

Forward contract  
11 U.S.C. § 546(e)  
11 U.S.C. § 101(25) (A)  
Maturity date

McKittrick v. Gavilon LLC, Adversary No. 11-3038  
Cascade Grain Products, LLC, Case No. 09-30508-elp7

10/28/11

ELP

Unpublished

In this preference action, the court granted summary judgment to defendants, because the contracts for which payments were made within 90 days before bankruptcy were settlement payments to forward contract merchants on forward contracts. Section 546(e) provides a safe harbor for such payments.

In a Memorandum Opinion, the court addressed the trustee's argument that the four contracts at issue were not "forward contracts," because they provided for a window of time for shipment of grain, with the first date in the window being the same date as the date of the contract. A forward contract is defined in part as a contract "with a maturity date more than two days after the date the contract was entered into." § 101(25) (A). The question was what is meant by "maturity date" in that definition. The court concluded that, where the contracts provided that title and risk of loss passed to the debtor buyer upon delivery, the delivery date was the "maturity date" as used in the statute. Because none of the deliveries for which the payments were made occurred within two days of the contract date, all of the contracts at issue were forward contracts and the trustee could not recover the payments made to settle those contracts.

Below is an Opinion of the Court.

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ELIZABETH PERRIS  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

|                                      |   |                       |
|--------------------------------------|---|-----------------------|
| In Re:                               | ) |                       |
| CASCADE GRAIN PRODUCTS, LLC,         | ) | Bankruptcy Case No.   |
|                                      | ) | 09-30508-elp7         |
| Debtor.                              | ) |                       |
| <hr/>                                |   |                       |
| PETER C. MCKITTRICK, Trustee,        | ) | Adversary No. 11-3038 |
|                                      | ) |                       |
| Plaintiff,                           | ) |                       |
|                                      | ) | MEMORANDUM OPINION    |
| v.                                   | ) |                       |
|                                      | ) |                       |
| GAVILON, LLC, f/k/a ConAgra Trade    | ) |                       |
| Group, Inc.; and GAVILON GRAIN, LLC, | ) |                       |
| d/b/a Peavey Grain,                  | ) |                       |
|                                      | ) |                       |
| Defendants.                          | ) |                       |

Plaintiff, the trustee in this Chapter 7<sup>1</sup> bankruptcy case, filed this complaint to recover as preferential transfers \$19,885,728.12 that

<sup>1</sup> All chapter and section references in this Memorandum Opinion are to the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

1 debtor Cascade Grain Products, LLC ("debtor"), paid to defendants<sup>2</sup> within  
2 90 days before bankruptcy. Defendants move for summary judgment, arguing  
3 that all transfers were settlement payments on account of forward  
4 contracts and therefore not subject to recovery as preferences under  
5 § 546(e).<sup>3</sup>

#### 6 FACTS

7 Before it filed bankruptcy, debtor, an ethanol producer, entered  
8 into a number of contracts with defendants for the shipment of corn to be  
9 used in the production of ethanol. Pursuant to those contracts,  
10 defendants shipped corn to debtor and issued invoices, which debtor paid.  
11 Overpayments and underpayments were netted out. Within the 90 days  
12 before bankruptcy, debtor made payments to defendants totaling  
13 \$19,885,728.12.

14 The contracts called for shipment within a window of time. In  
15 four of the contracts, the shipment window commenced on the same date as  
16 the date of the contract. Each of those four contracts included a  
17 delivery term of "Del PNW," which the parties agree means that the  
18 contracts are "delivered contracts" as that term is used in the National

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19 <sup>2</sup> Defendants argue that debtor's contracts at issue in this  
20 proceeding were with defendant Gavilon Grain, LLC, not Gavilon, LLC.  
21 Because I conclude that defendants are entitled to summary judgment on  
22 their forward contract theory, I need not address the issue of whether  
23 Gavilon, LLC is properly a defendant in this proceeding. My reference in  
this Memorandum Opinion to defendants in the plural is not intended to  
indicate any conclusion with regard to Gavilon, LLC.

24 <sup>3</sup> Defendants also argue that one of the transfers at issue was  
25 actually a prepayment and that defendants gave new value after the  
26 payments were made. I understand that the prepayment issue has been  
resolved. Because I agree with defendants about their forward contract  
defense, I need not address the new value defense.

1 Feed and Grain Association's Rule 6.

2 The trustee seeks to recover the payments made within 90 days before  
3 bankruptcy as preferences pursuant to § 547(b).

4 Defendants do not dispute that the payments fit the requirements for  
5 a preferential transfer under § 547(b).<sup>4</sup> They argue, however, that they  
6 are entitled to summary judgment because they have a complete defense to  
7 recovery of the transfers under § 546(e).

8 DISCUSSION

9 The court shall grant summary judgment if there are no genuine  
10 disputes about material facts and the moving party is entitled to  
11 judgment as a matter of law. Fed. R. Bankr. P. 7056; Fed. R. Civ. P.  
12 56(a). There are no disputes about material facts, therefore the  
13 question here is whether defendants are entitled to judgment as a matter  
14 of law.

15 Section 546(e) provides, as relevant, that the trustee may not avoid  
16 a transfer if it is a settlement payment made to a forward contract  
17 merchant in connection with a forward contract. The trustee does not  
18 dispute that the payments were settlement payments, that defendants are  
19 forward contract merchants, or that a number of the contracts were  
20 forward contracts. He does, however, dispute that four of the contracts  
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24 <sup>4</sup> Section 547(b) allows a trustee to avoid as a preference any  
25 transfer of an interest of the debtor in property within 90 days before  
26 bankruptcy if it was to or for the benefit of a creditor on account of an  
antecedent debt, made while the debtor was insolvent, and that enabled  
the creditor to receive more than it would have received in a chapter 7  
case had the transfer not been made.

1 were forward contracts that are protected by § 546(e).<sup>5</sup>

2 The Bankruptcy Code defines a "forward contract" as

3 a contract . . . for the purchase, sale, or transfer of a commodity,  
4 . . . with a maturity date more than two days after the date the  
contract is entered into[.]

5 § 101(25)(A) (emphasis supplied). The trustee argues that the contracts  
6 at issue had a maturity date that is less than two days after the  
7 contract was entered into, and so are not forward contracts protected by  
8 § 546(e). He calculates the total payments made on those contracts to  
9 equal \$10,543,628.72.

10 The trustee's argument is based on the fact that each of the  
11 contracts at issue provides for shipment of corn within a window of time  
12 commencing on the same date as the date of the contract. For example,  
13 Contract No. 57234 is dated October 24, 2008, and calls for shipment of  
14 corn between October 24, 2008 and October 31, 2008. Because the shipment  
15 window commenced on the same date as the contracts, the trustee argues

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<sup>5</sup> Although the trustee said in his brief that there are five  
18 contracts, he identifies only four: 57234 (McKittrick Declaration, Exh.  
19 1), 57285 (McKittrick Declaration, Exh. 4), 57302 (McKittrick  
20 Declaration, Exh. 5), and 57355 (McKittrick Declaration, Exh. 8). In  
21 footnote 6 of the trustee's brief, he says that defendants have not  
identified to which contract the January 23, 2009, payment of \$101,486.07  
refers, and so it may refer to a non-forward contract.

22 At the hearing on this motion, the parties advised the court that  
23 they believe the \$101,486 payment was either a repayment for ethanol or a  
24 repayment for an earlier refund. In any event, defendants clarified that  
this payment is not included in their summary judgment motion.

25 Because the trustee does not dispute that the contracts other than  
26 the four in dispute are forward contracts, the payments made on account  
of those contracts are not recoverable as preferences, and defendants are  
entitled to summary judgment as to those payments.

1 that the contracts matured less than two days after the contracts were  
2 entered into and therefore are not forward contracts. In other words, he  
3 views "maturity" as the date on which defendants' performance could  
4 commence.

5 Defendants argue that the date of maturity is not the first date in  
6 the window for shipment, but instead is the last date on which  
7 performance can occur under the contract.<sup>6</sup> The question is not, they  
8 argue, whether the contract could be performed within two days of the  
9 contract date, but instead whether performance is due within two days of  
10 the contract date.

11 The dispute distills to what is meant by "maturity date" in  
12 § 101(25)(A). Although the Bankruptcy Code defines "forward contract,"  
13 it does so in part by using the term "maturity date," which it does not  
14 define.

15 In determining the meaning of "maturity date" as used in the  
16 definition of "forward contract" in § 101(25)(A), the court will look at  
17 the ordinary meaning of the term. See Ransom v. FIA Card Servs., N.A.,  
18 131 S.Ct. 716, 724 (2011). In the context of commercial law, the date of  
19 maturity is "[t]he date when a debt falls due, such as a debt on a  
20 promissory note or bond." Black's Law Dictionary 452 (9th ed. 2009). An  
21 obligation is "due" when it is "[i]mmediately enforceable" or "[o]wing  
22 and payable." Id. at 574.

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24 <sup>6</sup> Defendants argue that it is the last date on which delivery can  
25 be made under the contracts. However, the contracts do not actually  
26 provide any delivery dates. They provide for dates of shipment. I  
understand their argument to be that the contracts do not mature until  
the last date for performance.

1 Courts that have looked at the question of "maturity date" for  
2 purposes of § 546(e) and § 101(25)(A) have come to different conclusions  
3 about the meaning of the term. In In re Mirant Corp., 310 B.R. 548, 565  
4 n.26 (Bankr. N.D. Tex. 2004), for example, the court said that "[t]he  
5 term 'maturity' suggests a single date." It concluded, however, "that  
6 'maturity' means the due date for commencement of performance[,] "  
7 rejecting the Black's Law Dictionary definition because it defines the  
8 term "solely in terms of a promissory note." Id. Looking to the  
9 legislative history of § 101(25), the court noted that Congress  
10 contemplated a series of transactions, thereby supporting its conclusion  
11 that there could be numerous maturity dates, or due dates for  
12 commencement of performance, for a single contract.

13 The most recent case to have addressed the issue is In re Renew  
14 Energy LLC, 2011 WL 3793157 (Bankr. W.D. Wis. Aug. 24, 2011), which was a  
15 preference action to recover payments made by an ethanol plant to a  
16 natural gas company. The payments related to three contracts, each of  
17 which, as in this case, provided a window of time for performance. The  
18 court noted that no court had, as yet, explicitly defined "maturity  
19 date." Id. at \*4. It rejected reliance on cases, such as Lightfoot v.  
20 MXenergy, Inc., 2011 WL 1899764, \*4 (E.D. La. May 19, 2011), that say  
21 that the date of the first delivery is the maturity date, because in  
22 Lightfoot there was no dispute that the first date of delivery was  
23 outside the two-day period. "In the absence of any helpful definition in  
24 the Bankruptcy Code or the Uniform Commercial Code," the court said, the  
25 common sense or usage

26 definition of "maturity date" is the date that all other obligations

1 under the contract have been performed, and nothing else need be  
2 done except tender payment. Common usage in the context of forward  
3 contracts suggests that it refers to the date on which delivery has  
4 occurred and payment to "settle" is due. The word "mature," used in  
§ 101(25A), suggests a single date and meant [sic] the "due date for  
commencement of performance," but Congress did not intend to  
restrict the number of times a forward contract can mature.

5 Renew Energy, at \*4.

6 In Renew Energy, the court looked at the actual delivery dates, and  
7 concluded that the contract under which delivery was actually made within  
8 two days of contracting was not a forward contract within the safe harbor  
9 of § 546(e).

10 In support of his argument that "maturity date" means the date on  
11 which performance could commence, the trustee relies on cases that say  
12 that a forward contract must require delivery more than two days after  
13 the date of the contract. See, e.g., In re Nat'l Gas Distribs., LLC, 556  
14 F.3d 247 (4th Cir. 2009); In re MBS Mgmt. Servs., Inc., 432 B.R. 570  
15 (Bankr. E.D. La. 2010), aff'd, 2011 WL 1899764 (E.D. La. May 19, 2011);  
16 In re Borden Chemicals and Plastics Operating Ltd. P'ship, 336 B.R. 214  
17 (Bankr. D. Del. 2006); Mirant Corp., 310 B.R. 548. Those authorities are  
18 not helpful, because in those cases there was no dispute that the initial  
19 delivery was due more than two days after the contract was entered into.

20 Therefore, I am not convinced by the trustee's authorities that  
21 "maturity date" means the earliest date on which performance may occur,  
22 in other words, that the seller could (but was not required to) perform  
23 within two days of the contract. Because the ordinary meaning of the  
24 term does not help in determining whether the contracts at issue here are  
25 forward contracts, I turn to the purpose behind the safe harbor  
26 provision, which is to protect the financial markets "from the

1 destabilizing effects of bankruptcy proceedings for parties to specified  
2 commodities and financial contracts[.]” Nat’l Gas Distributions, 556 F.3d at  
3 252. Relying on the legislative history, the court in Nat’l Gas  
4 Distributions recognized that Congress was concerned that, “[b]ecause  
5 financial markets can change significantly in a matter of days, or even  
6 hours, a non-bankrupt party to ongoing securities and other financial  
7 transactions could face heavy losses unless the transactions are resolved  
8 promptly and with finality.” Id. at 253 (quoting H.R. Rep. No. 101-484,  
9 at 2 (1990)).

10 The primary purpose of a forward contract is to hedge against  
11 possible fluctuations in the price of a commodity. This purpose is  
12 financial and risk-shifting in nature, as opposed to the primary  
purpose of an ordinary commodity contract, which is to arrange for  
the purchase and sale of the commodity.

13 H.R. Rep. No. 101-484, at 3 (1990).

14 Given that Congress sought to protect payments under the type of  
15 price-hedging contracts that are known in the financial markets as  
16 forward contracts, the interpretation of “maturity date” as used in the  
17 definition of forward contracts in the Bankruptcy Code should conform  
18 with the usage of the term in the financial markets.

19 The common meaning of “forward contract” is “‘a privately negotiated  
20 investment contract in which a buyer commits to purchase something (as a  
21 quantity of a commodity, security, or currency) at a predetermined price  
22 on a set future date.’” Nat’l Gas Distributions, 556 F.3d at 260 (quoting  
23 Merriam-Webster’s Dictionary of Law (contract)).

24 [A] forward commodity contract, in being “forward,” must require a  
25 payment for the commodity at a price fixed at the time of  
26 contracting for delivery more than two days after the date the  
contract is entered into. A maturity date in the future means that  
the benefit or detriment from the contract depends on future

1 fluctuations in the market price of the commodity.

2 Id. (citations omitted).

3 The term "maturity date" is variously described in the financial  
4 markets as "[t]he future date at which the commodity must be bought or  
5 sold[,] "[www.oneview.mercer.ie/pages/1390620](http://www.oneview.mercer.ie/pages/1390620) (last visited on Oct. 27,  
6 2011); or the "[p]eriod within which a futures contract can be settled by  
7 delivery of the actual commodity," [www.cftc.gov/ConsumerProtection/  
8 EducationCenter/CFTCGlossary/glossary\\_f.html](http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/glossary_f.html) (last visited on Oct. 26,  
9 2011).<sup>7</sup> One of the defining characteristics of forward contracts in the  
10 financial markets is that they are hedges against fluctuations in the  
11 price of commodities, in that they are contracts for a set price for  
12 delivery sometime in the future. See Commodity Futures Trading Comm'n v.  
13 Erskine, 512 F.3d 309, 324-25 (6th Cir. 2008) (compiling definitions of  
14 "forward contract" from industry sources).

15 In light of the hedging component of forward contracts, I conclude  
16 that "maturity date," as used in the definition of "forward contract" in  
17 § 101(25), means the future date at which the commodity must be bought or  
18 sold. That is the date on which the benefit or detriment will be  
19 realized, depending on the market price, which is the date when ownership  
20 and risk of loss passes to the buyer. That is the date on which the  
21 buyer's obligation to pay matures, locking in the benefit or detriment of

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23 <sup>7</sup> The difference between futures contracts and forward contracts  
24 is that futures contracts are standardized and traded on the exchange.  
25 Forward contracts are individualized, private contracts. The two types  
26 of contracts have the same function: to "allow people to buy or sell a  
specific type of asset at a specific time at a given price."  
[www.investopedia.com/ask/answers/06/forwardsandfutures.asp#axzz1c5wP4yJg](http://www.investopedia.com/ask/answers/06/forwardsandfutures.asp#axzz1c5wP4yJg)  
(last visited on Oct. 28, 2011).

1 the contract.

2 The contracts in this case did not call for delivery on any  
3 particular date; they called for shipments within particular windows of  
4 time. The contracts at issue used the delivery term "Del PNW," which the  
5 parties agree means that they were "delivered contracts" as that term is  
6 used in the National Feed and Grain Association's Rule 6. Rule 6  
7 provides that, for delivered contracts transported by rail, title and the  
8 risk of loss pass to the buyer "when the conveyance is constructively  
9 placed or otherwise made available at the Buyer's original destination."  
10 [www.ngfa.org/files/misc/2011\\_Grain\\_Trade\\_Rules\\_for\\_web.pdf](http://www.ngfa.org/files/misc/2011_Grain_Trade_Rules_for_web.pdf) (last visited  
11 Oct. 23, 2011).

12 Only one of the shipments for which the disputed payments were made  
13 was made within two days of the contract. None of the shipments was  
14 delivered within two days of the date of the contract. Ownership and  
15 risk of loss did not pass to debtor until delivery was made. Therefore,  
16 none of the contracts matured within two days of the contract.

17 I conclude that the four contracts at issue were forward contracts,  
18 because the dates on which debtor received the corn, giving rise to its  
19 obligation to pay, was more than two days after the dates of the  
20 contracts. Although shipments could have been made within two days after  
21 the contracts were entered into, no deliveries actually occurred within  
22 two days of the contract dates. These contracts are similar in every way  
23 to the other contracts between debtor and defendants, which the trustee  
24 concedes were forward contracts, except for the fact that the period  
25 during which shipment could occur commenced on the date of the contracts.  
26

1 CONCLUSION

2 The contracts did not mature until delivery was made, which was more  
3 than two days after the date of the contracts. Therefore, the contracts  
4 were forward contracts, and § 546(e) precludes the trustee from avoiding  
5 the payments made to settle those contracts. Defendants are entitled to  
6 summary judgment as to all of the payments included in the complaint  
7 except for the one payment of \$101,486.07, made on January 23, 2009,  
8 which defendants did not include in their motion for summary judgment.

9 Mr. Conway should prepare and submit the order.

10 ###

11 cc: Timothy J. Conway  
12 Trish A. Walsh

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