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U.S. BANKRUPTCY COURT

New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURRS SUPERMARKETS, INC.,
Debtor. NO. 7-01-10779 SA

YVETTE GONZALES, TRUSTEE,
Plaintiff,
v. Adv. No. 02-1205 S

ALBUQUERQUE TORTILLA COMPANY, INC.,
F & R FOODS, L.L.C., a New Mexico limited liability company,
M.I. DISTRIBUTING, an unincorporated entity,
M.I. DISTRIBUTING, INC., a Texas corporation,
and ROBERT MARTINEZ,
Defendants.

MEMORANDUM OPINION AFTER TRIAL

This matter came before the Court for trial on the merits. Plaintiff was represented by her attorneys Jacobvitz, Thuma & Walker (Thomas Walker). Defendant Albuquerque Tortilla Company, Inc. ("ATC") was represented by its attorney Ray A. Padilla. Defendant F & R Foods, L.L.C. ("F&R") was represented by its attorney William J. Cooksey. Defendants M.I. Distributing, M.I. Distributing, Inc. and Robert Martinez (collectively, "MID") were represented by their attorney Walter L. Reardon, Jr. This adversary proceeding is an attempt by the Chapter 7 Trustee to recover amounts overpaid by the Debtor-in-possession to vendors during the Chapter 11 portion of this case. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

The parties stipulated to the following facts (doc 114):

1. On February 8, 2001 (the "Petition Date"), Furr's Supermarkets, Inc. ("Furr's") filed a voluntary petition in the

United States Bankruptcy Court for the District of New Mexico under Chapter 11 of the Bankruptcy Code.

2. Both before and after it filed bankruptcy, Furr's operated grocery stores in New Mexico and Texas.

3. Between February 8 and August 31, 2001, Furr's closed some of its stores.

4. On August 31, 2001, the Debtor ceased operating grocery stores altogether and on that date either transferred the stores pursuant to Court-approved sale or closed the remaining stores that were not purchased.

5. On December 19, 2001, Furr's Chapter 11 case was converted to a case under Chapter 7.

6. On December 19, 2001, Yvette Gonzales was appointed Chapter 7 Trustee in the Furr's bankruptcy case and continues in that capacity.

7. Albuquerque Tortilla Company, Inc. ("ATC") is a New Mexico corporation that manufactures and distributes food products. ATC transacted business with Furr's before and after Furr's filed bankruptcy.

8. F & R Foods, L.L.C. ("F&R") distributed ATC products to Furr's stores before and after Furr's filed bankruptcy.

9. M.I. Distributing ("MID") is a sole proprietorship, owned and operated by Robert Martinez, that distributed ATC products to Furr's stores before and after Furr's filed bankruptcy.

10. Prior to Furr's filing bankruptcy, ATC had quit doing business with Furr's due to Furr's failure to pay invoices, and because of insufficient funds checks, among other things.

11. Prior to Furr's filing bankruptcy, MID and F&R had quit doing business with Furr's.

12. After the Petition Date, ATC would not ship product to Furr's without receiving payment by wire transfer in advance.

13. ATC started selling to the Debtor again once a cash-in-advance system was put in place a few weeks after the bankruptcy was filed.

14. Furr's and ATC arranged for Furr's to wire funds to ATC to pay for product delivered to Furr's stores postpetition by ATC and its distributors, including F&R and MID. Furr's was supposed to wire funds to ATC and ATC was supposed to pay F&R and MID for the ATC products F&R and MID delivered to Furr's stores.

15. From February 26, 2001 through August 6, 2001, ATC delivered a letter to Furr's almost every week, in which ATC demanded a wire transfer in a specific total amount for product to be delivered the following week. ATC included in the total demanded payment, an amount for products to be delivered by ATC, an amount for products to be delivered by F&R and an amount for products to be delivered by MID.

16. Furr's transferred the amounts requested by ATC in the weekly letters, except for two weeks (March 13 and March 19,

2001) during which Furr's transferred exactly two times the amounts requested. The following amounts were transferred by wire transfer to ATC which were credited to ATC's account on or about the following dates:

Amount Wired from Furr's to ATC	Date credited per ATC bank statements
$32,058.17	02/26/01
$38,194.40	03/05/01
$63,239.46	03/13/01
$65,750.96	03/19/01
$33,641.92	03/26/01
$39,645.85	04/02/01
$61,452.82	04/16/01
$25,523.72	04/23/01
$11,942.16	05/01/01
$28,259.85	05/08/01
$26,507.33	05/15/01
$29,683.52	05/23/01
$30,697.56	05/29/01
$31,529.24	06/07/01
$30,377.39	06/14/01
$30,237.86	06/19/01
$28,680.80	06/26/01
$20,000.00	06/29/01
$10,992.56	07/02/01
$80,015.04	07/10/01
$29,131.75	07/16/01
$29,047.20	07/24/01

$30,478.60	08/02/01
$24,412.60	08/06/01

17. By check number 1208 dated April 16, 2001, ATC paid Furr's $64,495.21, which amount represented overpayment by Furr's to ATC on March 13 and March 19, 2001 in twice the amounts requested by ATC.

