UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 03-53097
	)	
POLYMER MACHINERY COMPANY,	)	CHAPTER 11
	)	
DEBTOR-IN-POSSESSION	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	**MEMORANDUM OPINION RE: DEBTOR'S MOTION FOR AUTHORITY TO ASSUME EXECUTORY CONTRACT AND OBJECTION THERETO**

Appearances:

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This matter comes before the Court on the following pleadings: (1) debtor's "Motion for Authority for Approval of Assumption of Executory Contracts" [docket #24] (the "Motion to Assume"); (2) an objection to the Motion to Assume filed by Barwell International Limited ("Barwell") [docket #34]; (3) debtor's proposed findings of fact and conclusions of law [docket #47]; and (4) Barwell's proposed findings of fact and conclusions of law [docket #46]. A hearing on the Motion to Assume was held on September 16 and 17, 2003 at which time the Court heard testimony from Kendall Ashby, the president and a shareholder of debtor and Garry Cowdry, the managing director and chairman of Barwell. After the hearing on the matter the Court gave the parties additional time in which to file the above referenced

proposed findings of fact and conclusions of law. Those pleadings were timely filed and the matter was then taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). In reaching its determinations, and whether or not specifically referenced in this Memorandum Opinion, the Court considered the demeanor and credibility of each of the witnesses who testified. Based upon such testimony and the evidence presented at the hearing, the arguments of counsel, the pleadings in debtor's chapter 11 case and pursuant to FED. R. BANKR. P. 7052, the Court makes the following findings of fact and conclusions of law.

BACKGROUND

Polymer Machinery Company ("PMC") is an Ohio corporation based in Tallmadge, Ohio and its business is comprised of two components, the sale of rubber processing machinery and the processing of rubber products. PMC was formed in 2000 to acquire the assets of an existing machinery distributorship business from Barwell, Inc., a wholly owned subsidiary of Barwell.

Barwell is a United Kingdom limited company based in Cambridge, England. Barwell has been in the business of developing, manufacturing, marketing and supporting certain products, including ram performers, ram extruders, pressure builders and related equipment for use in the polymer rubber industry since the mid 1960's. There are approximately 5,000 Barwell machines in use around the world, 700 of which are in North America. Barwell sells

its products to distributors who resell them to end-users in their respective territories.

Prior to 2000, the exclusive distributor for Barwell products in North America was Barwell, Inc. Kendall Ashby was the vice president of sales for Barwell, Inc. from 1992 to 1996. In 1996, Mr. Ashby became president of Barwell, Inc and remained as president until Barwell, Inc. sold its assets to PMC in 2000.

In April 2000, PMC and Barwell entered into an Exclusive Distribution Agreement (the "Distribution Agreement") in which PMC is defined as the "Distributor" and Barwell is defined as the "Supplier." Mr. Ashby negotiated and signed the Distribution Agreement on behalf of PMC and Mr. Cowdrey negotiated and signed the Distribution Agreement on behalf of Barwell. Through the Distribution Agreement, Barwell granted to PMC a nontransferable, exclusive right and license to distribute certain Barwell products to customers and end-users in the United States, Puerto Rico, Canada and Mexico for an initial term of ten years. Also through the Distribution Agreement, Barwell agreed not to sell certain of its products within PMC's exclusive territory during the Distribution Agreement's term.

The Distribution Agreement includes, *inter alia*, the following terms:

1. Definitions

> **"Quota"** The specified minimum amount of the Products and parts and services purchased by Distributor from Supplier on an annual basis, as set forth on Exhibit C (attached to the end of this Agreement). The Quota shall be measured by the value of the Products sold, (excluding all other costs associated with the sale of the Products e.g. freight and packaging) with such value being based on the net price that Supplier is paid by or on behalf of Distributor for the Product. The Quota shall be adjusted annually on the anniversary date of this Agreement by the CPI Adjustment, defined below, which is specified in writing. . . .

Exhibit C

Product Quota

$1,000,000.00 per annum as adjusted by the CPI Adjustment Total sales as made up of all Products, parts, and service rendered to the Distributor by the Supplier.

5. Distributor's Responsibilities

5.1 Sales. Distributor shall, in its discretion, maintain an inventory of Products and warehousing facilities sufficient to adequately serve the demands of its customers on a timely basis.

5.1.2 On an annual basis, Distributor shall purchase a minimum amount of the Products as determined and specified by the Quota. If, Distributor fails to meet the Quota for a period of two (2) consecutive years, Supplier may terminate this Agreement on sixty (60) days written notice. Provided, however, if Distributor fails to meet the Quota due to the fault of Supplier, then such failure shall not be counted against Distributor with regards to Section 5.1.2.

5.2 Promotional Efforts. Distributor shall use commercially reasonable efforts to promote the marketing and distribution of the Products within the Territory. . . .

* * *

5.7 Trained Personnel. Distributor shall train a sufficient number of its sales personnel in connection with the demonstration, use and sale of the Products in order to maintain a staff of competent sales personnel conversant in the specifications, features and advantages of those products.

13. Termination

13.1 Termination Events. Either party shall be entitled to terminate (without prejudice to any other right or remedy it may have) this Agreement by written notice to the other if:

* * *

(f) A material breach by the other party of any of the terms of this Agreement or the terms of that certain Purchase Agreement entered into by Barwell, Inc. and All-Tra, Inc. and Distributor in connection herewith, which breach is not remedied by the breaching party within thirty (30) days of the breaching party's receipt of written notice of such breach, provided that if the breach cannot be remedied within thirty (30) days, there shall be no default so long as the breaching party is diligently pursuing cure (not to exceed ninety (90) days). . . .

13.2 Notice of Termination. To terminate this Agreement pursuant to the terms of this Section 13, the terminating party shall notify the other party of such termination, in writing. Such termination shall be effective sixty (60) days following the receipt of such notice.

15. General Provisions

* * *

15.2 Waiver; Amendment; Modification. No waiver, amendment or modification, including those by custom, usage of trade or course of dealing, of any provision of this Agreement will be effective unless in writing and signed by the party against whom such waiver, amendment or modification is sought to be enforced. No waiver by any party of any default in performance by the other party under this Agreement or of any breach or series of breaches by the other party of any of the terms of conditions of this Agreement shall constitute a waiver of any subsequent default in performance under the Agreement or any subsequent breach of any terms or conditions of that Agreement. Performance of any obligation required of a party under this Agreement may be waived only by a written waiver signed by a duly authorized representative of the other party, that waiver shall be effective only with respect to the specific obligation in that waiver.

* * *

15.5 Cumulative Rights. Unless expressly provided to the contrary, any specific right or remedy provided in this Agreement shall not be exclusive but shall be cumulative upon all other rights and remedies set forth in this section and allowed under applicable law.

15.6 Governing Law. This Agreement shall be governed by the laws of England.

See Barwell Obj., Exhibit A - Distr. Agr. at pgs. 2, 6-7, 16-17, 19-20, 24 [docket #34].

PMC filed a voluntary chapter 11 bankruptcy petition on June 13, 2003. As of the date of that bankruptcy filing Barwell had not given PMC a written notice regarding termination of the Distribution Agreement due to a default thereunder. Debtor continues to maintain possession of its property and to operate its business as a debtor-in-possession pursuant to §§1107 and 1108 of the Bankruptcy Code.

DISCUSSION

Through its Motion to Assume, debtor requests authority to assume the Distribution Agreement pursuant to §365(a) of the Bankruptcy Code which provides that a debtor-in-possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. §365(a).[1] Neither debtor nor Barwell have contended that the Distribution is not an executory contract.

If there has been a default in an executory contract which a debtor is seeking to assume, assumption may not occur unless, at the time of assumption the debtor does all of the following:

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

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[1] In the Motion to Assume (which is comprised of only 3 short paragraphs) debtor merely cites to the whole of §365 of the Bankruptcy Code and does not set forth which of the 15 subsections of that statutory provision might apply to its request nor does debtor set forth any other legal authority. Debtor's Motion to Assume also fails to comply with Local Bankruptcy Rule 9013-1(a) which requires that a "motion or application tendered for filing *shall* be accompanied by a memorandum in support . . . ." *See* LOCAL R. BANKR. P. 9013(a) (emphasis added).

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. §365(b)(1). Barwell bears the initial burden of demonstrating that a default has occurred under the Distribution Agreement. *In re F.W. Restaurant Assoc., Inc.*, 190 B.R. 143, 147 (Bankr. D. Conn. 1995). If that burden is met, debtor then bears the burden of proof on the issues of prompt cure, just compensation and adequate assurance. *Id. See also In re Oklahoma Trash Control, Inc.*, 258 B.R. 461, 462 (Bankr. N.D. Okla. 2001) (party moving to assume executory contract bears ultimate burden of proving that the contract is subject to assumption and that all requirements for assumption have been met).

Default Under the Distribution Agreement: As a threshold issue it must be determined whether or not debtor is in default of the Distribution Agreement. As noted above, the Distribution Agreement is governed by the laws of England. Only Barwell presented the Court with any citations to applicable English law which defines "default" simply as a failure to perform under the terms of a contract. *See* Frederick Stroud's "The Judicial Dictionary of Words and Phrases Judicially Interpreted" (2nd ed.). *See also* Jowitt, "The Dictionary of English Law" (1959) (defining "breach" as a violation of an obligation and "breach of contract" as a failure to perform within the contract's terms).

One of PMC's responsibilities under the Distribution Agreement is to purchase a minimum amount of products from Barwell on a yearly basis as defined by the Quota. *See* Barwell Obj., Exhibit A - Distrib. Agr. at ¶5.1.2 [docket #34]. During the hearing on this

matter evidence was presented to demonstrate that, with annual adjustments for inflation, the Quota requirements under the Distribution Agreement are as follows:

April 1, 2000 to March 31, 2001	$1,000,000
April 1, 2001 to March 31, 2002	$1,021,000
April 1, 2002 to March 31, 2003	$1,035,000
April1, 2003 to March 31, 2004	$1,063,000

See Barwell Hrg. Exhibit. 2.

It is undisputed that PMC never fulfilled its Quota requirements. Once PMC failed to meet its Quota requirements for a period of two consecutive years, Barwell became entitled to terminate the agreement upon 60 days written notice. *See* Barwell Obj., Exhibit A - Distrib. Agr. at ¶5.1.2 [docket #34]. Thus, the uncontested failure by PMC to meet the Quota requirements[2] of the Distribution Agreement constitutes a default.[3]

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2 Debtor attempts to argue that "[t]he Quota section of the Distribution Agreement does not define a standard for evaluating breach. Rather, it is an objective standard for the assessment of Debtor's performance under the Distribution Agreement." *See* Debtor's Pr. FFCL at pg. 5 [docket #47]. Debtor provides no legal support for this contention nor does it explain why, if this provision merely provides a method of performance evaluation, the failure to meet the terms of the provision gives Barwell the right to terminate the contract.

3 Barwell also contends that PMC defaulted under the terms of the Distribution Agreement by a failure to maintain adequate inventory, by a failure to adequately promote Barwell's products and by a failure to employ an adequate amount of trained personnel. *See* Barwell's Pr. FFCL at pgs. 4-5 [docket #46]. Because the Court has determined that a default of the Distribution Agreement has occurred due to PMC's failure to meet its Quota requirements, it need not discuss whether or not default has occurred due to PMC's other alleged failures under the contract. Moreover, and perhaps most importantly, these alleged failures would only constitute a default under the Distribution Agreement if they amounted to a "material breach." *See* Barwell Obj., Exhibit A - Distr. Agr. at ¶13.1(f) [docket #34]. The only law cited by Barwell as to what constitutes a "material breach" under English law is a brief excerpt from a legal dictionary stating that whether something is material "depends partly on the facts of the case and party [sic] on the nature of the transaction." *See* Barwell Pr. FFCL at pg. 10 [docket #46]. This citation alone provides the Court with absolutely no guidance on how an evaluation should be undertaken to determine whether PMC's alleged failures under the Distribution Agreement constitute a "material breach." Because Barwell bears the burden of proof regarding default and because this Court will not conduct legal research in the first instance, these other arguments by Barwell will not be addressed any further.

Debtor's Prompt Cure, Just Compensation and Adequate Assurance: PMC's failure to meet its Quota requirements under the Distribution Agreement constitutes an historical default that appears to be incapable of cure. Courts that have addressed such a matter have come to differing conclusions as to whether or not the requirements of §365(b)(1)(A) of the Bankruptcy Code automatically precludes assumption of an executory contract due to debtor's inability to re-write history. *Compare In re Toyota of Yonkers, Inc.*, 135 B.R. 471 (Bankr. S.D.N.Y. 1992) (finding that debtor's failure to operate car dealership for seven consecutive days was default incapable of cure or remedy because it was grounds for termination of franchise agreement under applicable state law and debtor could not undo this historical fact) *with Matter of GP Express Airlines, Inc.*, 200 B.R. 222 (Bankr. D. Neb. 1996) (finding that §365(b)(2)(D) of the Bankruptcy Code excuses debtor from curing an historical default).[4] Given the facts of this case (as discussed more fully below), the Court need not decide whether or not an inability to cure an historical default automatically precludes debtor from assuming the Distribution Agreement.

Even if debtor were excused from curing the historical default regarding Quota requirements, it could not assume the Distribution Agreement unless it could compensate Barwell for any pecuniary loss it suffered as a result of the default and provide adequate assurance to Barwell that future Quota requirements would be met. 11 U.S.C. §365(b)(1)(B)

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[4] In its proposed findings of fact and conclusions of law Barwell cites only to the cases holding that a debtor cannot assume an executory contract when default of the contract is noncurable. *See* Barwell's Pr. FFCL at pgs. 12-13 [docket #46]. In its proposed findings of fact and conclusions of law debtor simply states that PMC's failure to comply with the Quota requirements does not constitute a breach. *See* Debtor's Pr. FFCL at pg. 8 [docket #47]. Other than cursory references to §365 of the Bankruptcy Code, debtor cites to absolutely no legal authority anywhere in its proposed findings of fact and conclusions of law.

and (C). Although he did not provide an specific figures, Mr. Cowdry testified during the hearing that Barwell suffered a monetary loss because of PMC's failure to meet its Quota requirements under the Distribution Agreement. Such loss was attributed to (1) decreased profits due to the gap between Barwell's actual sales to PMC (which was the only entity that could purchase and sell Barwell products North America) and the missed Quota and (2) the fact that Barwell could not increase the sales of its products in other parts of the world to make up for the shortage in purchases by PMC. Pursuant to the most recent Quota requirement in the Distribution Agreement, debtor must purchase at least $1,063,000 in products from Barwell between April 1, 2003 to March 31, 2004. Since the initiation of its chapter 11 case, debtor has filed four monthly operating reports, three of which show net operating and net income losses. *See* docket #19, docket #33 and docket #48. None of the filed operating reports show that debtor has made expenditures to purchase Barwell products.

During the hearing, Mr. Ashby testified that debtor was on track to meet the Quota requirement for April 1, 2003 to March 21, 2004. To support that testimony Mr. Ashby referenced an exhibit that showed "projected" purchases of $1,125,000 in Barwell products by debtor. *See* Debtor Hrg. Exhibit D. Mr. Ashby did not, however, explain how debtor arrived as such projection or how such projection would be reached in light of the fact that debtor has continued to lose money since its chapter 11 filing. Mr. Ashby also did not explain why debtor thought it could meet the Quota requirement for the most recent year when such requirements were never reached by PMC in prior years. Mr. Ashby also testified that debtor currently has no excess funds to compensate Barwell for lost profits due to PMC's failure to meet Quota requirements but indicated that debtor "hopes" to have some funds soon through a potential increase in sales.

Although debtor need not provide Barwell with an absolute guaranty that it will meet Quota requirements under the Distribution Agreement, it must, at a minimum, demonstrate that its future performance under that contract is more probable than not. *In re Texas Health Enterprises, Inc.*, 246 B.R. 832, 835 (Bankr. E.D. Tex. 2000). Moreover, debtor must be able to actually compensate Barwell for the pecuniary loss it suffered due to the default. Based upon the testimony and evidence presented by debtor during the hearing on this matter, coupled with the fact that debtor has continued to lose money since the filing of this chapter 11 case, the Court finds that debtor has not demonstrated that it can compensate Barwell for its monetary loss due to the default or that it can provide adequate assurance to Barwell that it will meet future Quota requirements under the Distribution Agreement.

Termination of the Distribution Agreement: As noted above, Barwell had not provided PMC with a written notice of termination prior to PMC's bankruptcy filing. Once the bankruptcy case was initiated, Barwell was prohibited from serving such notice by operation of the automatic stay. *See 48th Street Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th Street Steakhouse, Inc.)*, 835 F.2d 427 (2nd Cir. 1987). In lieu of seeking relief from the automatic stay, Barwell requested in its objection to the Motion to Assume that service of the objection also be considered service of its 60 day termination notice. Debtor has raised no argument against nor set forth any legal authority as to why Barwell's objection should not be treated in such a manner.[5]

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[5] Through its proposed findings of fact and conclusions of law debtor attempts to argue that, because no notice of termination was provided to PMC prior to the bankruptcy filing, a default could not have occurred under the Distribution Agreement.

> The notice and right to cure are contracted for [sic] the parties and must be enforced. The service of a notice of material breach is a condition precedent under

CONCLUSION

Based upon the foregoing the Court finds that Barwell has met its burden of demonstrating that debtor is in default of the Quota requirement of the Distribution Agreement. The Court further finds that debtor has not met its burden of demonstrating that it can provide Barwell with just compensation due to the default or with adequate assurance that it would perform under the Quota requirement in the future. The Court further finds that Barwell's objection constitutes a written notice of termination under the Distribution Agreement. Debtor's Motion to Assume is hereby denied.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

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the language of the Distribution Agreement to the recognition of a material breach by the parties. In the absence of any notice of material breach, there can be no recognized default subject to the right of cure set forth in §13.1(f).

Debtor's Pr. FFCL at pg. 7 [docket #47]. Such an argument evinces a basic misunderstanding of or simply ignores the difference between a default under the Distribution Agreement and the rights of the parties that arise upon such default. Moreover, it completely ignores the non-waiver of default provision set forth in §15.2 of the Distribution Agreement and the cumulative rights provision set forth in §15.5. In any event, had Barwell served a termination notice prior to PMC's bankruptcy filing and has such termination notice taken effect, the Distribution Agreement would no longer be subject to assumption by debtor. *See Estep v. Fifth Third Bank of NW Ohio (In re Estep)*, 173 B.R. 126, 130 (Bankr. N.D. Ohio 1994) (noting that if an executory contract was terminated prior to the bankruptcy filing there remains nothing left for debtor to assume).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4TH day of NOVEMBER 2003, the foregoing **MEMORANDUM OPINION RE: DEBTOR'S MOTION FOR AUTHORITY TO ASSUME EXECUTORY CONTRACT AND OBJECTION THERETO** was sent via regular U.S. Mail to:

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