UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MATCO ELECTRONICS GROUP, INC. CASE NO. 02-60835
Chapter 11
Debtor Jointly Administered

IN RE:

U.S. ASSEMBLIES NEW ENGLAND, INC. CASE NO. 02-60836

Debtor

IN RE:

U.S. ASSEMBLIES IN FLORIDA, INC. CASE NO. 02-60837

Debtor

IN RE:

U.S. ASSEMBLIES RALEIGH, INC. CASE NO. 02-60838

Debtor

IN RE:

MATCO TECHNOLOGIES CASE NO. 02-60839

Debtor

IN RE:

U.S. ASSEMBLIES SAN DIEGO, INC. CASE NO. 02-60840

Debtor

IN RE:

CAROLINA ASSEMBLIES, INC. CASE NO. 02-60841

Debtor

IN RE:

U.S. ASSEMBLIES HALLSTEAD, INC. CASE NO. 02-60842

Debtor

IN RE:

U.S. ASSEMBLIES IN GEORGIA, INC. CASE NO. 02-60843

Debtor

IN RE:

U.S. ASSEMBLIES ENDICOTT, INC. CASE NO. 02-60844

Debtor

THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF
THE MATCO ELECTRONICS GROUPS,
INC., et al.

Plaintiff

vs. ADV. PRO. NO. 02-80095

THE MATCO ELECTRONICS GROUP, INC.
U.S. ASSEMBLIES NEW ENGLAND, INC.
U.S. ASSEMBLIES IN FLORIDA, INC.
U.S. ASSEMBLIES RALEIGH, INC.
MATCO TECHNOLOGIES
U.S. ASSEMBLIES SAN DIEGO, INC.
CAROLINA ASSEMBLIES, INC.
U.S. ASSEMBLIES HALLSTEAD, INC.
U.S. ASSEMBLIES IN GEORGIA, INC.
U.S. ASSEMBLIES ENDICOTT, INC.

T.L. ACQUISITIONS CORP.
BSB BANK & TRUST COMPANY
AMERICAN MANUFACTURING SERVICES, INC.

JAMES MATHEWS
LARRY HARGREAVES
LAWRENCE DAVIS

Defendants

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently under consideration is a motion seeking partial summary judgment, filed on September 11, 2002, by the Official Committee of Unsecured Creditors ("Committee")[1] of Matco Electronics Group, Inc. ("Matco"), U.S. Assemblies New England, Inc., U.S. Assemblies in Florida, Inc., U.S. Assemblies Raleigh, Inc., Matco Technologies, U.S. Assemblies San Diego, Inc., Carolina Assemblies, Inc., U.S. Assemblies Hallstead, Inc., U.S. Assemblies in Georgia, Inc., and U.S. Assemblies Endicott, Inc.(collectively the "Debtors") in an adversary proceeding commenced by the Committee on or about April 22, 2002. On October 21, 2002, the Committee amended its motion ("Amended Motion"). The Amended Motion seeks partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated by Rule 7056 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), in connection with the second, third and tenth causes of action in the adversary proceeding commenced by the Committee against the Debtors, BSB Bank & Trust Company

[1] The Committee is comprised of the following unsecured creditors: Arrow Electronics, Inc., Avnet, Inc., Future Electronics, Heilind Electronics, Inc., Jaco Electronics, Inc., Mentec, LLC, PartMiner, Inc., Pioneer Standard-Electronics, Inc., Tyco Electronics Corporation and Ben Khoushnood, in an *ex officio* capacity. *See* Appointment of Committee of Unsecured Creditors, executed by the United States Trustee on or about March 26, 2002, and filed with the Court on March 27, 2002.

("BSB"), American Manufacturing Services, Inc.("AMS"), James Matthews ("Matthews")[2], T.L. Acquisitions Corporation ("TLA"), Larry Hargreaves ("Hargreaves") and Lawrence Davis ("Davis").[3]

The second cause of action, as well as the third cause of action in the Committee's complaint seek to avoid certain transfers[4] made by the Debtors as fraudulent conveyances pursuant to Sections 273, 273-a 274, 275 and 276 of the New York Debtor and Creditor Law ("DCL"), as authorized by § 544(b) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") and Code § 548(a)(1)(B), respectively.[5] Specifically, the Committee is seeking to avoid the "recast," guaranties and security agreement in connection with "BSB Loan II" as alleged fraudulent conveyances. In addition, the Committee seeks to avoid BSB's lien against the Debtors' assets with respect to "BSB Loan II" as a preference pursuant to Code § 547.

On November 12, 2002, BSB filed its opposition to the Amended Motion and also filed a cross-motion ("Cross-motion"), seeking partial summary judgment with respect to the tenth cause of action. Opposition to the Amended Motion was filed by Matthews and Davis on November 13, 2002.

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[2] Matthews has been identified as the president and sole shareholder of Matco. He is also the president and sole shareholder of U.S. Assemblies in Georgia, Inc. Matco, in turn, is the sole shareholder of the remaining Debtors, for which Matthews also serves as president.

[3] The causes of action originally asserted in the Committee's complaint are: 1) fraudulent transfers pursuant to Code § 548(a)(1)(A); 2) fraudulent transfers pursuant to DCL; 3) constructively fraudulent transfers pursuant to Code § 548(a)(1)(B); 4) piercing the corporate veil; 5) appropriation of corporate opportunity; 6) breach of fiduciary duty; 7) violation of the Uniform Commercial Code; 8) equitable subordination; 9) marshaling of assets; 10) preferences and 11) turnover and accounting.

[4] The Committee identifies the "transfers" it seeks to avoid as "[t]he Sales, Pre-Auction Transfers, Receivables Transfers and BSB Loan II." *See* ¶ 73 of the Committee's complaint.

[5] The Committee's Amended Motion is limited to requesting summary judgment only with respect to BSB Loan II.

In turn, the Committee filed its opposition to BSB's Cross-motion on November 26, 2002.

Both the Committee's Amended Motion and BSB's Cross-motion for partial summary judgment were heard by the Court at its regular motion term on December 3, 2002, in Syracuse, New York. The parties were given the opportunity to file memoranda of law and the matter was submitted for decision on January 21, 2003.