18. After the bankruptcy was filed, Furr's did not pay any amounts to ATC by check.

19. However, in addition to the wire transfers to ATC, Furr's sent checks to MID and F&R on account of the postpetition invoices delivered to Furr's stores by MID and F&R.

20. Postpetition, Furr's paid F&R $41,668.38 by checks.

21. Postpetition, Furr's sent MID $146,346.73 in checks.

22. Postpetition, ATC paid MID in full for products delivered to Furr's postpetition.

23. Postpetition, ATC paid F&R $49,999.66 by checks on account of ATC products delivered to Furr's postpetition.

24. Postpetition deliveries of ATC products to Furr's stores were evidenced by invoices delivered to Furr's stores with the products.

25. The total of postpetition receipts of product from ATC to Furr's as shown by invoices provided is $262,190.70.

26. The net of postpetition invoices and credits shown in Furr's records but not shown by invoices provided by ATC is $150,424.18, for total net product receipts from ATC of $412,614.88.

27. The total of postpetition receipts of product from F&R to Furr's as shown by invoices provided is $56,134.17.

28. The total of postpetition receipts of product from MID to Furr's as shown by invoices provided is $184,548.46.

29. The net credit for postpetition invoices shown in Furr's records but not shown by invoices provided by M.I. Distributing is $2,365.83, for total product receipts from M.I. Distributing of $186,914.29.

30. On August 13, 2002, Plaintiff filed the Complaint to Recover Overpayment on Open Account, seeking to recover excess, post-petition payments on open account by the Debtor as debtor-in-possession to ATC. Plaintiff's complaint was timely filed.

31. On or about March 30, 2004, Plaintiff filed a First Amended Complaint adding as defendants F&R and MI Distributing.

32. None of the defendants filed a motion or request with the Court to abstain or a motion to dismiss the adversary proceeding.

The Court also makes the following additional findings of fact:

33. Plaintiff settled with defendant F&R on the morning of trial. The Court therefore will make additional findings regarding F&R only to the extent necessary or relevant.

34. Furr's used the Lawson accounting system, which is an integrated system that performs, among other things, inventory, accounts receivable, accounts payable, and check-writing. When an invoice is entered into the Lawson system either manually or by uploading from a store location, it automatically generates a check to pay the invoice on the due date. In the Chapter 11 case when Furr's dealt with vendors on a prepaid or COD basis the automatic check-writing feature would have to be turned off in order to prevent double payment.

35. Although being paid directly by ATC for product delivered to Furr's, F&R and MID submitted invoices to Furr's for product delivered post-petition.

36. Furr's accounts payable clerk was not told to turn off the automatic check-writing function for F&R and MID, which resulted in erroneous payments by check to F&R and MID. None of the checks issued to F&R or MID should have been written.

37. Exhibit P-4 consists of 53 checks written by Furr's to MID. The first 6 checks, totaling $11,534.87, were endorsed by MID and deposited in MID's bank account. The remaining 47 checks were delivered by MID to ATC and deposited in ATC's bank account. Of these 47 remaining checks, MID had endorsed 23 of the checks before giving them to ATC[1]. ATC gave MID credit for the Furr's

[1] Exhibit P-13 lists 56 checks from Furr's to MID. The parties could not locate copies of 3 checks. Their total is

(continued...)

checks by reducing MID's account payable[2] to ATC. MID therefore received a benefit for the total amount of the Furr's checks it received. The total of the check payments to MID is $146,346.73.

38. The Court finds that the various exhibits consisting of printouts from the Lawson system accurately reflect the data input into the Lawson system, and finds that Furr's management intended the Lawson system to constitute the official accounting record. The Court also finds that the data was input into the Lawson system contemporaneously with the occurrence of the underlying transactions and that therefore the Lawson system is a reliable record that was maintained in Furr's ordinary course of business. The Court also finds that the data presented to the Court was not changed, but was kept safe and secure since it was generated.

39. Plaintiff employed Rachel Kefauver, a Certified Public Accountant, to examine the payments made by Furr's and compare them to product received by Furr's during the Chapter 11 portion of the case. She had previously worked for Furr's as an employee before the bankruptcy, and returned to Furr's as a consultant during the Chapter 11. She was there through the sale and closing of the stores on August 31, 2001 and through the closing

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[1](...continued)
included in the $146,346.73 in Stipulated Fact 21.

[2] MID admits it has an "open account" with ATC on which the balance fluctuates. Exhibit P-10, Interrogatory 20, at pp. 9-10.

of the corporate office in November or December 2001. After August 31, 2001 she worked on preparing documents that would assist in the closing of Furr's and would assist the Chapter 7 Trustee. The Court recognized Ms. Kefauver as an expert witness.

Ms. Kefauver examined the source documents presented and summarized as evidence in this case. Specifically, she reviewed the wire transfers to ATC and the payments made by checks to the distributors. She examined Furr's downloaded invoice detail showing the deliveries at the store level that were uploaded into the accounts payable system, the invoices provided to her by the vendors, ATC's account records, letters from ATC to Furr's and some or all of the documentation included with the letters. She reviewed the discovery responses. Of the thousands of invoices she reviewed, most were store stamped by Furr's and therefore evidenced actual delivery. Credit was given for all store stamped invoices and for invoices that were not store stamped if the information on the invoice was already included in the Furr's records. This work resulted in Exhibit P-14.

Exhibit P-14[3] is a summary of payments and receipts and is the key piece of evidence in this case. All of the numbers on Exhibit P-14 agree with the stipulated facts, other exhibits and the testimony in the case. Its numbers are supported by the

[3] Column P on Exhibit P-14 should be labeled "Net overpayment to vendors" rather than "Net overpayment by vendors".

source documents. It demonstrates that Furr's overpaid ATC and the distributors for product delivered during the chapter 11 case by $301,751.81. This reconciliation and all the supporting exhibits that fed into it were not disputed by any evidence at trial.

40. Exhibits P-16 through P-40 are weekly letters that ATC delivered to Furr's requesting wire transfers for each week's "anticipated orders." Exhibit P-24 is the April 30, 2001 letter. It gives Furr's a credit of $27,504.40[4]. Exhibit P-38, the letter of July 30, 2001, adds 3 paragraphs to what had basically become a weekly form letter. These 3 paragraphs acknowledge that Furr's had a "discrepancy" with amounts paid for ATC products. While difficult to understand, the gist of the paragraphs suggests that Furr's can deduct from its wire transfer the amounts that it has overpaid the distributors: "The wired money requested on behalf of our distributors can be deducted from what they presently owe Furr's for the payments the distributors received directly." Exhibits P-39 and P-40 are similar to P-38, and suggest that Furr's take deductions from the wire transfer. Furr's had two opportunities to deduct amounts from subsequent wire transfers but did not do so.

[4] Ben Lovato, an ATC employee, testified that this credit resulted from a late wire transfer, as a result of which four days of production had not taken place.

41. Luther Martinez, President of ATC, testified. He gave a brief history of ATC's relation to Furr's and the increased use of independent distributorships to deliver ATC product. M&I was one such distributor. ATC sold product to distributors at a distributor price, which was 25 to 30% lower than wholesale price. The distributors would then sell directly to supermarkets such as Furr's at the wholesale price. ATC had an accounting system and kept track of amounts owed by the distributors.

Shortly before the Chapter 11, ATC and Furr's stopped doing business with each other. Furr's then approached ATC post-petition and suggested a COD arrangement with ATC only; Furr's would wire money to ATC which in turn would arrange for delivery of product from ATC and the distributors. ATC would then account to the distributors for their share of the funds. Before the Chapter 11, the distributors would sometimes take checks they received from ATC and sign them back to ATC for credit on their own account. Mr. Martinez was only initially involved in negotiating the post-petition payment system with Furr's; Joe Gonzales and Ben Lovato took over dealing with Furr's. Mr. Martinez's understanding of the arrangement was that Furr's would wire transfer a certain sum of money each week and that then ATC would manufacture exactly that amount of product and deliver it. He claimed that despite ATC's attempts to deliver all of the

product paid for, sometimes stores would refuse to accept it so ATC would dispose of it or feed it to the hogs[5].

Mr. Martinez claimed that he was unaware of the double payments to the distributors. The Court finds this highly unbelievable. In any event, someone at ATC knew about the checks because ATC was depositing them on a weekly basis. He also claimed that if ATC had received checks from a distributor post-petition, it would have been credited to their account.

On cross-examination, when first asked if ATC had produced everything requested in discovery, Mr. Martinez responded that Plaintiff should ask "Benny" (i.e., Ben Lovato, an employee). When asked a second time, he responded that Ben Lovato had produced everything. Finally, when confronted with a copy of his deposition he stated that as far as he knew ATC had produced everything in discovery that was relevant to Furr's. ATC's attorney then stipulated that ATC had produced everything requested.

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[5] Ben Lovato later testified on cross-examination that often the rejected chili would be traded to a renderer who would then give ATC a pig for a matanza. A matanza (Spanish, from "matar", to kill) is the slaughter, butchering and cooking of a pig, goat or sheep as a community affair; the cooked meat becomes part of a communal meal and the uncooked meat is distributed among the community members. For a short description of matanza, see E. Richardson, Matanza - A New Mexico Celebration, http://www.thesantafesite.com/articles-database/Matanza---A-New-Mexico-Celebration.html)

Mr. Martinez stated that the rejections of product started right after the Chapter 11 was filed. He agreed that the discrepancy between dollar amounts wired and products delivered was partially caused by the rejections. He insisted that even though the product was ordered only a few days before delivery, that the store managers would still reject it upon delivery, day after day and week after week, without anyone at Furr's headquarters knowing about it. The Court also finds this unbelievable. Furthermore, no defendant produced any documentation of any rejection of product[6].

Mr. Martinez described the relationship with Furr's as being a week by week affair. Furr's individual stores would order a certain amount of product, ATC would manufacture that product and it would be Furr's upon manufacture. ATC (and the distributors) would then deliver it. There was no refund or credit for undelivered product. Mr. Martinez's position is that ATC should retain all the money even for the product thrown out or fed to the hogs.

[6] MID, in its closing argument (doc 124 page 5-6) states that "[MID] was required to account for all product delivered to it by ATC as a method of inventory control imposed upon the distributor by the manufacturer as part of its normal business relationship... The distributors kept records reflecting what product was rejected for inventory control purposes." These records were not produced during discovery nor introduced at trial.

42. Ben Lovato, an ATC sales representative, also testified. He was in charge of the Furr's account both before and after the bankruptcy was filed. When asked by Plaintiff, he admitted that he knew that Mr. Martinez had left the task of responding to discovery up to him, but that he did not produce any accounting records because he did not work in the accounts receivable department. When asked if there were accounting records that had not been turned over, he responded that he did not know.

After the bankruptcy was filed, Mr. Lovato's role with regard to Furr's changed drastically. Pre-petition, ATC used the distributors to service the accounts. Post-petition, the distributors' drivers took orders from the individual stores. Mr. Lovato then took the orders from the distributors on a weekly basis by Friday. Mr. Lovato would then create a single invoice and spread-sheet. He would also do a sheet for each store, and sort them by district and do totals. He would then hand-carry the entire package to Furr's headquarters each Monday morning at 8:00 A.M. with a cover letter requesting a wire transfer for "anticipated orders."

Mr. Lovato explained that Exhibit P-24, the April 30, 2001 letter, gave a credit because the wire transfer for that week came in three or four days late and that therefore four days of production never took place.

Mr. Lovato testified that he was aware of deliveries to stores because the distributors had to give ATC proofs of delivery. He also stated that, if asked about each of the weekly letters, he would testify that the full amount of product was delivered each week. Plaintiff had a continuing objection under the best evidence rule to testimony regarding proofs of delivery that had not been produced in discovery. Nor were any previously unproduced proofs of delivery introduced as evidence at trial. And, there was no foundation laid about the reliability or authenticity of any of those proofs of delivery. ATC also did not establish that any proofs of delivery were lost or destroyed.

Mr. Lovato also testified that before Exhibit P-38, the July 30, 2001 letter, Mario Chavez (a Furr's employee) requested a meeting regarding payments that Furr's had made to the distributors. He claims that he had not known of these payments, and did not understand why Furr's had paid the distributors as well as ATC.

43. The Court finds that there was no "account" between Furr's and MID post-petition. Rather, there was a series of accidental payments.

44. Furr's never sent a demand letter to MID before naming it as a defendant in this proceeding.

45. The Court finds that there was no "open account" between ATC and Furr's post-petition. Instead, the Court finds that there

were a series of individual contracts, each one for the purchase and delivery that week of ATC products. Each individual contract stood on its own; no single contract was in any way connected to any other contract. None of these individual contracts were in writing[7], but are evidenced by Exhibits P-16 through 40 and Furr's weekly payments to ATC. None of them called for an award of attorney fees in the event of litigation. Either party was free to not enter into the next weekly contract. In fact, it appears that from ATC's perspective, ATC expected that at some point Furr's would stop weekly ordering of product; in one instance they did not produce for several days under the assumption that the agreement had ended when Furr's failed to wire transfer the money. It is also clear that ATC would not sell product on credit to Furr's. And, from Furr's perspective, it appears that Furr's did not view the relationship as an open account. When Furr's accidentally wired double payments to ATC it requested a refund of the money instead of having ATC apply it to any running account. Furr's did not intentionally extend credit to ATC.

ATC delivered (from itself and through its distributors) less product that contracted for every week. Trustee has a claim

[7] See also ATC's discovery responses (Exhibit P-7, page 8)("[E]verything was done orally.").

based on breach of contract. Trustee's claim is not based on an open account.

46. Furr's sent a demand letter to ATC requesting a refund of amounts overpaid on September 21, 2001 (Exhibit P11).

47. In its closing brief (doc 124 p. 6) MID argues that postpetition "distributors kept records reflecting what product was rejected for inventory control purposes." These records were not introduced at trial. Even had they been introduced they would not have been relevant to MID's defense; Plaintiff's claim against MID is for mistaken payments, not for a shortage of goods delivered.

48. MID produced no evidence at trial that it had changed its position to any detriment following and because of the checks it received from Furr's. Nor did MID produce any evidence of changed circumstances such that it would be inequitable to require MID to refund the erroneous payments.

49. Furr's payments to MID caused no harm to anyone except Furr's.

50. MID did not demonstrate any sufficient basis that would prevent the Court from awarding prejudgment interest.

51. ATC did not demonstrate any sufficient basis that would prevent the Court from awarding prejudgment interest.

CONCLUSIONS OF LAW

The remainder of this Memorandum will first discuss the "Open account" issues, then the cause of action against ATC, then the cause of action against MID and then Plaintiff's request for attorney's fees. It concludes with a discussion of pre- and post-judgment interest.

OPEN ACCOUNT ISSUES

New Mexico has adopted the common law definition and concept of an open account:

> "The term 'open account' means, ordinarily, an account based upon running or concurrent dealings between the parties which has not been closed, settled, or stated, and in which the inclusion of further dealings between the parties is contemplated."

Wolf and Klar Cos. v. Garner, 101 N.M. 116, 117, 679 P.2d 258, 259 (1984)(quoting Heron v. Gaylor, 46 N.M. 230, 232, 126 P.2d 295, 297 (1942)). "An action on an account is an action for breach of contract." Cooper & Pachell v. Haslage, 142 Ohio App.3d 704, 707, 756 N.E.2d 1248, 1250 (2001). (Citation and punctuation omitted.) See also Helmtec Indus. Inc. v. Motorcycle Stuff, Inc., 857 S.W.2d 334, 335 (Mo. Ct. App. 1993) (same.). Therefore, to prevail on an open account case the plaintiff must establish the existence of an express or implied contract, its consideration, the furnishing of the services or goods, the consideration therefor, and any payments made and balance due. Cooper, 142 Ohio App.3d at 707, 756 N.E.2d at 1250. See also Helmtec Indus. Inc. 875 S.W.2d at 335. (Plaintiff must show

offer, acceptance, consideration, correctness of the account, reasonableness of charges, and accordingly must prove defendant requested plaintiff to furnish merchandise or services, that plaintiff accepted the offer by furnishing the merchandise or services, and that the charges were reasonable.)

From an extensive review of "open account" cases, the Court finds that in the reported cases the plaintiff is always the seller of the goods or services, on credit, to the defendant.

> An open account is a type of credit extended through an advance agreement by a seller to a buyer which permits the buyer to make purchases without a note of security and is based on an evaluation of the buyer's credit. Black's Law Dictionary (5th ed); see also Stanton & Associates, Inc. v. Bryant Constr. Co., 464 So.2d 499 (Miss. 1985).

Cox v. Howard, Weil, Labouisse, Friedrichs, Inc., 619 So.2d 908, 914 (Miss. 1993). See also Cambridge Toxicology Group, Inc. v. Exnicios, 495 F.3d 169, 174 (5th Cir. 2007)("An open account is 'similar to a line of credit' and requires 'an ongoing relationship with an extension of credit to the debtor.'") (Citations omitted.) The Court has found no cases in which the buyer sues the seller on "open account" to recover overpayments.

In the case before the Court, there was no contract at all between MID and Furr's. There can therefore be no "open account." Additionally, Furr's never supplied goods or services to MID on an extension of credit. The fact that MID owes

anything at all is accidental. Therefore, Furr's cannot recover from MID on an open account theory.

As to ATC, the Court found above in the fact portion that there was no ongoing credit relationship with Furr's. Rather, there were a series of weekly contracts. This does not amount to an open account as a matter of law. In addition, Furr's never supplied goods or services to ATC on an extension of credit. The fact that ATC owes anything is based upon its breach of the weekly contract. Therefore, Furr's cannot recover from ATC on an open account theory.

ACTION AGAINST ATC

ATC's defense is that it produced all product required and delivered, or at least attempted to deliver, all of it to the stores. Plaintiff disputes that all product ordered was delivered. Plaintiff made a prima facie case that it has overpaid. The burden therefore shifts to ATC to prove its defense. ATC has not met this burden. While it is true that some stores closed during the Chapter 11 phase of the case preventing deliveries to those stores, ATC's description of events beyond that depicting massive rejections of product on a weekly basis is not believable. MID has stated that all distributors kept track of rejected product as part of an inventory control system. Those records were neither produced in discovery nor at trial. It is true that ATC produced thousands

of invoices. Some were marked as received by Furr's, and the Plaintiff gave credit for thousands of other deliveries for which ATC produced no invoices but the product showed up on Furr's records. Conspicuously missing, however, are records of rejected product.

The Court finds that either 1) these records of rejected product do not exist, or 2) if they exist, they do not support ATC's defense. First, if they existed, they should have been produced in discovery and put in evidence at trial. Presumably these records would have constituted a valid defense.

Second, the Court cannot just take ATC's word for it that all product was delivered, especially when ATC has alleged the existence of documents that demonstrate that. See ATC Discovery Responses (Exhibit P7, page 9)("Those refusals [to accept product] are evidenced by many, many, many boxes of documents which will be made available to Plaintiff's counsel upon reasonable request.") The best evidence rule prevents ATC from offering testimony about the content of those documents. See In re Terminal Cash Solutions, LLC, 2006 WL 3922108, *4 (Bankr. S.D. Fla. 2006) (best evidence of what the books reflect are the books and the entries therein). Furthermore, there was no foundation laid for the reliability or admissibility of these records. Testimony about them would have been hearsay and prohibited.

ATC's failure to produce the records also triggers the adverse inference rule, which states that the failure of a party to provide evidence peculiarly available to that party supports an inference that the truth would be damaging to that party. See Deutsche Financial Services Corp. v. Osborne (In re Osborne), 257 B.R. 14, 19 n.7 (Bankr. C.D. Cal. 2000). Under this rule the Court can infer that ATC failed to produce the records because they support Plaintiff's accounting rather than demonstrate ATC's version of the facts.

The Court therefore sustains Plaintiff's continuing objection regarding Mr. Lovato testifying about the contents of the proofs of delivery. In sum, ATC had the burden of proving the amount of rejected product but did not do so. Plaintiff should be awarded a judgment for the full amount of the discrepancy.

