IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF DELAWARE

IN RE:

STONE & WEBSTER, INCORPORATED; 1430 ENCLAVE PARKWAY CORPORATION; 245 SUMMER STREET CORPORATION; AEC INTERNATIONAL PROJECTS, INC.; ASSOCIATED ENGINEERS & CONSULTANTS, INC.; AUBURN VPS GENERAL CORPORATION; AUBURN VPS LIMITED CORPORATION; BELMONT CONSTRUCTORS COMPANY, INC.; COMMERCIAL COLD STORAGE, INC.; DSS ENGINEERS, INC.; ENCLAVE PARKWAY REALTY, INC.; FAST SUPPLY CORPORATION; GSES HOLDING, LLC; INTERNATIONAL ENGINEERS AND CONSTRUCTORS, INCORPORATED; NORDIC HOLDINGS, INC.; NORDIC INVESTORS, INC.; NORDIC RAIL SERVICES, INC.; NORDIC REFRIGERATED SERVICES, INC.; NORDIC REFRIGERATED SERVICES, LIMITED PARTNERSHIP; NORDIC TRANSPORTATION SERVICES, INC.; POLAR TRANSPORT, INC.; POWER TECHNOLOGIES, INC.; PRESCIENT TECHNOLOGIES, INC.; PROJECTS ENGINEERS, INCORPORATED; ROCKTON ASSOCIATES, INCORPORATED; ROCKTON TECHNICAL SERVICES CORPORATION; SABAL CORPORATION; SABAL REAL ESTATE CORPORATION; SAW CONSULTING SERVICES, INC.; SC WOOD, LLC; SELECTIVE TECHNOLOGIES CORPORATION; SLEEPER STREET REALTY CORPORATION; STONE & WEBSTER ABU DHABI (UNITED ARAB EMIRATES), INC.; STONE & WEBSTER ASIA CORPORATION; STONE & WEBSTER AUBURN CORPORATION; STONE & WEBSTER BHARAT, INCORPORATED; STONE & WEBSTER BINGHAMTON CORPORATION; STONE & WEBSTER CIVIL AND TRANSPORTATION SERVICES, INC., STONE & WEBSTER CONSTRUCTION COMPANY, INC.; STONE & WEBSTER DEVELOPMENT CORPORATION; STONE & WEBSTER DOMINICAN REPUBLIC,	)	
	)	Chapter 11
	)	Case Nos. 00-2142 through 00-2214

INCORPORATED; STONE & WEBSTER ENGINEERS AND CONSTRUCTORS, INC.; STONE & WEBSTER FAR EAST TECHNICAL SERVICES CORP.; STONE & WEBSTER INDONESIA CORPORATION; STONE & WEBSTER INDUSTRIAL TECHNOLOGY CORPORATION; STONE & WEBSTER INTER-AMERICAN CORPORATION; STONE & WEBSTER INTERNATIONAL CORPORATION; STONE & WEBSTER INTERNATIONAL PROJECTS CORPORATION; STONE & WEBSTER ITALIA, INCORPORATED; STONE & WEBSTER KOREA CORPORATION; STONE & WEBSTER KUWAIT, INCORPORATED; STONE & WEBSTER OVERSEAS DEVELOPMENT CORPORATION F/K/A STONE & WEBSTER LITHUANIA CORPORATION; STONE & WEBSTER MANAGEMENT CONSULTANTS, INC.; STONE & WEBSTER MIDDLE EAST ENGINEERING SERVICES CORPORATION; STONE & WEBSTER OF ARGENTINA CORPORATION; STONE & WEBSTER OF MEXICO ENGINEERING CORPORATION; STONE & WEBSTER OIL COMPANY, INC.; STONE & WEBSTER OPERATING CORPORATION; STONE & WEBSTER OVERSEAS CONSULTANTS, INC.; STONE & WEBSTER OVERSEAS GROUP, INC.; STONE & WEBSTER PACIFIC CORPORATION; STONE & WEBSTER POWER ENGINEERING CORPORATION; STONE & WEBSTER POWER PROJECTS CORPORATION; STONE & WEBSTER PROCUREMENT CORPORATION; STONE & WEBSTER PUERTO RICO, INCORPORATED; STONE & WEBSTER SAUDI ARABIA, INCORPORATED; STONE & WEBSTER TAIWAN CORPORATION; STONE & WEBSTER TECHNOLOGY CORPORATION; STONE & WEBSTER WALLINGFORD CORPORATION; STONE & WEBSTER WORLDWIDE ENGINEERING CORPORATION; SWL CORPORATION; STONE & WEBSTER ENGINEERING CORPORATION; and STONE & WEBSTER MICHIGAN, INC.,

Debtors.

MEMORANDUM OPINION REGARDING CLAIMS OF MAINE YANKEE ATOMIC POWER COMPANY

Gregg M. Galardi, Esquire and Eric M. Davis, Equire, Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, Delaware; Edward J. Meehan, Esquire, and David E. Carney, Esquire, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC; counsel for Debtors.

Michael B. Joseph, Esquire, and Theodore J. Tacconelli, Esquire, Ferry & Joseph, PA, Wilmington, Delaware; William J. Kayatta, Jr., Esquire, Pierce Atwood, Portland, Maine; counsel for Maine Yankee Atomic Power Company.

Dated: July 26, 2001

McKELVIE, District Judge

This is a commercial dispute that arises in the context of a bankruptcy action.

