UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Midwest Asphalt Corporation,	Court File No. 17-40075 (WJF) Chapter 7
Jointly Administered with:	
MAR Farms, LLC, and Delta Milling, LLC	Bky. Case No. 17-41371 Bky. Case No. 17-41372

Debtors.

Midwest Asphalt Services, LLC, and
Callidus Capital Corporation,

Plaintiffs,

vs.

Adv. Case No. 18-04101

John R. Stoebner, in his capacity as
Chapter 7 Trustee for the Debtors' Estates,

Defendant.

ORDER FOR JUDGMENT

This adversary proceeding was commenced to determine whether the purchaser of the bankruptcy estate's assets, Plaintiff Midwest Asphalt Services, LLC ("Midwest"), or the bankruptcy estate is entitled to $133,027.43 in refunds (the "Refund") due from the cancellation of Debtor Midwest Asphalt Corporation's ("MAC") insurance.

Both parties moved for partial summary judgment and an oral rendering of the cross-motions for partial summary judgment was delivered on December 13, 2018, determining the Refund was sold to Midwest. The order was not final because a counterclaim objecting to the

claim of Plaintiff Callidus Capital Corporation ("Callidus") by Defendant John R. Stoebner ("Trustee") remained to be litigated at trial on January 31, 2019.

On January 22, 2019, the parties filed a Stipulation [Dkt. No. 33], pursuant to which they agreed to entry of a final judgment in favor of the Plaintiffs consistent with the December 13, 2018 order declaring that the Refund was property of Midwest. [Id.] The parties also stipulated to the dismissal of the remaining claim and counterclaim. Therefore, a final judgment can now be entered.

Undisputed Facts and Procedural History

The facts of this case are essentially undisputed. MAC filed a voluntary petition for bankruptcy under Chapter 11 on January 12, 2017. [Dkt. Nos. 13 ¶ 1, 18 ¶ 1]. MAR Farms, LLC and Delta Milling, LLC subsequently filed for bankruptcy relief under Chapter 11 and the three cases were ordered to be jointly administered (MAC, MAR Farms, LLC and Delta Milling, LLC to be identified collectively as "Debtors" or "Sellers"). [Dkt. No. 18 ¶¶ 2-3]. On May 11, 2017, this Court granted Callidus "a post-petition lien on all assets of the Debtor (and their proceeds), whether now existing or hereafter arising or acquired, whether arising or acquired pre-petition or post-petition, of every kind and nature whatsoever." [Dkt. No. 1, exh. 2 ¶ 3].

On December 18, 2017, the Court entered an order ("Sale Order") authorizing the Debtors to sell "all assets of the Debtors, including but not limited to all real and personal property" to Callidus or its assignee or designee, subject to exceptions listed in the Sale Order or listed as an "Excluded Asset" in a final purchase agreement. [Dkt. No. 13, exh. 2 (Sale Order) ¶ M]. The Sale Order specified that "in the event of any conflict between the terms of the final purchase agreement and terms of this Order, this Order shall control." [Id., ¶ 15]. The Sale Order listed "Excluded

Assets" and specified that other assets would be "Excluded Assets" if "**expressly** listed as an Excluded Asset in a final purchase agreement." [Id., ¶ M] (emphasis added).

The Debtors and Midwest executed the Asset Purchase Agreement ("APA") and closed the sale on January 19, 2018 between 6:00 p.m. and 11:02 p.m. [Dkt. No. 13, exhs. 2 (APA), 3]. Midwest, a subsidiary of Callidus "that was formed for the purpose of acquiring the assets from the Debtor," is the designated purchaser under the APA. [Dkt. No. 1, exh. 7].

The APA included the following term:

> Section 2.01 Purchase and Sale. Except as otherwise provided below, **Buyer agrees to purchase** from the Sellers, and the Sellers agree to sell, convey, transfer, assign and deliver, or cause to be sold, conveyed, transferred, assigned and delivered, to Buyer at the Closing, free and clear of all Encumbrances and residual rights of Sellers' Affiliates, if any, pursuant to Section 363 of the Bankruptcy Code, other than Permitted Encumbrances, **all of the Sellers'** right, title and interest in, to and under all of Sellers' **assets of every kind and nature**, whether real, personal or mixed, tangible or intangible (including goodwill), wherever located and whether **now existing or hereafter acquired** (other than the Excluded Assets), including without limitation those which relate to, or are used or held for use in connection with, the Purchased Business (collectively, the "Purchased Assets"), **including, without limitation the following**:
>
> . . .
>
> (f) all Contracts listed on Schedule 2.01(f) of the Disclosure Schedules (the "Assumed Contracts"), in each case, as such Contract may have been amended or otherwise modified prior to the date of this Agreement, unless rejected by Buyer;
>
> (g) **all prepaid expenses**, credits, **advance payments**, **claims**, security, **refunds**, rights of recovery, rights of set-off, rights of recoupment, deposits, charges, sums and fees (including any such item relating to the payment of Taxes), other than any such security deposits made subject to an order of the Bankruptcy Court[.]

[Dkt. No. 13, exh. 2 (APA) ¶¶ 2.01(f)-(g)] (emphasis added).

The APA listed certain "Excluded Assets" that the parties agreed would remain the property of the Sellers and be excluded from the "Purchased Assets" listed in paragraph 2.01 of

the APA. The "Excluded Assets" included "all right, title and interest of the Sellers now or hereafter existing, in, to and under all Contracts (other than the Assumed Contracts and any other Contracts included in the Purchased Assets pursuant to Section 2.01) (collectively, the 'Excluded Contracts')." [Id., ¶ 2.02(d)]. The APA includes a list of "Assumed Contracts" and a list of "Specifically Excluded Assets" (as defined in the APA). [Id., sch. 2.01(f), 2.02(c)].

In October 2017, prior to the sale, MAC purchased eight insurance policies ("Insurance Policies") through Kraus-Anderson Insurance. [Dkt. No. 13, exh. 1; Dkt. No 1 ¶ 13]. MAC prepaid a full year's worth of premiums to obtain the Insurance Policies. [Dkt. No. 1 ¶ 13]. The Insurance Policies were not listed as "Assumed Contracts" on schedule 2.02(f) of the APA, nor were they (or any rights to payments under them) included on the list of "Specifically Excluded Assets." [Dkt. No. 13, exh. 2 (APA), sch. 2.01(f), 2.02(c)]. To be excluded from the sale under the Sale Order, the Insurance Policies and any rights to payment from cancellation were required to be "expressly listed as an Excluded Asset." [Dkt. No. 13, exh. 2 (Sale Order) ¶ M]. On January 24, 2018, MAC requested three of the Insurance Policies to be cancelled effective January 15, 2018 at 12:01 a.m., and five to be cancelled effective January 19, 2018 at 12:01 a.m. [Dkt. No. 13, exh. 1]. In either case, cancellation would be effective prior to the closing of the sale, which occurred late in the afternoon or evening of January 19, 2018. [Dkt. No. 13, exh. 3]. No evidence was presented, nor was it suggested by the parties, that the Insurance Policies were not cancelled pursuant to the terms of the Insurance Policies. Nor was any evidence presented to rebut the clear language of the cancellation notices concerning the effective dates of the cancellation.

Cancellation of the Insurance Policies resulted in the Refund ($133,027.43) and Kraus-Anderson Insurance disclaimed any interest in the Refund. [Dkt. No. 1, exh. 5]. Midwest asserted

it was entitled to the Refund held by Kraus-Anderson Insurance under the APA. The Trustee believed the funds were property of the bankruptcy estate.

This adversary proceeding was commenced on July 17, 2018. [Dkt. No. 1]. In Count I of the Complaint, Midwest and Callidus sought a declaration that the Refund was the property of Midwest pursuant to the terms of the APA. [Dkt. No. 1 ¶¶ 23-34]. In Count II of the Complaint, Midwest and Callidus alternatively sought a declaration that the Refund was subject to Callidus's security interest if not sold to Midwest. [Dkt. No. 1 ¶¶ 35-38]. The Trustee answered: (1) alleging that the Refund was not included in the sale and was property of the estate; (2) asserting a counterclaim objecting to Callidus's proof of claim; and (3) seeking an order disallowing Callidus's claim in its entirety. [Dkt. No. 6].

Midwest and Callidus replied to the counterclaim and moved for partial summary judgment on Count I of the Complaint. [Dkt. Nos. 8, 13]. Midwest and Callidus argued for partial summary judgment in their favor because: (1) the Refund was sold to Midwest by MAC pursuant to the APA and the Sale Order; and (2) to the extent the APA was ambiguous, parol evidence supports a conclusion that MAC intended to sell the Refund to Midwest. [Dkt. No. 13]. The Trustee also moved for partial summary judgment on Count I of the Complaint, arguing the Insurance Policies were excluded from the sale under the terms of the APA resulting in the Refund remaining property of the estate. [Dkt. No. 18]. The motions for partial summary judgment did not include resolution of the counterclaim by the Trustee seeking the disallowance of Callidus's claim.

A hearing was held on October 23, 2018. The cross-motions for partial summary judgment were taken under advisement at the conclusion of the hearing and an oral rendering of the Court's opinion was delivered on December 13, 2018. On January 22, 2019, the parties stipulated to entry

of a final judgment in favor of the Plaintiffs consistent with the December 13, 2018 order and dismissal of the remaining claim and counterclaim. [Dkt. No. 33].

Summary Judgment Standard

The standard for summary judgment was not in dispute by the parties. Summary judgment is governed by Federal Rule of Civil Procedure 56, which is made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. A movant is not entitled to summary judgment unless the movant can show that no genuine issue exists as to any material fact. Fed. R. Civ. P. 56(c). In considering a summary judgment motion, a court must determine whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The role of a court is not to weigh the evidence but instead to determine whether, as a matter of law, a genuine factual conflict exists. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). "In making this determination, the court is required to view the evidence in the light most favorable to the non-moving party and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts." Id. When a motion for summary judgment is properly made and supported with affidavits or other evidence as provided in Fed. R. Civ. P. 56(c), then the non-moving party may not merely rest upon the allegations or denials of the party's pleadings, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 585 (8th Cir. 1987). Moreover, summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Law Of Contract Interpretation

The issue before the Court is primarily one of interpretation of the APA and the Sale Order. Both parties agreed that the Sale Order and APA are unambiguous. However, they had conflicting interpretations of the language contained within the documents. Midwest and Callidus argued that the language used in the Sale Order and APA included the Refund in the sale to Midwest, while the Trustee argued that the language excluded the Insurance Policies, and the Refund upon cancellation of the Insurance Policies, from the sale.

Pursuant to section 11.06 of the APA, the APA is governed by Minnesota law. Under Minnesota law, "the primary goal of contract interpretation is to determine and enforce the intent of the parties." Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W.2d 320, 323 (Minn. 2003). Interpretation of unambiguous contracts is a question of law for the court, as is the determination that a contract is ambiguous. Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 2003). The terms of a contract are ambiguous if they are susceptible to more than one reasonable interpretation. Id. However, a contract's terms are not ambiguous simply because the parties' interpretations differ. See id. at 347 (concluding that the parties' dispute was due to conflicting interpretations of a contract's requirements, rather than the contract being ambiguous). If a contract is unambiguous, the "contract language must be given its plain and ordinary meaning and shall be enforced by courts even if the result is harsh." Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W.2d 700, 704 (Minn. 1999) (footnotes omitted). Courts are to read contract terms in the context of the entire contract and will not construe the terms to lead to an absurd result. Employers Mut. Liab. Ins. Co. v. Eagles Lodge, 165 N.W.2d 554, 556 (Minn. 1969). Additionally, courts are to interpret a contract in such a way which gives meaning to all provisions. Current Tech. Concepts, Inc. v. Irie Enters., Inc., 530 N.W.2d 539, 543 (Minn. 1995).