Plaintiff also seeks a ruling that ATC is jointly and severally liable with MID for the total amounts awarded in this case because MID turned the checks over to ATC. The Court disagrees. MID received value for the checks turned over to ATC in that its payable to ATC was reduced. Plaintiff has not demonstrated any legal theory that would hold ATC liable for mistaken payments to MID.

The amount overpaid is calculated as follows:

Total wire transfers	$831,500.76
Less: check written back to Furr's	$(64,495.21)
Net wire transfers	$767,005.55
Deliveries (from Exhibit P-14, column L)	$(655,537.06)
Shortage	$111,468.49

ACTION AGAINST MID

> New Mexico has long recognized actions for unjust enrichment, that is, in quantum meruit or assumpsit. See Tom Growney Equip., Inc. v. Ansley, 119 N.M. 110, 112, 888 P.2d 992, 994 (Ct.App. 1994). To prevail on such a claim, one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust. See generally Restatement of the Law of Restitution §§ 1, 40, 41 (1937, as supplemented through 1988). The theory has evolved largely to provide relief where, in the absence of privity, a party cannot claim relief in contract and instead must seek refuge in equity. See Tom Growney Equip., Inc., 119 N.M. at 112, 888 P.2d at 994; see also Hydro Conduit Corp. v. Kemble, 110 N.M. 173, 175, 793 P.2d 855, 857 (1990) ("This quasi-contractual obligation is created by the courts for reasons of justice and equity, notwithstanding the lack of any contractual relationship between the parties." (citation and internal quotation marks omitted.))

Ontiveros Insulation Co., Inc. v. Sanchez, 129 N.M. 200, 203-04, 3 P.3d 695, 698-99 (Ct. App. 2000). (Emphasis in original.) In the case before this Court MID was knowingly benefitted at Furr's expense. It stood idly by and accepted $146,346.73 of checks to which it knew it was not entitled. It is inconceivable that MID did not realize an error was being compounded weekly. It would be unjust to allow MID to retain the benefit of the checks. See

Sunwest Bank of Albuquerque, N.A. v. Colucci, 117 N.M. 373, 376, 872 P.2d 346, 349 (1994) ("It is often considered unjust to retain a benefit where there has been a mistake in conferring the benefit."). Therefore, MID was unjustly enriched and should be ordered to return the $146,346.73 to Furr's.

Even ignoring the "unjust enrichment" theory, the payments to MID are recoverable. Under New Mexico law, payments made as a result of a material mistake of fact are regarded as involuntary and are recoverable. Rabbit Ear Cattle Co. v. Frieze, 80 N.M. 203, 204, 453 P.2d 373, 374 (1969). Furr's paid MID as a result of a material mistake of fact, so is entitled to a return of the payments.

In its closing argument (doc 124 p. 7), MID argues that Plaintiff did not plead theories of "money paid by mistake" or restitution or unjust enrichment or implied contract and therefore may not recover under those theories. The Court disagrees for two reasons.

First, the Trustee did plead this. The First Amended Complaint (doc 32) alleges:

> 16. After the Petition Date, Furr's paid to MID by check approximately $146,346.73, for the same product that ATC paid MID, resulting in double payment to MID in the amount paid to it by Furr's post-petition.
> 17. Pursuant to applicable state law and/or 11 U.S.C. §542, the Trustee is entitled to a judgment against Defendants in the amounts overpaid by Furr's.

and seeks the following relief:

> C. For judgment in Plaintiff's favor and against M.I. Distributing, Robert Martinez and M.I. Distributing, Inc., jointly and severally, in the full amount of the overpayments and/or double payments by Furr's to MID during the postpetition period in amounts to be proven at trial, for reasonable attorney fees, for pre- and post- judgment interest, for costs, and for all other just and proper relief.

The Court finds that Plaintiff did request equitable relief under state law to recover the accidental, double payments.

Second, even if the First Amended Complaint cannot be this broadly construed, the Court finds that the parties in fact tried these causes of action. Federal Rule of Civil Procedure 15(b)[8], incorporated into Rule 7015, Fed.R.Bankr.Proc., allows claims to be decided on their merits rather than on "procedural niceties."

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[8] Federal Rule of Civil Procedure 15(b) provided:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(In 2007 the language of Rule 15(b) was amended. The changes were intended to be stylistic only. See Advisory Committee Notes).

Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 456 (10th Cir. 1982). When evidence is presented on an issue beyond the scope of the pretrial order, Rule 15(b) may effect an amendment to the pretrial order. Id. If there is no objection to the introduction of evidence on an issue beyond the scope of the pretrial order, there is implied consent if the parties recognize that the issue has entered the case at trial. Id. at 457. And, consent will also be found when the party opposing the amendment himself produces evidence on the new issue. Id. The Court finds that the equitable issues were tried by consent. There were no objections at trial when Plaintiff elicited testimony about the accounting mistakes that lead to double payments. Therefore, MID's objection at this time to the introduction of evidence on the equitable issues is untimely.

ATTORNEY'S FEES

Under the American rule, in effect in New Mexico since the territorial days, each party is responsible for its own attorneys fees. New Mexico Right to Choose/NARAL v. Johnson, 127 N.M. 654, 657, 986 P.2d 450, 453 (1999). The American rule recognizes a few exceptions: the authority of a statute, a court rule, or a provision in a contract. Id. In this case Plaintiffs sought attorney fees under the New Mexico Open Account Statute, N.M. Stat. Ann. § 39-2-2.1. The Court found that there was no open account with either ATC or MID. Therefore, fees should be denied

under that statute. Otherwise, there is no court rule or contract provision calling for attorney fees. Plaintiff's request for attorney fees should be denied.

PREJUDGMENT INTEREST

> Prejudgment interest may be awarded under either Section 56-8-3 or Section 56-8-4(B). Section 56-8-3 allows prejudgment interest in cases on money due by contract, money received to the use of another and retained without the owner's consent, and money due on the settlement of matured accounts. Section 56-8-4(B) allows prejudgment interest in the discretion of the court after the court considers, among other things, whether the plaintiff was the cause of unreasonable delay in the adjudication of his or her claims and whether the defendant had previously made a reasonable and timely offer of settlement.
>
> The obligation to pay prejudgment interest under Section 56-8-3 arises by operation of law and constitutes an obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor between the time the claimant's claim accrues and the time of judgment (the loss of use and earning power of the claimant's funds). See Economy Rentals, Inc. v. Garcia, 112 N.M. 748, 762, 819 P.2d 1306, 1320 (1991). Section 56-8-3 is construed according to Restatement of Contracts § 337 (1932), which takes the view that prejudgment interest should be awarded as a matter of right under certain circumstances. Shaeffer v. Kelton, 95 N.M. 182, 187-88, 619 P.2d 1226, 1231-32 (1980). As we recently noted:
>
> > Prejudgment interest is awarded as a matter of right only when a party has breached a duty to pay a definite sum of money or "the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices."
>
> Smith v. McKee, 116 N.M. 34, 36, 859 P.2d 1061, 1063 (1993) (quoting Kueffer v. Kueffer, 110 N.M. 10, 12, 791 P.2d 461, 463 (1990)).

Colucci, 117 N.M. at 377-78, 872 P.2d at 350-51. (Footnotes omitted.) The trial court must consider the equities in the case

before awarding prejudgment interest under Section 56-8-3, but in cases where the plaintiff is entitled to interest as a matter of right the burden rests on the defendant to show a basis for denying the award. Id. at 378, 872 P.2d at 351. When the amount owed is readily ascertainable, interest generally should be awarded absent "peculiar circumstances." Id. (quoting Ranch World of N.M., Inc. v. Berry Land & Cattle Co., 110 N.M. 402, 404, 796 P.2d 1098, 1100 (1990).)

The Court has examined the equities in this case, and finds no particular reason that Plaintiff should not be awarded pre-judgment interest under Section 56-8-3. ATC owes money based on a contract and the amounts are easily ascertainable. MID owes money based on unjust enrichment and the amounts are easily ascertainable. See Id. (Sunwest Bank accidentally paid defendant and was entitled to recover under theory of unjust enrichment and was entitled to receive pre-judgment interest as "money received to the use of another and retained without the owner's consent expressed or implied.") Neither Defendant presented any evidence that would serve as a basis to deny the award of pre-judgment interest. Frankly, the Court finds the behaviors of ATC and MID egregious in this case. The Court believes that both of these Defendants were aware of the mistaken payments that continued week after week and stood silent while much-needed hundreds of thousands of dollars left the coffers of a Debtor attempting to

restructure under the Bankruptcy Code. Therefore, the Court will award Plaintiff the maximum statutory rate of pre-judgment interest, i.e., 15% per annum.

Because the Court will award pre-judgment interest under section 56-8-3, it need not consider whether an award would be appropriate under section 56-8-4(B). The Court will next calculate the amount of the pre-judgment interest.

Prejudgment interest is awarded between the time the claimant's claim accrues and the time of judgment. It is difficult to ascertain exactly on what dates what claims arose against ATC, but it is absolutely certain that as of August 31, 2001 ATC owed Furr's $111,468.49. August 31, 2001 to March 21, 2008 (date of entry of this Memorandum Opinion) is 2394 days. Interest at 15% per annum for 2394 days on $111,468.49 principal is $109,666.67.

On the other hand, amounts owed by MID are easily ascertainable. Exhibit P-4 shows the date each check cleared the bank (with the exception of 3 checks, which the Court estimated cleared the bank with the next following check). Exhibit A to this opinion calculates the interest due on each payment from the date it cleared the bank to March 3, 2008. Exhibit A shows pre-judgment interest due of $148,658.10.

POST-JUDGMENT INTEREST

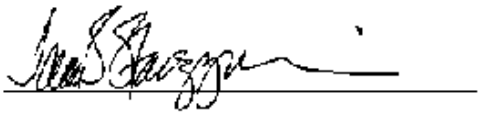
Interest on federal judgments is governed by 28 U.S.C. § 1961(a). That statute provides, in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court.... Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

The overwhelming weight of federal authority holds that § 1961, rather than a state court rate, applies to federal judgments, even where the federal court's jurisdiction rests on diversity of citizenship. In re Connaught Properties, 176 B.R. 678, 683-84 (Bankr. D. Ct. 1995). Therefore, the Court rules that the judgment will bear interest at the rate determined by 28 U.S.C. § 1961.

CONCLUSION

For the above reasons, the Court finds that 1) judgment should be entered against ATC for $111,468.49 principal plus pre-judgment interest of $109,666.67, for a total of $221,135.16, which sum shall accrue interest at the federal judgment rate and 2) judgment should be entered against MID for $146,346.73 principal plus pre-judgment interest of $148,658.10, for a total of $295,004.83, which sum shall accrue interest at the federal judgment rate.



Honorable James S. Starzynski
United States Bankruptcy Judge

Date Entered on Docket: March 21, 2008

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Computation of Pre-Judgment Interest due from MID **EXHIBIT A**

Date Paid	Judgment	# days	Amount	Interest	Comment
03/22/2001	03/21/2008	2556	2,383.62	2,503.78	
03/22/2001	03/21/2008	2556	3,330.15	3,498.03	
03/26/2001	03/21/2008	2552	455.00	477.19	
03/28/2001	03/21/2008	2550	1,908.32	1,999.81	
03/30/2001	03/21/2008	2548	2,154.70	2,256.24	
03/30/2001	03/21/2008	2548	1,303.00	1,364.40	
04/23/2001	03/21/2008	2524	1,024.00	1,062.15	
04/23/2001	03/21/2008	2524	1,731.70	1,796.22	
04/23/2001	03/21/2008	2524	1,546.58	1,604.21	
04/23/2001	03/21/2008	2524	1,112.60	1,154.06	estimated date paid
04/23/2001	03/21/2008	2524	2,943.34	3,053.01	
04/23/2001	03/21/2008	2524	2,497.58	2,590.64	
05/04/2001	03/21/2008	2513	1,438.81	1,485.92	
05/04/2001	03/21/2008	2513	2,512.40	2,594.66	
05/04/2001	03/21/2008	2513	3,185.41	3,289.70	
05/04/2001	03/21/2008	2513	2,057.67	2,125.04	
05/04/2001	03/21/2008	2513	3,154.50	3,257.78	
05/11/2001	03/21/2008	2506	2,131.10	2,194.74	
05/11/2001	03/21/2008	2506	1,746.04	1,798.18	
05/11/2001	03/21/2008	2506	2,888.08	2,974.33	
05/17/2001	03/21/2008	2500	2,911.60	2,991.37	
05/17/2001	03/21/2008	2500	1,878.00	1,929.45	
05/31/2001	03/21/2008	2486	2,966.64	3,030.85	
05/31/2001	03/21/2008	2486	2,196.91	2,244.46	
05/30/2001	03/21/2008	2487	1,114.10	1,138.67	
05/30/2001	03/21/2008	2487	3,303.10	3,375.95	
05/30/2001	03/21/2008	2487	2,543.70	2,599.80	
05/30/2001	03/21/2008	2487	1,497.14	1,530.16	
05/30/2001	03/21/2008	2487	2,493.64	2,548.64	
06/04/2001	03/21/2008	2482	2,412.60	2,460.85	
06/04/2001	03/21/2008	2482	1,251.40	1,276.43	
06/15/2001	03/21/2008	2471	2,705.31	2,747.19	
06/15/2001	03/21/2008	2471	2,531.86	2,571.05	
06/20/2001	03/21/2008	2466	1,656.80	1,679.04	
06/20/2001	03/21/2008	2466	997.63	1,011.02	
06/20/2001	03/21/2008	2466	3,988.80	4,042.35	
06/27/2001	03/21/2008	2459	3,618.28	3,656.45	
06/27/2001	03/21/2008	2459	2,235.60	2,259.18	
06/27/2001	03/21/2008	2459	2,027.34	2,048.72	
07/03/2001	03/21/2008	2453	3,936.00	3,967.81	
07/03/2001	03/21/2008	2453	2,334.40	2,353.27	
07/03/2001	03/21/2008	2453	1,736.67	1,750.71	
07/03/2001	03/21/2008	2453	3,204.00	3,229.90	
07/03/2001	03/21/2008	2453	2,076.20	2,092.98	
07/11/2001	03/21/2008	2445	1,341.60	1,348.03	
07/19/2001	03/21/2008	2437	3,376.58	3,381.67	
07/19/2001	03/21/2008	2437	2,294.34	2,297.80	
07/19/2001	03/21/2008	2437	4,381.90	4,388.50	
07/19/2001	03/21/2008	2437	2,827.80	2,832.06	

07/24/2001	03/21/2008	2432	1,561.91	1,561.05	
08/03/2001	03/21/2008	2422	2,817.80	2,804.68	estimated date paid
08/03/2001	03/21/2008	2422	2,525.60	2,513.84	estimated date paid
08/03/2001	03/21/2008	2422	1,849.24	1,840.63	
08/03/2001	03/21/2008	2422	2,963.00	2,949.20	
08/10/2001	03/21/2008	2415	15,564.50	15,447.23	
08/10/2001	03/21/2008	2415	5,720.14	5,677.04	
			146,346.73	148,658.10	

Checks	146,346.73
Interest	148,658.10
Total	295,004.83