

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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: :
In re : Chapter 11 Case No.
: :
AMES DEPARTMENT STORES, : 01-42217 (REG)
: :
INC., et al., : Jointly Administered
: :
DEBTORS. : :
: :
-----X
AMES MERCHANDISING CORP., :
: :
Plaintiff, :
against, : Adversary Proceeding
: :
NIKKO AMERICA, INC., : No. 03-08310 (REG)
: :
Defendant. : :
: :
-----X

DECISION AFTER TRIAL

APPEARANCES:

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ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE:

In this adversary proceeding under the umbrella of the chapter 11 cases of Ames Department Stores, Inc. and its affiliates (“**Debtors**”), Ames Merchandising Corp. (“**Ames**”) seeks to recover five alleged preferential transfers, totaling approximately \$185,000, from Defendant Nikko America, Inc. (“**Nikko America**”).

Because the Court concludes, after hearing the evidence, that Nikko America is an entity distinct from the entities that were actually Ames’ creditors and to whom Ames actually made payment, and Ames failed to prove that Nikko America received the benefit of the transfers, judgment will be entered for the Defendant.

The Court’s Findings of Fact and Conclusions of Law in connection with its determination follow.

Findings of Fact

The Parties

Nikko America is the North and South American “sales office” for Nikko Co. Ltd. (“**Nikko Co.**”).¹ Nikko Co. owns 60% of Nikko America, and either directly or indirectly owns two of its production facilities, Nikko Hong Kong (“**Nikko TEC**”) and Nikko Malaysia (“**Nikko Electronics**”).² Nikko America, Nikko TEC, and Nikko Electronics each maintained their own books and records, paid their own expenses, and had separate boards of directors and officers.³

Nikko America generated business by

¹ Trial Tr. 118.

² *Id.*

³ Cothrun Aff. 2-3.

(1) selling products locally, and then transmitting those orders to the various factories while earning a commission on the sale; and

(2) ordering products directly from the factories, stocking them in Texas, and filling orders with the U.S. stock.⁴

In 2001, Nikko America employed a sales representative, RLA Marketing, under a “manufacturer’s representative agreement,” to conduct sales for it in the northeastern United States.⁵ As Nikko America’s sales representative, RLA would “call on [buyers] and see if they wanted to place orders, show the new merchandise, see if they had any issues or problems with Nikko America, [and] see if there was any way to increase sales for Nikko America . . . Nikko TEC, [or] Nikko Bhd.”⁶

Nikko America received a percentage of the sales that it generated for Nikko TEC and Nikko Electronics.⁷ Typically, Nikko America earned a 25% to 29% commission, once the contract was “paid in full.”⁸ Nikko America would then pay RLA a 2% to 3% commission.⁹

The Transaction

Typically, “the [Ames] buyers would have meetings in terms of planning for . . . the season, either spring or fall. Those buyers would prepare the kinds of product that they wanted in the store for the seasons. Once it was approved, they would have negotiations with vendors in terms of quantity, style, size, price, and the kinds of assortments”¹⁰ In April/May 2001, the Ames toy buyer, Greg Thoutte, discussed terms of a contract for the purchase of remote

⁴ Trial Tr. 121-22.

⁵ *Id.* at 114.

⁶ *Id.* at 102-03.

⁷ *Id.* at 116, 122.

⁸ *Id.* at 123.

⁹ *Id.* at 111. Nikko America’s commission included the commission it would remit to RLA. *Id.* at 123.

¹⁰ *Id.* at 59

controlled toy cars with RLA's representative, Dave Johnson.¹¹ Dave Johnson then communicated Ames' terms to Jeff Falke, Nikko America's vice president of sales, to determine if Nikko America "could fill the order on the terms that Ames wanted."¹² Although Ames characterized the discussions between Ames, RLA, and Nikko America as "negotiations," Nikko America could not "carte blanche agree to anything."¹³ Importantly, whether orders submitted to Nikko Electronics or Nikko TEC could be met was "solely at their discretion."¹⁴

Once Nikko America determined that an order could be filled, Ames would issue a purchase order.¹⁵ The purchase order was "what [Ames] expected to receive those goods against, and . . . was the driving document."¹⁶ Between May 7 and May 10, Ames physically delivered five purchase orders to RLA that were subsequently forwarded to Nikko America.¹⁷ The purchase orders were addressed to "Dave Johnson, Nikko America c/o RLA Marketing, 461 From Road, Paramus, NJ 07652."¹⁸ The purchase orders indicated the total quantities ordered, the unit price for each toy car, and the allocation of the toy cars to be delivered among Ames' three distribution centers.¹⁹ The purchase orders also indicated FOB Points and that payment would be made via wire transfer.²⁰

¹¹ *Id.* at 55, 59, 125, 152-53 (note that the Trial Transcript phonetically describes Thoutte as Theat). *See also* Ex. 3, Nikko America ("NA Ex.") 0015-16, 0024, 0036-36, 0045-46, 0055-56, 0067-68, 0125-128, 0147-148, 0202-213 (These are "worksheets in preparation for releasing a purchase order for these goods from the [Ames] imports department." Trial Tr. 60).

¹² Trial Tr. 60.

¹³ *Id.* at 151.

¹⁴ *Id.*

¹⁵ *Id.* at 125. According to Ames' witness a purchase order was issued "once the deal, meaning an agreement on terms, price, quantity, shipment dates, ha[d] been reached . . ." *Id.* at 61.

¹⁶ Trial Tr. 59.

¹⁷ *Id.* at 59-61, 103. *See also* NA Ex. 0001-02, 0018, 0034, 0123-24, 0164-65.

¹⁸ *See* NA Ex. 0001-02, 0018, 0034, 0123-24, 0164-65.

¹⁹ *Id.*

²⁰ *Id.*

Upon receipt of the purchase orders, Nikko America generated order acknowledgement forms (“**Order Acknowledgements**”) that were subsequently forwarded to Nikko Electronics and Nikko TEC.²¹ These forms were used “to confirm that the factory was both aware of what the purchase order called for and could confirm to someone that it was going to do so”²² Based on the purchase orders, Nikko America “[knew] who to direct the order acknowledgement forms to.”²³ Nikko America “ha[d] intimate knowledge”²⁴ of the items Nikko Electronics and Nikko TEC produced because “only certain items [were] produced out of certain factories.”²⁵ Each Order Acknowledgement referenced items produced at either Nikko Electronics or Nikko TEC, but not both.²⁶ Nikko America split each purchase order into Order Acknowledgements based on the product being ordered. The Order Acknowledgements were then forwarded by Nikko America to either Nikko Electronics or Nikko TEC.²⁷

In response to the Order Acknowledgments, Nikko Electronics issued a Sales Confirmation/Pro-Forma Invoice (“**Pro Forma Invoice**”).²⁸ Each Pro Forma Invoice referenced the Ames purchase order number and was addressed to Ames but indicated an incomplete address, referring to “Rock Hill, CT” instead of “Rocky Hill, CT” and did not include a zip

²¹ The Order Acknowledgment stated “Dear Factory, This document acknowledges receipt of PO number . . . from customer. Please review the information and send order confirmation with a confirmed ship date.” NA Ex. 0003. Order Acknowledgements were not sent to Ames. Trial Tr. 7.

²² Trial Tr. 125.

²³ *Id.* at 106.

²⁴ *Id.*

²⁵ *Id.* at 105-06 (“It would either be produced out of Malaysia or Hong Kong, but not both.”).

²⁶ *Id.* at 104-06.

²⁷ *Id.* at 103.

²⁸ Trial Tr. 107. The Pro Forma Invoice stated “We, as seller, hereby confirm having sold to you, as Buyer, the goods as specified hereunder. Please sign and return the duplicate copy to us by return. If there is any discrepancy, please let us know immediately by fax, as otherwise the terms and conditions set forth hereunder shall be deemed to be accepted irrespective of your return of the duplicative copy with or without your counter signature.” *See* NA Ex. 0004.

code.²⁹ The Pro Forma Invoices were signed by *Nikko Electronics* (not Nikko America) and required a signature by the accepting party.³⁰ The Pro Forma Invoices were not typically returned from customers “[i]ts purpose [was] really to say . . . here’s a sneak preview pro forma of what [the invoice] is going to look like . . . just a politeness, it says, please sign it and return it.”³¹ The Pro Forma Invoices provided for “FOB Malaysia” and for Ames to wire payment to *Nikko Electronics*.³²

Nikko TEC, in response to the Order Acknowledgments, issued order confirmation forms (“**Order Confirmations**”).³³ These forms were properly addressed to Ames, did not require a signature of acceptance,³⁴ included the Ames purchase order number, and provided for payment via wire transfer.³⁵

Nikko America submitted into evidence nine Pro Forma Invoices issued by Nikko Electronics referencing a total of \$352,500³⁶ and two Order Confirmations from Nikko TEC totaling \$42,656.³⁷

²⁹ See NA Ex. 0004. Many of the Pro Forma Invoices in evidence indicate that they were faxed to Nikko America after they were issued. See NA Ex. 0004, 0008, 0012.