Stone & Webster Engineering Corporation is a Massachusetts corporation with its principal place of business in Boston, Massachusetts ("SWEC"). Stone & Webster Incorporated is a Delaware corporation with its principal place of business in Boston, Massachusetts. Stone & Webster Engineers and Constructors, Inc. is a Maryland Corporation with its principal place of business in Boston, Massachusetts. Stone & Webster Incorporated owns one hundred percent of the shares of Stone & Webster Engineers and Constructors, Inc. which in turn owns one hundred percent of the shares of SWEC. The court will refer to these three companies collectively as "the debtors."

Maine Yankee Atomic Power Company is a Maine corporation with its principal place of business in Wiscasset, Maine. Maine Yankee owns a nuclear power generating facility in Wiscasset, Maine.

Maine Yankee and SWEC entered into an agreement effective August 31, 1998 to decommission Maine Yankee's nuclear power plant in Wiscasset, Maine.

On May 4, 2000, Maine Yankee issued a notice to SWEC purporting to terminate the agreement based upon SWEC's insolvency and upon Maine Yankee's assertion that SWEC had not adequately performed under the contract.

On June 2, 2000, Stone & Webster Incorporated, and certain affiliates including Stone & Webster Engineers and Constructors, Inc. and SWEC filed voluntary petitions for bankruptcy relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330.

On August 23, 2000, Maine Yankee filed proofs of claim in the bankruptcy cases against

SWEC and against Stone & Webster Incorporated and Stone & Webster Engineers and Constructors, Inc. as guarantors of SWEC's performance. On November 16, 2000, the debtors objected to Maine Yankee's claims arguing that the court should disallow the claims because Maine Yankee did not properly terminate the decommissioning agreement for either insolvency or failure to perform and, in any event, did not have a right to damages for terminating the agreement on account of SWEC's insolvency. Further, the debtors argue that the court should disallow the claims because Maine Yankee holds property owed to the debtors' estate. On December 18, 2000, Maine Yankee filed a response. On January 16, 2001, the debtors filed a brief in support of their objection. On January 17, 2001, Maine Yankee filed a response.

On February 6, 2001, the parties submitted a Pretrial Order on the threshold defenses to the Maine Yankee claims. On February 13, 2001, the court held a one-day non-jury trial to consider the threshold defenses raised by the debtors. At the hearing, SWEC called one witness, James Carroll, the president and chief restructuring officer of Stone & Webster, Incorporated as of January 31, 2001 and the vice president and controller of Stone & Webster, Incorporated from August 31, 1999 through January 30, 2001.

This is the court's decision on those defenses.

I. FACTUAL AND PROCEDURAL BACKGROUND

The court takes the following facts from the testimony and evidence presented at the February 13, 2001 hearing.

Effective August 31, 1998, Maine Yankee and SWEC entered into an agreement titled "Agreement Between Maine Yankee Atomic Power Company and Stone & Webster Engineering

Corporation for the Decommissioning of the Maine Yankee Plant." Pursuant to this decommissioning agreement, SWEC agreed to perform certain work related to the decommissioning of the Wiscasset nuclear power plant and the completion of a fuel storage installation. Stone & Webster Incorporated and Stone & Webster Engineers and Constructors, Inc. guaranteed SWEC's performance under the contract. The agreement targeted April 30, 2004 as the completion date for the project.

Because the interpretation of the decommissioning agreement is central to this dispute, the court will describe several pertinent contract provisions.

According to Carroll, under the decommissioning agreement, it was SWEC's exclusive duty to pay the subcontractors. Article 4 covers the terms of payment. Under Articles 4.2 and 4.4, SWEC was to provide monthly invoices for itself and the subcontractors based on earned value and for reimbursable charges incurred. Article 4.3 contemplates the provision of lien indemnities and lien waivers where appropriate.

Article 31.0 of the decommissioning agreement sets out the procedures for providing lien waivers and the payment of subcontractors. The provision obligates SWEC to waive any rights to a mechanic's lien upon payment of services and requires that SWEC "obtain from any Subcontractor or material man which provides goods or services a written waiver of such Subcontractors' or material men's right to any such lien . . . ." For those Subcontractor's whose contract price was less than $1,000,000, SWEC could provide an indemnity in lieu of a waiver.

Article 11 of the decommissioning agreement provides the parties the ability to terminate for cause. Article 11 states in full:

11.0 TERMINATION FOR CAUSE

11.1 Maine Yankee shall have the right, upon written notice to Contractor, to terminate the Agreement without any further liability to Contractor over and above compensation for Work performed, in the event of the occurrence of any of the following:

11.1.1 insolvency of the Contractor,

11.1.2 the filing of a voluntary petition in bankruptcy by Contractor;

11.1.3 the filing of an involuntary petition to have Contractor declared bankrupt;

11.1.4 the appointment of a receiver or trustee for Contractor;

11.1.5 the execution by Contractor of an assignment for the benefit of creditors; provided, however, Contractor may make an assignment of accounts receivable to a lending institution in its normal course of business without prejudice or notice; or

11.1.6 the commencement of any legal proceeding against Contractor which substantially interferes with Contractor's ability to perform

11.2 If Contractor fails to substantially perform under the Contract Documents or if Contractor materially breaches any of the terms of the Contract Documents, or should Maine Yankee receive a Confirmatory Action Letter or NRC order which causes the suspension of Work as a result of Contractor's deficient

activities, Maine Yankee shall have the right, without further liability to Contractor, upon giving contractor written notice and reasonable time to remedy such deficiency, to:

11.2.1 terminate the Agreement in whole or in part upon giving a second written notice to Contractor of such termination and the basis thereof, if Contractor has failed to initiate the remedy in a reasonable fashion within thirty (30) days of the first notice in the immediately preceding paragraph;

11.2.2 obtain performance of some or all of the Contractor's obligations under the Contract Documents from another contractor and recover reasonable excess cost resulting therefrom from the Contractor, and/or

11.2.3 exercise any action available at law or in equity to enforce remedies provided, including liquidated damages, for the Contractor's failure to perform as set forth in the Contract Documents.

11.3 A termination under this article shall be effective immediately upon receipt of any written notice as described in Article 11.1 or Article 11.2.1 by the Contractor. The Contractor shall immediately cease Work, commence demobilization of any affected forces and promptly remove from the Site materials and equipment belonging to Contractor which have not been fully paid for by Maine Yankee. If requested to do so by Maine Yankee, Contractor shall promptly transfer title and deliver to Maine Yankee such completed or

partially completed and paid for Work and assign any Subcontracts rights as Contractor may have with any third parties for the Work. Contractor shall attempt to promptly settle, any liabilities and claims arising out of any resulting termination of subcontracts and orders at no cost to Maine Yankee.

11.4 If the unpaid Agreement funds, including any funds payable to Maine Yankee by reason of letter fo credit, performance bond or insurance coverage, fail to compensate Maine Yankee for the total direct damages and costs incurred by Maine Yankee to finish the Work, Contractor shall pay such difference to Maine Yankee within thirty (30) days following receipt of an undisputed invoice from Maine Yankee. This obligation for payment shall survive the termination of the Agreement or relevant portion thereof.

11.5 In the event any termination under this Article 11 is subsequently determined to have been made without cause, such termination shall be deemed to Termination for Convenience under Article 12.1.

11.6 In the event that Maine Yankee fails to comply with its material obligations herein, including but not limited to: Maine Yankee's non payment of any invoice per Section 4.4., Maine Yankee's failure to provide reasonable evidence that fund are available for the next year as per Section 4.6, Maine Yankee's declaring bankruptcy or otherwise is determined to not have the capability of paying its bills in the ordinary course of business, and Maine Yankee's failure to comply with its insurance requirements and obligations per

> Section 24B; and after Contractor has given Maine Yankee written notice of its intention to terminate, and allowed Maine Yankee a reasonable time to remedy such default, not less than sixty (60) days for nonpayment, Contractor may terminate this Agreement for Maine Yankee's default and Contractor shall be entitled to be paid pursuant to Article 12 hereof.

On November 18, 1999, Maine Yankee sent SWEC a letter giving formal notice of default under Article 11.2 for failure to perform under the decommissioning agreement. Maine Yankee identified a number of breaches: SWEC's failure to pay its subcontractors and suppliers for work previously performed; SWEC's failure to provide properly filled out lien waivers (according to Maine Yankee, the lien wavers erroneously represented that all of its subcontracts had been paid in full for the work); and the notice that one of SWEC's major subcontractors was considering suspending all work as a result of SWEC's failure to pay in a timely manner. Further, Maine Yankee requested information about the possibility that SWEC and its parent corporations may have been insolvent. Maine Yankee stated that SWEC "failed to substantially perform its obligations with respect to the performance of the Work and is in material breach of the terms of the [decommissioning agreement]" and demanded that SWEC take action to remedy the deficiencies in its performance. Maine Yankee withheld payment of SWEC's October invoice until SWEC provided evidence that it would cure the alleged breaches.

On November 30, 1999, in response to the November 18, 1999 letter, Maine Yankee and SWEC entered into Addendum No. 3 of the decommissioning agreement. By that agreement, SWEC agreed to provide corrected lien waivers and certified statements from certain suppliers for overdue

amounts and to meet with representatives of Maine Yankee periodically. Further, SWEC had to provide lien waivers "from all subcontractors whose contract/order price on the date of the invoice was greater than $100,000 and from all other Suppliers whose contract/order price on the date of the invoice is greater than $250,000." In exchange, Maine Yankee agreed to make payment to SWEC no more than one business day after receipt of the revised lien waivers and certification. On December 1, 1999, Maine Yankee wire-transferred most of the money due under the November 4 and 5, 1999 invoices.

On February 7, 2000, Maine Yankee sent SWEC a letter containing the subject line: "RE: ISFSI Cask Material Procurement and Fabrication, SWS-MY-000309." According to Carroll, the IFISI cask is a containment area for spent fuel storage. Carroll testified that this letter dealt with the ownership and procurement of the cask. The letter details Maine Yankee's concerns about the cask and SWEC's failure to create and distribute a detailed project schedule as required by the decommissioning agreement.

On March 28, 2000, Maine Yankee sent a letter to SWEC detailing concerns about the lack of a schedule for Reactor Vessel Internals Segmentation ("RVIS") activities. The letter describes the need to integrate the RVIS activities into the main project schedule.

Despite these concerns, from October 1999 through March 2000, SWEC submitted invoices to Maine Yankee pursuant to the decommissioning agreement. Included with the invoices were the lien waiver forms signed by SWEC and certain subcontractors. Maine Yankee paid the amount due under these invoices.

