Albert J. Millus, Jr., Esq.
Hinman, Howard & Kattell, LLP
700 Security Building
80 Exchange Street
Binghamton, New York 13902-5250

Douglas E. Spelfogel, Esq.
Nixon Peabody LLP
990 Stewart Avenue
Garden City, New York 11530

Joann Sternheimer, Esq.
Deily, Dautel & Mooney, LLP
8 Thurlow Terrace
Albany, New York 12203-1006

David D. MacKnight, Esq.
Lacy Katzen Ryen & Mittleman, LLP
130 East Main St.
Rochester, New York 14604

RE:		
	Matco Electronics Group, Inc.	CASE NO. 02-60835
	U.S. Assemblies New England, Inc.	CASE NO. 02-60836
	U.S. Assemblies in Florida, Inc.	CASE NO. 02-60837
	U.S. Assemblies Raleigh, Inc.	CASE NO. 02-60838
	Matco Technologies	CASE NO. 02-60839
	U.S. Assemblies San Diego, Inc.	CASE NO. 02-60840
	Carolina Assemblies, Inc.	CASE NO. 02-60841
	U.S. Assemblies Hallstead, Inc.	CASE NO. 02-60842
	U.S. Assemblies in Georgia, Inc.	CASE NO. 02-60843
	U.S. Assemblies Endicott, Inc.	CASE NO. 02-60844
	Chapter 11 Jointly Administered	

ADV. PRO. NO. 02-80095

LETTER DECISION and ORDER

On April 15, 2003, American Manufacturing Services, Inc.("AMS") a Defendant in the within Adversary Proceeding, filed a motion seeking reconsideration of this Court's Memorandum- Decision, Findings of Fact, Conclusions of Law and Order dated April 4, 2003 ("April 4th Decision"), to the extent the Court dismissed the First and Third Counterclaims asserted in AMS's answer, filed with the Court on August 16, 2002 ("Answer"). The Motion was argued before the Court on May 6, 2003, at Syracuse,

New York, after which the Court agreed to issue a written decision. The Court assumes familiarity with it's April 4th Decision and will not repeat it herein.

In essence, AMS argues that the Court erred in dismissing its First and Third Counterclaims because it should have treated the Official Committee of Unsecured Creditors of the Matco Electronics Group, Inc et al. ("Committee"), the Plaintiff herein, as having ratified and adopted the terms of a Stipulation dated March 4, 2002 ("Stipulation"), entered into between AMS and a number of individual creditors, which creditors ("Petitioning Creditors") had, in fact, filed an involuntary petition in bankruptcy against the Debtors on February 13, 2002. AMS notes that these same Petitioning Creditors, less than a month after executing the Stipulation and with minor exceptions, were designated by the United States Trustee as the Committee. AMS asserts that the parties and the Court have treated the Petitioning Creditors and Committee as one and the same at all times since execution of the Stipulation, and it was not until the Court *sua sponte* raised the distinction in the April 4th Decision that anyone focused on it.

The Committee's motion seeking dismissal of AMS's counterclaims was made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as incorporated by Rule 7012 of the Federal Rules of Bankruptcy Procedure. AMS takes issue with the fact that the Court *sua sponte* raised the fact that the Committee was not in existence at the time the Stipulation was executed. The Committee in opposition asserts, and the Court agrees, that there is ample authority for a court to dismiss a complaint or counterclaim *sua sponte* based upon arguments that were not expressly raised by the parties. *See Murphy v. Lancaster*, 960 F.2d 746, 748 (8th Cir. 1992) (noting that "a *sua sponte* dismissal without prior notice under Ruled 12(b)(6) is authorized only 'when it is patently obvious the plaintiff could not prevail based on the facts alleged in the complaint.' (citation omitted)."); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986,

991 (9th Cir. 1987) (stating that "a court may dismiss a claim *sua sponte* under Fed.R.Civ.P. 12(b)(6) (citations omitted). Such a dismissal may be made without notice where the claimant cannot possibly win relief."). While AMS's ratification argument might provide it with a basis to assert a claim against the Committee, it is an entirely new theory of liability not asserted in its Answer and thus not before the Court when it issued its April 4th Decision.

As the Committee points out, AMS's arguments would tend to blur the very real distinction between a duly constituted creditors committee appointed by the United States Trustee and a group of prepetition creditors who may be similar in identity.

In reconsidering it's April 4th Order, the Court believes that AMS reads more into its counterclaims than is warranted. AMS's First Counterclaim at ¶ 116 of its Answer alleges that the Committee and AMS entered into the Stipulation on March 4, 2002, and that thereafter, based upon various alleged actions of the Committee, it "breached said contract by its conduct." *Id.* ¶ 121. In reaching the conclusions as contained in it's April 4th Order, the Court simply observed that the first counterclaim would have to be dismissed because it alleged a breach of contract against a party that did not exist at the time the contract (the March 4th Stipulation) was executed. Nowhere in the first counterclaim is there an allegation that AMS sought to impose liability on the Committee on some theory that it assumed and ratified the Stipulation by its conduct post-formation. The Court acknowledges that AMS is not without remedy for its allegations that it suffered damage as a result of continual breaches of the Stipulation; the Court, in dismissing the First Counterclaim, simply observed that such a remedy will not lie against an entity that was not a party to the Stipulation.

As to AMS's Third Counterclaim it alleges that AMS was fraudulently induced to enter into the

Stipulation by the Committee based upon certain representations of the "Committee, through its representatives and some of its members." *Id.* ¶ 132. In dismissing the Third Counterclaim, the Court again observed that at the time the Stipulation was executed, the Committee did not exist. The Court finds no basis in the reconsideration motion to disturb that conclusion.

Based on the foregoing ,it is

ORDERED, that the motion of AMS seeking reconsideration of this Court's April 4th Order is denied.

Dated at Utica, New York

this 22nd day of May 2003

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge