ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF CONNECTICUT

In Proceedings Under Chapter 11
Case Number: 10-21973

In the Matter of:
THE KASDEN FUEL COMPANY,
Debtor.

Adversary Proceeding: 10-02183

HMZ ENERGY, LLC,
Plaintiff,
v.
SACK DISTRIBUTORS CORP., ET AL.,
Defendants.

Excerpt of the Hearing on

Doc #43 - Scheduling Order on 4/11/2011

(Re:[30] Motion for Summary Judgment filed by Plaintiff HMZ Energy LLC.)

May 11, 2011

H e l d B e f o r e:

The Hon. ALBERT S. DABROWSKI,

U.S. Bankruptcy Judge

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(The following was transcribed from a digital sound recording.)

* * *

12:15 P.M.

THE COURT: All right. Mr. Feingenbaum, you were going to consult, and I assume everybody has, to the extent possible, with their clients.

MR. FEINGENBAUM: I believe so, your Honor. I think the parties have agreed to give brief comments.

THE COURT: Okay.

MR. KLEIN: Your Honor, before we get to that, I wanted to raise one point of clarification with respect to the bid procedures and the place of the auction. I had said that we would agree to have the auction in Hartford. I think that your Honor may have been implying that the auction should take place itself in the courtroom.

THE COURT: No, not necessarily, but --

MR. KLEIN: Okay.

THE COURT: -- in Hartford so in the event there's some kind of a dispute, you could come over here.

MR. KLEIN: Right.

THE COURT: Where --

MR. KLEIN: That's perfect.

THE COURT: Okay.

MR. KLEIN: Thank you, your Honor.

THE COURT: Mr. Feingenbaum.

MR. FEINGENBAUM: Thank you, Judge. Your Honor, obviously, I think -- there's been lots of briefs filed. I filed three briefs. Mr. Goldman filed a brief. Mr. White filed a brief on behalf of the trustee. So I don't really think it's appropriate, given the volume that you have to deal with, that it's necessary to repeat all the arguments, and I have no intention of doing so, so I will make a few brief comments, basically, in light of -- because we had simultaneous briefs -- in light of the brief from Sack.

Your Honor, there -- it is clear from those briefs that there is no

material issue of fact here -- no issue of material fact here. Three parties admit to the documents, the basic documents, the note and security agreement.

THE COURT: Well, actually, it's interesting. One of the things that slows me down is the 56(a)(2) statement. The responsive pleading was not specific to admit or deny. It also contained argument to some extent. And that's -- that's a -- this is -- this is -- it is a critical observation from a judge's perspective, but it is the usual and it makes it -- when I approach a summary judgment motion, I want the facts, and they're normally teed up in A1 and A2, and then the arguments are set forth separately. And right out of the slot, I find myself slowing down dealing with arguments as to is this relevant, is this not, what's going on here.

And then, of course, as you know, there were numerous documents, including the commercial security agreement, which was attached, I believe, to Document ID Number -- ECF Number 22 in the adversary,

which appears to the Court to have particular relevance to the resolution of the matter.

MR. FEINGENBAUM: Well, your Honor, I think --

THE COURT: And you might want to address that.

MR. FEINGENBAUM: Yeah. Well, that's exactly what I intend --

THE COURT: The definition of collateral contained within Section 1 of the -- page one of that.

MR. FEINGENBAUM: I think it's the definition, with all due respect, of liabilities (inaudible) --

THE COURT: Well -- and above --

MR. FEINGENBAUM: Yes.

THE COURT: That incorporates the definition of --

MR. FEINGENBAUM: And that's exactly what I intend to address, your Honor.

THE COURT: All right.

MR. FEINGENBAUM: And I believe there's no dispute between the parties that that is the commericial security

agreement involved here, and that -- attached to that --

THE COURT: I'm so far -- if it's not, advise me, because I'm treating it as -- as undisputed, and it's certainly worthy of consideration in the context of resolving this motion. Whether it's dispositive or not, as I sit here at this minute, I haven't determined, yet, its importance.

MR. FEINGENBAUM: And then there is the note that's attached to it, and I don't believe there's any dispute that those are the written documents that we have here. There is the obligations of Sack -- obligations, rather, of the estate to Sack, which are set forth in the Sack claim, and I don't believe there's any dispute that that's the Sack claim in this case against the Debtor. And as a result of looking at that claim, it's clear that anything that was due and owing on December 14, 2005, has been paid.

