



**ENTERED**

TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

**The following constitutes the ruling of the court and has the force and effect therein described.**

**Signed November 10, 2009**

**United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

IN RE:	§	
	§	CASE NO. 08-45664-DML-11
PILGRIM'S PRIDE CORPORATION, <i>ET AL.</i> ,	§	
	§	JOINTLY ADMINISTERED
DEBTORS.	§	

**MEMORANDUM ORDER**

Before the court is *Debtors' Omnibus Objection to Reclamation Claims* (the "Omnibus Objection") filed by Pilgrim's Pride Corporation and its affiliated debtors (together, "Debtors"). The court held a hearing (the "Hearing") on the Objection on July 21, 2009. Prior to the Hearing, the parties submitted briefs, and at the Hearing, the court made an oral ruling on the record, which is reflected in part below.<sup>1</sup>

This matter is subject to the court's core jurisdiction. 28 U.S.C. §§ 1334 and 157(b)(2)(B). This memorandum order embodies the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

<sup>1</sup> This memorandum order does not addresses all of the issues raised by the parties. Others are addressed by separate order. The court has determined it necessary to explain its ruling through this memorandum order rather than adopting an order presented by the parties.

Debtors' pre-petition lenders have perfected security interests in all or most of Debtors' property. Certain of Debtors' vendors have filed claims based on their right to reclaim goods that were delivered to Debtor prepetition but not paid for by Debtor. The issue is the extent to which the pre-existing liens extinguish or subordinate any asserted reclamation claims for goods that are subject to those liens.

Reclamation rights are governed by section 546(c) of the Bankruptcy Code (the "Code").<sup>2</sup> Section 546(c) provides:

(1) Except as provided in subsection (d) of this section and in section 507(c), *and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof*, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of commencement of a case under this title, but such a seller may not reclaim such goods unless such seller demands in writing reclamation of such goods—

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller may still assert the rights contained in section 503(b)(9).

11 U.S.C. § 546(c)(1) (emphasis added). The italicized clause was added to the Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").<sup>3</sup>

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<sup>2</sup> 11 U.S.C. §§ 101 *et seq.*

<sup>3</sup> That is not the only change that BAPCPA made to that section. Prior to 2005, section 546(c) read:

Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods of the debtor has received such goods while insolvent, but—

(1) such seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—

(A) before 10 days after receipt of such goods by the debtor; or

Since the passage of BAPCPA, “[t]he avoiding powers expressly set forth in section 546(c) are subject to the seller’s right of reclamation which is, in turn, subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof.” 5 COLLIER ON BANKRUPTCY ¶ 546.04[1] (15th ed. rev. 2009).

Certain vendors, however, rely on *Phar-Mor, Inc. v. McKesson Corp.*, 534 F.3d 502 (6th Cir. 2008), which was decided under pre-BAPCPA law, to support their position that their reclamation claims, despite the changes to the statute, are not subordinate to pre-existing liens on the property they seek to reclaim. Though that may have been the state of the law in the Sixth Circuit before BAPCPA, it was not the state of the law in this circuit. *See Interfirst Bank of Abeline v. Lull Manufacturing*, 778 F.2d 228 (5th Cir. 1985); *In the Matter of Samuels & Co.*, 526 F.2d 1238 (5th Cir. 1976). Under these decisions of the Court of Appeals for the Fifth Circuit—which represent governing precedent—even absent BAPCPA, the lenders’ rights would be superior to those of reclamation claimants.

The court believes that Congress meant to clarify the competing rights of lien holders and reclamation claimants when it amended section 546(c). *See* 5 COLLIER ON BANKRUPTCY ¶ 546.04[2][a][vii] n. 45 (15th ed. rev. 2009). “Given the tendency to protect the rights of properly perfected, prior secured creditors throughout other provisions in [BAPCPA] . . . the same intent likely applies in section 546(c)(1).” *Id.*

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- (B) if such 10-day period expires after commencement of the case, before 20 days after receipt of such goods by the debtor; and
  - (2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—
    - (A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or
    - (B) secures such claim by a lien.

Thus, the Code (as amended by BAPCPA) and Fifth Circuit precedent are consistent with Debtors' position that the claims of reclamation claimants in the case at bar are subordinate to the perfected security interests of Debtors' pre-petition lenders. Any reliance on *Phar-Mor* in deciding this case is inappropriate. Therefore, the court holds that the claims of reclamation claimants are subordinate to the liens held by Debtors' pre-petition lenders that attach to Debtors' property that is subject to reclamation. The court, however, holds that, although the reclamation claims are subordinate to the pre-existing liens, the pre-existing liens do not extinguish the reclamation claims. It is, therefore,

ORDERED that under the express terms of section 546(c) of the Code, which provides that the rights of a seller of goods to reclaim such goods are "subject to the prior rights of a security interest in such goods or the proceeds thereof," the remaining reclamation claims, to the extent that the goods that are the subject of such claims are covered by the liens of Debtors' prepetition secured lenders, are hereby declared to be subordinate to, although, to the extent of the surplus value, not extinguished by, the rights of the prepetition secured lenders; and it is further

ORDERED that the responding vendors are not entitled to reclaim the goods so long as their reclamation rights remain subordinate to the rights of the prepetition secured lenders; and it is further

ORDERED that Debtors shall serve a copy of this Order on each responding vendor; and it is further

ORDERED that this Court hereby retains jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order.

### END OF ORDER ###