 20, 2003, Debtor filed its Motion to Assume Settlement Agreement or in the Alternative, to Approve Settlement Agreement Pursuant to Bankruptcy Rule 9019 ("Motion to Assume or Approve"). In its Motion to Assume or Approve, Debtor seeks assumption or approval of the three-party settlement that Travelers, Debtor and Mestek reached. However, Debtor's Motion to Assume or Approve fails to pay credence to the fact that Mestek, its own parent and Plan proponent, denies that it is a party to the settlement, and that without Mestek as a

² In a meager attempt to discredit Travelers' position that a bankruptcy court is not the appropriate forum for resolving disputes as to the validity, existence and enforceability of a pre-petition contract, Mestek contends that Travelers has contradicted itself because it filed Motions for Referral to Bankruptcy Judges in the Illinois and Iowa Actions. (See p. 5, n.5 of Mestek's Objection to Travelers' Motion to Defer Ruling). Not surprisingly, Mestek failed to inform the Court that referral is automatic and required in both the Northern District of Illinois and the Northern District of Iowa where the Iowa Action is pending. Thus, it is inappropriate for Mestek to insinuate that Travelers is responsible for referring the matters to the bankruptcy courts.

party to the settlement, there is no settlement to assume or approve. Thus, on November 14, 2003, well within the time to respond to the Motion to Assume or Approve, Travelers filed its Motion to Defer Ruling in response to Debtor's Motion to Assume or Approve³.

Travelers' Motion to Defer Ruling unequivocally establishes that Debtor's Motion to Assume or Approve is premature, because a dispute exists as to the very existence, enforceability and validity of the tri-partite settlement, of which Debtor seeks assumption or approval. As Mestek provided crucial and material consideration in exchange for Travelers' agreement to pay Debtor and Mestek a significant sum of money, the settlement is not enforceable without Mestek as a party thereto. Therefore, the dispute as to whether Mestek is a party to the settlement and thus, whether the settlement is valid and enforceable must be decided before Debtors' Motion to Assume or Approve can be adjudicated. See e.g., Orion Picture Corp. v. Showtime Networks, Inc., 4 F.3d 1095, 1099 (2nd Cir. 1993)(the bankruptcy courts should not resolve questions regarding the existence, enforceability or validity of a contract in the context of deciding whether to permit the trustee or debtor-in-possession to assume a contract). Further, the threshold dispute as to whether the settlement is valid and enforceable is not properly before this Court. Id. at 1102. The dispute is a non-core matter. Travelers has not filed a proof of claim. And Travelers' filed Motions for Abstention and Remand, which will be resolved in short order prior to Debtor's Motion to Transfer⁴.

³ In addition, Travelers filed a Preliminary Response to Debtor's Motion to Assume or Approve on November 25, 2003, also prior to the November 26, 2003 response deadline agreed to amongst the parties by Stipulation filed on November 7, 2003. Thus, Mestek's assertion that Travelers failed to "file a timely response" to Debtor's Motion to Assume or Approve is boldly untrue, as Travelers filed both its Motion to Defer Ruling and its Preliminary Response to Debtor's Motion to Assume or Approve before November 26, 2003. (See p. 3 of Mestek's Objection to Travelers' Motion to Defer Ruling.)

⁴ Debtor and Mestek have indicated that Debtor intends to file a Motion to Transfer in the Iowa Action. Though the issue has yet to arise in the Iowa Action, federal courts in Iowa, like Illinois, have ruled that Motions for Abstention and Remand should be addressed prior to Motions to Transfer Venue. See AUSA Life Insurance Co., Inc. v. Citigroup, Inc., 293 B.R. 471, 474 (N.D. Iowa 2003)("[F]ederal courts have held that a plaintiffs' motion for remand must necessarily be heard and decided prior to defendants' motion to transfer venue.")

On December 3, 2003, Debtor and Mestek filed Objections to Travelers' Motion to Defer (“Debtor’s Objection”) and (“Mestek’s Objection”). In Debtor’s Objection, Debtor generally asserts that a valid and binding settlement agreement was reached between the parties, and Debtor curiously criticizes Travelers for raising the issue of the enforceability of the settlement. (See p. 2 of Debtor's Objection.) Debtor's Objection makes no mention of the fact that Mestek, its own parent and Plan proponent, disputes that it is a party to the settlement, and thus, that Mestek and not Travelers, is the cause of the dispute as to the existence, enforceability and validity of the settlement; and that there is no settlement to assume or approve if Mestek is not a party thereto. Moreover, Debtor ignores the effect of Orion, as well as the fact that the contract dispute between Travelers, Debtor and Mestek is a non-core matter that has not been transferred to this Court, and instead, blankly argues that this Court can properly address the validity of the settlement in the context of Debtor's Motion to Assume or Approve.

