U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

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

The following constitutes the order of the Court.

Signed May 27, 2005

United States Bankruptcy Judge

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

IN RE:	§	
	§	
GPR HOLDINGS, L.L.C.,	§	CASE NO. 01-36736-SAF-11
	§	
GOLDEN PRAIRIE SUPPLY SERVICES,	§	
L.L.C.,	§	CASE NO. 01-36904-SAF-7
	§	
D E B T O R S.	§	
________________________________	§	
	§	
GPR HOLDINGS, LLC, et al.,	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 03-3430
	§	
DUKE ENERGY TRADING AND	§	
MARKETING, LLC,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

Robert Newhouse, the trustee for the bankruptcy estate of Aurora Natural Gas, L.L.C. (ANG), the debtor, seeks to recover $9,505,516.00 from Duke Energy Trading and Marketing, L.L.C.

(DETM), under 11 U.S.C. §§ 544, 547, 548 and 550.[1] Newhouse further challenges setoffs made by DETM as contrary to 11 U.S.C. § 553(b); requests that DETM's claim be disallowed unless DETM pays the avoidance judgment; and that DETM's claim be subordinated under 11 U.S.C. § 510(c). DETM responds that it received no avoidable transfer, that it properly setoff or recouped a debt, and that the forward contract protection of 11 U.S.C. § 546(e) applies. DETM further asserts a claim for $35,832,419.00 or $26,419,700.00, depending on credits for payment to affiliates of ANG. DETM contends that it did not engage in inequitable conduct supporting subordination of that claim.

By order entered October 5, 2004, the court denied DETM's motion for summary judgment. The court conducted a trial on February 22 through 25, 2005. DETM filed a post-trial brief on March 24, 2005, in response to a pre-trial brief filed by Newhouse on February 21, 2005. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rule 7052. The adversary proceeding raises core matters over which this court has jurisdiction to enter a final order. 28 U.S.C. §§ 157(b)(2)(B)(F)(H)(O) and 1334.

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[1] In his second amended complaint, Newhouse sought to recover transfers of $19,121,139.00. Pursuant to the pretrial order entered February 22, 2005, Newhouse has reduced his requested recovery to $9,505,516.00.

Facts

DETM is a Delaware limited liability company engaged in the business of marketing natural gas and electric power. DETM purchased natural gas from ANG and resold the gas to third parties. ANG acquired the natural gas from other entities and sold it to DETM and others. The relationship between DETM and ANG began in 1995, through DETM's predecessor in interest, Mobil Natural Gas, Inc. (MNGI). DETM is a joint venture between Duke Energy Corporation and MNGI. The prior venture entered into the contract with ANG. The original contract made payments due to ANG on the third day of each month following the delivery month.[2]

DETM historically manually paid ANG on the third day of the month, followed by "truing up" the payment based on the actual volume delivered. At the time of the "trueup," DETM would determine the amount of over or under payment due and either send a payment to ANG for the amount due, or carry a credit balance for ANG to be applied to the following month's gas flows. DETM prepaid and forwarded reconciliation statements to ANG on a monthly basis to keep track of payment. This transaction and method of settlement continued until early 1998.

In 1998, ANG requested earlier and more frequent payments from DETM. DETM agreed to the request and began making early

[2]The typical base contract in the industry provided for payments on the 25th day of the month following delivery of the gas. Buyers and sellers of natural gas would typically reconcile the gas transfers each month, paying the net. ANG requested that DETM pay on the third day of the month.

payments to ANG around the fifteenth of the month in which gas had been delivered. This payment process continued until March 1999, when ANG requested additional acceleration of payments. In March 1999, DETM began making two early payments to ANG, the first approximately ten days after gas flow, the second approximately ten days later. The parties would subsequently settle any imbalances by the monthly reconciliation process found above. If the value of gas flow exceeded early payments, DETM would wire the difference and, if the reverse were true, ANG would flow gas as payment. This settlement process continued until December 1999, when ANG again requested accelerated payments to four per month. During 2000, the number of early payment requests increased to thirteen. Mark Bounds, a DETM trader, handled the transactions with ANG. Bounds' manager, Y.J. Bourgeois, approved the transactions. ANG and DETM also, on June 13, 2000, entered into a Net Out Agreement, whereby all sales and purchase transactions would be netted and a net payment presented.

In July 2000, DETM negotiated a new contract with Aurora Natural Gas and Associated Products (ANGAP), a newly formed affiliate of ANG. DETM and ANGAP entered DETM's form Master Natural Gas Purchase and Sale Agreement (short form), which included the standard industry billing and payment terms. DETM and ANGAP did not execute a net out agreement. On October 10, 2000, Dennis McLaughlin, President of ANGAP, and Bounds, for

DETM, executed the contract. ANGAP did not deliver gas under the contract until November 2000.

In November 2000, ANG and DETM began shifting contracts for delivery of volumes of gas to ANGAP from their existing contractual agreement, which they intended to end in November 2000. However, DETM entered the new arrangement into its automated accounting system, but erroneously failed to “zero out” the deal ending in November 2000. This error created the appearance of two separate contractual arrangements. As a result, DETM started making double payments, that is to say, paying ANG twice for the same delivered gas. The double payments occurred in November 2000 ($660,000), December 2000 ($914,500), January 2001 ($1,529,850), and February 2001 ($886,600). During March 2001, ANG formed Golden Prairie Resources (GPR) and Golden Prairie Supply Services (GPSS). Shortly thereafter, ANG and DETM began shifting contracts for delivery of gas to GRP and GPSS. Again, as the new companies were entered into DETM’s automated tracking systems, a disconnect occurred between the individuals handling the manual payments and the system-generated automated payments. DETM operated its automated system without realizing that DETM had been paying ANG early through manually generated wire transfers for the collective flow of gas. In March 2001, the double payments totaled $6,198,400. In April 2001, the double payments reached $15,264,004. DETM’s accounting department realized the double payments in May 2001. After the entry of the contracts with the affiliate entities, DETM continued to pay ANG as directed by ANG. Thus, double payments went to ANG.

Throughout 2000 and 2001, DETM and ANG settled purchase and sales obligations between them as had been done from the beginning of their relationship. DETM paid for the collective gas flow delivered by ANG, ANGAP, GPR, and GPSS to ANG, as directed by ANG throughout the relevant time period. The ANG employees who handled ANG's dealings with DETM, also handled GPR and GPSS dealings with DETM. ANG, GPR and GPSS had the same offices and shared overhead. Through the end of May 2001, DETM made payments of approximately $34,737,933.00 directly to ANG in excess of the value of gas delivered by ANG for the benefit of DETM. From July 1, 2000, through July 31, 2001, DETM paid ANG $227,535,242.00 for gas deliveries. DETM only received from ANG gas deliveries during this same time frame of $191,702,823.00 (this includes netting out of $26,016,018 of gas sold to ANG by DETM as called for in the DETM/ANG Agreements). Thus, if ANG is viewed independently of the affiliated entities, DETM paid ANG $35,832,419.00 more than the value of gas ANG delivered to pipelines for the benefit of DETM. If given credit for net gas deliveries of gas made by GPR and GPSS for the benefit of DETM, that number is reduced to $26,419,700.00.

When DETM discovered the overpayments to ANG, it began attempting to recover its losses. On June 1, 2001, DETM's accounting department informed Bounds of the overpayments. Shortly thereafter, DETM's credit department began its investigation, and soon after, DETM retained counsel. In early June 2001, DETM sent its accounting personnel to ANG's offices in Dallas to audit and trace the ANG transactions with DETM and verify ANG's financial status. Also, immediately after discovery of the overpayments, DETM demanded by letter that ANG repay the overpayment immediately in full in cash. ANG acknowledged that it did not have the funds available to immediately repay DETM for the overpayments in full.

When Bounds learned of the overpayments on June 1, 2001, he immediately contacted McLaughlin to discuss the situation. Bounds informed McLaughlin of both the double payments by DETM and the fact that DETM may not be paying ANG further. McLaughlin informed Bounds that ANG could not immediately pay back the overpayment and indicated that a suspension of payments from DETM would be disastrous for ANG. Bounds then suggested negotiating a solution to the overpayment problem. ANG proposed that DETM deduct amounts owed for gas flows on a daily basis.

Soon after the discovery of the overpayments, changes occurred with respect to the payments for gas to ANG by DETM. A June 7, 2001, email from Bounds to McLaughlin detailed the proposed changes. On June 8, 2001, McLaughlin delivered to Mitchell Davidson, a Senior Vice President at DETM dealing with the ANG transactions, a business plan to support the viability of the repayment plan. The plan proposed by ANG implemented the changes sent in Bounds' June 7, 2001, email, and contemplated an immediate initial repayment of $100,000 per day from payment for future deliveries of gas from ANG to DETM between June 6, 2001, to June 14, 2001, followed by subsequent increases in repayment in the amounts to $200,000 and $400,000 per day beginning on June 14, 2001, and July 1, 2001, respectively. The proposal also stated that ANG would pay the remainder of the overpayment amount, plus interest, on July 31, 2001. DETM examined ANG's repayment proposal while discussions continued. On June 11, 2001, a string of emails between Bounds and DETM accountant Kathleen Brackman detailing the accounting for the payments by ANG illustrated that the reconciliation process of $100,000 daily payments differed from DETM's usual payment practice for gas from ANG. DETM technically would pay ANG $1,000,000 for June gas, and ANG each day would pay back $100,000 to reduce the overpayment.

On June 15, 2001, after the DETM accounting team conducted its investigation of ANG's bank statements and financial information, Davidson wrote McLaughlin indicating that DETM concluded that ANG would not be able to repay the monies that it owed DETM. DETM therefore rejected the June 8, 2001, business plan submitted by ANG, and demanded a substantive business plan with a detailed repayment structure and certain financial statements and company information.

On June 22, 2001, the parties negotiated and entered into a work-out plan. The details of the work-out plan were memorialized in a June 22, 2001, letter drafted by DETM's counsel. In the June 22, 2001, agreement, the parties agreed that DETM would apply daily a $100,000 setoff reconciliation and purchase the rest of the gas delivered each day. DETM also required that ANG (1) pledge the shares of ANG Holdings LLC to DETM; (2) pledge to DETM the shares of Aurion Technologies, Inc., another entity controlled by ANG; (3) assign certain gas contracts ANG entered into with another entity, Redwine Resources, Inc.; (4) deliver $20 million in performance bonds for the benefit of DETM; (5) grant to DETM a lien on all the assets of ANG Holdings LLC, GPR Holdings LLC, Golden Prairie Resources LLC, Golden Prairie Supply LLC, and Aurora Natural Gas LLC; (6) provide all financial statements of the company to DETM; (7) and pledge not to transfer any material assets of ANG or any other affiliate or make any distributions, dividends, or loans until the overpayments were repaid to DETM.

The June 22, 2001, agreement between DETM and ANG applied the setoff as effective to dates in early June. On both June 6, 2001, and June 7, 2001, DETM applied setoffs in the amount of $100,000. On June 8, 2001, DETM applied a setoff in the amount of $200,000. The setoffs, however, stopped after June 8, 2001, when only a total of $400,000 was applied by DETM.

DETM perceived changes in the market and in ANG's prospects soon after the June 22, 2001, agreement was entered. On July 2, 2001, DETM concluded that it would cease business relations with ANG and informed ANG that it would not make any further payments to ANG. ANG, however, continued to ship the gas despite DETM's nonpayment, and from July 2, 2001, to July 9, 2001, ANG shipped to DETM $179,657 in gas.

Forward Contract Defense

In response to Newhouse's avoidance claims for relief, DETM invokes the protections of 11 U.S.C. § 546(e). Under § 546 (e), Newhouse may not avoid a transfer that is a "settlement payment" made by or to a "forward contract merchant" that is made before the commencement of the case, except under § 548(a)(1)(A). A "forward contract merchant" means a person whose business consists in whole or in part of entering into forward contracts as or with merchants in a commodity or similar interest. 11 U.S.C. § 101(26). A "forward contract" means a contract (other than a commodity contract) for the purchase, sale or transfer of a commodity or similar interest which is presently or in the future becomes the subject of dealing in the forward contract trade, with a maturity more than two days after the date the contract is entered. 11 U.S.C. § 101(25). A "settlement payment" is broadly defined to include any payment commonly used in the forward contract trade. 11 U.S.C. § 101(51A).

DETM contends that it purchased gas from ANG under forward contracts, that DETM operated as a forward contract merchant, and that DETM recovered overpayments for delivered gas by effecting settlement payments. The parties' base contract contemplated the future buying and selling of natural gas. Richard Higgins, DETM's natural gas trader, explained that under the base contract, for actual purchases of gas, DETM and ANG entered written confirmation agreements or spot transactions. The parties agree that spot transactions do not constitute forward contract transactions.[3] Higgins testified that the confirmation agreements detailed pipeline, point of purchase, volume and prices of transfers of natural gas. These transactions occurred more than two days after the date of entry of the contract.

These transactions typically resulted in a financial imbalance with ANG. DETM's and ANG's respective accounting offices reconciled the imbalances. Higgins testified that if the accounting offices could not reconcile the imbalances, they would refer the impasse to their respective natural gas traders. At the end of each month, after the reconciliation, DETM applied any appropriate setoff and paid the net amount, if any, to ANG.

Under the base contract with the subsequent written confirmation agreements for the buying and selling of natural gas, both ANG and DETM were forward contract merchants operating under forward contracts.

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[3]The Rocky Mountain Region transactions of May 15, 2000, and July 10, 2000, for negotiated volume and prices for a single day or two, for $477,000, are not forward deliveries under forward contracts.

Section 546(e) shields settlement payments made by or to forward contract merchants. The court must determine whether setoff applications made pursuant to and following the June 22, 2001, agreement constitute settlement payments. To be settlement payments, the setoffs must be commonly used in the forward contract trade.

The forward contract natural gas trade typically results in imbalances between the buyers and sellers of natural gas. Commonly, the seller has delivered more gas than the buyer has paid for, or the buyer has paid for more gas than the seller has delivered. Under the forward contract arrangement, shipments and payments continue, putting the forward contract merchants in a position to apply setoffs. The parties agree that buyers and sellers of natural gas typically reconcile the imbalances on a monthly basis and apply setoffs as appropriate following the reconciliations. The buyer would thereafter pay the seller any net amount due. The application of setoffs with the subsequent net payments constitute settlement payments as defined for purposes of § 546(e).

DETM argues that the overpayment followed by the parties' negotiations, the subsequent delivery of gas and the setoffs fit this pattern, making the setoffs settlement payments not subject to the avoidance claims except under § 548(a)(1)(A). Newhouse counters that the June 22, 2001, agreement amounts to a negotiated debt work out to avoid litigation taking the subsequent transfers outside the common practice in the forward contract trade, and therefore not settlement payments. The preponderance of the evidence supports Newhouse's position.

As found above, DETM made the manual payments, but thereafter erroneously made the automated payments. DETM overpaid for natural gas delivered under the forward contracts. Commonly, the parties' respective accounting departments would reconcile that imbalance, and, in the case of overpayment, the seller would remedy the imbalance. Here, ANG could not afford to repay the overpayment or ship gas without subsequent payment. ANG used the overpayments to operate its and its affiliates' businesses, and lacked the resources to remedy the imbalance following reconciliation.

DETM doubly paid for the gas, at a magnitude, as found above, that caused the parties to dramatically change their interactions. DETM involved its credit department and retained counsel. DETM sent its accounting personnel to Dallas to essentially audit ANG's transactions with DETM, to trace and account for the use of DETM's payments and to verify ANG's financial status. DETM's counsel demanded full immediate repayment, which lead to negotiations resulting in the June 22, 2001, agreement. The agreement structured subsequent transactions to provide for partial setoff and payment for newly shipped gas. The collection efforts as laid out in the letter agreement, however, did not comply with the common payment practices in the trade. In the June 22, 2001, agreement, the parties agreed that DETM would apply daily a $100,000 setoff reconciliation and purchase the rest of the gas each day. DETM also required that ANG (1) pledge the shares of ANG Holdings LLC to DETM; (2) pledge to DETM the shares of Aurion Technologies, Inc., another entity controlled by ANG; (3) assign certain gas contracts ANG entered into with another entity, Redwine Resources, Inc.; (4) deliver $20 million in performance bonds for the benefit of DETM; (5) grant to DETM a lien on all the assets of ANG Holdings LLC, GPR Holdings LLC, Golden Prairie Resources LLC, Golden Prairie Supply LLC, and Aurora Natural Gas LLC; (6) provide all financial statements of the company to DETM; (7) and pledge not to transfer any material assets of ANG or any other affiliate or make any distributions, dividends, or loans until the overpayments were repaid to DETM. That amounted to a negotiated arrangement for the payment of debt to avoid litigation.

Perceiving a change in the market and in ANG's prospects, DETM unilaterally terminated its participation in the June 22, 2001, agreement. Nevertheless, ANG kept shipping gas which DETM applied against the debt. Superficially, DETM setoff an overpayment imbalance. But the setoff occurred following the unsuccessful debt repayment work out agreement, and not pursuant to the common process used under the forward contract in the forward natural gas trade.

Vernon Jones, an energy industry consultant, testified on DETM's behalf that the June 22, 2001, letter follows and ties to the original base contract between the parties. He viewed the negotiations and resulting June 22, 2001, agreement as a form of reconciliation. He testified that reconciliation may lead to collection efforts that would not fit within common settlement payment practices in the trade. Although he further testified that he did not see a demand letter from DETM for the repayment, he recognized that DETM would not commonly involve its lawyers in reconciling imbalances, determining setoffs and net payments, and negotiating debt restructure plans.

As found above, DETM, in essence, demanded that ANG repay the overpayment immediately in full in cash. When ANG could not meet that demand, the parties negotiated a workout agreement. DETM required that ANG permit an examination of ANG's financial records to determine what ANG did with the overpayments. The June 22, 2001, agreement went beyond common terms of settlement payments in the forward contract trade. Unlike typical reconciliations accomplished by accounting departments, DETM and ANG agreed that DETM would apply $100,000 to the debt daily and purchase the rest of the gas delivered each day. DETM insisted that ANG transfer stock to DETM. DETM required a performance bond. DETM also required that ANG assign contracts to DETM. After the parties entered the agreement, as Jones recognized, ANG failed to perform many of those negotiated items. While superficially the June 22, 2001, agreement would not exist without the base contract, the June 22, 2001, agreement addressed an unusual overpayment and the related financial situation outside the common practice. Jones testified that involuntary collection efforts went beyond the common reconciliation and setoff process. The court finds that the parties negotiated a debt work out agreement to avoid litigation for debt collection. The resulting agreement nevertheless failed. Not every transaction by forward contract merchants is eligible for the protections of § 546(e). In re Mirant Corp., 310 B.R. 548, 569 n. 33 (Bankr. N.D. Tex. 2004). The transactions under and following the June 22, 2001, agreement do not qualify as settlement payments protected by § 546(e).

Setoff

In response to Newhouse's avoidance claims, DETM further asserts that it properly setoff the value of the transfers against the overpayment, barring Newhouse from recovering under 11 U.S.C. § 553. Newhouse responds that the setoffs themselves may be avoided.

Setoff is governed by section 553 of the Bankruptcy Code, which provides:

> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before

> the commencement of the case under this title against a claim of such a creditor against the debtor that arose before the commencement of the case . . .

11 U.S.C. § 553(a).

To establish a valid right to setoff under § 553, DETM must prove: (i) a debt owed to the debtor which arose before the commencement of the bankruptcy case; (ii) a claim against the debtor which arose before the commencement of the bankruptcy case; and (iii) that the debt and claim are mutual obligations. See 11 U.S.C. § 553(a).

The Code further provides that the trustee may recover certain pre-petition setoffs as preferences. With certain exceptions not applicable,

> if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of (A) 90 days before the date of the filing of the petition; and (B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

11 U.S.C. § 553(b)(1). "Insufficiency" means the amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of the claim. 11 U.S.C. § 553(b)(2).

Section 553 thereby allows a creditor to apply a setoff but creates a preference recovery for the trustee separate from 11 U.S.C. § 547. Newhouse may establish the basis for a setoff preference without establishing all the elements of § 547. The court must compare the insufficiency on the dates prescribed by § 553. Newhouse may establish a preference under § 553 for any difference without the need to establish the elements of a preference under § 547. Newhouse may separately establish a preference under § 547. The provisions are not mutually exclusive.

DETM owed ANG for gas shipped. ANG owed DETM for overpayments on prior shipments of gas. The respective debts and claims are mutual obligations. DETM validly setoff the mutual obligations.

May 15, 2001, is the ninetieth day before the filing of the bankruptcy petition. At the close of business on May 14, 2001, ANG owed DETM $34,737,934. On May 15, 2001, DETM paid ANG $1,000,000, increasing the amount ANG owed DETM to $35,737,934. On May 15, 2001, ANG delivered $340,708 worth of gas into the pipeline for DETM, and DETM owed ANG for that gas. Applying that debt to the amount ANG owed DETM leaves an insufficiency on May 15, 2001, of $35,397,226.

Thereafter, ANG continued to deliver gas until July 9, 2001, and, in effect, DETM applied the value of each delivery to the balance owed by ANG. At the close of business on July 8, 2001, ANG owed DETM $35,848,185. On July 9, 2001, ANG delivered $15,766 worth of natural gas to DETM. DETM owed ANG for that gas. Applying that debt to the amount ANG owed DETM leaves an insufficiency on July 9, 2001, of $35,832,419.

In the interim, DETM also had applied $400,000 under the June 22, 2001, agreement. When it made that setoff, the insufficiency did not fall below the insufficiency on May 15, 2001.

On this record, Newhouse has not established that a setoff preference under § 553 can be recovered.

Recoupment

DETM asserts that it recouped amounts owed, shielding it from any avoidance judgment. "'Recoupment allows a defendant to reduce the amount of a plaintiff's claim by asserting a claim against the plaintiff which arose out of the same transaction to arrive at a just and proper liability on the plaintiff's claim.'" Matter of Holford, 896 F.2d 176, 178 (5th Cir. 1990)(quoting Collier on Bankruptcy ¶ 553.03 (15th ed. 1984))(Compare: "[S]etoff involves a claim of the defendant against the plaintiff which arises out of a transaction which is different from that on which the plaintiff's claim is based." Id.)

In determining whether claims arise out of the same transaction, the Fifth Circuit has noted that "[t]here is no general standard governing whether events are part of the same or different transaction. '[G]iven the equitable nature of the [recoupment] doctrine, courts have refrained from precisely defining the same-transaction standard, focusing instead on the facts and the equities of each case.'" Kosadnar v. Metro. Life

Ins. Co. (In re Kosadnar), 157 F.3d 1011, 1015 (5th Cir. 1998). The gas transfer transactions under and following the June 22, 2001, agreement are different than the gas transactions before the entry of that agreement. The overpayment occurred prior to that agreement. The June 22, 2001, agreement constituted a debt workout arrangement to avoid litigation, as found above. While ANG delivered gas to pipelines for DETM based on the original contracts with written confirmations entered prior to DETM's discovery of the overpayment, the subsequent workout agreement altered the parties' relationship concerning the repayment and the purchase of natural gas. The court cannot find that the obligations arose out of the same transaction. Recoupment does not apply.

Fraudulent Conveyance

Newhouse contends that ANG transferred gas to DETM during the one year before its bankruptcy case with the actual intent to hinder, delay or defraud ANG's creditors. Alternatively, Newhouse asserts that ANG received less than reasonably equivalent value in exchange for the transferred gas while ANG was insolvent.

Intent to Hinder, Delay or Defraud

Section 548(a)(1)(A) of the Bankruptcy Code provides:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the

> petition, if the debtor voluntarily or involuntarily--
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

11 U.S.C. § 548(a)(1)(A)(2002).

Section 24.005(a)(1) of the Texas Business and Commerce Code provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor.

Tex. Bus. & Com. Code § 24.005(a)(1)(Vernon 2002).

The trustee may avoid any transfer of an interest of the debtor in property that is avoidable under applicable law by a creditor holding an allowed unsecured claim. 11 U.S.C. § 544(b). Known as the strong arm provision of the Bankruptcy Code, § 544 "allows the trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance laws and confers on the trustee the status of a hypothetical creditor or bona fide purchaser as of the commencement of the case." In re Zedda, 103 F.3d 1195, 1201 (5th Cir. 1997).

Under both the Bankruptcy Code and Texas law, the intent to hinder or delay or defraud are three separate elements. Each one on its own may make a transfer fraudulent. "Thus, an intent merely to delay, but not ultimately prevent, a creditor from being repaid is generally sufficient to trigger the requisite culpability required by the statute." 5 Collier on Bankruptcy ¶ 548.04[1], pp. 548-22 to 548-24 (rev. 15th ed. 2000); Sherman v. FSC Realty, LLC (In re Brentwood Lexford Partners, LLC), 292 B.R. 255, 262-263 (Bankr. N.D. Tex. 2003).

Intent to hinder, delay or defraud may be established by circumstantial evidence. Id., at 263. In assessing that evidence, the courts consider "badges of fraud." Section 24.005(b) of Tex. Bus. & Com. Code, the Texas Uniform Fraudulent Transfer Act ("UFTA"), codified eleven, non-exclusive, badges of fraud that may be used to prove the fraudulent intent of the transferor. In re Hinsley, 201 F.3d 638, 643 (5th Cir. 2000). Section 24.005(b) provides:

> (b) In determining actual intent under Subsection (a)(1) of this section, consideration may be given, among other factors, to whether:
> (1) the transfer or obligation was to an insider;
> (2) the debtor retained possession or control of the property transferred after the transfer;
> (3) the transfer or obligation was concealed;
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) the transfer was of substantially all the debtor's assets;
> (6) the debtor absconded;
> (7) the debtor removed or concealed assets;
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Tex. Bus. & Com. Code § 24.005(b)(Vernon 2002).

Newhouse argues that DETM and McLaughlin arranged for ANG to transfer gas to DETM under the guise that DETM would pay for all but $100,000 per day. For ANG's other creditors, the flow of gas under that arrangement made it appear that ANG would be receiving income to service debts. DETM did not make the payments to ANG for the gas. Newhouse contends that DETM intended to apply the value of all of the gas to ANG's prior obligation, and did not intend to pay ANG for all but $100,000 per day of the newly shipped gas. Imputing this intent to ANG, Newhouse argues that, as a result, ANG did not have the cash flow to service its other debts. Newhouse asserts that amounts to an intent to hinder, delay or defraud those other creditors.

ANG realized it had received overpayments in excess of $26,000,000 before DETM realized it had made them. Rick Wiley of ANG's fiscal staff testified that he and Michelle Walker, another ANG accountant, talked to McLaughlin about the payments. Walker felt that ANG should establish a reserve for the overpaid funds. Wiley did not consider the overpaid funds to be ANG's money.

During that time, ANG experienced cash flow problems. Wiley testified that ANG had been managed on a day-to-day basis depending on the availability of cash. ANG used the overpayments for operations during this cash crisis. Earl Crow, president of

GPR Holdings and ANG at the time of the filing of the bankruptcy petition, testified that ANG and its affiliates benefitted by the DETM overpayment.

McLaughlin directed Walker where to apply ANG funds, depending on the most immediate need of ANG or one of its affiliates. As ANG used the DETM funds for its needs or those of its affiliates, the funds benefitted the creditors of ANG or one of the affiliates. Crow testified that ANG disregarded the corporate distinctions of the affiliates the closer they slid to bankruptcy, using cash where most needed.

After the use of the overpaid funds, ANG kept operating. After examining ANG’s books and records and tracking the distribution of funds by ANG, DETM and ANG entered the June 22, 2001, agreement.

On July 2, 2001, DETM personnel concluded that the agreement with ANG would not work. As the price of gas fell in the market, DETM obtained the impression from McLaughlin that ANG could not meet the gas level commitment to DETM. On July 3, 2001, an internal DETM email reflected a concern with an ANG bankruptcy filing. Steve Trimble of DETM sent an internal email on or about July 2, 2001, suggesting that DETM keep accepting gas without paying for it, and, immediately thereafter, DETM sent ANG an email stating it would not make any further payments until further notice. Mitchell Davidson of DETM informed McLaughlin that DETM would make no further payments. McLaughlin called

DETM, urging DETM to continue doing business with ANG. DETM did not agree. Nevertheless, ANG continued to ship gas to DETM. DETM applied the value of that gas to the amount due on the overpayments.

Newhouse argues that DETM negotiated the June 22, 2001, agreement and then terminated payments to obtain as much gas as possible to offset against the overpayment before an ANG bankruptcy filing. Knowing that DETM would stop making payments, ANG shipped gas anyway. This combination, Newhouse argues, allowed DETM to obtain preferential treatment while allowing ANG to have the appearance of operating. Newhouse maintains that, as a result, ANG transferred gas to hinder or delay its other creditors.

Newhouse has not met his burden of proof. Receipt or negotiation of a preference by a creditor cannot be imputed to an intent to hinder or delay to the debtor. DETM is not an insider of ANG. ANG did not transfer the gas to an insider. DETM held a claim against the debtor. ANG did not retain control of the gas. Newhouse presented no evidence that the transfer had been concealed. ANG did not transfer all or substantially all of its assets.

ANG was insolvent or became insolvent shortly after the transfers. DETM and ANG negotiated the June 22, 2001, agreement in good faith. DETM stopped making payments after it perceived a change in the market with a resulting adverse effect on ANG.

DETM told ANG it would not pay for any more gas. ANG shipped anyway, apparently hoping for business.

Newhouse did not present evidence of any side agreement between anyone at DETM and McLaughlin. Newhouse did not establish that DETM entered the June 22, 2001, agreement with no intention to pay for subsequently delivered gas nor as a ruse to recover the overpayment. To the contrary, DETM requested to be immediately repaid after discovery of the overpayment. DETM negotiated and agreed to the June 22, 2001, terms in response to ANG's inability to immediately repay DETM.

Under the totality of these circumstances, the court cannot find an intent to hinder or delay or defraud creditors by DETM to impute to ANG, nor an intent to hinder or delay or defraud creditors by ANG. The claims for relief based on an intentional fraudulent transfer under federal or Texas law will be dismissed.

Constructive Fraud

Section 548(a)(1)(B) of the Bankruptcy Code provides:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily-
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(a)(1)(B)(2002). According to this provision, the court must determine from the perspective of the transferor, that no great disparity exists between the value of goods exchanged. Brentwood Lexford, 292 B.R. at 267.

Section 24.006 of the Texas Business and Commerce Code provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
> (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Tex. Bus. & Com. Code Ann. § 24.006 (Vernon 2002).

As a result of the automated payments following the manual payments through May 31, 2001, ANG owed DETM $34,737,933. In their letter agreement of June 22, 2001, ANG conceded that it owed DETM resulting from the double payments. Following that agreement, ANG transferred gas to DETM. DETM applied the value of the gas to the prior debt.

Satisfaction of an antecedent debt of ANG constitutes value in exchange for the transfer. 11 U.S.C. § 548(d)(2)(A). DETM applied the value of the gas shipped to the antecedent debt dollar for dollar. Pursuant to the Bankruptcy Code, that constitutes reasonably equivalent value. As a result, the transfer cannot be avoided under § 548(a)(1)(B).

Newhouse contends that if the court avoids DETM's setoff of the value of the gas to the antecedent debt then § 548(d)(2)(A) would not apply. In other words, Newhouse seeks to avoid the setoff as a fraudulent transfer. The setoff cannot be avoided as a fraudulent transfer. The claims for relief based on a constructive fraudulent transfer under federal or Texas law will be dismissed.

Preference

Newhouse contends that the transfers of natural gas to DETM after May 15, 2001, should be avoided under 11 U.S.C. § 547(b). Newhouse requests that the court enter a judgment for the avoided transfers under 11 U.S.C. § 550.

Section 547(b) provides, in pertinent part:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property-
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made-
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if-
> (A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

As found above, on May 15, 2001, ANG owed DETM $35,397,226. ANG transferred at least $9,505,516 worth of natural gas to DETM during the 90 days before the filing of the bankruptcy case. ANG made the transfers to DETM, a creditor. ANG made the transfers while it was insolvent. Ultimately, DETM applied the value of the transferred property to its claim against ANG. By doing so, DETM received more than DETM would have received if the claim would have been paid under a Chapter 7 case.

Of that total, ANG transferred $8,296,806 worth of natural gas between May 15, 2001, and June 21, 2001. The transfers had been made pursuant to the parties' contract and contracts with affiliates of ANG and implementing written confirmations. As a result, the transfers had been made for or on account of an antecedent debt owed by ANG before the transfers had been made. That $8,296,806 constitutes preferential transfers.

As found above, the nature of the transactions changed when the parties entered the June 22, 2001, debt workout agreement. The court must determine whether ANG made all the transfers beginning on June 22, 2001, for or on account of an antecedent debt owed by ANG before the transfers had been made. As a result of the overpayment, ANG owed DETM an antecedent debt before the transfers had been made. To address the payment of that antecedent debt, the parties negotiated the June 22, 2001, work out agreement. Under that agreement, $100,000 worth of each daily transfer of natural gas would be for or on account of the antecedent debt and the remainder of the daily shipment would be for new business.

The parties performed under the June 22, 2001, agreement for a short period of time. Pursuant to the agreement, ANG transferred $400,000 worth of natural gas for or on account of the antecedent debt. That $400,000 total constitutes preferential transfers.

Under the June 22, 2001, agreement, although premised on their underlying contracts and written confirmations, the remainder of the gas placed in the pipeline for DETM, $629,053, generated new obligations of DETM to pay ANG. As found above, transfers under that work out agreement do not qualify as settlement payments for the protections of § 546(e). DETM did not pay cash for that gas, but, instead, applied the value to the overpayment. Thus, ANG effectively transferred that gas for or on account of the antecedent debt owed. That $629,053 constitutes preferential transfers.

On July 2, 2001, DETM informed ANG that it would no longer perform under the June 22, 2001, agreement, and that it would not pay ANG for any further delivery of natural gas. DETM thereby unilaterally terminated the June 22, 2001, agreement. Nevertheless, ANG continued to ship natural gas until July 9,

2001. DETM accepted the gas, and applied the value of the gas to the antecedent debt.

Newhouse did not present any direct evidence to establish why ANG continued to transfer the natural gas. McLaughlin did not testify. Tom Rainwater, a consultant working on behalf of ANG, did not testify. Nevertheless, the court may infer a finding from the evidence presented. Newhouse presented evidence of the financial situation of ANG and its affiliates. ANG's financial precariousness mandated that ANG pursue any potentially viable business. ANG knew it owed DETM a debt based on the overpayment. ANG knew that the June 22, 2001, work out arrangement had not be successful. ANG knew that DETM would not pay for any subsequently shipped gas. Nevertheless, ANG transferred gas to DETM. The court infers that ANG transferred the gas for or on account of the antecedent debt.

ANG transferred $179,657 worth of natural gas from July 2, 2001, to July 9, 2001, for or on account of the antecedent debt. That $179,657 constitutes preferential transfers.

Based on these findings of fact, Newhouse has established that total transfers of $9,505,516 worth of natural gas amount to preferential transfers under § 547(b).

DETM asserts that Newhouse may not avoid those transfers because of the new value defense of 11 U.S.C. § 547(c)(4). By the terms of the June 22, 2001, agreement, ANG effectively extended credit to DETM for the natural gas shipped in addition to the $100,000 applied to the antecedent debt. Under the June 22, 2001, agreement, ANG transferred $629,053 worth of gas on new accounts between June 22, 2001, and July 2, 2001. That amounts to "new value" as defined by 11 U.S.C. § 547(a)(2). The trustee may not, therefore, avoid the transfers of $400,000 worth of natural gas under § 547. With regard to the $629,053 of new accounts, DETM did not pay for those deliveries but instead applied them to the overpayment. Consequently, DETM did not provide additional new value to ANG above the $400,000.

With regard to the natural gas shipped beginning July 2, 2001, the new value defense of § 547(c)(4) does not apply.

DETM also asserts that the ordinary course of business defense applies. Preferential transfers made in the ordinary course of business may not be avoided. 11 U.S.C. § 547(c)(2).

Section 547(c)(2) provides:

> The trustee may not avoid under this section a transfer-
> . . . . (2) to the extent that such transfer was-
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> (C) made according to ordinary business terms. . . .

11 U.S.C. § 547(c).

DETM has the burden of proving the ordinary course of business defense. 11 U.S.C. § 547(g).

Under the first prong of the ordinary course test, § 547(c)(2)(A), DETM must establish that ANG incurred the debt in the ordinary course of ANG's and DETM's business or financial affairs. The selling and buying of natural gas was in the ordinary course of both parties' business affairs.

Under the second prong of the ordinary course test, DETM must establish that the payments were made in the ordinary course of its and ANG's business or financial affairs. 11 U.S.C. § 547(c)(2)(B). The Bankruptcy Code does not impose a precise legal test for whether payments have been made in the ordinary course of business. GasMark Ltd. Liquidating Trust v. Louis Dreyfus, 158 F.3d 312, 317-18 (5th Cir. 1998). Accordingly, courts focus on the time within which the debtor ordinarily paid the creditor and whether the timing of payments during the preference period demonstrated some consistency with that practice. Id. The court must also compare prior dealings between the debtor and the creditor with their dealings during the preference period to determine whether the challenged dealings were ordinary. Mossay v. Hallwood Petroleum, Inc., No. Civ.A.3:96-CV-2898, 1997 WL 222921, at *4 (N.D. Tex. Apr. 28, 1997). The court considers the timing of the payments, the amount and manner in which the transaction was paid and the circumstances under which the transfer was made. Id.

As found above, the parties regularly reconciled shipment and payment imbalances, on a monthly basis, typically by the accounting departments with occasional trader involvement. Transfers before June 22, 2001, are comparable to the parties' prior dealings. However, the overpayment in this case was extraordinary. The parties did not address the overpayment in the manner that they reconciled monthly imbalances. The parties' transactions under and following the June 22, 2001, agreement differed dramatically from the parties' transactions concerning imbalances before May 15, 2001. DETM established the second prong of the test for transfers before June 22, 2001, but not for transfers on and after June 22, 2001.

DETM must also establish that the transfer had been made according to ordinary business terms. 11 U.S.C. § 547(c)(2)(C). To meet that burden, DETM must establish the customary terms and conditions used by other enterprises in the same industry facing the same or similar problems. The court must analyze whether the transfers were made according to ordinary business terms using an objective standard. Gulf City Seafoods, Inc., v. Ludwig Shrimp Co., Inc. (In re Gulf City Seafoods, Inc.), 296 F.3d 363, 369-70 (5th Cir. 2002). "[T]he question must be resolved by consideration of the practices in the industry -- not by the parties' dealings with each other." Id. at 369. Dealings outside the range of practices in the industry would be outside the ordinary business terms of § 547(c)(2)(C).

To establish an industry standard as a rough benchmark, "the creditor should provide evidence of credit arrangements of other debtors and creditors in a similar market, preferably both geographic and product." Gulf City Seafoods, 296 F.3d at 369.

As found above, the parties engaged as forward contract merchants in the trading of natural gas. The transfers before the June 22, 2001, agreement were typical or common in the natural gas trading business under forward contracts. As also found above, the June 22, 2001, work out agreement and subsequent transactions to address the overpayment were not typical or common in the natural gas trading business under forward contracts. Work out agreements to avoid litigation do not constitute settlement payments under the common forward contract merchant practice in the business. Consequently, DETM has not established the third prong of the ordinary course of business defense, for transfers beginning June 22, 2001.[4]

The ordinary course of business defense applies to transfers before June 22, 2001, but does not apply to the preferential transfers beginning June 22, 2001.

DETM also invokes the contemporaneous exchange for new value defense. 11 U.S.C. § 547(c)(1). The parties did not intend that the natural gas transfers beginning June 22, 2001, be contemporaneous exchanges for new value. The defense does not apply.

In summary, ANG made preferential transfers totaling $9,505,516 between May 15, 2001, and July 9, 2001. Of that

[4]Although not addressed in the forward contract section of this memorandum opinion, the court would apply 11 U.S.C. § 546(e) to transfers before June 22, 2001.

amount, $8,296,806 worth of gas had been delivered between May 15, 2001, and June 21, 2001. The ordinary course defense and § 546(e) shield those preferences from the trustee's avoidance power. In addition, the $400,000 applied to the overpayment between June 22, 2001, and July 9, 2001, is shielded by the new value defense. The trustee may only recover the $629,053 delivered between June 22, 2001, and July 1, 2001, which is not covered by the $400,000 argued setoff amount, and the $179,657 transferred between July 2, 2001, and July 9, 2001, for which the ordinary course, new value, and § 546(e) defenses do not apply. Accordingly, Newhouse shall have a judgment voiding the transfers of $808,710 worth of natural gas.

Claim Disallowance

ANG constitutes a separate legal entity from its affiliates. Gregg County Appraisal Dist. v. Laidlaw Waste Sys., Inc., 907 S.W.2d 12 (Tex. App.--Tyler 1995, no writ)("In Texas, for the purpose of legal proceedings, subsidiary corporations and parent corporations are separate and distinct 'persons' as a matter of law.") A court may disregard a corporation's separate identity to hold it liable for an affiliate or subsidiary's obligation in cases of fraud. Mobil Oil Corp. v. Linear Films, Inc., 718 F.Supp. 260, 265-71 (D. Del. 1989). As found above, fraud is not involved in this case. A court may pierce the corporate veil when a subsidiary corporation is considered the alter ego of its parent corporation. Geyer v. Ingersoll, 621 A.2d 784, 793 (Del. Ch. 1992). To apply the alter ego theory, the court must find something more than mere unity of financial interest. Mobil Oil Corp., 718 F.Supp. at 265-71. Although McLaughlin often disregarded the corporate entities, all contractual relations between and among the parties had been by express contracts with specific entities. The affiliates had separate assets, contracts and liabilities. While many creditors were the same, their claims differed. Each affiliate maintained its books separately. Internal accountants traced and accounted for use of funds with respect to each affiliate. The affiliates have their own bankruptcy cases. The court therefore considers ANG independently of the other entities. Inter-debtor transactions must be resolved by the respective bankruptcy estates, with appropriate treatment of creditors.

The court finds that DETM holds a claim against the ANG bankruptcy estate of $35,832,419.00.

Newhouse requests that the court disallow the claim. Under § 502(d) of the Bankruptcy Code, "the court shall disallow any claim of any entity from which property is recoverable under section . . .550, or 553 of this title . . ., unless such entity . . .has paid the amount . . ." 11 U.S.C. § 502(d). Under this provision, the court must allow the entity a reasonable period of time before disallowing its claim. See In re Davis, 889 F.2d 658, 662 (5th Cir. 1989)(explaining that § 502(d) is triggered only after a creditor has been afforded a reasonable amount of time to satisfy an avoidance judgment).

DETM shall have ninety days from the date of the entry of a final judgment, unless stayed pending appeal, to satisfy the judgment. If DETM timely satisfies the judgment, DETM shall have an allowed claim of $35,832,419 plus the amount of the judgment. If DETM does not timely satisfy the judgment, its claim shall be disallowed.

Equitable Subordination

Newhouse requests that the court equitably subordinate DETM's claim pursuant to 11 U.S.C. § 510(c). The Bankruptcy Code provides that "the court may - (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim." 11 U.S.C. § 510(c)(1). To equitably subordinate a claim under § 510(c)(1), the trustee must establish: (1) that the claimant engaged in inequitable conduct; (2) that the conduct resulted in harm to the creditors and conferred an unfair advantage on the claimant; and (3) that the subordination would not be inconsistent with the Bankruptcy Code. Matter of Fabricators, Inc., 926 F.2d 1458, 1464-65 (5th Cir. 1991); In re Mobile Steel Co., 563 F.2d 692, 699-702 (5th Cir. 1977).

Inequitable conduct usually involves: (1) fraud, illegality or breach of fiduciary duties; (2) undercapitalization; or (3) a claimant's use of the debtor as a mere instrumentality or alter ego. In re Herby's Foods, 2 F.3d 128, 131 (5th Cir. 1993); Matter of Clark Pipe and Supply Co., Inc., 893 F.2d 693, 699 (5th Cir. 1990). The inequitable conduct may occur when a fiduciary of the debtor misuses his position to the disadvantage of other creditors; when a third party controls the debtor to the disadvantage of other creditors; or when a third party actually defrauds other creditors. Matter of United States Abatement Corp., 39 F.3d 556, 561 (5th Cir. 1994).

Newhouse argues that DETM fraudulently caused ANG to purchase gas to ship to DETM when DETM did not intend to pay ANG for the gas yet knew that ANG could not pay its suppliers for the gas. Newhouse further argues that constitutes inequitable conduct that directly harmed ANG's other creditors.

Equitable subordination does not apply. Newhouse failed to establish that ANG transferred the gas with an intent to hinder, delay or defraud its creditors. Newhouse premised his claim of an intentionally fraudulent transfer by imputing an alleged DETM intent not to pay for the transferred gas when it entered the June 22, 2001, agreement. Newhouse failed to establish that alleged fact. As a result, Newhouse has necessarily failed to establish that DETM intentionally caused ANG to ship gas under the June 22, 2001, agreement when DETM had no intention to pay for that gas. DETM informed ANG that it would not pay for gas shipped beginning July 2, 2001. ANG nevertheless continued to ship gas. The fraudulent premise for equitable subordination therefore has likewise not been established.

DETM acted as a trading partner holding a claim. A creditor has no fiduciary obligation to either its debtor or other creditors of its debtor in the collection of its claim. Clark Pipe, 893 F.2d at 702. DETM merely attempted to negotiate a manner to recover the overpayment that ANG could afford under the circumstances known in June 2001.

But, if Newhouse had established the fraudulent intent, the transfers would have been avoided as fraudulent transfers, with Newhouse obtaining a judgment under 11 U.S.C. § 550. Unless DETM paid that judgment, DETM's claim would have been disallowed. 11 U.S.C. § 502(d). If the claim had been disallowed, the request to equitably subordinate the claim would have been denied as moot. On the other hand, if the judgment had been paid, the inequitable conduct would have been remedied. The court may only subordinate a claim to the extent necessary to address the inequitable conduct, that is, the harm or unfair advantage caused by that inequitable conduct. Herby's Foods, 2 F.3d at 131. With the conduct remedied by the payment of the judgment, the court would have had no need to subordinate DETM's claim. The request to equitably subordinate would have been denied.

As a result, equitable subordination does not apply and that claim for relief must be denied.

Conclusion

Newhouse may avoid a § 547 preference of $808,710. Newhouse shall have a judgment under 11 U.S.C. § 550 of $808,710. DETM shall have ninety days from the date of the entry of a final judgment, unless stayed pending appeal, to satisfy the judgment. If DETM timely satisfies the judgment, DETM shall have an allowed claim of $35,832,419 plus the amount of the judgment. If DETM does not timely satisfy the judgment, its claim shall be disallowed.

The defense of § 546(e) does not apply on or after June 22, 2001, but applies prior to that date. Recoupment does not apply. The setoffs were appropriate, and are not subject to the setoff preference recovery under the Bankruptcy Code. There were no avoidable fraudulent transfers under federal or Texas law. DETM's allowed claim shall not be subordinated under § 510(c).

The Bankruptcy Code does not provide for the recovery of attorney's fees under §§ 547 or 550. Newhouse's request for an award of attorney's fees is denied.

Order

Based on the foregoing,

IT IS ORDERED that Robert Newhouse, Chapter 7 trustee of the bankruptcy estate of Aurora Natural Gas, L.L.C., shall have a judgment against Duke Energy Trading and Marketing, L.L.C., of $808,710 pursuant to 11 U.S.C. § 550, with pre-judgment interest from the date of the filing of this adversary proceeding..

IT IS FURTHER ORDERED that DETM shall have ninety days from the date of the entry of a final judgment, unless stayed pending appeal, to satisfy the judgment. If DETM timely satisfies the judgment, DETM shall have an allowed claim of $35,832,419 plus the amount of the judgment. If DETM does not timely satisfy the judgment, its claim shall be disallowed.

IT IS FURTHER ORDERED that all other relief requested by Newhouse shall be denied.

Counsel for Newhouse shall submit a proposed final judgment consistent with this order.

###END OF ORDER###