In the Pretrial Order the parties agreed that as of May 1, 2000, and at all times thereafter,

SWEC was insolvent within the meaning of Article 11.1.1 of the decommissioning agreement and within the meaning of 11 U.S.C. § 101(32)(A).

On May 1, 2000, Maine Yankee sent a letter to SWEC regarding Stone and Webster Incorporated and SWEC's financial situation. In the letter, Maine Yankee asserted that it had notified SWEC in the November 18, 1999 letter of potential breaches of the agreement and advised SWEC that Maine Yankee might terminate the decommissioning agreement because of SWEC's potential insolvency. Further, Maine Yankee stated: "This past weekend's press release and the news reports about Stone & Webster, Inc., demonstrate that, despite your attempts to improve your financial situation, SWEC remains insolvent." Maine Yankee also informed SWEC that it "remains in default of the [decommissioning agreement] and its efforts to cure since the November 18 letter have not remedied the material breaches of contract." Although Maine Yankee did not terminate the contract, it explicitly reserved the right to do so. Lastly, Maine Yankee requested a meeting no later than May 4, 2001 to find a mutually agreeable method for completing the project.

On May 3, 2000, the parties met to discuss the future of SWEC's work at the nuclear power plant. According to Carroll, at that meeting, Maine Yankee led SWEC to believe that the parties would work together to find a way to complete the project.

On May 4, 2000, SWEC hand delivered two invoices to Maine Yankee dated May 3, 2000, purportedly covering work and charges for April 2000 (the "April 2000 invoices"). The total amount of these invoices is $6,328,314. These invoices were not accompanied by lien waivers from the subcontractors and SWEC admits that it had not paid the subcontractors for the work covered in those invoices.

Also on May 4, 2000, Maine Yankee sent SWEC an official notice of termination under Article 11 of the decommissioning agreement. According to that letter, Maine Yankee terminated the agreement because of SWEC's insolvency and SWEC's failure to cure the defaults identified in the November 18, 1999 and May 2, 2000 letter. (The court assumes that Maine Yankee meant the letter dated May 1, 2000.) Specifically, Maine Yankee stated that SWEC had not provided an acceptable project schedule, had not made adequate progress in completion of the work, had not obtained the necessary regulatory approvals, had not administered the work, failed to provide adequate assurances of its ability to complete performance, and failed to pay its subcontractors and suppliers as required by the decommissioning agreement.

On May 9, 2000, Maine Yankee sent a letter to SWEC stating that it had received the April 2000 invoices, but noted that SWEC had not provided the necessary lien waivers. Thus, Maine Yankee stated, "the subject invoices do not comply with the contract requirements and would not, in any event, be considered appropriate for payment."

On that same day, SWEC sent a letter to Maine Yankee regarding the May 4, 2000 termination notice. The letter laid out grounds under which SWEC would continue to provide services on the Maine Yankee project until June 30, 2000.

On May 10, 2000, the parties entered into the Interim Service Agreement. That agreement ran from May 4, 2000 to June 30, 2000 and laid out terms "to mitigate the damages and adverse consequences of an abrupt or inefficient demobilization at the Maine Yankee site as a result of [the May 4, 2000 termination notice] and other contested issues among the parties . . . ." In essence, the parties agreed to perform as they would have under the decommissioning agreement for the duration of the

Interim Service Agreement with certain exceptions. SWEC agreed to continue work on a modified schedule approved by Maine Yankee and Maine Yankee agreed to pay charges and reimbursable costs directly to the subcontractors. Further, Maine Yankee agreed to pay $5,100,789.36 to subcontractors, suppliers, vendors, and consultants for goods services provided prior to May 1, 2000 and SWEC agreed to provide the appropriate lien waivers with respect to all work in the April 2000 invoices. Despite these modifications and concessions, the parties explicitly stated that they retained their rights under the decommissioning agreement.

On May 22, 2000, the parties amended the Interim Service Agreement for the first time. That amendment made minor modifications to the language of the agreement.

On June 1, 2000, Maine Yankee sent SWEC a letter stating that it had not received any third party lien waivers from SWEC with respect to the April 2000 invoices and requested that SWEC provide all of the appropriate lien waivers by June 8, 2000.

On June 2, 2000, Stone & Webster Incorporated, and certain affiliates including Stone & Webster Engineers and Constructors, Inc. and SWEC filed voluntary petitions for bankruptcy relief.

On June 8, 2000, SWEC contends that it provided lien releases for the appropriate subcontractors according to the work performed during April 2000.

On June 27, 2000, the parties entered into a Second Amendment to the Interim Service Agreement. This amendment extended the term of the Interim Service Agreement until September 30, 2000 and made other modifications to the scope of work and procedures for payment.

On August 23, 2000, Maine Yankee filed a proof of claim in the amount of $78.2 million against SWEC. At the same time, Maine Yankee filed nearly identical proofs of claim against Stone &

Webster, Incorporated and Stone & Webster Engineers and Constructors, Inc.

On November 16, 2000, the debtors filed an objection under 11 U.S.C. §§ 502(b)[1] and 502(d)[2] to the Maine Yankee's claims. According to the debtors, the court should disallow Maine Yankee's claims under § 502(b) because Maine Yankee did not properly terminate the decommissioning agreement either for insolvency or for failure to perform and Maine Yankee has no right to damages even if it properly terminated for insolvency. The debtors further argue that the court should disallow the claims under § 502(d) because Maine Yankee has not paid SWEC the amount owed under the April 2000 invoices.

On February 6, 2001, the parties submitted a Pretrial Order on the threshold defenses by the

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[1] Section 502(b) states in relevant part:

> 502. Allowance of claims or interests
> . . .
> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that--
> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

11 U.S.C. § 502(b)(1).

[2] Section 502(d) states in relevant part:

> 502. Allowance of claims or interests
> . . .
> (d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

11 U.S.C. § 502(d)

debtors to the Maine Yankee claims. On February 13, 2001, the court held a non-jury trial on the threshold defenses. At trial, the debtors put one witness, James Carroll, on the stand. Maine Yankee did not present any witnesses.

The parties dispute whether the court should disallow Maine Yankee's claims under §§ 502(b) and 502(d).

II. DISCUSSION

A. Should the court disallow the claims under § 502(b)?

Under § 502(b)(1), the court must not allow claims against a debtor that are unenforceable "under any agreement or applicable law." The debtors argue that Maine Yankee cannot demonstrate that it is entitled to damages under the decommissioning agreement for three reasons: 1) Article 11.1, which allows Maine Yankee to terminate the agreement if SWEC becomes insolvent, does not create a right to recover damages; 2) if Article 11.1 does give a right to recover damages, Maine Yankee did not properly terminate the agreement under that provision because Maine Yankee did not give SWEC an opportunity to cure its financial position; and 3) Maine Yankee failed to follow the procedures required to terminate the decommissioning agreement under Article 11.2, which allows Maine Yankee to terminate the agreement for failure to perform.

1. Is Maine Yankee entitled to recover damages from SWEC if the sole basis for terminating was SWEC's insolvency?

The debtors argue that even if Maine Yankee properly exercised its right to terminate the contract for insolvency, Maine Yankee does not have the right to pursue any remedies or damages for

termination under that provision. According to the debtors, the difference in the terms of Article 11.1, termination for insolvency, and 11.2, termination for failure to perform, demonstrates that Maine Yankee did not bargain for the right to pursue damages under Article 11.1. The debtors point out that in contrast to the termination for insolvency provision, which only lists events that give Maine Yankee the right to terminate the agreement, the termination for failure to perform provision gives Maine Yankee both the right to terminate and the express right to pursue "any action available at law or in equity to enforce remedies provided."

Maine Yankee makes two arguments in opposition. First, Maine Yankee contends that the plain language of Article 11.4, the damages provision, specifies that SWEC "shall pay" Maine Yankee in the event that other funds fail to compensate for direct damages and costs incurred by Maine Yankee to finish the work. According to Maine Yankee this passage does not limit recovery to termination for failure to perform.

Second, Maine Yankee argues that the structure of Article 11 makes clear that damages are available for termination for insolvency. According to Maine Yankee, 11.1 and 11.2 specify the conditions upon which Maine Yankee can terminate the agreement and 11.3 and 11.4 specify SWEC's obligations in the event of a termination. Moreover, Maine Yankee further contends that the termination for failure to perform section contains an additional provision for remedies because that passage covers causes for termination that might create harm to Maine Yankee above and beyond the costs of completion and for which Maine Yankee might seek a remedy short of termination.

In light of the structure and plain language of the contract, the court finds that Maine Yankee can sue for damages under Article 11.4 for termination under Article 11.1 for insolvency. Article 11.1

limits Maine Yankee's liability to SWEC to the amount owed for work already performed. The failure to include information about recovery of damages in this portion of Article 11 does not indicate that Maine Yankee has waived its right to damages. Article 11.4 gives Maine Yankee the right to damages and costs in the event that a performance bond or insurance does not compensate Maine Yankee for completing the work in the event of termination.

2. Did Maine Yankee properly terminate the decommissioning agreement under Article 11.1 for insolvency?

According to the debtors, Maine Yankee did not provide SWEC an opportunity to cure its financial condition before terminating the agreement pursuant to Article 11.1. Specifically, the debtors argue that although Maine Yankee provided SWEC with a "formal Notice of Default" in the November 18, 1999 letter, Maine Yankee did not terminate the decommissioning agreement. Rather, although Maine Yankee reserved the right to terminate for insolvency, Maine Yankee merely advised that it expected SWEC to take steps to cure its default. SWEC contends that it alleviated Maine Yankee's concerns about its financial condition by signing Amendment 3 on November 30, 1999.

Further, the debtors contend that in the May 1, 2000 letter, Maine Yankee provided notice of concerns about the SWEC's financial situation, but did not terminate the agreement. The debtors state that Maine Yankee again demanded that SWEC cure its default, "including providing Maine Yankee with sufficient information to permit Maine Yankee to evaluate SWEC's financial condition." Carroll testified that as a result of the May 3, 2000 meeting, SWEC officials believed that the parties would work together to resolve the situation as they had in the past. Thus, SWEC contends that it was not

properly on notice that Maine Yankee might terminate. Lastly, SWEC contends that the May 1, 2000 letter did not give it enough time to cure its financial position.

Maine Yankee contends that although it did not terminate the agreement after the November 18, 1999 and May 1, 2000 letter, it had the right to do so at a later date. That is, according to Maine Yankee, both of those letters constituted notice of an intent to terminate for insolvency and because SWEC did not cure its financial deficiencies, Maine Yankee was entitled to terminate the agreement at any time.

As a preliminary matter, the court notes the difference in the drafting of the provisions for termination for insolvency and termination for failure to perform. Although Article 11.2, termination for failure to perform, requires Maine Yankee to provide SWEC with "written notice and reasonable time to remedy such deficiency" prior to terminating, Article 11.1, termination for insolvency, merely requires "written notice" to terminate. One might conclude from this that the notice provision for Article 11.1 does not require adequate time to cure.

Nonetheless, the court finds that both the November 18, 1999 and May 1, 2000 letters constituted adequate notice of an intent to terminate. Thereafter, Maine Yankee was within its contractual rights to terminate the agreement. Maine Yankee did not waive the right to terminate by entering into negotiations to continue the work. That is, SWEC cannot reasonably claim that Maine Yankee abandoned its notice of an intent to terminate because the parties discussed continuing the commercial relationship in a mutually beneficial manner. Moreover, Maine Yankee placed SWEC on notice as early as November 18, 1999 of concerns about SWEC's financial position. As Maine Yankee noted, SWEC had from November until May to improve its financial position. As is clear from

the facts before the court, SWEC did not do so. Therefore, the court finds that Maine Yankee provided notice and time to cure prior to terminating the agreement for insolvency.

3. Did Maine Yankee properly terminate the decommissioning agreement under for failure to perform under Article 11.2?

In contrast to Article 11.1, termination for insolvency, Article 11.2 spells out the conditions precedent to proper termination for failure to perform. In order to terminate for failure to perform, Maine Yankee must give "written notice and reasonable time to remedy such deficiency" and give "a second written notice to [SWEC] of such termination and the basis thereof, if [SWEC] has failed to initiate the remedy in a reasonable fashion within thirty (30) days of the first notice." Thus, Maine Yankee could only terminate under this provision after giving SWEC notice of an intent to terminate and thirty days in which to cure the identified default.

According to SWEC, Maine Yankee did not follow these procedures in terminating the contract under Article 11.2. In the May 4, 2000 termination letter, Maine Yankee stated that it was ending the decommissioning agreement because of the following defaults:

(1) The insolvency of Stone & Webster under Section 11.1.1; and

(2) Stone & Webster's failure to cure all of the defaults identified in Maine Yankee's November 18, 1999 and May 2, 2000 letter;[3] and

(3) Stone & Webster's failure to perform its material obligations and its failure to

[3] The court assumes that this is a reference to the letter dated May 1, 2000 from Maine Yankee to SWEC. The parties have not identified a May 2, 2000 letter.

> cure its numerous material defaults in its obligations under the Contract Agreement, including, but not limited to, its failure to provide an acceptable Project Schedule under Section 11.9 of the Amended RFP, its failure to make adequate progress in completion of the Work, its failure to plan for and obtain the necessary regulatory approvals for the Work, its failure to properly and adequately administer the Work, its failure to provide adequate assurances of its ability to complete performance under the Contract Agreement, and its failure to pay its subcontractors and suppliers as required by the Contract Agreement.

SWEC contends that the first basis deals with termination under Article 11.1 and that the third basis raises reasons for termination for which Maine Yankee has never provided notice. Thus, according to SWEC, only the second basis remains as a proper rationale for termination under Article 11.2 for failure to perform.

Maine Yankee takes a different view of its contractual requirements. Maine Yankee identifies four breaches of SWEC's duty under the decommissioning agreement under which it was entitled to terminate the pursuant to Article 11.2: 1) failure to pay subcontractors, 2) failure to provide a detailed project schedule, 3) failure to obtain Certificates of Compliance for the casks, and 4) a failure to provide adequate assurance of an ability to perform. Maine Yankee further contends that it provided written notice of these deficiencies in at least three letters – the November 18, 1999 letter, the February 7, 2000 letter, and the May 1, 2000 letter – and that SWEC failed to cure any of these defaults.

In the November 18, 1999 letter, Maine Yankee alleged three breaches of the decommissioning agreement: failure to pay its subcontractors, failure to provide proper lien waivers, and notice by one of SWEC's major subcontractors that it considered suspending work for SWEC's failure to pay in a timely manner. In the February 7, 2000 letter, Maine Yankee made clear that it was concerned about the lack of a proper project schedule. SWEC contends that this letter was inadequate as formal notice because Maine Yankee did not state that it was formal notice and that it differed in form from the November 18, 1999 formal notice. However, the contract does not require a particular form of notice. The February 7, 2000 letter made clear in several paragraphs of text that SWEC had not met its obligations under the contract. To the extent that the May 4, 2000 termination notice identified concerns first addressed in either the November 18, 1999 letter or the February 7, 2000 letter, the court finds that Maine Yankee provided adequate notice and time to cure prior to the termination letter.

Lastly, SWEC argues that Maine Yankee did not provide adequate time to cure concerns raised in the May 1, 2000 letter. According to SWEC, the contract requires Maine Yankee to give SWEC thirty days notice and opportunity to cure. Maine Yankee concedes that the May 4, 2000 termination did not meet this requirement, but contends that "a nonbreaching party does not have to comply with notice and cure provisions when to do so would be futile." The court finds that it need not settle this dispute because the May 1, 2000 letter did not raise new grounds for terminating the agreement. Rather, this letter repeated the concerns of the November 18, 1999 and the February 7, 2000 letters.

The court concludes that the November 18, 1999 and February 7, 2000 letters from Maine

Yankee provided SWEC with notice of a number of potential defaults. This notice gave SWEC adequate time to cure these concerns. The court, however, cannot determine based on the evidence presented whether SWEC actually breached the contract such that Maine Yankee properly terminated the decommissioning agreement under Article 11.2.

4. Conclusion as to claims under § 502(b)

The court finds that Maine Yankee can bring a claim for damages under Article 11.4 for termination for insolvency pursuant to Article 11.1. Further, the court finds that Maine Yankee gave SWEC adequate notice of its intent to terminate the agreement for insolvency. Lastly, the court finds that pursuant to Article 11.2 Maine Yankee provided SWEC adequate notice and time to cure potential defaults in the November 18, 1999 and February 7, 2000 letter. Therefore, the court will not disallow the claims under § 502(b)(1).

B. Should the court disallow claims under § 502(d)?

Under § 502(d), courts should "disallow claims of any entity from which property is recoverable under section 542 . . . or that is a transferee of a transfer avoidable under section . . . 547 [or] 548 . . . unless such entity or transferee has paid the amount, or turned over any such property . . . ." 11 U.S.C. § 502(d). The bankruptcy code defines a transfer as "every mode . . . of disposing of or parting with property or with an interest in property." 11 U.S.C. § 101(54) (emphasis added). The debtors argue that pursuant to this section of the bankruptcy code, the court should disallow Maine Yankee's claims because two transfers, the interim service agreement and the subcontractor payments, are avoidable under §§ 547 and 548. Further, the debtors argue that Maine Yankee holds property of the estate recoverable under § 542.

According to the debtors, upon generating the invoices for the April work, SWEC had a receivable in the amount of $6,328,314. Therefore, as of May 4, 2000, the day of the delivery of those invoices, SWEC had a right to payment of that amount. Those invoices represented $1,227,524.64 of work and charges from SWEC and $5,100,789.36 of work and charges from subcontractors from April 2000.

On the same day that SWEC delivered those invoices, Maine Yankee terminated the decommissioning agreement. Subsequently, on May 10, 2000, the parties entered into the Interim Service Agreement. Pursuant to the Interim Service Agreement, Maine Yankee directly paid $5,100,789.36 to the subcontractors. This payment bypassed the typical method of payment under the decommissioning agreement, whereby Maine Yankee would pay SWEC the total invoice amount and SWEC would pay the subcontractors.

SWEC contends that by paying the subcontractors $5,100,789.36 of the April 2000 invoices, Maine Yankee transferred part of SWEC's receivable, an interest in property, to the Subcontractor. According to SWEC, the Interim Service Agreement, which allowed for this direct payment to the subcontractors, and the subsequent payment constitute a preferential transfer under § 547 and a fraudulent transfer under § 548. In other words, SWEC gave away the right to collect the $5,100,789.36 in the Interim Service Agreement to the detriment of other creditors. SWEC further contends that by failing to pay the remainder to SWEC, $1,227,524.64, Maine Yankee is in possession of property owed to SWEC that is recoverable under §§ 542.

Maine Yankee argues that the court need not reach any of these bankruptcy defenses because Maine Yankee does not owe SWEC the amounts reflected on the May 3, 2000 invoices. That is, each

of debtor's bankruptcy defenses require, as a preliminary matter, that Maine Yankee owe SWEC the approximately $6.3 million. According to Maine Yankee, it does not owe SWEC because: 1) SWEC failed to submit valid lien waivers to support the April 2000 invoices, a condition precedent to Maine Yankee's obligation to pay; and 2) SWEC breached the decommissioning agreement and therefore had no accounts receivable. The first of these arguments is relevant to the approximately $5.1 million dollars owed to the subcontractors, the second of these arguments is relevant to the remainder owed to SWEC.

The debtors concede that SWEC had not paid the subcontractors as of the date of the April 2000 invoices. Further, Carroll testified that SWEC would not have used the Maine Yankee payments to pay the subcontractors. Rather, SWEC would have used the funds for payroll and other operating expenses. Moreover, SWEC concedes that it had not attached the proper lien waivers to the April 2000 invoices. Nonetheless, SWEC contends that under the decommissioning agreement the April 2000 invoices constitute a contingent interest in property. That is, SWEC maintains that it was entitled to collect the total amount of the invoices and to correct its failure to provide lien waivers. SWEC claims its interest in the April 2000 invoices is contingent upon fulfilling its obligation to provide lien waivers. The parties dispute whether or not SWEC has or even could properly file all of the proper lien waivers under Article 4 of the decommissioning agreement and the addendum signed on November 30, 1999.

In considering this issue, the court notes that the lien waivers state (emphasis added):

> Contractor herein represents that all bills of Contractor's Subcontractors who performed Work or furnished materials for the performance of said Subcontracts <u>have</u>

> been paid for their Work pursuant to the terms of said Subcontracts and covered by the above payment, and Contractor further agrees to indemnify and hold harmless Purchaser and Owner from any and all manner of actions, caus of action, suits, in law or in equity, which any such Subcontractor or supplier may bring . . . .

Despite this language, Carroll testified that SWEC's common practice was to collect the invoice charges and the lien waivers from the subcontractors prior to invoicing Maine Yankee or paying the Subcontractors. In light of this regular business practice, SWEC argues that it need not have had an intent to pay the subcontractors to provide properly filled out lien waivers. In other words, SWEC argues that it regularly invoiced Maine Yankee without paying the subcontractors and should not be penalized for following the same practice with regard to the April 2000 invoices. The court finds, however, that the lien waivers require that SWEC have paid the subcontractors in order to be properly filed with Maine Yankee. Therefore, because SWEC had not paid and did not intend to pay the subcontractors, SWEC could not meet its contingent requirement to invoice Maine Yankee properly.

Further, the court notes that Maine Yankee may not have had an obligation to provide SWEC with the approximately $5.1 million, given that Maine Yankee terminated under Article 11.1 and knew that SWEC would not pay the subcontractors. That is, Maine Yankee bargained for the ability to terminate the decommissioning agreement in the event that SWEC was insolvent. The contract makes clear that upon such a termination, Maine Yankee had to pay SWEC for the work it performed, see Article 11.1, but the contract does not state whether or not Maine Yankee would owe SWEC for work performed by the subcontractors. It would be a hollow bargain for Maine Yankee to agree to

pay SWEC for subcontractor work, if Maine Yankee knew that SWEC would not, in turn, pay the subcontractors.

As for Maine Yankee's second argument, the court finds that, even if it properly terminated the agreement for failure to perform under Article 11.2 or for insolvency under Article 11.1, Maine Yankee would still owe SWEC for the work SWEC performed. To rule otherwise would unjustly enrich Maine Yankee.

With these preliminary determinations in mind, the court will discuss the applicability of the bankruptcy provisions.

1. Are the transfers avoidable under § 547 or § 548?

Under § 547, the court may force the recipient of an interest in property to return what he received to the bankruptcy estate. Courts force creditors to return funds received from the debtor, even if received as compensation for an honest debt, in order to fairly divide the assets of the bankrupt corporation among a number of worthy creditors. That is, Congress laid out in the context of the bankruptcy statute a policy goal of treating creditors in like situations equally. To effectuate that goal, Congress allows courts to undo transactions where a corporation, after becoming insolvent, pays some debts and not others. Section 547(b) allows trustees to avoid a transfer of an interest of the debtor if the transfer was:

(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

. . .

(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.

11 U.S.C. § 547(b).

Congress enacted § 548 to meet similar policy goals. Section 548 prevents debtors from making transfers with the actual intent to hinder or delay creditors or from making transfers for less than reasonably equivalent value.[4] This prevents a debtor from giving away its property and thus reducing

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[4] Section 548 states in relevant part:

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation . . . .

11 U.S.C. § 548(a)(1).

the estate and from incurring debts such that there are more creditors to share in the assets remaining in the company.

Because the court finds that SWEC did not intend to pay its subcontractors for the April 2000 invoices and Maine Yankee properly terminated the decommissioning agreement under Article 11.1, it follows that Maine Yankee did not owe SWEC the approximately $5.1 million. Therefore, the Interim Service Agreement did not constitute a transfer of a property interest from SWEC to Maine Yankee. Thus, SWEC cannot avail itself of either of these defenses.

2. Does Maine Yankee hold property recoverable under § 542?

According to SWEC, Maine Yankee only objected to that portion of the April 2000 invoices owed to the subcontractors. The balance, $1,227,524.64, is a mature debt, owed to SWEC. Under § 542(b),

> an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

11 U.S.C. § 542(b). SWEC argues that under this provision, the court should bar Maine Yankee's claims because of Maine Yankee's outstanding debt.

Maine Yankee argues first that it does not owe SWEC any part of the $6.3 million. According

to Maine Yankee, even if the court finds that it owes SWEC for all or a portion of the April 2000 invoices, the debt is not matured because it is the subject of a dispute. Lastly, even if the court finds a debt and there is no dispute about the amount owed, Maine Yankee contends that it has the right to set off that amount against SWEC's obligation under the contract. See 11 U.S.C. § 553.

"Section 553 incorporates and preserves in bankruptcy law the right of setoff available at common law." Cohen v. Savings Bldg. & Loan Co., 896 F.2d 54, 57 (3d Cir. 1990). "The right of setoff depends on the existence of mutual debts and claims between creditor and debtor" and allows parties that owe mutual debts to set one against the other and only pay the balance. Id.

At this stage of the proceeding, the court cannot determine whether the parties owe each other mutual debts, and will reserve decision on that issue. However, the court finds that to the extent that Maine Yankee owes SWEC for work done in April 2000, Maine Yankee may set off that amount against potential claims that it may have against SWEC for breach of the decommissioning agreement.

III. CONCLUSION

The court finds that Maine Yankee properly terminated the decommissioning agreement under for insolvency Article 11.1 and has a right to recovery under Article 11.4 for termination under that provision. The court, however, does not rule on the propriety of Maine Yankee's termination for failure to perform under Article 11.2. Nonetheless, the court will not disallow Maine Yankee's claims under 11 U.S.C. § § 502(b)(1).

Further, the court finds that SWEC did not intend to pay the subcontractors for the work performed during April 2000. Therefore, SWEC could not provide properly filled out lien waivers for those subcontractors. As such, SWEC did not provide adequate support for the April 2000 invoices

and Maine Yankee had no duty to pay SWEC approximately $5.1 million. Thus, the Interim Service Agreement, which gave Maine Yankee the right to pay the subcontractors directly, does not constitute a preferential or fraudulent transfer under the bankruptcy code.

Lastly, the court finds that to the extent that Maine Yankee owes SWEC for work SWEC performed before April 2000, Maine Yankee may set off that amount against claims for breaching the decommissioning agreement.