And so, accordingly, the Sack claim is for an amount due after that date,

and that December 14, 2005, is a significant date, your Honor, because that's the date which is five years after the date of the note. And I believe there's no dispute. There have been no oral modifications to the security agreement, and modifications that are being attempted to be inferred here are sullied by course of conduct as stated by Sacks' brief.

Your Honor, this is solely an issue of state law, and frankly, I'm reminded of my old tort professor's admonishment continually during first year law school, about don't forget the statute, and the statute is what governs here.

And there are two statutes in the UCC which are of particular importance, and relevant, and pertinent to this decision -- to this matter: 42(a)-9-203(a)(2)(a) and the official comment that interprets that statute states that a security agreement must be authenticated, and a security agreement in this context to be authenticated means it must be in writing; 42(a)-9-204(c), and it's official comment

number five, is the other statute in the UCC that's so critical here, and that provides that for a security agreement to cover future advances, that language needs to be in the security agreement. And as I'll go through -- as we go through that commericial security agreement, I'll point out that that language isn't in there.

Accordingly, there has to be a written security agreement, and there has to be a specific provision for future advances. Here, the security agreement only covers the note and the other obligations then existing, and it's only through, your Honor, a tortuous reading of the granting paragraph of the commericial security agreement that one can even farfetched -- on a farfetched basis conclude that there was future advances that were -- that were contemplated. And the reason is that the Defendant's reading ignores that the term "liabilities," capital L, is a defined term. And if we look to that document, your Honor -- I have copies if people need it or if your Honor needs it -- but if we look to that document, it defines

"liabilities" in the penultimate sentence, and those liabilities are the liabilities under the note, the commericial reserve credit agreement and note, in consideration of the loan, secure payment and performance of the loan and all other liabilities and obligation of lender -- excuse me -- obligations of borrower to lender of every name and nature whatsoever, direct or indirect, absolute and contingent now existing, now existing.

It doesn't say, or hereinafter incurred or any other such language. It says now existing, whether as maker, debtor, guarantor, surety, endorser, pledgor or otherwise, hereinafter called the liabilities. So liabilities has a strict defined term. It's obligations under the note and other obligations that may have been then existing. And then it goes on to say, it is the true, clear and express intention of the borrower that the continuing grant of this security interest remain as security for payment and performance of the liabilities now existing and whether or not such

liabilities, capital L, are related to the transaction described in Schedule A by class or kind or whether or not contemplated by the parties at the time of the granting of this security interest.

There is no way to read that, your Honor, and give -- give credence to the fact that liabilities is a defined term. That there is no way to read this last sentence or the penultimate sentence in any other way that it does not include future advances, and that the only way to include future advances would be by Mr. Goldman's concept of course of conduct, which the law does not permit. The law simply does not permit because it's not in the security agreement. The statute is clear. There has been no modification that's been authenticated, which means in writing, signed by the parties. There's only this security agreement.

Accordingly, 9-204(c) is not complied with. That is the import of the Berman case and the cases which discussed Berman, and in fact, it is the import of a

case even cited by Sack, the Lackow case, which points out the distinction when you have future advance language. It's critical. It has to be there. That's what the Legislature said.

So the Defendant says, okay, well, we modified the note. Well, your Honor, you can't modify the note by course of conduct because then you wouldn't be in compliance with Connecticut General Statute Section 52-550, which is the statute of frauds. Since this was for over $50,000, any new arrangement for advances of loans after the maturity date had to be in writing, and there's some discussion by Mr. Goldman about maturity date and right to terminate, et cetera.

Well, maturity date, your Honor, has -- has a meaning, and the maturity date is the date at which the obligation becomes due. There are a couple of cases that -- that speak to that that I don't think are in the briefs, McIntyre versus Ticor Title Insurance Company, 658 F.Supp. 944 District of Alaska 1986, and Virgin Islands

versus Brown 221 F.2nd 402 Third Circuit 1955. And those cases, your Honor, adopt basically the Black's Law Dictionary definition of maturity date as the date which the obligation becomes due. That date was December 14, 2005, and all of the obligations that were due and owing as of December 14, 2005, have been paid, and there's no dispute of fact about that.

In order to amend that note consistent with the statute of fraud, there would be a writing. There was no writing. Again, course of conduct under the case law, which I put forth in detail, would require that -- require the writing, and that course of conduct, because this relationship can be explained in another way, that is, the purchase of oil on an open account, simply doesn't hold water as a modification.

The note had a defined credit limit of $2 million and a maturity date of five years. The Defendant claims it could increase, at its discretion, the credit limit, and again, your Honor, that's only if you ignore the definition of credit limit,

but that's a defined term, and that's the $2 million, and they claim that the maturity date can be changed at its discretion because somehow that's a waiver of a provision for their benefit, that would turn commericial law on its head. I've never heard of such an argument. In fact, there's no case that says so. There can't be because it would have you -- a unilateral imposition of an obligation on another party in contravention of the statutes of frauds.

There is termination language, and termination language, your Honor, is common in lines of credit. Prior to the maturity date, they can be terminated and the parties can pay off the obligation and walk away. Does that mean that the obligation continues beyond the maturity date? Absolutely not, because the obligation was due then, and it can only be -- that due date can only be extended when you have future advances, in other words, new loans, that can only be extended under -- to comply with the statute of frauds in writing.

Your Honor, to listen to the

Defendant's argument is to come away with a completely different set of agreement than are in evidence and have been agreed to by the parties. The Defendant would have this Court change the credit limit, the maturity date, imply future advance clause, and read out the words "then existing." And that's the only way they can prevail, and you can't do that consistent with the statutes that I've mentioned. If these parties wanted your Honor to have a simple security agreement to cover future purchases, they could have said so. They went into this whole scheme with a note, with a credit limit, et cetera. That's what they agreed to. That's what they're stuck with. If they wanted the -- a security agreement to cover future purchases, they could have said so. They didn't. They could have amended the documents in writing. They didn't. So this is what we're stuck with.

There are no cases cited by the Defendant, your Honor, that hold that course of conduct can create a future advance clause where none existed in their written security agreement, and no cases have been

cited which hold that a note can be modified by course of conduct and stay within the requirements of the statute of frauds. In fact, your Honor, the main cases cited by the Defendant deal with other statutes, deal with other issues, not the issues before the Court. Of course, there are no cases which hold the way that the Defendant would like to hold because it's just not the law.

So therefore, your Honor, based on the briefs, based on these brief comments I've made today, we think that the Court has to grant the summary judgment here in order to be consistent with the statutes involved and in order to give credence to these agreements which the parties executed. Thank you.

THE COURT: Hold on, Mr. Goldman.

Lisa. (Inaudible.) Okay. Well, if I can't do it, I can't do it. Okay. Thank you.

Mr. Goldman.

MR. GOLDMAN: Yes, thank you, your Honor. I think --

MR. WHITE: Your Honor, did you --

THE COURT: Oh, well, actually, you've got a separate motion with regard to Count 2.

MR. WHITE: Correct.

THE COURT: And you think Count 3 is --

MR. WHITE: It's the same argument as Mr. --

THE COURT: Okay.

MR. WHITE: If I have three minutes, I'll sit down -- it's up to you --

THE COURT: No. I -- I overlooked you. I shouldn't have.

MR. WHITE: That's -- that's -- (inaudible) need to. But your Honor, basically, the -- we adopt Attorney Feingenbaum's arguments, papers, and his oral arguments. As we indicated in our papers, the trustee is here essentially with respect to administer to creditors that a finding that Sack is secured would impact not only HMZ, but more to the point -- administer to creditors that it would render the estate

insolvent. We adopt the arguments that have been made by counsel that we think the response to the brief that there was really only three issues that I saw that the -- the note, as you indicated, the collateral as security for the payment and performance of borrowers, liabilities, initial "L," to lender. That's paragraph one.

Mr. Feingenbaum went over the definition of liabilities. That infers now existing. There is no future advances, and the claims that are being covered under the agreement are invoices from 2008 to 2010 so they're clearly not covered. The explanation of the maturity date has been made and course of conduct is not relevant. The only exception that has been talked about to the writing, something called "the composite document rule," and it's very clear that those documents have to be contemporaneous. There is no dispute as to fact as to the documents that are being relied on. They are bills of lading eight years late. So it doesn't even fit into the narrow exception.

Your Honor, just in summary,

we would not be here arguing about this had Sack negotiated with Kasden and obtained a writing extending all this. His rights would have been protected. He didn't. He is now the largest unsecured creditor in the case. Thank you.

THE COURT: Mr. Goldman.

MR. GOLDMAN: Thank you, your Honor. Just preliminarily, I wanted to address your Honor's concern about our Rule 56 response.

THE COURT: That is not -- it's not going to affect the disposition of the matter. It's just by way of a general observation, and I know it was your 56(a)(2), but I get them all the time like that, and it's just helpful if they're very precise. You admit you deny, or in some cases, you admitted parts, you bifurcated, which is fine. But you then added --

MR. GOLDMAN: Yeah.

THE COURT: -- argument to it.

MR. GOLDMAN: And I apologize for doing that. I will bear that in mind in --

THE COURT: It's just an observation.

MR. GOLDMAN: -- future motions, but I did want --

THE COURT: It didn't prejudice you in any way.

MR. GOLDMAN: I did want to explain to the Court the reason that I did that was because our scheduling order does say that in my statement it shall set forth any alleged new material facts. Now, maybe I went a little beyond on that --

THE COURT: Okay.

MR. GOLDMAN: -- to get in the realm of argument, but I inserted --

THE COURT: This becomes a problem when I get 300 paragraphs --

MR. GOLDMAN: Yeah.

THE COURT: -- in statements. This is relatively easy in the context of determining what the facts are as admitted and being undisputed by a comparison of the A1's and A2's.

MR. GOLDMAN: Very --

THE COURT: It's not a

problem. Don't dwell on it.

MR. GOLDMAN: Very well. Okay. Thank you.

With that, I think there are two fundamental factual inaccuracies that HMZ is attempting to pass off here. The first of which is the -- the fact that the security agreement by its terms does not cover future advances. That is ambiguous at best, but let me -- before I get into that, there is nothing in Section 9-204(c) that requires the magic words "future advances" to be in a security agreement in order to cover future advances. It simply says, the security agreement may provide for future advances, that collateral will cover future advances. So to take away from that that unless the words "future advances" are in a security agreement then you're out of luck is just not supported.

Now, to address the actual security agreement as Mr. Feingenbaum has gone through. I first would like to note that the, quote, security agreement that we're dealing with here is not only the

actual commercial security agreement that he was quoting from, but it is also the note. The note and the security agreement have to be construed together. In fact, the note is actually incorporated into the security agreement as being attached as Schedule A. So you really have to construe both of those documents together as the security agreement.

Now, unlike the Berman case, which has been cited numerous times, the security agreement here covers liabilities other than one specific note. The security agreement in the Berman case just referred to one note. Here, we have a security agreement that covers the loan and all other liabilities, obligations of every name and nature whatsoever. Now, the language following that, Mr. Feingenbaum maintains is an exclusive listing, a bracketing, so to speak, of what those liabilities consist of, but that is not the natural reading of that clause, I would submit. I would submit instead that what follows after the word "whatsoever," comma, direct or indirect, absolute and contingent, now existing as

whether maker, debtor, guarantor, surety, endorsor, pledgor or otherwise is exemplative. It is an exemplative listing of what the liabilities are. It is not purporting to be exhaustive and to define those liabilities.

And the fact that the word -- words "hereinafter incurred" are not contained here should not be dispositive, because in the very next sentence, you see that it's -- the parties are clarifying their intent that the liability shall cover those, again, now existing and then you have the word "or," quote, whether or not contemplated by the parties at the time of the signing of this agreement -- or at the granting of this security agreement. So if future advances -- and our position is that future advances were contemplated under the note -- it's perhaps an open question as to whether they were contemplated in excess of $2 million or made after -- or those made after December 14, 2005. But even if they weren't contemplated, they are covered by this provision, which says, "or whether or not contemplated by the

parties at the time of the granting of the security agreement."

At a very minimum, it creates an ambiguity in this agreement precluding the grant of summary judgment. That is not an unreasonable reading of these two companion provisions. I would submit that that interpretation is further supported by the note, which although it defines credit limit in paragraph three as $2 million, we then have in paragraph five, under the manner of requesting advances, it says you -- all requests for advances by Kasden under this agreement may be, quote, up to the credit limit approved for me. Well, if credit limit is already defined in paragraph three, why do we have the words "approved for me." There is a legitimate reading of this language to mean that Sack could approve a higher credit limit for Kasden under -- under the terms of this agreement.

And it would be reasonable for them to contemplate such a -- such discretion in this case. We've presented evidence of the circumstances of the entering into these

agreements; that is, that Sack had become the exclusive supplier of Kasden and was expected to remain its exclusive supplier in the future so that the parties should have the flexibility of increasing the credit limit.

It is also unreasonable to presume that the parties entered into this voluntary agreement with idea that if Sack was magnanimous enough to increase Kasden's credit at its request, that Sack would be unsecured for that amount. In fact, it's counterintuitive to believe that the parties would enter into this type of arrangement and have that result. So I would submit that the interpretations further if you -- if you look at that language in the note, it at least creates an ambiguity raising a genuine issue of material fact precluding summary judgment.

Now, the idea that there is a maturity date in the note, I would dispute and for the reasons that I set forth in my brief. The parties knew how to see how this agreement is terminated. In paragraph 9 and 19 of the note, there is a specific way to terminate the agreement, and contrary to what

Mr. Feingenbaum has represented, that just doesn't apply to prematurity termination. Paragraph 19 -- paragraph 9 does say that, that you can terminate by paying in full, but paragraph 19 has no limitation of terminating pre -- before the five-year period expires. It just says, I may terminate this agreement at any time by paying you in full all outstanding balances and other charges I owe under this agreement and by sending you the written notice of such intention. And, as we've set forth in Mr. Sack's affidavit, no notice of termination was ever sent.

Now, as to the -- as to the legal argument, let me address first the argument that any modification or amendment had to be authenticated, and I would also preliminarily like to note that Sacks first argument here is that course of performance under this agreement amplifies rather than modifies the security agreement. It essentially shows that from day one the parties exceeded the credit limit within -- as Mr. Sack set forth two weeks after they entered into the agreement, and really were

operating under these documents as if this were a revolving credit facility --

THE COURT: Mr. Goldman, would you -- I want to access the note for a moment. I've got a copy of the security agreement, and I just want to interrupt you because I want to give full attention to your argument. And I just wanted to take a quick look at the note so bear with me for a second.

(Pause.)

THE COURT: I'm looking at 2183, which is HMZ Adversary, the lead case, and I'm looking at 22, which is the motion, and there are various exhibits. Three is the commericial security agreement. What exhibit is the note, if you know?

MR. GOLDMAN: It's A. Yeah, it's A.

MR. FEINGENBAUM: Your Honor, perhaps, I can cut through that. If you look at Document Number 31.

THE COURT: All right. Wait a minute.

MR. FEINGENBAUM: Which is my

memo.

THE COURT: Okay.

MR. FEINGENBAUM: It's Exhibit A to that.

THE COURT: All right. Thank you, Mr. Goldman.

MR. GOLDMAN: Okay.

THE COURT: And Mr. Feingenbaum, for the reference.

MR. GOLDMAN: So if I can turn now to the legal argument, as I was doing, and the argument that any modification or amendment had to be authenticated. Again, as I was saying, our -- our first argument here is that course of performance really just lends interpretative assistance as to the meaning of the security agreement rather than modifying it. Although, we are saying that in the event, if necessary, it also modifies the security agreement, but it does essentially reflect that they -- the parties went beyond the credit limit in paragraph three immediately after the agreement was entered into, functioned as if it was a revolving facility up until April of 2010.

And the intent of the parties is -- is basically corroborated by the affidavit that we submitted by Mr. Ide, where in January of 2010, when Kasden was seeking to get new financing, there was a discussion, with Mr. Sack present, about how that was going to be done, because it was going to be primarily for -- to pay down the Sack line, and there was a discussion at that time that Mr. Sack had a lien on the assets.

The Deitchs remained silent. I would submit that that is an adoptive admission. Based on the evidentiary portion of my brief, the Court should consider that, at least in determining what the parties intent was concerning the agreement for purposes of the instant motion for summary judgment, and I think it has to be, at least for purposes of this motion, accepted as true. And the course of performance that we say amplifies or modifies the documents is, I would submit, consistent with -- there is a way at least to construe it as being consistent with the terms -- the actual terms of the agreement and note because, as I've

stated, the credit limit in paragraph three of the note can be construed as being subject to approval of a higher amount under paragraph five, that there's no term of expiration under the term of the note and only provisions dealing with termination, which weren't exercised, and you also have the -- whether or not contemplated language here would at least create an issue of fact as to whether -- what was done was contemplated or not contemplated.

In any event, the argument that the course of performance of the parties can't be considered here where each act of -- unless each act of performance is authenticated simply can't be accepted. That essentially asks the Court to engraft an exception to the UCC section of course of performance, and the definition of agreement, which is set forth in Section 1-201(b)(3). And it specifically provides that an agreement -- part of an agreement is -- can be defined as the parties' course of performance under that agreement.

What Mr. Feingenbaum is

arguing -- arguing is that section should contain an exception for -- unless the agreement is a security agreement and the party is -- and the issue is whether or not the security agreement covers future advances. That exception does not exist in that Article 1 section. And in addition, in Article 1 of the UCC, as adopted in Connecticut, specifically Section 1-102, it specifically states that all sections in Article 1 are applicable to every other article of the Uniform Commericial Code.

So in addition, even taking the statute that Mr. Feingenbaum relies on, 9-204(c), for the creation of future advances, it still refers to a security agreement may provide. Well, in defining security agreement that just takes you back to course of performance through the definition of agreement in Article 1 and through the definition of course of performance also in Article 1 applicable to all other articles of the Uniform Commercial Code. So I don't think that the provision that's cited here, 9-204(c), in any way cuts

off the argument that we've been making here. It just refers you back to course of performance.

Now, the -- the -- the argument -- I'd next like to address the argument that the note can't be amended without a writing or -- a part performance. First of all, I don't think it's even necessary to consult the note to reach the conclusion, at least for the purposes of denying the motion for summary judgment, that Sack's current claim is secured, because we have the language in the security agreement that covers liabilities whether or not contemplated by the parties, so you really don't even have to consult the note.

But if you are going to consult the note, there are two problems I view with their argument. First is that purposes of determining the scope of the security agreement before the Court, you can't really separate out the note and argue that the parties' postagreement course of performance can't be considered because it wasn't in writing.

The note, as I've pointed out, is essentially incorporated into the security agreement by having been attached as Schedule A. So you can't get away from the point that course of performance has to be considered by arguing the statute of frauds. That is simply a disguised argument that the course of performance has to be authenticated in order to be legally effective and should not be accepted.

As I've mentioned, Sack's argument doesn't depend on there being an amendment to the note. The note by its terms can be construed as continuing since there was never any termination of the note, and paragraph eight can be interpreted reasonably to simply provide that whatever outstanding balances there were on the five-year anniversary of the note had to be paid as of that date.

Now, the argument on part performance, even if the Court accepts the fact, the argument that the note would have to be consulted, they cite the -- the Glazer case for this idea that part performance has

to be of such a character that they can be naturally and reasonably accounted for in no other way than by the existence of some contract in relation to the subject matter in dispute.

Now, in that case, the court found there was not part performance because the conduct in question -- first of all, they were trying to create a contract. They didn't have an contract, actual contract between the parties. They were trying to create one by part performance. And the court found that several sending out of prebillings, so-called "deferred billing category -- statements" that were relied on in that case as the part performance, the sending out of those statements prior to the time that they say the contract was created prevented that conduct from being part performance. And also, in that case, the plaintiff was trying to establish part performance with the testimony of its own witness that, yes, they intended this to be part performance.

We don't have any of that

here. We have an existing agreement that was in effect between these parties, and we have a -- virtually identical course of performance post-December 2005 as existed before that period of time.

And we also have not only the testimony of Sack, but we have in evidence the intent of the Debtor that Sack remain secured for those post-December 2005 advances by the adoptive admissions that I have cited in the papers. I would also submit that it is illogical to conclude that after December 2005, at a time when Kasden owed my client 4 to 5 million dollars, that Sack intended to continue to support this company under the terms of these agreements, as it had done from December 2005, without remaining secured.

And so the performance that continued after 2005, December 2005, if to the extent the Court considers it necessary to do so, should be considered part performance, because it's illogical to conclude that as Sack continued to support this company and got -- and they got into

Sack even further that that would not have been referable to the agreements that were in -- that are in effect as of December 2005.

And that's all I have, your Honor.

THE COURT: Mr. Feingenbaum.

MR. FEINGENBAUM: Your Honor, just a brief rebuttal. It's exactly these tortured analyses and illogical or not illogical kind of discussions is what the statutes of frauds and what Uniform Commericial Code is designed to protect against. You're supposed to have precision. You're supposed to have certainty in the law of commericial transactions. It's what the Berman talks about. It's what treatises talk about and all the cases talk about. And we start with the security agreement. We went through the language. Mr. Goldman would like to see the "not existing" read out of it, but you can't do that. That's what it says. That's the best evidence.

THE COURT: You mean -- you said not existing, you mean --

MR. FEINGENBAUM: Now

existing --

THE COURT: -- now existing.

MR. FEINGENBAUM: -- cannot be read out of that agreement. It says what it says with regard to that. There's no indication anywhere in that agreement that it covers future advances whatsoever. With respect that "or not contemplated by the parties," well, that could be other obligations that are owed at that time. For example, what if that -- that the parties weren't thinking about -- for example, what if there was a Sack truck -- excuse me -- a Kasden truck that caused damage to a Sack terminal. Well, and maybe the parties didn't know about it. That could be -- that would be covered by that because that would be an obligation then existing that the parties haven't contemplated.

It doesn't say contemplated in the future or future advances or anything like that. Nowhere it says that. It just says now existing, period, end of story. You have to read everything in accordance with the definition of liabilities, which is

limited by now existing, and anything that is secured here is only the liabilities.

Your Honor, with respect to that future advances language, it doesn't have to be in writing. Well, that would be contrary to every case and every treatise that's ever discussed this issue, and I would just leave it at that. With respect to the note and these different readings of the note, I just want to point out a couple of things. I just want to get it in front of me.

THE COURT: Well, you've stipulated that the language of the note is what it is, so to speak.

MR. FEINGENBAUM: The written words are what they are and --

THE COURT: Stipulate the obvious. So you're talking about his interpretation of the language --

MR. FEINGENBAUM: Exactly, your Honor.

THE COURT: -- not the language. Okay.

MR. FEINGENBAUM: Because for

example, if you look at paragraph 19, paragraph 19, which he points to several times about the right to terminate, it says, paying you full for all outstanding advance balances, capital "A," advanced balances. Okay. What is that? Well, an advance balance is defined -- and advance is defined in paragraph two, and it says, "made during the period that this agreement is in effect." The agreement is in effect until it's due. The obligations were due on December 14, 2005. There was no writing or no other indication otherwise.

The purchase of oil after that date could have been on open account. If the parties wanted to put that in the terms of a note or a new security agreement, they could have done that. They could have modified these documents. They didn't. And that would -- what would be required in this situation.

So therefore, based on what is truly a fair reading of -- of these documents with respect to giving credence to all of its words and to all of the defined terms, as

well as the statutes and cases involved, that summary judgment in favor of the Plaintiff, your Honor, is appropriate. Thank you.

THE COURT: All right.

MR. KLEIN: Your Honor, I have nothing further. I would just join that summary judgment should be granted.

THE COURT: Mr. Goldman, last and final word.

MR. GOLDMAN: Yes, I just wanted to add, your Honor. I did not say that future advance -- future advance clauses didn't have to be in writing. What I said was the exact words "future advances" didn't have to be used not that they -- clauses don't have to be in writing, and I believe this one was.

THE COURT: All right. Thank you. I'll take the matter under advisement. So you will all be pleased I was advised, about an hour ago that the temperature problem has been resolved.

MR. FEINGENBAUM: Good to know.

MR. KLEIN: Thank you, your

Honor.

MR. FEINGENBAUM: Thank you, Judge.

THE CLERK: All rise. The court is adjourned.

(Whereupon, the above proceedings were adjourned at 1:04 p.m.)

CERTIFICATE

I hereby certify that the foregoing 41 pages are a complete and accurate transcription of a digital sound recording taken of the Excerpt on the Hearing on DOC#43 - SCHEDULING ORDER ON 4/11/2011 (RE:[30] MOTION FOR SUMMARY JUDGMENT FILED BY PLAINTIFF HMZ ENERGY LLC), which was held in Adversary Proceeding Number 10-02183, HMZ ENERGY LLC, Plaintiff, versus, SACK DISTRIBUTORS CORP., ET AL., Defendants, held in Lead Case Number 10-21973, THE KASDEN FUEL COMPANY, Debtor, which was before The Hon. ALBERT S. DABROWSKI, U.S. Bankruptcy Judge, at the Federal Building, 450 Main Street, Hartford, Connecticut, on May 11, 2011.

I further certify that the digital sound recording was transcribed by the word processing department employees of United Reporters, Inc., under my direction.

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