³⁰ Trial Tr. 153. None of the Pro Forma Invoice submitted into evidence contained a signature by Ames.

³¹ *Id.* at 153-54.

³² *Id.* at 25. See also NA Ex. 0004, 0008, 0012, 0103, 0107, 0113, 0152-54.

³³ The Order Confirmation stated, “We hereby confirm our sales to you and your purchase from us the undermentioned goods under the following terms and conditions.” NA Ex. 0022.

³⁴ See NA Ex. 0022-23, 0032-33.

³⁵ *Id.*

³⁶ See NA Ex. 0004, 0008, 0012, 0103, 0107, 0113, 0152-54.

³⁷ See NA 0022-23, 0032-33. The record is unclear if Ames received the Pro Forma Invoices or the Order Confirmations pertaining to these transfers. Although the Ames witness indicated that he had never seen these documents prior to the trial and that Ames did not receive documents “purporting to be sales confirmations,” he had no “reason to believe [they were] not sent.” Nikko America was also unable to confirm that the invoices or confirmations were sent to Ames. The Pro Forma Invoices and Order Confirmations were submitted into evidence by Nikko America. Ames was unable to check its records pertaining to these transfers because it classified the transactions in its “Foreign Vendor” database and when its “import system . . . broke down . . . [it was] not able to recover the information from it . . .” Trial Tr. 84.

After the issuance of Pro Forma Invoices, Nikko Electronics generated commercial invoices (“**Commercial Invoices**”) and delivered the underlying merchandise to Ames’ shipping agent, Fritz Transportation.³⁸ Upon receipt of the merchandise, Fritz sent a document to Ames indicating that it “received the merchandise . . . that it was now in the possession of Fritz on behalf of the company”³⁹

Nikko America has produced nine Commercial Invoices relating to the transfers, all issued by Nikko Electronics: three invoices dated June 21, 2001⁴⁰, totaling \$102,600, and six Commercial Invoices dated July 12, 2001, totaling \$249,900.⁴¹

Although the record is unclear whether Ames ever received the Commercial Invoices from Nikko TEC and Nikko Electronics,⁴² “Ames did not necessarily pay a vendor simply because it issued a purchase order.”⁴³ Typically, “when Ames would issue a purchase order, it would receive something back in the form of an invoice.”⁴⁴ The Ames witness noted that before its import system crashed, “[t]here would be an invoice from Nikko. *I don’t know which entity.*”⁴⁵ It is likely that Ames received invoices from Nikko Electronics or Nikko TEC, as

³⁸ Trial Tr. 29, 110-11. No invoices from Nikko TEC were presented into evidence. Nikko America could not confirm that the Commercial Invoices had actually been sent to Ames and Ames could not confirm that it received the Commercial Invoices because all documents pertaining to this transaction were lost when Ames’ import system crashed. *See supra* note 37.

³⁹ Trial Tr. at 66. The only documents from Fritz in evidence pertain to shipments by Nikko Electronics and indicate Nikko Electronics as the “Shipper” and receipt of a Commercial Invoice. *Id.* at 67.

⁴⁰ *See* NA Ex. 0101, 0109, 0115.

⁴¹ *See* NA Ex. 0005, 0009, 0013, 0156-58. No Commercial Invoices issued by Nikko TEC were introduced into evidence.

⁴² The Ames witness did not “have a belief without speculation that the commercial invoices issued by Nikko Electronics [or Nikko TEC] would have been in the [Ames] system before it crashed. . . .” Trial Tr. 88-89.

⁴³ *Id.* at 38.

⁴⁴ *Id.* at 38-39.

⁴⁵ *Id.* at 89 (emphasis added).

contrasted to Nikko America. Nikko America submitted into evidence invoices from Nikko Electronics and Nikko TEC, provided by Ames, that pertained to prior transactions.⁴⁶

In July 2001, Ames wired \$79,249.20 to *Nikko TEC* and in August 2001 Ames wired \$110,000 to *Nikko Electronics*.⁴⁷ At this time Ames had “a listing of what bills were due or what bills had to be paid . . . and based on that documentation, decisions were made to allocate whatever cash was available every day.”⁴⁸ “In the case of International, or vendors whose goods were being picked up overseas, the triggering mechanism was Fritz for payment.”⁴⁹ Both parties agreed that there were no documents in evidence that appeared to have been sent from Nikko America directly to Ames.⁵⁰ It is not clear from the record if Nikko America received any part of its commission from Nikko Electronics or Nikko TEC.⁵¹ On August 20, 2001, Ames filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code.

The parties agree that no payments were sent to Nikko North America.

⁴⁶ *Id.* at 89-92.

⁴⁷ The payments to Nikko Electronics were: July 6, 2001: \$20,000.00 and August 3, 2001: \$60,000.00. The payments to Nikko TEC were: July 9, 2001: \$20,506.20; July 13, 2001: \$38,743.00; August 8, 2001: \$50,000.00. *See* Pre-Trial Stipulation § III ¶ 3 (the dates of these transfers do not appear to be disputed). The Ames witness indicated that its records did not reveal who gave them the instructions to wire payments to Ames. Trial Tr. 28.

⁴⁸ Trial Tr. 46.

⁴⁹ *Id.* at 39. For domestic shipments the procedure was that “[a]n invoice from a vendor would come in at some point in time and it would be entered into the system, and when the merchandise was delivered at the distribution center, a shipping receipt would be entered into the system by the Ames employee” *Id.* at 64.

⁵⁰ *Id.* at 37.

⁵¹ As indicated above Nikko America would receive its commission once Ames paid in full. Although Nikko America’s witness did not “actually know whether [Nikko America] got a portion of the fees that were paid,” he did indicate that, “Ames started paying partial payments and lump sums. And so its fair to believe that [Nikko America] never received any payment on [the transaction] because [Nikko America] wouldn’t have got above to the point where [Nikko Electronics or Nikko TEC] would have paid [Nikko America] a commission.” Tr. 122-23. Ames has not presented any evidence indicating that Nikko America received its commission.

Discussion

To avoid a transfer as a preference, Ames must establish each of the elements set forth in section 547(b), by a preponderance of the evidence.⁵² Section 547(b) provides:

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made—
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The critical issues here arise with respect to section 547(b)(1), requiring that the transfer be “to or for the benefit of a creditor.”

⁵² *In re Roblin Industries, Inc.*, 78 F.3d 30, 34 (2d Cir. 1996).

Was Nikko America a creditor?

The Bankruptcy Code defines a creditor as an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor”⁵³ Under the Bankruptcy Code, the term “claim” is defined as any “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, disputed, undisputed, legal, equitable, secured, or unsecured”⁵⁴

Ames argues that the purchase orders represent a contractual relationship between Nikko America and Ames, memorializing Ames’ “promise to Nikko America to pay for goods . . . at the negotiated prices.”⁵⁵ As a result of this relationship, Ames contends that Nikko America is its creditor because Nikko America “was the named party to the contract. . . . took the lion’s share, if not all, of the profits . . . was responsible for absorbing any loss on the contract . . . [a]nd . . . was responsible for handling the execution . . . as well as the delegation of performance duties under the contract.”⁵⁶

After seeing and hearing the evidence, the Court does not believe that it can make the findings for which Ames argues. The details of the agreement and relationship between the Nikko entities were not fleshed out very extensively, and while that is a deficiency as to which both sides share some responsibility, the burden as to this issue was on Ames. Insofar as the evidence reflects, the deal was structured such that Nikko America would receive its commission

⁵³ 11 U.S.C § 101 (10).

⁵⁴ 11 U.S.C § 101 (5).

⁵⁵ Ames Post Trial Br. 10.

⁵⁶ *Id.* at 10-11. Although the right to payment may have been contingent upon Nikko America’s performance obligations, Ames argues that “contingent rights are explicitly included as rights to payment under the definition of claim.” *Id.* at 10. While, “guarantors are classic examples of creditors holding ‘contingent’ claims,” *In re Valley Food Services, LLC*, 2008 WL 5423495 *4 (Bankr. W.D. Mo. 2008) (citations omitted), no evidence has been presented indicating that Nikko America was a guarantor.

from Nikko Electronics and Nikko TEC. The commission was not owed to Nikko America by Ames, and Nikko America did not expect to receive payment from Ames.⁵⁷

In *In re Black & Geddes*,⁵⁸ the court dealt with a similar situation. There the debtor attempted to recover and avoid alleged preference payments it made to a steamship agency acting on behalf of a common carrier. The agency forwarded the payments to the carrier, only retaining its commission. The court held that the payment was not a preferential transfer to the steamship agency because the indebtedness was due to the *common carrier*, which performed the services, not the agency.⁵⁹ Here, similarly, it was Nikko Electronics and Nikko TEC that produced the product, delivered it to Ames' shipping agent, and invoiced the transaction. Therefore, Nikko America did not have a right to payment from Ames, and cannot be found to be a creditor.

Ames' argument that Nikko America was the principal to the transaction relies heavily on the contention that Nikko America "decided which factory should produce the requested merchandise," and that Nikko America delegated its performance obligations.⁶⁰ But the factual predicate for that contention is deficient. As noted above Nikko America did not have "carte blanche" authority to agree to fill any order.⁶¹ Nikko America required confirmation from Nikko Electronics and Nikko TEC, and utilized the Order Acknowledgements to forward them the purchase orders. Nikko America was not responsible for deciding which factories would produce the requested products. Nikko Electronics and Nikko TEC produced different products

⁵⁷ Nikko America did not expect "to have the right to recover amounts that would otherwise be due . . . because the transactions were invoiced by different entities." Trial Tr. 152.

⁵⁸ 59 B.R. 873, 875 (Bankr. S.D.N.Y. 1986) (Abram, J.).

⁵⁹ The court also noted that "[the steamship agency's] retention of its commission out of the funds does not leave it vulnerable to a preference attack for that amount. [The steamship agency] did not owe this fee to [the shipping agent] and the fee was due solely from [the ocean carrier]." *Id.* at 874 n.2.

⁶⁰ Ames Post Trial Br. 11.

⁶¹ *See* n.13 and accompanying text.

and each Order Acknowledgement was specific to products produced by either Nikko Electronics or Nikko TEC, but not both.

Accordingly, the Court cannot, and does not, find that Nikko America was Ames' creditor.

Benefit to Nikko America

The Court also must conclude that Ames failed to establish that Nikko America benefited from the transfers.⁶²

Under sections 547(b) and 550(a)(1),⁶³ a debtor can avoid and recover a transfer from a party that benefited from, but did not actually receive, the transfer. In such a case, the “[b]enefit occurs without the beneficiary ever holding the money or property, precisely because someone else received it.”⁶⁴ “The ‘paradigm’ transfer beneficiary [is] a party whose indemnification obligations or whose debts are extinguished or reduced by the transfer: that is ‘someone who receives the benefit but not the money.’”⁶⁵ Some courts have relied upon an “actual, quantifiable, and accessible benefit” test to determine whether a transfer “benefits” the party that did not actually receive the transfer.⁶⁶ Although some courts have considered the intent of the

⁶² The parties agree that the payments were not sent directly to Nikko America.

⁶³ According to section 550(a)(1), a transfer avoided under the Bankruptcy Code can be recovered from the initial transferee or “the entity for whose benefit such transfer was made.” 11 U.S.C. § 550(a)(1).

⁶⁴ *Securities Investor Protection Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 313 (Bankr. S.D.N.Y. 1999) (citing *In re Finely Kumble, Wagner, Hein, Underberg, Manley, Myerson & Casey*, 130 F.3d 52, 57 (2d Cir. 1997)).

⁶⁵ *In re McCook Metals, Inc.*, 319 B.R. 570, 590 (Bankr. N.D. Ill. 2005) (“*McCook Metals*”) (quoting *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 895 (7th Cir. 1988)). See also *In re Enron Creditors Recovery Corp.*, 407 B.R. 17, 32 (Bankr. S.D.N.Y. 2009) (“*Enron*”) (“The prototype that illustrates the concept of an entity for whose benefit a transfer is made is a guarantor, who receives the benefit but not the actual money paid.”). See also *In re Connolly North America, LLC*, 340 B.R. 829, 836-37 (Bankr. E.D. Mich. 2006) (“*Connolly*”) (holding that the debtor could recover and avoid alleged preferential transfers from a party that did not receive the payments and was not a guarantor because “the benefit it received is analogous to that received by a guarantor . . . to the extent its exposure to liability . . . was reduced because of Debtor’s transfers . . .”).

⁶⁶ See *Connolly*, 340 B.R. 829 at 834 (quoting *McCook Metals*, 319 B.R. at 592 n.18). See also *Enron*, 407 B.R. at 33 (“The benefit must be ‘direct, ascertainable and quantifiable’”).

parties to the transaction,⁶⁷ intent alone has not been enough to establish a preferential transfer. It is generally understood that the effect of the transfers, rather than the intent of the parties, is controlling.⁶⁸ For the purpose of sections 547 and 550, the transfers were not made for Nikko America's benefit and are not avoidable or recoverable from Nikko America.

The record does not establish that Nikko America received any actual or direct benefit from the transfers. Under the terms of the agreement, Nikko America expected to receive its commission from Nikko TEC and Nikko Electronics "had [Ames] paid in full."⁶⁹ But Ames failed to present any evidence that Nikko America received any part of its commission, and Nikko America's witness indicated that "[t]here's no account or evidence that anything was ever paid to Nikko America."⁷⁰

Because Nikko America did not receive any payments or commission, Ames relies solely on the testimony of Randy Cothrun, Nikko America's witness, to demonstrate that Nikko America benefited from the transfers. According to Ames, "Cothrun explicitly testified that Nikko America took the risk of loss on the transactions with Ames, so that if the combined Nikko entities suffered a loss, it was Nikko America that would have to absorb the loss."⁷¹ Thus,

⁶⁷ See *Enron*, 407 B.R. at 33 ("While it is sometimes observed that the entity must be the *intended* beneficiary . . . others question whether intent is relevant and, if relevant, whether it is the intent of the transferor or the intent of the recipient of the benefit that is at issue. . . . showing a direct ascertainable and quantifiable monetary benefit to the defendant would obviate the need to show intent." (emphasis in original)).

⁶⁸ See 5 COLLIER ON BANKRUPTCY ¶ 547.01 (16ed. Rev. 2010) ("The debtor's intent or motive is not material in the consideration of an alleged preference under section 547."). *McCook Metals*, 319 B.R. at 591 ("[B]asing transfer beneficiary liability on the mere intent of the transferor creates a potential constitutional problem.").

⁶⁹ Trial Tr. 123. According to Nikko America's witness, Nikko America would get its twenty-five to twenty-nine percent "[u]nless there was a cash loss." Trial Tr. 134.

⁷⁰ Trial Tr. 134.

⁷¹ Ames Post Trial Br. 13 (quotations deleted).

Ames argues that Nikko America's "losses would have been \$189,249.20 greater if Ames had not paid . . . [a]s such, Nikko America received an actual benefit in the amount of \$189,249."⁷²

However, this mischaracterizes the testimony. The subject matter of the testimony related to commissions. Cothrun initially stated that "its fair to believe that [Nikko America] never received any payment on these [transactions] because we wouldn't have got above to the point where [Nikko Electronics or Nikko TEC] would have paid us a commission."⁷³ As a follow up question Cothrun was asked, "[i]n other words, when there was a loss on this account, you had to take the loss?"⁷⁴ The follow up question was unrelated to the previous question and the preceding testimony regarding commission. Neither the testimony nor any other evidence supports the contention that Nikko America would or did record a loss for the entire contract, and there is no basis for Ames' argument that "if the combined Nikko entities suffered a loss, it was Nikko America that would absorb the loss."⁷⁵

As a result, Ames has failed to establish that Nikko America received any benefit from the transfers; it was not a guarantor, it was not responsible for the transaction, and the transfers did not reduce any of its obligations or liabilities.⁷⁶ For this reason too, which is conceptually more fundamental, Ames has failed to meet its burden under 547(b)(1).⁷⁷

⁷² *Id.*

⁷³ Trial Tr. 122

⁷⁴ *Id.*

⁷⁵ Ames Post Trial Br. 13.

⁷⁶ *See Enron*, 407 B.R. at 37 (holding that payments could not be recovered from a party whose only benefit was the elimination of potential litigation because the uncertainty of the potential outcome made the benefit "more theoretical or potential . . . unlike that of an analogous lawsuit brought against a guarantor.").

⁷⁷ Thus the court does not find it necessary to address sections 547(b)(2) and (5).

Conclusion

Ames has failed to meet its burden to establish that Nikko America was a creditor at the time of the transfer, and that it received any direct or actual benefit from the payments.

Judgment will be entered in favor of Defendant Nikko America. Pursuant to Fed. R. Bankr. P. 7054 and Fed. R. Civ. P. 54, and Fed. R. Bankr. P. 7058 and Fed. R. Civ. P. 58, Nikko America is to settle a standalone judgment in accordance with this Decision. The time to appeal will run from the time of entry of judgment, and not from the date of this Decision.

Dated: New York, New York
March 28, 2011

s/Robert E. Gerber
United States Bankruptcy Judge