If a court determines that a contract is ambiguous, it may admit parol, or extrinsic, evidence of the parties' intent. Flynn v. Sawyer, 272 N.W.2d 904, 908 (Minn. 1978); Wick v. Murphy, 54 N.W.2d 805, 808-09 (Minn. 1952); Leslie v. Minneapolis Teachers Ret. Fund Ass'n, 16 N.W.2d 313, 315 (Minn. 1944). When extrinsic evidence has been admitted, the interpretation of ambiguous terms becomes a question of fact for a jury. Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn. 1979); Noreen v. Park Const. Co., 96 N.W.2d 33, 36 (Minn. 1959).

Issues

Midwest and Callidus argued that the Refund was clearly sold pursuant to the language of the APA, which sold all assets of "every kind and nature," including "refunds" as a category of assets to be sold to Midwest. See [Dkt. No. 13 (APA) ¶ 2.01(g)]. The Trustee, in countering the arguments of Midwest and Callidus, argued that the Refund was excluded from the sale. First, the Trustee argued the Refund does not fall under any of the definitions of "Purchased Assets" in the APA. Second, he argued even if the Refund is a "Purchased Asset" it did not exist at closing and could not have been sold. Third, he argued the Insurance Policies were "Excluded Contracts" under the APA, and, therefore, the Refund resulting from the Insurance Policies' cancellation was excluded from the sale. For the Trustee to prevail on the argument that the Refund was excluded because the Insurance Policies were excluded, the Refund must have been incapable of being severed from the Insurance Policies and exist as a distinct asset. The Court must also consider whether, even if the Insurance Policies were excluded, the Refund, after cancellation of the Insurance Policies, was sold as an after-acquired asset.

After reviewing each of these issues, the Court concludes that the Trustee's arguments fail[1] as the Refund was sold to Midwest. The Refund was covered as a "Purchased Asset" under numerous provisions of the APA and Sale Order. The Refund existed at closing. It was not excluded from the sale and it could be severed from the Insurance Policies even if the Insurance Policies were excluded. Finally, if the Insurance Policies were not cancelled until after the sale, the Refund could be sold as property acquired after the sale by MAC pursuant t o the APA.

Analysis

I. The Refund Is A Refund Under The Terms Of The APA.

Midwest and Callidus argued the Refund at issue is a refund as that term is commonly understood, and refunds were sold to Midwest under the APA. The Trustee argued that the Refund is not covered by the terms of the APA because "refunds" was not a defined term within the APA and, therefore, it is unclear what it is meant to include.

Contract language is to be given its plain and ordinary meaning. Black's Law Dictionary defines "refund" in part as: "The return of money to a person who overpaid." Black's Law Dictionary 1472 (10th ed. 2014). Using this definition, the word "refunds" within the APA is analogous with repayment. This is consistent with a basic premise of insurance law which states that when a policy is terminated mid-term (which is the case here), the insured is usually entitled to a return of the pro-rata portion of the premium. 4 Law and Prac. of Ins. Coverage Litig. § 47:49 (July 2018). Generally accepted accounting principles also support this basic premise, expressing that "when an insurance policy is canceled before it expires, the unearned premium, which is roughly equivalent to the balance remaining in the 'prepaid insurance' balance sheet account, is

[1] Even if the Trustee prevailed on each of these issues, he must eliminate Callidus's security interest in the Refund and a second security interest claimed by Mark Welty.

refunded to the insured." In re Megamarket of Lexington, Inc., 207 B.R. 527, 533 (Bankr. E.D. Ky. 1997) (citing Patrick R. Delaney, James R. Adler, Barry J. Epstein, & Michael F. Foran, GAAP: Interpretation and Application of Generally Accepted Accounting Principles, at 37, 121 (1993)) (emphasis added). Here, the parties agreed that MAC prepaid a full year's worth of premiums to Kraus-Anderson to obtain the Insurance Policies. MAC then cancelled the Insurance Policies mid-term leaving Kraus-Anderson in possession of $133,027.43 in overpayments resulting from that cancellation. Had MAC cancelled the Insurance Policies mid-term and not sold its assets to Midwest, it would have been entitled to a refund of any overpayments resulting from such cancellation. This situation fits squarely within the definition of "refund."

However, the proper term for the return of the unused premiums does not matter because it clearly falls under the definition of "Purchased Asset" under the APA. First, section 2.01 states all assets of every kind and nature are to be sold. See [Dkt. No. 13, exh. 2 (APA) ¶ 2.01]. The Refund is a type of asset and it does not need to be categorized. If it was not an asset, the parties would not be fighting to recover it. But, more specifically, until the Insurance Policies were cancelled there can be little doubt the payment to the insurer was a "prepaid expense" or "advance payment," items covered under the definition of "Purchased Assets." See [id., ¶ 2.01(g)]. Alternatively, the right to a refund upon cancellation could have been a contingent, or an unmatured "refund" or a contingent "claim" prior to cancellation. See [id., ¶¶ 2.01(g), (n)]. A contingent and unmatured claim and refund are "kinds" of assets. See [id., ¶ 2.01 (identifying "Purchased Assets" as "assets of every kind and nature")]. After cancellation, if the amount owed by the insurer is not a "refund," it could be a "claim" (against the insurer) until paid. See [id., ¶¶ 2.01(g), (n)]. Therefore, there can be no serious doubt that the Refund is covered by the APA and the Sale Order.

II. The Insurance Policies Were Effectively Cancelled Prior To Closing And The Refund Was Sold To Midwest.

Midwest and Callidus argued that the Insurance Policies were cancelled prior to closing giving rise to the Refund, which was sold at closing. The Trustee disagreed and his counsel argued at the October 23, 2018 hearing that the term "refunds" in section 2.01(g) of the APA did not include the Refund in this instance, "[b]ecause the Refund did not exist at the time of the [APA]'s closing. The right to a refund did not arise until the cancellation [of the Insurance Policies] was made." [Dkt. No. 21].

Six days after the closing, MAC submitted eight "Cancellation Request/Policy Release" forms cancelling the eight Insurance Policies. [Dkt. No. 13, exh. 1]. These forms were signed by Blair Bury, President of MAC, on January 25, 2018 with three listing an "effective date and hour of cancellation" of January 15, 2018 at 12:01 a.m. and five listing an "effective date and hour of cancellation" of January 19, 2018 at 12:01 a.m. [Id.] The closing of the sale occurred later in the day on January 19, 2018. See [Dkt. No. 13, exh. 3]. The Trustee directed the Court to the signature date of January 25, 2018 rather than the "effective date and hour of cancellation" to prove that the Insurance Policies were still in effect at the time of the January 19, 2018 closing. However, the "Cancellation Request/Policy Release" forms specifically stated that "[n]o claims of any type will by made against the Insurance Company . . . under this policy for losses which occur after the date of cancellation shown above." See [Dkt. No. 13, exh. 1]. This statement clearly proves the undisputed intent of MAC to cancel the Insurance Policies retroactively giving rise to the Refund at or prior to the closing. The Trustee, required to rebut facts submitted by Midwest and Callidus, presented no evidence or law that the effective date of cancellation was not valid. See Fed. R. Civ. P. 56(c), (e). Thus, there is no genuine issue of material fact that the Insurance Policies were

effectively not in existence at the closing and could not be excluded from the sale. Only the Refund existed and it was sold to Midwest.

III. Even If The Insurance Policies Were Not Cancelled Prior To Closing, The Refund Was Not Excluded From The Sale.

The Trustee, assuming the Insurance Policies existed at closing, argued that the language of section 2.02 of the APA excluded the Insurance Policies from the sale, and therefore, the Refund was excluded as part of the excluded Insurance Policies. Section 2.02 of the APA defined "Excluded Assets" in relevant part as:

> (d) all right, title and interest of the Sellers now and hereafter existing in, to and under all Contracts (other than the Assumed Contracts and any other Contracts included in the Purchased Assets pursuant to Section 2.01.) (collectively, the "**Excluded Contracts**").

The Trustee asserted that the language of section 2.02 of the APA demonstrated that contracts not explicitly assumed were deemed "Excluded Assets." He argued that the inclusion of nine other insurance policies among the "Assumed Contracts" was significant as it established the parties' intent that insurance policies be included within "Contracts." The Trustee argued that by intentionally excluding the Insurance Policies from "Assumed Contracts," the contracting parties placed them within the category of "Excluded Contracts," making them "Excluded Assets" under section 2.02 of the APA by implication. The Trustee also viewed the Insurance Policies and the Refund as a bundle—meaning one could not be assumed without the other. Thus, the Trustee argued, because the Insurance Policies were not "Assumed Contracts" and were "Excluded Assets," they (and the Refund arising from the cancellations) were excluded from the sale.

However, the Trustee ignored the Sale Order. The Sale Order identified "**all** assets" of the Debtors as "Sale Assets" unless "**expressly** listed as an Excluded Asset." [Dkt. No. 13, exh. 2 (Sale Order) ¶ M] (emphasis added). There is no question the Insurance Policies and the right to the

Refund were not expressly listed as "Excluded Assets" in the APA. The Sale Order appears to be in conflict with the Trustee's interpretation of the APA as to the Insurance Policies themselves. But, the Sale Order governs if it conflicts with the APA: "[I]n the event of any conflict between the terms of the final purchase agreement and the terms of this [Sale] Order, this [Sale] Order shall control." [Dkt. No. 13, exh. 2 (Sale Order) ¶ 15]. The failure of the Sellers or Midwest to expressly list the Insurance Policies and the right to payment under the Insurance Policies in the APA as "Specifically Excluded Assets" means, under the Sale Order, the Insurance Policies (if in existence at closing at all) or the payments due upon cancellation were "Sale Assets."[2]

IV. The Refund Can Be Sold Separately From The Insurance Policies.

Even if the Insurance Policies were excluded under the APA and the Sale Order, the Trustee did not explain why a refund cannot be separated from the Insurance Policies and included in the sale as a separate asset. In fact, payment streams are often separated from their underlying contracts. In NetBank, FSB v. Kipperman (In re Commercial Money Ctr., Inc.), 350 B.R. 465, 475 (B.A.P. 9th Cir. 2006), the Bankruptcy Appellate Panel for the Ninth Circuit held that payment streams separated from their underlying leases may be sold independently of the underlying lease. It is quite common to sell payment streams under a contract without the purchaser assuming the contract itself. See Gray v. Jefferson Loan & Inv. Bank (In re Commercial Mgmt. Serv., Inc.),

[2] Neither party addressed whether the Insurance Policies needed to be assumed and assigned under 11 U.S.C. § 365 as executory contracts. At least one court has held prepaid insurance contracts, such as the Insurance Policies in this case, are not executory. See Westchester Surplus Lines Ins., Co. v. Surfside Resort & Suites, Inc. (In re Surfside Resort & Suites, Inc.), 344 B.R. 179, 186 (Bankr. M.D. Fla. 2006). If required to be assumed and assigned, the Debtors could have brought such a motion at Midwest's request. See [Dkt. No. 13, exh. 2 (Sale Order) n.1]. If not required to be assumed and assigned as executory contracts, and if not cancelled prior to the sale, the Insurance Policies (as not specifically excluded) could have been sold like the nine other insurance contracts. But, since the Insurance Policies were undisputedly cancelled, and because of the other reasons cited in this order, whether or not they were executory contracts is immaterial.

127 B.R. 296, 304 (Bankr. D. Mass. 1991) (concluding a bank's purchase of the right to receive payments due under equipment leases could be perfected by possession of the leases). Therefore, MAC could sell its right to payment resulting from cancellation of the Insurance Policies without also requiring the Insurance Policies to which the Refund relates to be assumed by Midwest. The right to the Refund is severable from the Insurance Policies as a distinct asset.

There is nothing inconsistent with excluding the Insurance Policies and including the Refund in the sale. MAC received the benefit of the Insurance Policies until they were cancelled and, upon cancellation, MAC became entitled to a refund for overpayment based on the prepaid premiums. Under Section 2.01 of the APA, those refunds became property of Midwest. Therefore, the APA could have excluded the Insurance Policies but also included the Refund in the sale giving meaning to both provisions of the APA.

V. The APA Included Refunds Acquired After The Closing.

Even if: (1) the Insurance Policies were terminated after the closing; (2) the Insurance Policies were excluded from the sale; and (3) the right to the Refund could not be severed from the Insurance Policies, the Refund was nonetheless sold to Midwest as property acquired by MAC after the closing. The APA clearly included all assets "whether now existing or **hereafter** acquired." [Dkt. No. 13, exh. 2 (APA) ¶ 2.01] (emphasis added). The inclusion of property "hereafter acquired" in section 2.01 of the APA is significant. Under Minnesota law, courts are directed to read a contract in its entirety and interpret it in a way that gives meaning to all provisions. Current Tech. Concepts, Inc., 530 N.W.2d at 543; Employers Mut. Liab. Ins. Co., 165 N.W.2d at 556.

Black's Law Dictionary defines "acquire" in the following way: "To gain possession or control of; to get or obtain." Black's Law Dictionary 28 (10th ed. 2014). The inclusion of property

"hereafter acquired" in combination with the use of the word "refunds" in subsection 2.01(g) worked to allow any refunds coming into possession or control of MAC after the closing of the APA to be included in the sale. To interpret the APA differently would be to eliminate property "hereafter acquired." Thus, even if the Trustee was correct that the Insurance Policies were still in effect at the time of the January 19, 2018 closing and were "Excluded Contracts," the Refund would nonetheless be included in the sale as property acquired after the sale. This point was acknowledged at the October 23, 2018 hearing when the Trustee's attorney conceded that this was a "logical interpretation" of that section of the APA.

Because (as the parties agreed) the APA is unambiguous, the contract language must be given its plain and ordinary meaning and read in a way that gives meaning to all provisions. It is completely consistent with the APA for the Debtor to get the benefit of the Insurance Policies (coverage) until the sale closed or even for a period after the sale and, then, upon cancellation, the Refund is paid to Midwest. But, it is inconsistent to have the Refund, after cancellation of the Insurance Policies, retained by the estate when after-acquired refunds were specifically included in the sale under the APA. Therefore, even if the Insurance Policies were not cancelled effective at closing, the Refund was included in the sale as after-acquired property.

VI. Callidus And Midwest Provided Sufficient Parol Evidence To Prove The Parties' Intent To Sell The Refund.

Even if the APA and the Sale Order were ambiguous, Midwest and Callidus provided undisputed parol evidence showing the intent of the parties to the contract. Generally, a court will not resort to construction of a contract where the intent of the parties is expressed in clear and unambiguous language. See Telex Corp. v. Data Prods. Corp., 135 N.W.2d 681, 686-87 (Minn. 1965) (concluding that when the written language of an agreement, once applied to the subject matter, is clear, the court should not look beyond the wording of the contract to construe its terms).

If the terms of the contract were ambiguous or uncertain, generally summary judgment is inappropriate and the parties should be given the opportunity to present evidence. In re Turners Crossroad Dev. Co., 277 N.W.2d 364, 368-69 (Minn. 1979). But, if the party moving for summary judgment satisfies its burden of showing there is no genuine issue of material fact, the non-moving party may not rest upon the allegations contained in the pleadings, "but rather must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists." Chism v. W.R. Grace & Co., 158 F.3d 988, 990 (8th Cir. 1998) (citing Fed. R. Civ. P. 56(e)). In order to survive summary judgment, the party "must do more than simply show that there is some metaphysical doubt as to the material facts; they must show there is sufficient evidence to support a jury verdict in their favor." Id. (quotation and citations omitted).

Callidus and Midwest provided parol evidence of the parties' intent in drafting the language of the APA—to transfer all assets of the Debtors except Chapter 5 actions (avoidance claims). See [Dkt. No. 13 ("Memorandum in Support of Midwest Asphalt Services, LLC's Motion for Summary Judgment as to Count I of the Complaint"), at 10 (citing "Final Report in Chapter 11 case" ("Final Report"), at 4, No. 17-40075, [Dkt. No. 399])]; see also In re Phillips, 593 F.2d 356, 358 (8th Cir. 1979) (recognizing a bankruptcy court may take judicial notice of facts contained in court pleadings, including in other cases or courts). The Final Report prepared by MAC dated March, 29, 2018 (long after the closing) indicates that the Debtors, as sellers under the APA, did not list the Refund as an estate asset. [Final Report, at 4]. Thus, MAC believed it transferred the Refund in the sale.

In addition, the eight "Cancellation Request/Policy Release" forms discussed above, indicated MAC's intent to release the Insurance Policies effective on or before the closing and, therefore, the intent to sell the Refund. [Dkt. No. 13 exh. 1]. These forms demonstrate an intent

on the part of MAC, as a seller under the APA, that the Insurance Policies would not be effective past the closing. Given the date on which the cancellation was to take effect, it is clear that the Sellers intended the Insurance Policies to neither be "Excluded Assets" nor "Assumed Contracts" under the APA; rather, it shows an intent on the part of the Sellers that the Insurance Policies would simply fail to exist past the effective date of cancellation, the day of closing. See [Dkt. No. 13, exh. 1 ("No claims of any type will be made against the Insurance Company . . . under this policy for losses which occur after the date of cancellation [either January 15, 2018 or January 19, 2018] shown above.")]. The documents clearly show that the right to a return of the prepayments on the Insurance Policies arose from the date listed as the effective date of cancellation, not the later date on which the cancellation request was actually made. Therefore, these documents prove the intent of the Sellers that the Refund be sold to Midwest.

The Trustee provided no evidence to rebut the parol evidence cited by Midwest and Callidus in either defending the Plaintiffs' partial summary judgment motion or in supporting his own cross-motion for partial summary judgment. The Trustee was required to show that a genuine issue of material fact existed. See Chism, 158 F.3d at 990; see also Anderson, 477 U.S. at 251-52 (describing the summary judgement standard as, in essence, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"). Here, no evidence was presented by the Trustee to rebut the evidence of the Plaintiffs. Thus, he did not demonstrate that a genuine issue of material fact exists on the question of the parties' intent.

The Trustee had the opportunity to conduct discovery on the issues raised in the Plaintiffs' motion for partial summary judgment. The discovery period commenced at least a month and a half prior to the October 23, 2018 hearing on the partial summary judgment motions and terminated

on November 30, 2018. [Dkt. Nos. 14, 15]. Under Federal Rule of Civil Procedure 56(d), the Trustee had an opportunity to request additional time to respond to the factual allegations by conducting additional discovery or request the Court defer considering the partial summary judgement motions until discovery was completed. He did not do so. Because the Trustee did not counter the evidence of Midwest and Callidus concerning the contracting parties' intent, Midwest and Callidus's allegations were undisputed and support summary judgment as an alternative. Fed. R. Civ. P. 56(c), (e).

Conclusion

The right to payment for unused premiums after cancellation of the Insurance Policies is a refund (or other "Purchased Asset") under the APA and the Sale Order. The Insurance Policies were effectively cancelled prior to the closing and could not be excluded from the sale. The Insurance Policies did not exist. Accordingly, the Refund effectively existed at closing and was included in the sale. In any event, the right to the Refund (and the Insurance Policies) was not expressly excluded from the sale and was sold to Midwest. But, even if the Insurance Policies were excluded, the Refund was sold as it can be severed from the Insurance Policies as an independent asset. Finally, even if the Insurance Policies were not effectively cancelled until after the closing, the Refund became property of Midwest upon cancellation of the Insurance Policies as property acquired after the closing pursuant to the specific language of the APA. Alternatively, if the APA is ambiguous, uncontested evidence shows it was the intent of the parties to sell the Refund to Midwest.

IT IS HEREBY ORDERED:

1. Count I of the Complaint filed by the Plaintiffs is **GRANTED**. The rights to the funds held by Kraus-Anderson Insurance resulting from the cancellation of Debtor

Midwest Asphalt Corporation's Insurance Policies were included in the sale between Midwest Asphalt Corporation and Midwest Asphalt Services, LLC and are property of Plaintiff Midwest Asphalt Services, LLC and not the bankruptcy estate.

2. Pursuant to the parties' stipulation, Count II of the Plaintiffs' Complaint is **DISMISSED** without prejudice.

3. Pursuant to the parties' stipulation, the Defendant's Counterclaim is **DISMISSED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: *February 14, 2019*

By the Court:

/e/ William J. Fisher

William J. Fisher
United States Bankruptcy Judge