In Mestek’s Objection, Mestek asserts that Debtor’s Motion to Assume or Approve is ripe for adjudication, because the Court can address the validity and enforceability of the settlement as to Debtor and Travelers. This argument ignores the inescapable fact that there would have been no settlement whatsoever without Mestek as a party thereto. Thus, the Court cannot address the validity and enforceability of some alleged settlement as to Debtor and Travelers because no such settlement ever existed. In addition, Mestek makes the outlandish claim that the tri-partite settlement is somehow comprised of two separate and distinct agreements: one between Travelers and Debtor settling the coverage actions and one allegedly between Travelers and Mestek regarding future obligations. Aside from the fact that there is no evidence whatsoever substantiating such an assertion, Mestek’s contention is wholly illogical when one considers the fact that Mestek, and not just Debtor, seeks insurance coverage from

Travelers in the coverage actions. Thus, it would be non-sensical for Travelers to settle the coverage actions with Debtor and not with Mestek in one fell swoop, which Travelers in fact did.

Hence, Debtor's and Mestek's efforts to portray Debtor's Motion to Assume or Approve as ripe and the contract dispute amongst the parties as core are unavailing. This Court should defer ruling on the Motion to Assume or Approve pending the outcome of the proceedings in other courts.

ARGUMENT

I. Disputed Issues As To Whether Mestek Is A Party To The Settlement, And Thus, Whether The Settlement Is Existent, Valid, Enforceable Must Be Resolved Before This Court Can Address Debtor's Motion to Assume Or Approve.

Debtor's Motion to Assume or Approve is premature, because there are threshold questions as to whether there is an enforceable settlement to assume or approve in the first place. Orion, 4 F.3d at 1099. In Orion, much like this case, the debtor initiated a contract action against a party to a pre-petition contract seeking enforcement of the contract. Orion, 4 F.3d at 1097. As in this case, the debtor eventually filed a motion to assume the agreement in the context of its bankruptcy proceedings, and in response, and much like Travelers in this case, the other party to the alleged contract chose not to file a proof of claim in the debtor's bankruptcy and it sought to withdraw the contract action from the bankruptcy court asserting that it was a non-core legal matter. Id. at 1097, 1102. The motion to withdraw was eventually denied, and after resolving questions relating to the validity of the contract in the context of the debtor's motion to assume, the bankruptcy court granted the debtor's motion to assume. Id. at 1097-98.

On appeal, the Second Circuit held that it was error for the bankruptcy court to decide disputed factual issues in the context of ruling on the debtor's motion to assume. Id. at 1098-99. The court stated:

Although several bankruptcy courts have read § 365 as authorizing them to resolve

questions involving the validity of contracts before deciding whether to permit the trustee or debtor-in-possession to assume the contracts, we believe that nothing in § 365 provides such authorization. [Citations omitted].

Orion, 4 F.3d at 1098.

In Re III Enterprises, Inc. is in accord with Orion on the issue of whether bankruptcy courts can address motions to assume or reject when issues as to the validity, existence and enforceability remain unresolved. In Re III Enterprises, Inc., 163 B.R. 453, 459 (Bankr. E.D. Pa. 1994). In In Re III Enterprises, Inc. the United States Bankruptcy Court for the Eastern District of Pennsylvania specifically stated that a bankruptcy court could not address a motion to assume or reject until the issue of whether a valid contract exists is resolved, stating:

It is elementary to observe that, before the Debtor can assume or reject a contract, or, for that matter, before [the creditor] can seek to enforce a contract, there must be a contract to assume, reject or enforce... The issue of the existence and enforceability of the underlying contract are threshold issues the resolution of which is absolutely essential to the adjudication of the Motion.

Id. 163 B.R. at 459.

In this case, it is undeniable that a dispute exists as to whether the tri-partite settlement between Travelers, Debtor and Mestek is existent, valid and enforceable. Mestek disputes that it is a party to the settlement. Travelers disputes that it is a party to Mestek's newly created alleged two-party agreement, since Travelers -- knowing Met-Coil's precarious pre-petition financial situation-- would never have entered into the settlement without Mestek as a party thereto. The valuable consideration Mestek agreed to provide Travelers is crucial to Travelers' agreement to pay Debtor and Mestek a significant sum of money. Without Mestek as a party, and hence, without Mestek's consideration, no settlement exists. Because a dispute clearly exists as to the validity, existence and enforceability of the settlement, as Orion makes clear, it is premature for this Court to address Debtor's Motion to Assume or Approve.