In addition, approximately one month prior to the Committee filing its motion for summary judgment, AMS filed its answer to the Committee's complaint on August 16, 2002, and asserted three counterclaims ("Counterclaims") against the Committee. According to AMS's counsel, "we are alleging, namely, that the Committee decided to destroy AMS for improper purposes, and that the Committee was engaged in a game of economic blackmail against the AMS investors." *See* Letter of Albert J. Millus, Jr., Esq., dated November 22, 2002.

In its first counterclaim, AMS alleges that the Committee has breached the terms of a Stipulation entered into on or about March 4, 2002. AMS contends that the Committee "engaged in ongoing conduct which has completely thwarted AMS's attempts to obtain financing. *See* AMS's Answer at ¶ 117. AMS also alleges that "the Committee or one or more members of the Committee have been engaged in conduct outside of this bankruptcy proceeding designed to hinder and destroy AMS's business . . . ." *Id.* at ¶ 118. AMS's second counterclaim alleges that "the Committee and one or more of its members have engaged in unfair competition under New York State Law . . . ." *Id.* at ¶128. Finally, AMS alleges that the Committee, "through its representatives and some if its members" made false representations on which AMS relied in entering into a Stipulation restricting its sale of assets and requiring AMS to provide certain confidential financial information to the Committee. *Id.* at ¶¶ 134-

136. AMS alleges that the Committee and its members have acted in bad faith and in breach of their duty to all unsecured creditors warranting punitive damages. *Id*. at ¶ 138. It is AMS's position that the actions of the Committee were undertaken "(1) to benefit the Committee members by diverting AMS business to customers of the Committee members and (2) to blackmail the AMS investors into paying a substantial settlement to the unsecured creditors or risk losing their $4.5 million capital infusion." *See* Affidavit of Albert J. Millus, Jr., Esq., sworn to January 29, 2003, and filed January 30, 2003.

On September 5, 2002, the Committee filed its reply to the Counterclaims. On January 22, 2003, the Committee filed a motion to dismiss the Counterclaims pursuant to Fed.R.Civ.P. 12(b)(6), as incorporated by Fed.R.Bankr.P. 7012, and also requested sanctions against AMS pursuant to Fed.R.Civ.P. 11 ("Dismissal Motion"). Opposition to its Dismissal Motion was filed on behalf of AMS on January 30, 2003.

The Dismissal Motion filed by the Committee with respect to AMS's Counterclaims was heard on February 4, 2003, in Syracuse, New York, and submitted for decision on that day.

The Court has determined that all three motions should be consolidated for decision in the interests of judicial economy.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(O).

FACTS

Committee's Amended Motion and BSB's for Summary Judgment pursuant to Fed.R.Bankr.P. 7056

Pursuant to Rule 7056-1 of the Local Rules of Bankruptcy Practice for the U.S. Bankruptcy Court, Northern District of New York, the Committee has presented the Court with the following "Statement of Undisputed Facts":

1. On February 13, 2002 (the "Filing Date"), involuntary petitions for relief pursuant to Section 303 of the Bankruptcy Code were filed against the Debtors. An order for relief was entered in each of the above cases on March 15, 2002, effective as of March 11, 2002. At or about the same time, an order was entered directing the joint administration of the above cases.

2. On March 26, 2002, the Office of the United States Trustee directed the creation of the Committee pursuant to Code § 1102.

3. At all relevant times, James F. Matthews was the sole shareholder and chief executive officer of Matco.

4. Matco is the parent corporation and wholly owns all of the outstanding shares of the other Debtors, except U.S. Assemblies in Georgia, Inc., which is wholly owned by Matthews.

5. As of September 2001, there was a loan owing from Matthews to BSB in the outstanding principal amount of approximately $7.5 million ("the Matthews Loan"). The Matthews Loan was secured by the following property:

   1) a First Mortgage on Stage Road, Vestal, NY;

   2) a First Mortgage on Wayne St., Endicott, NY;

   3) a pledge of 217,186 shares of Hughes Supply Common Stock valued at $5.7

million. This stock was later sold by agreement between BSB and Matthews and converted into a Certificate of Deposit in the amount of $5.6 million which was then pledged as collateral and is still held as such by BSB;

4) a First Mortgage on 320 North Jensen Rd., Vestal, NY having an appraised value of $2 million;

5) a First Mortgage on Wholesale Electric Building at 3103 Old Vestal Road, Vestal, NY having an appraised value of $460,000;

6) a First Mortgage on Port City Electra Building at 2550 Charlotte Highway, Voorsville, NY appraised at $945,000;

7) an assignment of life insurance on James F. Matthews in the amount of $3 million with a cash value of $825,000 and

8) a pledge of 500,000 shares of Rainbow Display, Inc. Stock then valued at $1,500,000.

6. By note, guarantee and security agreement dated September 22, 2001, the Matthews Loan was recast so as to be a loan owed to BSB by Matthews and Matco as co-borrowers (the "Recast" of "BSB Loan II"). The Debtors and certain non-debtor affiliates guaranteed the Recast (the "Guaranties") and collateralized their Guaranties with a security interest in their personal property, fixtures, accounts, inventories, general intangibles, equipment and all other assets of the companies (the "Security Interest").

7.[6] No additional funding was given to Matco or its subsidiaries for the creation of the Recast, the Guaranties or the Security Interest.

8. On December 21, 2001, the Recast Matthews Loan was sold by BSB to TLA.

9. Paragraph 79 of the Committee's complaint states that "[t]he Debtors were insolvent on the date that such transfers were made or was made or was rendered insolvent by making such

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[6] The facts in paragraphs 2,3, 5, 6 and 7 were agreed upon by the Debtors, BSB and the Committee and memorialized in a Stipulation of Facts submitted in connection with a Motion for Relief from the Automatic Stay, filed by BSB on March 20, 2002. In Matthew's Statement of Undisputed Facts and Disputed Material Facts, attached to his Memorandum of Law, filed November 13, 2002, he points out that he was not a party to the Stipulation and asserts that he is not bound by the statements in the Stipulation.

transfers."

10. Paragraph 59 of the Debtors' answer to the complaint states that the Debtors "[a]dmit the allegations set forth in paragraph 79 of the Complaint."

11. To the extent the Matthews Loan was actually an obligation of the Debtors, BSB was a creditor of the Debtors by virtue of such obligation and such obligation constituted an antecedent debt of the Debtors.

12. The notary pages attached to the Security Agreement state that the Security Agreement was executed on December 21, 2001, 54 days before the Filing Date.

13. General Unsecured Creditors' claims will not be paid in full upon a liquidation of the Debtors' assets.

14. BSB would receive more as a secured creditor with a priority in payment than it would receive if the Security Agreement had not been transferred and BSB was paid together with all other general unsecured creditors.

BSB, as well as Matthews, disputes 11, 13 and 14 as listed above. *See* BSB's Statement of Undisputed Facts and Statement of Disputed Material Facts at ¶ 4 and Matthews' Statement of Undisputed Facts and Disputed Material Facts at ¶ 4. BSB also disagrees with the Committee's "conclusions or assertions" set forth in 10 and 11 above while acknowledging that they are "literally accurate." *See id.* at ¶ 6. Matthews points out that his response regarding the Debtors' insolvency in answering ¶ 79 of the Complaint was different from that of the Debtors and, accordingly, he is not bound by it.[7] BSB also disputes the Committee's allegations of the Debtors' insolvency and also disputes the assertion by the Committee that the Debtors received "neither 'fair consideration' as

[7] In response to the Committee's assertion that the "Debtors were insolvent on the date that such transfers were made . . .," Matthews indicated that "[t]o the extent insolvent means 'unable to meet its obligations as they matured,' Defendant admits the allegations . . . ." Matthews asserts that he does not believe that the Debtors were insolvent on a balance sheet basis. *See* Matthews' Memorandum of Law, filed November 13, 2002, at 5.

defined in DCL § 272 nor 'value' as defined by Bankruptcy Code § 548(d)(2)(A) in exchange for their incurrence of the obligation under BSB Loan II and the Guaranties or for its granting of the Security Interest." *Id.* at ¶ 7. Finally, BSB disputes the Committee's assertion that the Security Interest enabled BSB to recover more in this case than it would if this were a case under chapter 7. *See id.* at ¶ 8.

Matthews also takes issue with certain contentions of the Committee set forth in its motion insofar as they imply that no consideration or property was given in connection with various transactions.

BSB also submits additional alleged undisputed facts,[8] including:

1. BSB made the Matthews Loan in November 1997. As of about September 22, 2001, the outstanding principal amount due BSB under the Matthews Loan was approximately $7.5 million.

2. On or about May 14, 1998, Matco and American Board Companies, Inc. executed a promissory note ("Note 1") as co-borrowers in favor of BSB as lender ("BSB Loan I"). BSB Loan I was guaranteed by Matthews and all of the Matco subsidiaries.

3. On or about May 14, 1998, as security for repayment of BSB Loan I and all other debt to BSB whether existing then or incurred later, Matco and the Matco subsidiaries executed and delivered to BSB commercial security agreements (the "Security Agreements") pursuant to which Matco and the Matco subsidiaries granted BSB a security interest in all Inventory, Accounts, Equipment and General Intangibles "whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located (emphasis added by BSB).

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[8] The Committee takes the position that "[t]he five additional undisputed facts submitted by BSB . . . are irrelevant for the current dispute before this Court." Local Bankruptcy Rule 7056-1 Statement at ¶ 2, as attached to Committee's Reply Brief, filed November 26, 2002. It further states that "Committee disputes the conclusions or assertions of BSB therein as to the effect of the transfers and payments (and in particular the Committee questions whether payments to the Debtors were repaid, transferred to third party non-debtor affiliates or paid to Matthews)." *Id.* at ¶ 4. The Committee further explains that it was unable to make a determination concerning the "universe of transfers" allegedly because it has not been provided with all documentation requested. *Id.* at ¶ 3 and Affidavit of William Giovanniello of BDO Seidman, LLP, sworn to November 22, 2002, indicating non-receipt of information concerning transactions between BSB, the Debtors and Matthews, as well as between NBOC.

4. The Matco subsidiaries guaranteed BSB Loan II and collateralized their Guaranties pursuant to security agreements (2001 Security Agreements) executed in connection with BSB Loan II which granted BSB a security interest in the Matco subsidiaries' personal property, fixtures, accounts, inventories, general intangibles, equipment and all other assets of the companies.

5. $5,768,115.02 (76% of the total amount of BSB Loan II) was remitted directly by BSB to the Debtors, not Matthews.

Matthews also offers the following additional material facts, based in large part on the sworn affidavit of Davis, sworn to on November 8, 2002, and documentation attached thereto, filed November 13, 2002:[9]

1. On November 15, 1997, BSB and Matthews signed a loan agreement (as referenced above as the "Matthews Loan") whereby Matthews obtained a $6 million line of credit (Account No. 12671) (the "Matthews Loan Account") for business use.

2. The proceeds of the Matthews Loan were advanced to various companies in the Matco group to fund specific projects and/or to use for working capital.

3. On November 17, 1997, $5 million was transferred from the Matthews Loan Account to U.S. Assemblies San Diego, Inc. to purchase equipment associated with U.S. Assemblies San Diego, Inc.'s contract with Smith-Corona Corporation. On December 10, 1997, U.S. Assemblies San Diego, Inc. repaid the $5 million advance with funds obtained from G.E. Capital Corporation secured by the Smith-Corona equipment.

4. On December 15, 1997, $1.8 million was transferred from the Matthews Loan Account to Matco Precision to purchase equipment relating to Matco Precision's contract with Perkin Elmer. On January 4, 1998, the Perkin Elmer advance was repaid with the proceeds of an industrial revenue bond issue.

5. On January 23, 1998, $325,255.98 was transferred from the Matthews Loan Account to the South Carolina Public Service Authority in connection with Matthews' purchase of the real property on which Debtor Carolina Assemblies was located (which purchase was completed in April 1998). Although the property is owned by Matthews, it was used in connection with Carolina Assemblies' business.

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[9] The Court makes no finding on whether these additional facts are undisputed and sets them forth herein for informational purposes in considering the motions now before it.

6. On February 13, 1998, $500,000 was advanced from the Matthews Loan Account to Debtor U.S. Assemblies Raleigh, Inc. for operating capital. On that same date, an additional $500,000 was advanced to MTX, now known as Visara, Inc., for operating costs.

7. On February 19, 1992, $180,000 from the Matthews Loan Account was transferred to Matco Precision for working capital; $20,000 was advanced to Debtor U.S. Assemblies New England, Inc.; $80,000 was advanced to Debtor U.S. Assemblies Raleigh, Inc., and $30,000 was advanced to Debtor U.S. Assemblies San Diego, Inc., all for operating funds.

