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District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURRS,
Debtor. No. 7-01-10779 SA

YVETTE GONZALES, TRUSTEE,
Plaintiff,
v. Adv. No. 02-1107 S

AMERICAN PROMOTIONAL EVENTS, INC.,
Defendant.

MEMORANDUM IN SUPPORT OF JUDGMENT

This matter came before the Court for trial on October 1 and 2, 2003 on the complaint and the defenses thereto. Plaintiff Trustee ("Plaintiff" or "Trustee") appeared through her attorneys Davis & Pierce, P.C. (Chris W. Pierce) and Jacobvitz, Thuma & Walker, A Professional Corporation (David T. Thuma). Defendant American Promotional Events, Inc. ("Defendant" or "American") appeared through its attorney Cadigan Law Firm, P.C. (Michael J. Cadigan).

Plaintiff seeks $89,722.11 as a preferential transfer. Defendant raised certain defenses enumerated in § 547(c), specifically subsections (1) (contemporaneous exchange of value), (2) (ordinary course of business), and (4) (subsequent new value) (doc 11). Having considered the evidence (testimony in person and by deposition, the exhibits, the parties' stipulations and those matters of which the Court has

taken judicial notice of adjudicative fact) and the legal arguments of counsel, the Court finds and concludes that judgment should be awarded to Plaintiff in the sum of $91,390.41, together with costs and post judgment interest at the federal statutory judgment interest rate.

ANALYSIS:

Plaintiff's Prima Facie Case:

The parties stipulated in part at the beginning of the trial (doc 65) that, among other things, American was a creditor of Furrs during the period from November 10, 2000 through the petition date of February 8, 2001; that Furrs paid American $83,977.99 by check dated December 27, 2000; that after the payment was made, Furrs still owed American $54,000-$56,200; that the payment enabled American to receive more that it would have received if (a) the case were a case under chapter 7 of title 11, (b) the payment had not been made, and (c) American received payment of the debt to the extent provided by the Code; and that the amount of the "net" preference (quotation marks in original) was not more than $89,722.11.

Plaintiff's Exhibit D provided the accounting to show how the $89,722.11 figure was calculated. Exhibit D consists of columns that list receipts of product, returns of product for

credit memos, payments, and a column that reflects a running "preference balance." However, using Exhibit D, the Court arrives at a different preference figure which it will use instead.

First, the Court will discuss the issue of credit memos. The Court finds that American's recovery of product and resultant credit memos constitute preferential transfers. Return of inventory can be a preferential transfer. See Wallace Hardware Co., Inc. v. Abrams, 223 F.3d 382, 408 (6th Cir. 2000); Sicherman v. Diamoncut, Inc. (In re Sol Bergman Estate Jewelers, Inc.), 225 B.R. 896, 904 (6th Cir. B.A.P. 1998) aff'd, 208 F.3d 215 (6th Cir. 2000); Ferrari v. Computer Assoc. Int'l, Inc. (In re First Software Corp.), 84 B.R. 278, 283 (Bankr. D. Mass. 1988), aff'd, 107 B.R. 417 (D. Mass. 1989); Gennet v. Coastal Wholesale, Inc. (In re Martin County Custom Pools, Inc.), 37 B.R. 52, 53 (Bankr. S.D. Fla. 1984); Harris v. Scotsman Queen Products Div. Of King-Seeley Thermos Co. (In re Handsco Distrib., Inc.), 32 B.R. 358, 359 (Bankr. S.D. Ohio 1983).

Each of the product return transactions in this case provided no net value to the estate.[1] Rather, American

[1] This conclusion assumes that the value of the product picked up each time was equal to the value in the respective credit memo. Nothing in the evidence suggested that the

obtained from Furrs value (in the form of recovered product) that it would never have recovered from Furrs in its bankruptcy case, thereby diminishing the value of the estate as it reduced its own claim against Furrs.

The $83,977.99 check and $14,561.90 of credit memos issued by American total $98,539.89, which for lack of a better term would be the "gross" preference number. This is the maximum that the Trustee may be entitled to recover from American, subject of course to whatever affirmative defenses American is able to prove up pursuant to § 547(c).

In a similar vein, the parties appear to have agreed that, as reflected on Exhibit D, Furrs should be treated as having transferred the $83,977.99 to American by check on December 30, 2001. The parties stipulated that the date of the check was December 27 (doc 65); and Exhibit L (Furrs bank statement) shows the check was honored on January 4. Ms. Kefauver testified that the check was honored on January 4, but that she subtracted three days for "mailing". She then apparently

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credit memos did not accurately reflect what was picked up, or that the amount credited back to the estate was different than what the estate was charged for the product when it was delivered, or that the product delivered had a value different than what was charged. See McCracken v. Green (In re Dinettes Etc., Inc.), 16 B.R. 629, 630-31 (Bankr. S.D. Fla. 1981)(Inventory preferentially returned to vendor was valued at actual cost to the debtor.)

subtracted two more days for the January 1 holiday, which fell on a Monday, and for the preceding Sunday. However, for purposes of § 547(b) a transfer of funds takes place on the day the check is honored by the drawee bank, Barnhill v. Johnson, 503 U.S. 393, 395, 112 S.Ct. 1386, 1388 (1992). Thus, the check should be credited as of January 4 rather than December 30.

By the parties' stipulations and Exhibit D (as modified by the Court in this opinion), Plaintiff explicitly established most of its prima facie case pursuant to § 547(b).[2] The remaining parts of Plaintiff's case were the elements of whether the debtor was insolvent when the transfer was made and

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[2] Section 547(b) provides:

Except as provided in subsection (c) 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;
...
(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.

whether the debt in question was an antecedent debt.

Section 547(f) provides that the debtor is presumed to have been insolvent during the ninety days immediately preceding the filing of the petition. American provided no evidence to the contrary.[3] The Court thus finds that the debtor was insolvent during the ninety days immediately preceding the filing of the petition.

Concerning what debts were antecedent,

> "[a]lthough 'antecedent debt' is not defined by the Code, a debt is 'antecedent' if it is incurred before the transfer: the debt must have preceded the transfer. [C]ourts hold that a debt is 'incurred' when the debtor first becomes legally bound to pay,...."

Alan Resnick and Henry Sommer, 5 Collier on Bankruptcy (15th Ed. Rev. 2003) ¶ 547.03[4], 547-34 -35. (Footnotes omitted.) Accord, Official Committee of Unsecured Creditors v. Toy King Distributors, Inc. (In re Toy King Distributors, Inc.), 256 B.R. 1, 90-91 (Bankr. M.D. Fla. 2000), citing Tidwell v. Amsouth Bank, N.A. (In re Cavalier Homes of Georgia, Inc.), 102 B.R. 878, 885-86 (Bankr. M.D. Ga. 1989). Almost the entire debt was incurred outside the ninety days immediately preceding the filing of the petition. Substantially all of the product

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[3] Had the Court been so requested, it would have taken judicial notice of the adjucative fact that this chapter 7 case is administratively insolvent.

paid for by American's check was delivered months before the payment, although some of it was delivered in the period from December 18 through 23, 2000. See Exhibit F (showing what invoices were paid with the $83,977.99 check; approximately 93% of the dollar amount of the check at issue was for invoices 152 days late, and the remaining 7% was paid 32 days early, as measured from the invoice due date of January 31, 2001.) Thus the check and the credit memos were all for debts incurred prior to the payment or each credit memo.

Therefore Plaintiff established a prima facie case of entitlement to recover preferential payments totaling $98,539.89. The burden of proof (of coming forward with a prima facie case and of having persuaded the Court at the end of the day) thus shifted to American to establish its defenses to the Trustee's claim.[4]

§ 547(c)(2) defense (ordinary course of business):

Defendant primarily relied on the ordinary course of

[4] Section 547(g) provides:
For the purposes of this section, the trustee has the burden of proving the availability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the
nonavoidability of a transfer under subsection (c) of this section.

business defense in its case set out in § 547(c)(2).[5] A creditor has the burden of coming forward with evidence and of persuasion that payments qualify for the ordinary course of business exception. 11 U.S.C. § 547(g); Clark v. Balcor Real Estate Finance, Inc. (In re Meridith Hoffman Partners), 12 F.3d 1549, 1553 (10th Cir. 1993) cert. denied, 512 U.S. 1206 (1994). Failure to meet any of the three requirements of § 547(c)(2) results in denial of the defense. Id.[6]

Section 547(c)(2)(C) requires Defendant to establish a prima facie case that the transactions at issue were conducted according to "ordinary business terms". This is the so-called "objective test". In Meridith Hoffman Partners the Tenth Circuit defined the phrase "ordinary business terms" as terms that are used in usual or ordinary situations, 12 F.3d at 1553,

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[5] Section 547(c) provides in relevant part:
The trustee may not avoid under this section a transfer–
...
(2) to the extent that such transfer was--
(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
(C) made according to ordinary business terms;....

[6] The § 547(c)(2) defense is narrowly construed. Jobin v. McKay (In re M&L Business Machine Co.), 84 F.3d 1330, 1339 (10th Cir.), cert. denied 519 U.S. 1040 (1996); Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.), 220 B.R. 1005, 1020 (10th Cir. B.A.P. 1998). In this case the Court has not had to rely on this doctrine in making its decision.

and further elaborated: "Ordinary business terms therefore are those used in 'normal financing relations'; the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy." Id.[7]

Applying this test requires a determination of what the relevant market is from which to determine "ordinary business terms". See, for example, In the Matter of Tolona Pizza Products Corp., 3 F.3d 1029, 1033 (7th Cir. 1993) (musing about what the relevant market would be for suppliers of sausage to pizza makers in the Chicago area).

To begin with, to establish what the overall industry practices are, the creditor (ordinarily) cannot rely solely on its own experience with other customers, In the Matter of Midway Airlines, Inc.,69 F.3d 792, 798 (7th Cir. 1995); Logan v. Basic Distribution Corp. (In re Fred Hawes Org., Inc.), 957 F.2d 239, 246 (6th Cir. 1991), or the debtor's arrangements with other creditors, Gulf City Seafoods, Inc. v. Ludwig Shrimp Co.,

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[7] This interpretation of § 547(c)(2)(C) raises difficulties for American, which has asserted in, for example, its Defendant's Memorandum in Support of Motion for summary Judgment, at 2-3 and 7 (doc 42), that there are no healthy grocery stores (except Wal-Mart) and that all grocery stores pay late. Meridith Hoffman Partners probably would require that the Court exclude unhealthy stores from any survey of the data, thus making irrelevant evidence of similar businesses' treatment of delinquent customers who are having financial problems.

Inc. (In the Matter of Gulf City Seafoods, Inc.), 296 F.3d 363, 368 n. 5 and 369 (5th Cir. 2002), or even both. Id., at 368 n. 5. Evidence about the practices of other creditors and (in the Tenth Circuit, healthy) debtors in the industry is required. Id. A defendant "may not derive the standards and practices of the industry from its own practices and must present evidence of the actual practices of its competitors." Grigsby v. Purolator Products Air Filtration Co., Inc. (In re Apex Automotive Warehouse, L.P.), 245 B.R. 543, 550 (Bankr. N.D. Ill. 2000). The exception to this rule is the rare instance in which the creditor comprises the entire industry. Fiber Lite Corporation v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.), 18 F.3d 217, 227 (3rd Cir. 1994)[8]; cf. Advo-System, Inc. v. Maxway Corp., 37 F.3d 1044, 1050-51 (4th Cir. 1994) (court assumed arguendo that creditor Advo-System, as the only direct-mail advertising system to offer its services on a nationwide basis, defined the relevant industry).

There seems to be general agreement that defining the relevant industry is difficult. Tolona Pizza, 3 F.3d at 1033; Gulf City Seafoods, 266 F.3d at 369 (citing Tolona Pizza).

[8] "Just as one swallow does not a spring make, one firm does not an industry make (at least not ordinarily; an exceptionally large firm may be an industry unto itself)." In re Molded Acoustical Products, 18 F.3d at 227. (Footnote omitted.)

Defining the relevant industry is a factual determination "heavily dependent upon the circumstances of each individual case." Roblin Indus., Inc. v. Ford Motor Co. (In re Roblin Indus., Inc.), 78 F.3d 30, 40 (2nd Cir. 1996).

At least two cases look at the intersection of the creditor's business with the debtor's business to determine the relevant industry or market. In Solow v. Ogletree, Deakins, Nash, Smoak & Stewart (In re Midway Airlines, Inc.), 180 B.R. 1009, 1015 (Bankr. N.D. Ill. 1995) the Court said that the "fair way" to define the relevant industry is to examine the relationships between domestic airline carriers and the lawyers that they hire, and thus looked at the law firm's (Ogletree et al.) relationships with other domestic air carriers and the debtor's relationships with other attorneys to define the industry. Moglia v. ISP Technologies, Inc. (In re DeMert & Dougherty, Inc.), 232 B.R. 103, 109 (N.D. Ill. 1999), citing In re Midway Airlines, Inc., defined the relevant industry as "chemical suppliers to manufacturers of beauty products"; it noted that defining the industry as "chemical manufacturers supplying chemical products" would be so broad that it would render 547(c)(2)(C) meaningless.

American argued that the market should be the transactions between suppliers of consumer (family) fireworks and retail

outlets such as grocery chains and other mass merchandising outlets. American also argued that the measuring market should not include other seasonal products, such as pumpkins, Christmas trees, Valentine's Day cards and Easter bunnies. The distinction for American lies in the fact that state laws, including those of New Mexico, generally limit the times that fireworks can be sold to twice a year (around July 4 and New Year's), and that there are no similar (statutory) laws that prohibit the sale of Christmas trees or Easter bunnies, for example, at any time. In consequence, American argues, stores are not compelled by the immediate need for further supplies to stay current with a supplier of fireworks; they can, instead, not pay for a season's worth of fireworks until the next season arrives. Whether this distinction makes a difference is unclear; the Court finds that it is not necessary to decide whether the existence of the statutes affects the defense.[9] But the Court does find that the relevant industry is the sale of consumer fireworks to retail outlets such as grocery chains, discounts sellers, and other large chains, which in turn resell the fireworks to their customers. See In re DeMert &

[9] The "law" of supply and demand, arguably just as coercive as statutory law (and probably more so), would have the same effect for fireworks as for Christmas trees and Easter bunnies. American's contrast between the markets for fireworks and for bread and milk may be more convincing.

Dougherty, Inc. and In re Midway Airlines, Inc.

American is essentially several retailers that have been combined into one company. Those companies include F&S (formerly owned by Ken Delfield and his spouse), Family Fireworks and Pyrodyne. Mr. Delfield, who is now in charge of sales for the south and the southwest for American, testified that American had approximately 90% of the market for consumer fireworks sold to the chains nationwide, and about 95% of the market in New Mexico and west Texas where the Furrs stores were. Roger Kite, general manager of the main production facility in Tulsa, testified that American had 97-99% of the national market. There are ten other large wholesalers of consumer fireworks, but rather than doing business with grocery retailers and similar outlets, these other companies manage or sell to tent and stand locations. Tent and stand locations involve different payment terms, usually cash on delivery. All this testimony from American's witnesses was uncontested. In effect, therefore, American's sales define the market that American is in; those sales are the market. In consequence, the terms and practices that characterize the relationships between American and its buyers constitute the "ordinary business terms" against which its transactions with Furrs must be measured.

Examples of, indeed a comprehensive list of, the retailers who buy from American are set out in Defendant's exhibit 16 denominated Defendant's "Current Clients". That list appears to name every retailer of any significant size in the state, in the region and in the entire United States, including but not limited to such nationally known entities as Costco, Sam's, Fred Meyer, K-Mart, Target, WalMart, Rite Aid, Walgreens, A&P, Albertsons, Circle K, Giant, Jewel Osco, Kroger, Lowes Food, Raley's, Ralphs, Smith's and Winn-Dixie. The breathtaking range of American's clientele confirms the Court's finding that American's sales do indeed define the market for sales of consumer fireworks to grocery chains and similar retail outlets.

American's witnesses, particularly Mr. Delfield, testified that the holiday delivery periods are the Fourth of July, New Year's, Chinese New Year's, and Cinco de Mayo (the U.S. version of the celebration of Mexican independence which takes place, as the name suggests, on May 5), that the standard invoice terms are respectively July 31 and January 31, that payments made long after the invoice date were commonplace in the industry, and that routinely customers paid only when they had to obtain the shipments for the next holiday period. Mr. Delfield also testified that it was common for fireworks

wholesalers to make collection calls even to financially healthy grocery retailers, the reason for this being, apparently, that most customers in the industry pay beyond the standard invoice terms.

It was against this background that American presented its evidence of transactions with some but not all of the Current Clients. Exhibits 17, 18 and 19. American presented a relatively small number of its customer accounts, and therein lies the problem for American.

The line items in exhibit 17, as Mr. Delfield pointed out, and in exhibits 18 and 19, refer to divisions of the customer companies rather than the entire company. For example, for all the Kroger divisions that exist in the eastern part of the United States (in other words, the territory covered by the eastern division of American), only Kroger Columbus and Kroger Michigan appear in exhibit 17. (Mr. Delfield testified that there were six Kroger divisions in American's East Division.) No Kroger divisions appear in exhibit 18, but Kroger Columbus and Kroger Michigan appear again in exhibit 19, with Kroger Cincinnati, Kroger Nashville, Kroger Louisville, Kroger Roanoke and, as a separate entity, Kroger Stores, Inc./Roanoke. Yet exhibit 16 simply lists "Kroger", which the Court takes to mean all the Kroger divisions. Similarly, in exhibit 17 only three

of the Wynn Dixie divisions appear: Jacksonville, Miami and Montgomery, all in Florida. These three divisions appear again in exhibit 19, together with six other divisions: Charlotte, Kentucky, Montgomery [Alabama], New Orleans, Orlando and Raleigh, and something called the "Wynn Dixie Posting Account". Another example is Sam's Club company 0002 which appears in exhibits 17 and 19; Sam's Club company 0005 appears in exhibit 18. Sam's Posting Account appears in exhibit 19. No evidence was presented how many divisions there are of Krogers, Wynn Dixie or Sam's Club, nor what Wynn Dixie Posting Account or Sam's Posting Account is.

American had the burden of coming forward with a prima facie case to show what the terms were for the industry as a whole. By coming forward with evidence of what clearly appears to be only a small portion of that industry, American left a significant doubt in the Court's mind about what is the industry-wide practice of payment for goods received. Perhaps the customer accounts provided were in fact a large percentage of the industry, but there was no testimony of that, and a surface review of the accounts presented in exhibits 17, 18 and 19 compared with the "Current Client" list in exhibit 16 strongly suggests that the accounts presented are a small percentage of the total industry. Nor did American present

credible evidence, although it obviously suggested otherwise, that the apparently small sample presented to the Court in exhibits 17, 18 and 19 was representative of the rest of the industry. Similarly, Mr. Kite's vague and anecdotal examples of payment practices did not address the overall market sufficiently, and Mr. Delfield admitted that typical times for payment of accounts receivable were July 31 and January 31. American had available to it all the information that the Court needed to make a judgment about the industry as a whole, and chose not to present it. At the end of the defense case, the Court was left unpersuaded; the Court strongly suspects that a full presentation of the industry-wide statistics would have supported the Trustee's position rather than American's.[10] In other words, American failed to make a prima facie case for its § 547(c)(2)(C) defense.

The foregoing analysis applies also to the payment of the invoices for the deliveries from December 18 through 23, shortly before the December 27 check was cut. Even if it did not, however, the Court finds persuasive the testimony presented by Sandra Dunlap, Ken Fine and Judy Baker, all of

[10] Indeed, Mr. Kite candidly stated that Furrs always paid outside the industry standard, and that it would not be ordinary course of business to not pay a bill for lack of money.

whom worked in the “back office” of Furrs during the critical months and years leading up to the filing. What they described for the years and months preceding the filing was like the last days in a bunker: checks printed out on the due date for mailing but stored because there was no money to cover them, storage of these checks originally in a manager’s bathroom until they became so numerous that file cabinets and a separate software program were required to keep tack of them (resulting in an accounting program to override the accounting program that paid the invoices); an ad hoc committee of top-level and department managers selecting which vendor accounts would be paid in order to maintain a minimal level of product on the shelves, cash forecasts prepared to aid the ad hoc committee in determining how much money was available to pay vendors, voiding and reissuing checks to those vendors who were to be paid, $20-40 million of held checks in December 2000, constant collection calls from vendors, vendors having Furrs on credit hold, and shelves going bare. In this context, payment of the American invoices for the December 2000 deliveries as part of the $83,977.99 payment cannot possibly be construed as “ordinary business terms”.[11]

[11] Section 547(c)(2)(C) does not by its terms require that the creditor know what the debtor’s circumstances are when the payment is made. It would therefore be irrelevant if American

In consequence, the Court finds that American has failed to meet its burden of proof for its ordinary course of business defense. This being the case, the Court need not consider whether American met its burden of proof on the "subjective test" of § 547(c)(2)(B).

§ 547(c)(4) defense (subsequent new value):

"In order to qualify for the new value defense, the creditor must prove: (1) new value was given to the debtor after the preferential transfer; (2) that the new value was unsecured; and (3) that it remained unpaid." Rushton v. E & S Int'l Enterprises, Inc. (In re Eleva, Inc.), 235 B.R. 486, 488-89 (10th Cir. B.A.P. 1999), citing Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.), 52 F.3d 228 (9th Cir. 1995). (IRFM in turn cites the seminal ruling on § 547(c)(4), Garland v. Union Electric Co. (In re Garland), 19 B.R. 920, 926, 928-29 (Bankr. E.D. Mo. 1982)). For the purposes of section 547(c), the creditor extends new value when the goods are shipped. In re Eleva, Inc., 235 B.R. at 489. There was no direct testimony about whether the dates of deliveries of product in Exhibit D reflect when the loads of product were shipped, or when they arrived at the stores, although given the testimony that

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were never told or learned of Furrs' lack of cash and resulting crisis-mode operations.

shipments were recorded in the accounting system when they were received at the store or warehouse[12], it is likely that they were shipped earlier than appears on Exhibit D. Nevertheless, the parties stipulated that "Defendant (i) provided new value, and/or (ii) picked up unsold product and issued to Furr's credit memos, on the dates, and in the amounts, set forth on Furr's Exhibit D." Stipulated Facts no. 6 (doc 65). Given the difficulty of establishing the shipping dates, the Court will accept the parties' stipulation.

"[S]ubsequent advances of new value may be used to offset prior...preferences. A creditor is permitted to carry forward preferences until they are exhausted by subsequent advances of new value." Mosier, 52 F.3d at 232. See also Williams v. Agama Systems, Inc. (In re Micro Innovations Corp.), 185 F.3d 329, 336-37 (5th Cir. 1999); Crichton v. Wheeling Nat'l Bank (In re Meredith Manor, Inc.), 902 F.2d 257, 258 (4th Cir. 1990).[13]

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[12] The fireworks were shipped directly to each store, rather than to the warehouse. Compare Exhibit E (Direct Store Deliveries) with Exhibit D (Total Receipts/Returns column).

[13] Four examples are as follows: (a) $10 preference payment (day 90), $5 of new value (day 70) and $3 of new value (day 65) = trustee recovers $2 as a preference; (b) $10 preference (day 90), $5 of new value (day 70), $3 of new value (day 65), and $4 preference payment (day 60) = trustee recovers $6 as a preference; (c) $10 preference (day 90), $5 of new value (day 70), $3 of new value (day 65), $4 preference

The four deliveries of product valued at $9,358.70 delivered on December 27 and 29 and on January 3 and 4, cannot be credited against the Furrs payment of $83,977.99 on January 4 because they were not "subsequent". After January 4 and before February 8, 2002 (the petition date), American shipped $7,149.48 of product to Furrs. This entire $7,149.48 can be fully applied against the earlier preferences as a defense, leaving a net preference of $98,539.89 - $7,149.48, or $91,390.41.[14]

§ 547(c)(1) defense (contemporaneous exchange of value):

American also raised the affirmative defense of § 547(c)(1), asserting a contemporaneous exchange of value for some of the transactions.[15]

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payment (day 60) and $5 of new value (day 40) = trustee recovers $1 as a preference; and (d) $10 preference (day 90), $5 of new value (day 70), $6 of new value (day 65), $4 preference payment (day 60) and $1 of new value (day 40) = trustee recovers $3 as a preference.

[14] This amount differs from the parties' $89,722.11 figure by $1,668.30, which is the total of the January 3 and 4 shipments of $897.18 and $771.12. Ms. Kefauver testified that Exhibit D was prepared in a way that the date of the $83,977.99 payment could be changed to another date and the preference could still be calculated. It is for this reason that the Court has not used the parties' stipulation concerning the "net" preference.

[15] The trustee may not avoid under this section a transfer--
(1) to the extent such transfer was--
(A) intended by the debtor and the creditor to

> Section 547(c)(1) protects transfers from attack if (1) the preference defendant extended new value to the debtor, (2) both the defendant and the debtor intended the new value and reciprocal transfer by the debtor to be contemporaneous and (3) the exchange was in fact contemporaneous.

5 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 547.04[1], at 547-47 (15th ed. rev.). The parties' intent to make a contemporaneous transfer is an essential element of a section 547(c)(1) defense. Lowrey v. U.P.G. Inc. (In re Robinson Bros. Drilling, Inc.), 877 F.2d 32, 33 n.1 (10th Cir. 1989). See also Harrah's Tunica Corp. v. Meeks (In re Armstrong), 291 F.3d 517, 525 (8th Cir. 2002) (parties' intent is the critical inquiry) (quoting Official Plan Comm. v. Expeditors Int'l of Washington, Inc. (In re Gateway Pacific Corp.), 153 F.3d 915, 918 (8th Cir. 1998).) The section protects transfers that do not result in diminution of the estate because unsecured creditors are not harmed by the transfer if the estate was replenished by an infusion of assets that are of roughly equal value to those transferred. Manchester v. First Bank & Trust Co. (In re Moses), 256 B.R. 641, 652 (10th Cir. B.A.P. 2000).

> or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
> (B) in fact a substantially contemporaneous exchange;...

American argued that a small number of transactions totaling about $5,250 met the standards for this defense. Apparently that figure refers to product deliveries of $897.18 on January 3, 2001, $771.12 on January 4, $1,352.56 on January 5, and $2,196.96 on January 6. These deliveries followed the $83,977.99 payment, credited on Exhibit D on December 30.[16] American argued that the mere issuance of the check constituted evidence of the parties' shared intent to make a contemporaneous exchange. That of course cannot be the standard, since it would mean that every payment made by a debtor would be treated as meeting the standard for a contemporaneous exchange of value. American also argued that Ken Fine, the Furrs employee who developed and ran the automated check-holding system for Furrs, shared an intent with American that the $83,977.99 payment was intended to cover specific recent deliveries of product. Nothing in the evidence presented at trial supports that assertion for any of the deliveries that were made. In consequence, the § 547(c)(1) defense must fail.

CONCLUSION:

Before and during the trial, a variety of issues arose

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[16] Of course, the total of $5,250 is reduced when the payment is credited on January 4 instead.

which the Court does not need to decide. For example, American challenged the expertise of Arthur "Buzz" Doyle as an expert witness. Since Mr. Doyle testified in support of the Trustee's rebuttal case, the testimony is irrelevant to the disposition of the matter. American also charged Furrs with spoliating evidence by not doing a better job of preserving its records. But because the information allegedly lost – records from calendar years 1999 and 2000 – would bear on the issue of the course of dealing between Furrs and American under § 547(c)(2)(B), the so called "subjective test", and because the Court's disposition of the issue of the "objective" test under § 547(c)(2)(C) resolves the question of the § 547(c)(2) defense, there is no need to consider the spoliation issue either.

Thus, for the foregoing reasons, the Court finds that judgment should be awarded in favor of the Trustee and against American in the principal amount of $91,390.41, together with costs. Since the complaint did not ask for prejudgment interest, only post judgment interest at the federal statutory judgment interest rate is awarded, pursuant to 28 U.S.C. § 1961(a). A judgment consistent with this opinion will issue.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 1, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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