Debtor's and Mestek's arguments do nothing to dispel the fact that a dispute exists as to

the validity, existence and enforceability of the settlement. Debtor asserts that “Orion noted that a bankruptcy court could hear and adjudicate a contractual dispute related to a motion to assume.” (See p. 3 of Debtor’s Objection.) Although the Orion court did not express an all-out prohibition on bankruptcy courts resolving disputed contractual issues simultaneously with motions to assume, the Orion concluded that, based on the facts presented, the bankruptcy court should not have addressed the disputed contractual issues. As the facts of this case are directly in accord with those in Orion, this Court should refrain from resolving the validity, existence and enforceability of the tri-partite settlement simultaneously with Debtor’s Motion to Assume or Approve.

In addition, Debtor claims that “the enforceability of the Settlement Agreement against Mestek is not an issue that must even be decided by this Court in the context of approving a settlement by the Debtor under Bankruptcy Rule 9019.” Like Mestek’s assertion that a valid and binding settlement exists only as to Debtor and Travelers (See p. 7 of Debtor’s Objection; p. 5 of Mestek’s Objection.), this claim ignores the fact that, unless Mestek is a party to the settlement, no settlement whatsoever exists. As the very existence of the tri-partite settlement hinges on whether Mestek is a party thereto, the issue of the enforceability of the settlement as to Mestek is indeed a precondition to this Court being able to assume or approve the settlement. Until a court (appropriately a state court) resolves the issue of whether Mestek is a party to the settlement, and thus, whether the settlement is existent, valid and enforceable, this Court cannot address Debtor’s Motion to Assume or Approve. Therefore, there is no escaping the fact that Debtor’s Motion to Assume or Approve is premature.

II. The Issue Of Whether Mestek Is A Party To The Tri-Partite Settlement, And Thus, Whether The Settlement Is Existent, Valid And Enforceable, Is Not Properly Before This Court.

In addition to ruling that the bankruptcy court erred in resolving disputed contract issues in the context of the debtor's motion to assume, the Orion court ruled that the contract dispute was a non-core matter, which should not have been addressed by the bankruptcy court in the first place, stating:

Thus we hold this breach-of-contract action by a debtor against a party to a pre-petition contract, who has filed no proof of claim with the bankruptcy court, is non-core. Since the core/non-core determination was the pivotal issue in determining the Motion to Withdraw, we vacate the district court's denial of the motion and remand it in light of the standards set forth in this opinion.

Id. at 1102; See also, Beard v. Braunstein, 914 F.2d 434, 445 (3d Cir. 1990)(action involving pre-petition contracts allegedly breached before and after the filing of the petition is entirely a non-core matter); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84, 102 S. Ct. 2858 (U.S. 1982)(bankruptcy courts are not empowered to adjudicate a state contract action, based on a pre-petition contract, where the creditor has not filed a proof of claim with the bankruptcy court); In Re United States Brass Corp., 110 F.3d 1261, 1268-69 (7th Cir. 1997)(declaratory judgment actions regarding pre-petition insurance policies, which are initiated in state court under state law are merely "related to" non-core proceedings).

The present case falls directly within the parameters of Orion, Beard, Marathon Pipe Line Co. and Brass. The dispute between Travelers, Debtor and Mestek involves state law contract issues, the three-party settlement (and insurance policies) were entered into before Debtor filed its petition for bankruptcy, the dispute was initiated in state court, and Travelers has not sought the benefit of this Court's jurisdiction by filing a proof of claim. Accordingly, the dispute is a non-core proceeding, and these cases mandate a finding that this Court is not the appropriate forum for resolving the validity, enforceability and existence of the settlement between Travelers, Debtor and Mestek.

Debtor and Mestek argue that In Re III Enterprises permits this Court to resolve the

enforceability issues. (See p. 3 of Debtor's Objection; p. 7 of Mestek's Objection)⁵. The procedural posture of that case distinguishes it from our own case. Though the In Re III Enterprises court eventually resolved the enforceability issues, it do so only because the entire contract dispute (and all pleadings relating thereto) were going to be transferred to the bankruptcy court. Id at 458, n.2. As Debtor and Mestek failed to point out, the court stated, "We understand that the DE Bankr. Ct. intends to transfer the Delaware [contract] action and [the other party's] motion to remand to this court." Id.

However, unlike in In Re III Enterprises, the present dispute is not being transferred to this Court. Travelers' Motion for Abstention and Remand will be resolved in short order in the Illinois Action, and Travelers' Motion for Abstention and Remand in the Iowa Action will likewise proceed prior to any eventual Motion to Transfer. AUSA Life Insurance Co., Inc. v. Citigroup, Inc., 293 B.R. 471, 474 (N.D. Iowa 2003)("[F]ederal courts have held that a plaintiffs' motion for remand must necessarily be heard and decided prior to defendants' motion to transfer venue.") Therefore, the fact that the In Re III Enterprises court resolved disputed contractual issues in no way justifies this Court doing the same, as Debtor and Mestek contend⁶.

⁵ Both Debtor and Mestek disingenuously assert that In Re III Enterprises stands for the opposite proposition for which Travelers cites it in its Motion to Defer Ruling. This is simply not true, as Travelers properly cites In Re III Enterprises as being in accord with Orion on the issue of whether bankruptcy courts can address motions to assume or reject when issues as to the validity, existence and enforceability remain unresolved (See p. 7 of Travelers' Motion to Defer Ruling), and Travelers discusses the difference between the case at bar and In Re III Enterprises on the issue of whether a bankruptcy court can properly address disputed contract issues in the context of a motion to assume or reject (See p. 8 of Travelers' Motion to Defer Ruling).

⁶ Debtor and Mestek rely on several other inapplicable cases in support of their assertions that this Court can and should resolve the disputed contract issues. For instance, Georgia Port Authority v. Diamond Mfg. Co. Inc., 164 B.R. 189 (Bankr. S.D. Ga. 1994), has no bearing on this case because it involved the assumption of a lease, which is treated differently by the Bankruptcy Code than a secured debt such as that at issue in this case. Similarly, PSI Net, Inc. v. Cisco Systems Capital Corp., 271 B.R. 1 (Bankr. S.D.N.Y. 2001), is inapplicable because it dealt with the recharacterization of a lease, which is typically regarded as a core bankruptcy matter and which was fundamental to the debtor's restructuring. Likewise, Resolution Trust Corp. v. Best Products Co., Inc., 68 F.3d 26 (2nd Cir. 1995), does little to bolster Debtor's and Mestek's efforts to keep the contract dispute before this Court, as unlike in this case, Orion and Marathon Pipe Line Co., the parties in Best Products Co. Inc. sought the benefit of the bankruptcy court's jurisdiction by filing proofs of claim, thereby rendering the dispute a core matter.

Next, Debtor's and Mestek's half-hearted arguments that the dispute pertaining to the tripartite settlement is a core matter because it will have a significant impact on Debtor's reorganization and other core matters are unconvincing. Debtor and Mestek have presented no evidence whatsoever establishing that the settlement has anything to do with the restructuring of the debtor-creditor relationships, which is at the core of the federal bankruptcy power. Marathon Pipe Line Co., 102 S. Ct. at 87. To the contrary, adjudication of the settlement issues will involve the resolution of state-created private rights, which are non-core matters. Id. The only relationship the pre-petition contract issues have with Debtor's bankruptcy proceedings is that determination of the issues will affect the ultimate size of the estate, which is insufficient to render them core matters. Orion, 4 F.3d at 1102 (noting that defining pre-petition contract actions as core because the amounts due would inure to the benefit of the estate would "wipe out the underpinnings of *Marathon*"); citing, 1 COLLIER ON BANKRUPTCY ¶ 3.01[2][B][III] at 3049. As the Seventh Circuit in Brass ruled:

The fact that it is an *important* right to the bankrupt--[the debtor] claims to be seeking \$500 million in insurance coverage--is irrelevant. "Core" is a defined term in the Bankruptcy Code, a term of art, rather than a metaphor. The impact of a claim on the size of the debtor's estate is a criterion of whether the claim is related to the bankruptcy and is therefore a noncore proceeding. So [the debtor] has it backwards--arguing for classification as a core proceeding on the basis of a criterion for classification as a noncore proceeding. [Citations omitted].

Brass, 110 F.3d at 1268-69.

CONCLUSION

As the dispute between Travelers, Debtor and Mestek is a non-core proceeding, Travelers' Motions for Abstention and Remand have yet to be adjudicated, and Debtor's Motions to Transfer will only be heard if Travelers' Motions for Abstention and Remand are eventually denied, the issue of the existence, enforcement and validity of the tri-partite settlement is not

before this Court. Therefore, this Court should defer ruling on Debtor's Motion to Assume or Approve, pending the outcome of the proceedings in other courts.

Respectfully submitted,

Dated: December 8, 2003
Wilmington, Delaware

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