8. On February 20, 1998, $55,000 was transferred from the Matthews Loan Account to Matco for operating funds. On the same date, $50,000 was transferred to the Matco Group and $260,000 was transferred to Debtor U.S. Assemblies New England.

9. On February 23, 1998, $25,000 was advanced from the Matthews Loan Account to Matco for operating needs.

10. On February 23, 1998, $30,000 was transferred to Debtor U.S. Assemblies in Florida for working capital.

11. On February 23, 1998, $50,000 was advanced from the Matthews Loan Account to U.S. Assemblies RTP for operating funds.

12. On February 23, 1998, $1.22 million was transferred from the Matthews Loan Account to Debtor U.S. Assemblies Raleigh, Inc. for operating costs.

13. On March 5, 1998, $125,000 was transferred from the Matthews Loan Account to Matco for operating cash.

14. On March 13, 1998, $370,000 was transferred from the Matthews Loan Account to Matco for operating funds.

15. On April 14, 1998, $380,000 was transferred from the Matthews Loan Account to James F. Matthews to purchase the real property upon which Debtor Carolina Assemblies' plant was located.

16. On May 2, 1998, $356,629.30 was transferred from the Matthews Loan Account to Siegel, O'Connor Schiff & Zangari PC (Seller's attorney) in connection with the purchase of real property upon which Matco Precision's plant was located. The funds were used in connection with the Debtors' business operations.

17. On June 1, 1998, $200,000 was advanced from the Matthews Loan Account to KBS, Inc. to

fund Debtor U.S. Assemblies in Florida's purchase of KBS, Inc., a competing manufacturer of electronic components.

18. On April 1, 1999, $675,000 was transferred from the Matthews Loan Account to Matco for operating funds. On that same date, $168,115.02 was transferred from the Matthews Loan Account to Debtor U.S. Assemblies New England, Inc.

19. On August 8, 2000, BSB and Matthews increased the Matthews credit line to $8.5 million to provide additional working capital to the Debtors. On August 8, 2000, BSB charged a fee in connection with the line increase of $45,027.75.

20. On August 25, 2000, $1.5 million was advanced from the Matthews Loan Account to the National Bank of Canada ("NBOC") in payment of Matco's obligations under its loan with NBOC.

21. When the Matthews Loan was "recast", the Debtors' books were marked to reflect a $7.5 million reduction in the Debtors' debt to Matthews and a corresponding $7.5 million increase in their obligation to BSB. In other words, the total amount of debt on the Debtors' books did not change as a result of the "recasting" of the Matthews Loan.

Additional facts found in a Statement of Undisputed Facts, executed on behalf of BSB, the Debtors and the Committee on or about April 19, 2002, in connection with a lift stay motion filed by BSB on March 20, 20002, include:

1. As of December 28, 2001, the approximate outstanding balance on BSB Loan I was $4,026,415.87.

2. BSB Loan II is secured by a lien on essentially all of the Assets of Matco and Matco subsidiaries, including a first priority lien on essentially all the equipment owned by Matco and its subsidiaries.

3. As of December 28, 2001, the outstanding balance on BSB Loan II was $7,545,027.75.

4. As of December 12, 2001, the amount owed to BSB by virtue of the assignment of the NBOC debt was $13,772,614.46.

5. The NBOC debt was secured by essentially all of Matco's and its subsidiaries' assets, as well as certain personal property of Matthews.

Committee's Motion for Dismissal of AMS's Counterclaims pursuant to Fed.R.Civ.P. 12(b)(6)

The following additional allegations are set forth in AMS's counterclaims, as supplemented by information elicited during an evidentiary hearing in November 2002:[10]

On or about November 30, 2001, Matco's largest secured creditor at that time, NBOC, refused to advance further funds to Matco and began collecting its receivables. BSB agreed to purchase the NBOC loans at a discount on the condition, *inter alia*, that the Debtors' assets be liquidated and sold to a new going concern. To that end, AMS was formed in October 2001 with the infusion of $4.5 million in new capital. In January 2002, AMS purchased the equipment located at a number of the Debtors' facilities pursuant to UCC Article 9 sales. AMS also purchased approximately $5,687,000 in inventory from Matco, paying approximately $300,000 for it. AMS owes the Debtors approximately $5.2 million for the inventory it previously purchased.

According to AMS, the Committee is comprised of suppliers of electronic parts who prepetition sold to the Debtors items used in the manufacture of electronic components and assemblies. AMS alleges that the Committee advised AMS that it was in favor of AMS continuing as a going concern. On or about March 4, 2002, AMS asserts that the Committee and AMS entered into an stipulation whereby AMS agreed not to dispose of any of its assets other than in the normal course of its business and also agreed to provide the Committee with regular operation reports. In exchange, the Committee

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[10] An evidentiary hearing was conducted on November 1, 6 and 7, 2002, with respect to a motion by the Debtors seeking approval of a compromise between them and AMS.

agreed not to interfere with AMS's efforts to obtain financing.[11]

It was anticipated that AMS would be able to obtain financing on the equipment it had purchased at the Article 9 sales of the Debtors' assets and ultimately would be able to obtain advances on accounts receivable. However, AMS's ability to obtain the financing was adversely impacted as a result of the involuntary petitions filed against the Debtors, as well as the Committee's commencement of the adversary proceeding herein, naming AMS, *inter alia*, as a defendant. Davis acknowledged at the November 2002 Hearing that AMS's ultimate ability to pay for the inventory was dependent on its being able to obtain future financing.

It is AMS's contention that the Committee has "engaged in ongoing conduct which has completely thwarted AMS's attempts to obtain financing." *See* AMS's Brief in Opposition to Dismissal Motion, filed January 30, 2003, at 6. Such conduct allegedly included the commencement of the adversary proceeding against AMS and the Committee's opposition to "a perfectly reasonable and rational" compromise between AMS and the Debtors, which ultimately was rejected by this Court in its Memorandum-Decision of November 27, 2002.[12] According to AMS, simultaneous with its

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[11] The Stipulation, executed March 4, 2002, and approved by Order of this Court on May 31, 2002, was entered into by AMS and the "Petitioning Creditors" comprised of Arrow Electronics, Inc., Jaco Electronics, Inc., Future Electronics, Heiland Electronics, Inc., Partminer, Inc., Pioneer Standard Electronics, Inc., Insight Electronics, LLC, Unique Electronics, Inc., Tyco Electronics Corporation and Dynamic Details, LP. As noted previously, the Committee was not formed until approximately March 26, 2002, and is comprised of some, but not all, of the Petitioning Creditors. Under the terms of the Stipulation, it was to remain in effect for six months from the date of execution.

[12] Under the terms of the compromise, AMS agreed to release its claims against the Debtors and the Debtors in turn would release their claims against AMS, with certain exceptions, and against Hargreaves and Davis. This adversary proceeding would also have been dismissed as to those defendants.

opposition to the compromise, the Committee also failed to accept an offer by AMS to place AMS on the market and allow the unsecured creditors to retain any price in excess of $11.5 million. AMS contends that the $11.5 million would have been used to repay AMS's investors, pay Debtors for inventory previously purchased and pay for losses that would have been incurred during the pendency of the sale efforts.

AMS also alleges that the Committee or one or more of its members have, *inter alia*, refused to sell electronic components to AMS, disparaged AMS to its potential customers and leaked sensitive and confidential information about AMS to potential customers. *See* AMS's Brief in Opposition to Dismissal Motion at 7.

It is AMS's position that "the Committee and one or more of its members have willfully acted in bad faith, in excess of their authority, and in pursuit of an unlawful agenda contrary to the interests of unsecured creditors." *See* AMS's Answer and Counterclaims at ¶ 124.

DISCUSSION

Initially, the Court notes that the Committee argues that there is no authority in the Federal Rules of Bankruptcy Procedure which would allow BSB to assert a cross-motion for summary judgment. However, Fed.R.Civ.P. 56(b), incorporated by reference in Fed.R.Bankr.P. 7056, makes it clear that a defendant is entitled to seek summary judgment. Furthermore, the courts in the Second Circuit recognize that such relief may be asserted as a cross-motion. *See, e.g.*, *Nutritional Health Alliance v. Food and Drug Administration*, 318 F.3d 92 (2d Cir. 2003); *In re Potter*, 313 F.3d 93 (2d Cir.

2002); *Phillips v. Saratoga Harness Racing, Inc.*, 233 F. Supp.2d 361 (N.D.N.Y. 2002); *In re Adelphia Communications Corp.*, 287 B.R. 605 (Bankr. S.D.N.Y. 2003). The Court concludes that the Committee's argument is without merit.

The moving party seeking summary judgment must establish that there is no genuine issue as to any material fact, thus entitling the movant to judgment as a matter of law. A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party."*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(movant need only illustrate by reference to record opponent's failure to introduce evidence in support of essential element of its claim). It is the role of the Court on such a motion to determine whether there are issues of fact to be tried; it is not the role of the Court to try the issues of fact. *See Schering Crop. v. Home Insurance Co.*, 712 F.2d 4, 9 (2d Cir. 1983) (citation omitted).

The Committee has provided the Court with what it considers to be facts for which there is no genuine issue. Some of the facts have been disputed and/or supplemented by BSB, AMS and Matthews. The substantive law will determine which facts are material. *Anderson*, 477 U.S. at 248. Thus, whether a fact is material depends on the elements of the respective causes of action which must be proven.

First and Second Causes of Action - Avoidance of Transfer based on Constructive Fraud pursuant to Code § 544 and DCL §§ 273-275 and Code § 548

Under DCL § 273-275, a creditor may avoid a transaction as constructively fraudulent if it is

proven (1) that a transfer was made for less than fair consideration, as defined in DCL § 272, and (2) that at the time of the transaction, the transferor was either insolvent, a defendant in an action for money damages, engaged in a business with unreasonably small capital, or about to incur debts beyond the transferor's ability to repay. *See Goscienski v. LaRosa (In re Montclair Homes, Inc.)*, 200 B.R. 84, 98 (Bankr. E.D.N.Y. 1996), citing *Marine Midland Bank v. Murkoff*, 120 A.D.2d 122, 124, 508 N.Y.S.2d 17, 19 (N.Y. App. Div. 1986).

Code § 548 permits avoidance of a transfer if it is established that the Debtor had an interest in the property, that a transfer of that interest occurred within one year of the filing of the petition, that the Debtor was insolvent at the time of the transfer or became insolvent as a result thereof, and that the Debtor received less than reasonable equivalent value in exchange for such transfer. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994).

With respect to the question of the Debtors' insolvency, the Committee contends that the Debtors admitted in their Answer to the Complaint that they were insolvent at the time of the transfers or were rendered insolvent as a result of the transfers. *See* ¶ 79 of the Committee's Complaint and ¶ 59 of the Debtors' Answer. BSB contends that it is not bound by the admission of the Debtors and Matthews points out that in his Answer to the Committee's Complaint, he did not make a general admission as to the Debtors' alleged insolvency.

Section 101(32)(A) defines "insolvent" as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of (i) property transferred, concealed or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii) property that may be exempted from property of the estate under section 522 of this title. " 11

U.S.C. § 101(32). In determining insolvency, the Code applies a balance sheet analysis which tests whether at the time of a particular transfer the transferor's debts exceeded the "fair valuation" of its assets, exclusive of property exempted or fraudulently transferred. In this regard,

> factual findings must be made as to the fair valuation of the debtor's assets. In this context, fair valuation does not mean historical value or cost, or refer to the value of the debtor's assets under the worst or best circumstances. Instead, fair valuation is measured by a hypothetical liquidation of the debtor's assets over a reasonable period of time.

In re Southwest Equipment Rental, Inc., 1992 WL 684872 at *21 (E.D. Tenn. 1992).

New York Business Corporation Law ("BCL") defines "insolvent" as "being unable to pay debts as they become due in the usual course of the debtor's business. BCL § 102(8) (McKinney's 1986 & Supp. 2002). DCL § 271 defines it as "when the present fair salable value of [a person's] assets is less that the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." DCL § 271 (McKinney's 2001). Black's Law Dictionary draws a distinction between "balance-sheet insolvency," which is "created when the debtor's liabilities exceed its assets," and "equity insolvency," which is "created when the debtor cannot meet its obligations as they fall due." BLACK'S LAW DICTIONARY 799 (1999).

The fact that the Debtors admitted in their Answer that they were "insolvent" at the time of the transfers does not relieve the Committee of its burden of establishing insolvency since there is no indication in the Debtors' Answer whether they are admitting to "balance-sheet insolvency" or "equity insolvency." Furthermore, the Court notes that under Code § 548, there is no presumption of insolvency of a debtor during the 90 days immediately prior to the filing of the petition as there is in an

avoidance action under Code § 547. *See In re Schultz*, 250 B.R. 22, 28 n. 3 (Bankr. E.D.N.Y. 2000); *In re Larry's Marineland of Richmond, Inc.*, 166 B.R. 871, 873 (Bankr. E.D. Ky. 1993); *In re War Eagle Floats, Inc.*, 104 B.R. 398, 400 (Bankr. E.D. Okla. 1989). The Court concludes that there are genuine issues of material fact which need to be addressed with respect to the Debtors' solvency at the time of the recast of the Matthews Loan. Accordingly, the Court will deny the Committee's Amended Motion for partial summary judgment as to its second and third causes of action without having to address the issues of fair consideration, reasonable equivalent value and good faith as they apply to causes of action based on DCL § 273-275 and Code § 548.

Tenth Cause of Action - Avoidance of Preferential Transfer based on Code § 547

A transfer may be avoided as a preference if each of five conditions is satisfied and none of seven exceptions are applicable. *See Union Bank v. Wolas*, 502 U.S. 151, 154, 112 S.Ct. 527, 529, 116 L.Ed.2d 514 (1991). The conditions, which are set out in Code § 547(b), are that the transfer must have been made: (1) for the benefit of a creditor; (2) on account of an antecedent debt; (3) while the debtor was insolvent; and (4) within ninety days before the bankruptcy; and (5) it must have enabled the transferee to receive a larger share of the estate's assets than it would have received if the transfer had not been made and the estate's assets had been liquidated under chapter 7. *Id.* Transfers that have no real distributional consequences are entirely beyond the purview of preference law. *See Palmer Clay Products Co. v. Brown*, 297 U.S. 227, 229, 56 S.Ct. 450, 451, 80 L.Ed. 655 (1936) (construing § 60(b) of the 1898 Bankruptcy Act, which is the current Code § 547(b)(5). The Committee, as plaintiff, bears the burden of proof on each of these elements by a preponderance of the

evidence standard. *See Lawson v. Ford Motor Co. (In re Roblin Industries, Inc.)*, 78 F.3d 30, 34 (2d Cir. 1996); *In re LeCafe Creme, Ltd.*, 244 B.R. 221, 231 (Bankr. S.D.N.Y. 2000).

In this case, the Committee seeks to avoid the Security Interest granted to BSB in connection with BSB Loan II. The Security Agreement, executed on December 21, 2001, provides that the security interests and collateral secures

> the amount due under James F. Matthews (a "Borrower") and Matco Electronic Group, Inc. (a "Borrower") Note dated September 22, 2001, in the [amount] of $7,545,027.75 and the Note of American Board Companies, Inc. (a "Borrower") and Matco Electronics Group, Inc. dated December 16, 1998, in the amount of $9,583,388.00, together with any renewal, amendment, modifications, extension, substitution or replacement of either such Note as well as any and all obligations, liabilities, direct or indirect, but [sic] or contingent, now existing or hereafter arising of any of the Borrowers to Bank . . . Each of the Debtors further grant[s] and agree[s] that each Security interest granted by any of them under its Security Agreement dated May 14, 1998 is hereby spread such that the Obligations described above are secured by each such Security Interest and that the term "indebtedness"[13] in each such Security Agreement is hereby amended to include each of the Obligations.

See Exhibit D of Committee's Amended Notice and Motion, filed October 21, 2002.

The Security Agreement of December 2001 was executed within 90 days of the filing of the involuntary petition raising the presumption of the Debtors' insolvency at the time of the alleged transfer. 11 U.S.C. § 547(f). As noted above, "[t]he Bankruptcy Code deems a corporation to be 'insolvent'

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[13] According to the terms of the Security Agreements, the word "indebtedness" "includes all other obligations, debts and liabilities . . . of Borrower, or any one or more of them, to Lender, as well as all claims by Lender against Borrower, or any one or more of them, whether existing now or later . . . whether Borrower may be liable individually or jointly with others; whether Borrower may be obligated as guarantor, surety . . . ." *See* Exhibit 1 of Affidavit of Joseph W. Loftus, sworn to on November 8, 2002, and filed November 12, 2002.

if 'the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of [property concealed to defraud creditors and exempt property.]'" *In re Buffalo Auto Glass,* 187 B.R. 451, 453 (Bankr. W.D.N.Y. 1995), quoting 11 U.S.C. § 101(32)(A). BSB has not offered no proof substantial enough to overcome the presumption found in Code § 547(f). Thus, for purposes of avoiding any transfer to BSB, the Court concludes that the Debtors were insolvent at the time of such transfer for purposes of Code § 547(b).

BSB points out that by the terms of the Security Agreement of December 2001 it received no more interest in the Collateral than it had by virtue of the Security Agreements of May 14, 1998, in connection with BSB Loan I and, therefore, there was no transfer that benefitted BSB. In addition, BSB contends that the Committee cannot establish that the Security Interest was granted on account of an antecedent debt or that it enabled BSB to receive more than if the alleged transfer had not been made and the case had been liquidated under chapter 7.

A debt is "antecedent" for purposes of Code § 547(b)(2) if it was incurred prior to the alleged transfer. *See Southmark Corp. v. Marley (Matter of Southmark Corp.),* 62 F.3d 104, 106 (5th Cir. 1995); *Pereira v. Lehigh Savings Bank, SLA (In re Artha Management, Inc.),* 174 B.R. 671, 678 (Bankr. S.D.N.Y. 1994). "A debt is incurred when the debtor first becomes legally obligated to pay." *Mendelsohn v. Louis Frey Co., Inc. (In re Moran),* 188 B.R. 492, 497 (Bankr. E.D.N.Y. 1995) (citations omitted).

According to the Promissory Note of September 22, 2001, the "specific purpose of this loan is modification of note #12671" (the Matthews Loan). *See* Exhibit G of Memorandum of Law of Matthews, filed November 13, 2002. The Promissory Note further states that it was simply to renew

the existing balance on #12671 of $7,545,027.75. *See id.* According to the terms of the September 22, 2001 Promissory Note, the loan, identified as Loan # 17791, matured on November 30, 2001, and Matco and Matthews were jointly and severally liable for the payment of $7,545,027.75 on that date. *See id.*. Specifically, the Promissory Note states that "Borrower will pay this loan in one principal payment of $7,545,027.75 plus interest on November 30, 2001. *Id.* There is no indication that there was a payment made by either Matthews or Matco of the $7,545,027.75 on November 30, 2001. According to the facts alleged by the Committee, the "Recast Matthews Loan" was sold by BSB to TLA on December 21, 2001, the same day the Security Agreement, granting a security interest in various assets of the Debtors to BSB with respect to the Promissory Note of September 22, 2001, was executed. *See* Exhibit D of Committee's Amended Notice and Motion. Thus, if there was a transfer of a security interest in the Debtors' collateral, it was on account of an antecedent debt that, according to the documents, was due and payable on November 30, 2001.

"Transfer" is defined as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." 11 U.S.C. § 101(54). The term was intended by Congress to be as "broad as possible." H.R. Rep. No. 595, 95th Cong., 1st Sess. 314 (1977) and S.Rep. No. 989, 95th Cong., 2d Sess. 27 (1978). In this case, under BSB Loan II on December 21, 2001, BSB allegedly was granted a security interest in the same Collateral in which it already held an interest pursuant to the May 14, 1998 Security Agreements. *See* BSB's Cross-motion at ¶ 49. It is on that basis that it argues there was no preferential transfer. Furthermore, as noted above, even if there was a transfer, transfers that have no real distributional

consequences are entirely beyond the purview of preference law.

BSB has provided copies of Commercial Security Agreements, dated May 14, 1998, in the principal amount of $10 million. Matco Electronics Group, Inc. and American Board Companies, Inc. are identified as the "Borrower" and BSB Bank & Trust Company is identified as "Lender." In addition, various debtor and non-debtor affiliates are identified as "Grantors." These include U.S. Assemblies Hallstead, Inc., U.S. Assemblies New England, Inc., Eagle Technologies, Inc., MTX, Inc.[14], Carolina Assemblies, Inc., U.S. Assemblies Raleigh, Inc., U.S. Assemblies San Diego, Inc., U.S. Assemblies in Florida, Inc., Matco Precision, Inc., U.S. Assemblies RTP, Inc., and U.S. Assemblies Endicott, Inc. *See* Exhibit 1 of Affidavit of Joseph W. Loftus, BSB Assistant Vice President, sworn to on November 8, 2002, and filed November 12, 2002. BSB argues that by virtue of the 1998 Commercial Security Agreements it obtained a security interest in all of the Debtors' assets (the "Collateral").

The Committee argues that by virtue of BSB Loan II, the Debtors assumed additional obligations totaling $7.5 million. However, according to the affidavit of Davis, "[w]hen the Matthews Loan was 'recast', the Debtors' books were marked to reflect a $7.5 million reduction in the Debtors' debt to Mr. Matthews and a corresponding $7.5 million increase in their obligations to BSB. In other words, the total amount of debt on the Debtors' books did not change as a result of the 'recasting' of the Matthews Loan." *See* Affidavit of Lawrence Davis, sworn to November 8, 2002, and filed November 13, 2002, at ¶ 27.

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[14] MTX, Inc. is now known as Visara, Inc.

In *Matter of Brown*, 46 B.R. 615 (Bankr. S.D.Ohio 1985), the chapter 13 trustee sought to avoid the transfer of a security interest in the debtor's automobile pursuant to Code § 547(b). On May 25, 1984, the debtor owed the bank $1,452.32 on a note secured by a lien on the automobile. *See id.* Debtor also owed the bank $689.43 on a credit card debt. *Id.* On May 25, 1984, approximately a month prior to the debtor filing his petition, he executed a note for $2,141.75, which paid off both obligations. *Id.* On June 27, 1984, approximately one week prepetition, the bank perfected its lien on the automobile based on the May 25th note and filed a proof of claim for $2,129.01. *Id.* at 616. The parties agreed that the value of the automobile was $1,000 at the time the note was executed. *Id.*

The court in *Brown* concluded that the bank's security interest was valid to defeat the trustee's avoidance powers with respect to the original loan balance as it did not receive more than it would have if the transfer had not been made. *Id.* However, with respect to the unsecured credit card balance, the court determined that there had been no "contemporaneous exchange for new value" as to unsecured portion of the debt. *Id.* at 616-17. Accordingly, the court granted the relief sought by the trustee only to the extent of avoiding the bank's lien as to the unsecured credit card debt in the amount of $689.43. *Id.* at 617.

Matthews points out that BSB would have to be paid the remaining balance of the NBOC loan and the balance on BSB Loan I before the "recast" could result in a benefit to BSB. There is no indication of the value of the Debtors' Collateral at the time the Security Agreement of December 2001 was executed. If at that time BSB was oversecured in the Debtors' Collateral, then, arguably, providing that the security interest in any unencumbered collateral be "spread" to cover the "recasted" Matthews Loan would constitute a transfer of an interest of the Debtors to the benefit of BSB, securing the debt

previously owed to BSB in connection with the Matthews Loan. While the total amount of debt on the Debtors' books may not have changed, arguably, at least a portion of what was an alleged unsecured debt owing to Matthews by the Debtors prior to the "recast," may have been rendered a secured debt owing to BSB by virtue of the Security Agreement of December 2001, thus benefitting BSB and allowing it to receive a larger share of the Debtors' assets than it would have received if the alleged transfer had not been made and the Debtors' assets had been liquidated under chapter 7. What had been an obligation of Matthews, secured by his assets, arguably became an obligation of the Debtors owed to BSB and secured by any unencumbered assets as a result of the "recasting" within the 90 day preference period.

The Court concludes, having reviewed the arguments of the parties and the affidavits presented, that there are genuine issues of fact that must be resolved before it can make determination of whether the Security Interest granted by virtue of the Security Agreement of December 2001 in connection with BSB Loan II was a preference. Based on the discussion above, it is evident that there are questions regarding whether or not there was a transfer that benefitted BSB and whether it would allow BSB to obtain a larger share of the estates' assets than it would have received if the Security Interest had not been granted. Accordingly, the Court must deny the Committee's Amended Motion and BSB's Cross-motion for partial summary judgment with respect to the tenth cause of action.

Motion to Dismiss AMS's Counterclaims pursuant to Fed.R.Civ.P. 12(b)(6)

In considering a motion to dismiss, the Court must accept all of the non-movant's allegations as true, and will grant the motion to dismiss "only if it is clear that no relief could be granted under any

set of facts that can be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984) (citation omitted).

AMS's First Counterclaim

AMS alleges that the Committee has breached the terms of the Stipulation by its conduct, including, *inter alia*, commencing the adversary proceeding and opposing the Court's approval of the compromise between AMS and the Debtors. AMS also alleges that the Committee has engaged in a pattern of conduct intended to hinder and destroy AMS's business, including refusing to sell electronic components to AMS, disparaging AMS to its potential customers with the intent to induce them not to do business with AMS, and leaking confidential information about AMS to its potential customers for the same purpose or intent. It is AMS's position that these actions were contrary to the terms of the Stipulation in which AMS contends the Committee agreed not to interfere with AMS's efforts to obtain financing.

AMS's First Counterclaim, based on an alleged breach of contract by the Committee, must be dismissed as the Committee was not a party to the Stipulation and was not even in existence at the time it was executed by the individual Petitioning Creditors. A stranger to a contract cannot be named as a defendant in a breach of contract action. *See In re Falchi*, 1998 WL 274679 *9 (Bankr.S.D.N.Y.1998), citing *Mellencamp v. Riva Music Ltd.*, 698 F.Supp.1154,1160 (S.D.N.Y.1988) (companies who were strangers to a contract could not be held liable for breach even though they shared directors with and assisted companies that signed the contract)*; Stratton Group, Ltd. v. Sprayregen*, 458 F.Supp.1216, 1218 (S.D.N.Y.1978) (the individual who was president,

chairman of the board, and chairman of the executive committee of defendant was not liable for defendant's breach of contract, because he was not a party to the contract).

AMS's Second Counterclaim

AMS alleges that the Committee has engaged in unfair competition under New York State law by engaging in the same conduct as alleged in its first cause of action, including refusing to sell electronic components to AMS, disparaging AMS to its potential customers and leaking sensitive and confidential information about AMS to its potential customers for the purpose of inducing them to refuse to do business with AMS.

With respect to the allegation that the Committee has refused to sell electronic components to AMS, the Court finds it without merit. Code § 1103(c) authorizes the Committee, *inter alia*, to investigate the acts, conduct, assets, liabilities and financial condition of the Debtors, participate in the formulation of a plan and perform such other services as are in the interest of those represented. 11 U.S.C. § 1103(c). While the individual members of the Committee may be suppliers of electronic parts, the Committee itself is not in the business of selling electronic components or any other products. Furthermore, the "refusal to sell to anyone does not amount to prohibited restraint of trade." *Dior v. Milton*, 9 Misc. 2d 425, 462 (N.Y. Sup. Ct.), *aff'd* 2 A.D. 878, 156 N.Y.S.2d 996 (1956).

Whether the Committee as a whole disparaged AMS to its potential customers need not be addressed, as the Court must dismiss that aspect of its second counterclaim, as well, because in order to establish a cause of action based on disparagement, AMS must have identified in its counterclaim "'the persons who ceased to be customers, or who refused to purchase . . . . [I]f they are not named,

no cause of action is stated.'" *Payrolls & Tabulating, Inc. v. Sperry Rand Corp.*, 22 A.D.2d 595, 598 (App. Div. 1965), quoting *Drug Research Corp. v. Curtis Pub. Co.*, 7 N.Y.2d 435, 441 (1960). No such "potential customers" are identified.

Finally, AMS alleges that the Committee leaked "sensitive and confidential information about AMS to its potential customers with the intention and effect of inducing said customers to refuse to do business with AMS." *See* ¶ 118(c) of AMS's Answer and Counterclaims. The fact that the Committee is not in the business of selling electronic components and, thus, is not a competitor of AMS, does not render this portion of AMS's counterclaim insufficient. *See Dior*, 9 Misc.2d at 454-55 (citations omitted) (noting that "In their endeavor to prevent unfair business practices, the courts have determined that it was unnecessary to the sufficiency of a complaint and to the granting of relief that it be alleged and established that the parties are actual competitors."). The court in *Dior* explained that "the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion . . . and a court of equity will penetrate and restrain every guise resorted to by the wrong-doer." *Id.* at 455.

However, the Court finds that AMS also failed to state a cause of action with respect to this aspect of its second counterclaim in that it has not identified any potential customers or the nature of the confidential information that allegedly was disseminated by the Committee subsequent to its formation.

AMS's Third Counterclaim

AMS's Third Counterclaim alleges that the Committee and some its members made false

representations to it for the purpose of inducing AMS to enter into the Stipulation referenced above. It is AMS's position that the Committee and its members have, in making the representations, acted in bad faith and in breach of the Committee's duty toward all unsecured creditors.

As previously discussed, the Committee was not in existence at the time AMS and the Petitioning Creditors entered into the Stipulation. Accordingly, any allegation that the Committee made false representations that induced AMS to enter into the Stipulation has no basis in fact. The Court concludes that AMS's Third Counterclaim must be dismissed.

Committee's Request for Sanctions against AMS pursuant to Fed.R.Bankr.P. 9011

The Committee seeks attorney fees and costs pursuant to Fed.R.Bankr.P. 9011, arguing that the assertion of the Counterclaims was merely an attempt to harass the Committee for activities which "are unequivocally within the Committee's statutory and Court-ordered power . . . ." *See* Committee's Motion to Dismiss AMS's Counterclaims, filed January 22, 2003, at 15. As discussed above, at least some of AMS's contentions may have had a basis in law despite being inartfully pled. Therefore, the Court will deny the Committee's request for sanctions.

Based on the foregoing, it is hereby

ORDERED that the Committee's Amended Motion seeking partial summary judgment with respect to the second, third and tenth causes of action in the Committee's Complaint is denied; it is further

ORDERED that BSB's Cross-motion seeking partial summary judgment with respect to the tenth cause of action in the Committee's Complaint is denied; it is further

ORDERED that the Committee's Dismissal Motion with respect to AMS's first and third counterclaims is granted; it is further

ORDERED that AMS's second counterclaim is dismissed without prejudice and finally it is

ORDERED that the Committee's motion seeking attorney fees and costs pursuant to Fed.R.Bankr.P. 9011 is denied.

Dated at Utica, New York

this 4th day of April 2003

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge