United States Bankruptcy Court
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 J. GONZALES,
Plaintiff,
v. Adv. No. 02-1091 S

NABISCO DIVISION OF KRAFT FOODS, INC.,
Defendant.

MEMORANDUM OPINION ON CROSS MOTIONS FOR SUMMARY JUDGMENT and ORDERS DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant's Motion for Summary Judgment (Doc. 28), Defendant's Revised Brief in Support of Its Motion for Summary Judgment (Doc. 37), Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc. 38), and Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc. 44). Also before the Court are Plaintiff's Motion for Partial Summary Judgment on the Defendant's "Ordinary Course of Business" Defense (Doc. 35), Defendant's Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment on the Ordinary Course of Business Defense (Doc. 41) and Plaintiff's Reply in Support of Her Motion for Partial Summary Judgment on the Defendant's "Ordinary Course of Business" Defense (Doc. 47). This is a core proceeding. 28 U.S.C. § 158(b)(2)(F). Plaintiff appears through her attorney Jacobvitz, Thuma &

Walker (David T. Thuma). Nabisco Division of Kraft Foods, Inc. ("Nabisco" or "Defendant") appears through its attorney Quarles & Brady (Valerie L. Bailey-Rihn). For the reasons set forth below, the Court finds that it should deny both motions.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056(c). In determining the facts for summary judgment purposes, the Court may rely on affidavits made with personal knowledge that set forth specific facts otherwise admissible in evidence and sworn or certified copies of papers attached to the affidavits. Fed.R.Civ.P. 56(e). When a motion for summary judgment is made and supported by affidavits or other evidence, an adverse party may not rest upon mere allegations or denials. Id. The court does not try the case on competing affidavits or depositions; the court's function is only to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

OVERVIEW OF DEFENDANT'S MOTION

Nabisco admits receiving payments during the preference period, but claims that the payments were made in the ordinary course of business and were also contemporaneous exchanges. Nabisco also claims that it provided new value in the form of

additional shipments after receiving the payments. (Doc. 37 pp. 1-2.) Finally, Nabisco claims that the Plaintiff lacks standing under § 550 because the unsecured creditors will not receive a dividend. (Id. at 2.) The standing issue was addressed in a separate opinion.

OVERVIEW OF PLAINTIFF'S MOTION

Plaintiff's motion seeks summary judgment on Nabisco's ordinary course of business defense. She claims that the payments made to Nabisco during the preference period were not made in the ordinary course of business, but were made during a period of "total chaos" and under conditions that were "as far from ordinary as can be imagined." (Doc. 35 pp. 1-2.)

STATUTORY PROVISIONS

For the purpose of these motions for summary judgment only, the Court will assume that the Plaintiff has established that the payments made were preferential under Bankruptcy Code § 547(b), thus making relevant the issue of defenses under § 547(c). Section 547(c) provides in relevant part:

> 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 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;
> (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.

...

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--
(A) not secured by an otherwise unavoidable security interest, and
(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

Section 547(g) provides:

For the purposes of this section, the trustee has the burden of proving the avoidability 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.

CONTEMPORANEOUS EXCHANGE FOR VALUE DEFENSE: SECTION 547(C)(1)

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.

The purpose of the contemporaneous exchange exception ... is to encourage creditors to continue to deal with troubled debtors without fear that they will have to disgorge payments received for value given. If creditors continue to deal with a troubled debtor, it is possible that bankruptcy will be avoided altogether.

5 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 547.04[1], at 547-47 -48 (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. Drillling, 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).

ORDINARY COURSE OF BUSINESS DEFENSE: SECTION 547(c)(2)

> The purpose of [the ordinary course of business defense] is to leave undisturbed normal financial relations, because doing so does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy. See 11 U.S.C.A. § 547. "This section is intended to protect recurring, customary credit transactions that are incurred and paid in the ordinary course of business of the debtor and the debtor's transferee." 4 Collier on Bankruptcy, ¶ 547.10 (15th ed. 1991).

Sender v. Nancy Elizabeth R. Heggland Family Trust, 48 F.3d 470, 475 (10th Cir. 1995).

> On the one hand the preference rule aims to ensure that creditors are treated equitably, both by deterring the failing debtor from treating preferentially its most obstreperous or demanding creditors in an effort to stave off a hard ride into bankruptcy, and by discouraging the creditors from racing to dismember the debtor. On the other hand, the ordinary course exception to the preference rule is formulated to induce creditors to continue dealing with a distressed debtor so as to kindle its chances of survival without a costly detour through, or a humbling ending in, the sticky web of bankruptcy.

Fiber Lite Corp. v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.), 18 F.3d 217, 219 (3rd Cir. 1994). To be protected, a transfer must be ordinary both from the transferee's perspective and the debtor's perspective. In re Milwaukee Cheese Wisconsin, Inc., 112 F.3d 845, 848 (7th Cir. 1997)(citing Marathon Oil Co. v. Flatau (In re Craig Oil Co.), 785 F.2d 1563 (11th Cir. 1986)); In re Tolona Pizza Products Corp., 3 F.3d 1029, 1032 (7th Cir. 1993)("One condition is that payment be in the ordinary course of both the debtor's and the creditor's business.") See also H.R. Rep. No. 595, 95th Cong., 1st Sess 373 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5874, 6329 (legislative history suggests that purpose of this section is to avoid unusual actions by either the debtor or its creditors).

Section 547(c)(2) encourages normal credit transactions and the continuation of short-term credit dealings with troubled debtors to stall rather than hasten bankruptcy. Logan v. Basic Distribution Corp. (In re Fred Hawes Organization, Inc.), 957 F.2d 239, 243 (6th Cir. 1992). The other often cited policy behind the ordinary course of business exception is to promote equality of distribution to the creditors. Armstrong, 291 F.3d at 527; Union Bank v. Wolas, 502 U.S. 151, 161 (1991):

> [T]he preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally. The operation of the preference section to deter "the race of diligence" of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section--that of equality of distribution.

See also Johnson v. Barnhill (In re Antweil), 931 F.2d 689, 692 (1991), aff'd 503 U.S. 393 (1992)("The most important purpose of section 547(b) is to facilitate equal distribution of the debtor's assets among the creditors.")

For the purposes of 547(c)(2), a transfer occurs upon delivery of a check. Bernstein v. RJL Leasing (In re White River Corp.), 799 F.2d 631, 633 (10th Cir. 1986). Compare Barnhill v. Johnson, 503 U.S. 393, 394-95 (1992)(For 547(b)

purposes a transfer made by check occurs on the date the drawee bank honors it.)

A creditor has the burden of proving that payments qualify for the ordinary course of business exception of § 547(c)(2). 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. 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. den. 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).

There is generally no disagreement over the first requirement (i.e., § 547(c)(2)(A)) that a debt was incurred in the ordinary course of business of the debtor and the transferee; reported cases under § 547(c)(2) overwhelmingly focus on subsections (B) and (C). Under those sections the creditor must prove that the transfers were ordinary as between the parties (§ 547(c)(2)(B)), which is a "subjective test", and ordinary in the industry (§ 547(c)(2)(C)), which is an "objective test". Id.

Section 547(c)(2)(B)

> Courts consider four primary factors to determine if payments are ordinary between the parties as required under the subjective test set forth in subsection (B): (1) the length of time the parties were engaged in the transaction in issue; (2) whether the amount or form of tender differed from past practices; (3) whether the debtor or creditor engaged in any unusual collection or payment activity; and (4) the circumstances under which the payment was made.[1] These factors are typically considered by comparing pre-preference period transfers with preference period transfers.

Sunset Sales, Inc. 220 B.R. at 1020-21.

> The relations of the debtor and the creditor are placed in a vacuum, and the transfer in question is assessed for its consistency with those relations. What is subjectively ordinary between the parties is answered from comparing and contrasting the timing, amount, manner and circumstances of the transaction against the backdrop of the parties' traditional dealings. The transaction is scrutinized for anything unusual or different.

Morris v. Kansas Drywall Supply Co. (In re Classic Drywall, Inc.), 121 B.R. 69, 75 (D. Kan. 1990)(Citations omitted).

Section 547(c)(2)(C)

Under § 547(c)(2)(C) "[t]he court here compares and contrasts the particular transaction against the 'practices' or 'standards' of the industry. A transaction is objectively

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[1]The Tenth Circuit Court's fourth factor differs from some other courts' test, which is "whether the creditor took advantage of debtor's deteriorating financial condition." See, e.g., Sulmeyer v. Pacific Suzuki (In re Grand Chevrolet, Inc.), 25 F.3d 728, 732 (9th Cir. 1994), cited by Nabisco in its brief, Doc. 37, p. 16.

ordinary if it does not deviate from industry norm but does conform to industry custom." Id.

> Ordinary business terms, as used in paragraph (C), is thought of as an objective test. Courts consider whether the payment is ordinary in relation to the standards prevailing in the relevant industry. The circuit courts are currently divided about how to determine whether a particular transaction falls within the confines of ordinary business terms. Three prevalent views have emerged. One view, espoused by the Second, Sixth, Seventh and Eighth Circuits, emphasizes the range of terms used by firms that are similar to the creditor. The Tenth Circuit follows a narrower definition of ordinary business terms, excluding extraordinary circumstances from consideration, such as collection practices that may be used when the debtor is financially unhealthy. The Third and Fourth Circuits take a middle ground, defining ordinary business terms on a "sliding-scale" approach that is based on the length of the relationship between the debtor and the creditor.

Ann van Bever, Current Preference Issues, 1 J. Small & Emerging Bus. L. 297, 306 (1997)(footnotes omitted).

In Meridith Hoffman Partners the Tenth Circuit discussed the term "ordinary business terms" used in § 547(c)(2)(C). 12 F.3d at 1553. The Court stated that "ordinary business terms" could mean either 1) terms that creditors in similar situations would commonly use, even if the situation itself is extraordinary, or 2) terms that are used in usual or ordinary situations. Id. It adopted the latter meaning,[2] and further

[2]Therefore, the cases cited by Nabisco on pages 17-19 of (continued...)

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."[3] Id. (Emphasis added.) This interpretation raises difficulties for defendants because it makes irrelevant evidence of similar businesses' treatment of delinquent customers who are having financial problems.

In Meredith Hoffman Partners, the Tenth Circuit ruled that the escrow payment arrangement at issue was not a normal financing arrangement, but rather one only used in the industry when the payor (debtor) is in trouble. 12 F.3d at

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[2](...continued)
its revised brief (related to prevailing practices of similarly-situated competitors faced with the same or similar problems) are not in line with Tenth Circuit law.

[3]This definition by the Tenth Circuit has been called "unique" because it flatly rejects both the "party-focused view" (court excludes late payments from preference attack when the manner and timing conform to the manner and timing of previous payments made and accepted between the parties) and the "industry-terms view" (court asks whether the manner and timing of the late payments conforms to the general and accepted methods of the parties' industry) adopted by the other circuits. Janet E. Bryne Thabit, Ordinary Business Terms: Setting the Standard for 11 U.S.C. § 547(c)(2)(C), 26 Loy. U. Chi. L.J. 473, 489-90, 496 (1995). In fact, the Tenth Circuit test set out in Meredith Hoffman Partners does accept the "industry-terms" view, although it refines that test by requiring that the behavior of healthy debtors be the measure of behavior. Id. at 1553. Refining the test seems to be commonplace among the circuits; e.g., Molded Acoustical Products, 18 F.3d at 220 ("We will embellish the Seventh Circuit test,...").

1554. The court did not qualify the "ordinary business terms" test by requiring reference to the length of the relationship between the debtor and the creditor. Id. at 1553-54. Compare, e.g., In re Molded Acoustical Products, Inc., 18 F.3d at 226 ("In addition [to what is "not unusual" in the industry], when the parties have had an enduring, steady relationship, one whose terms have not significantly changed during the pre-petition insolvency period, the creditor will be able to depart substantially from the range of terms established under the objective industry standard inquiry and still find a haven in subsection C.") However, most courts of appeal have recognized that the differing language and placement in the statute of subsections B and C require that each subsection have its own meaning as a part of the tripartite "ordinary course" test, e.g., id. at 219 n. 1, and as Meredith Hoffman Partners demonstrates, nothing in the "ordinary business terms" portion of the test requires a partial conflation of subsections B and C.

SUBSEQUENT NEW VALUE DEFENSE: SECTION 547(c)(4)

The purpose of the section 547(c)(4) defense is to encourage creditors to deal with troubled businesses. Rushton v. E & S Int'l Enterprises, Inc. (In re Eleva, Inc.), 235 B.R. 486, 489 (10th Cir. B.A.P. 1999).

> The exception of 547(c)(4) is intended to encourage creditors to work with troubled companies and to remove the unfairness of allowing the trustee to void all transfers made by the debtor to a creditor during the preference period without giving any corresponding credit for subsequent advances of new value to the debtor for which the preference defendant was not paid.

5 Collier on Bankruptcy ¶ 547.04[4][a], at 547-68.3.

"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." In re Eleva, Inc., 235 B.R. at 488-89, 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), a preferential transfer occurs on the date the check is delivered. In re Eleva, Inc., 235 B.R. at 488. And, the creditor extends new value when the goods are shipped. Id. at 489. "[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). 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 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.

DISPUTED MATERIAL FACTS

For the purpose of these motions for summary judgment, the Court finds that the following facts are subject to genuine dispute:

A. The Court finds that there are material fact questions related to Nabisco's contemporaneous exchange defense. First, neither party points to facts in the record that establish the parties' shared intent that the payments to Nabisco were or were not intended to be contemporaneous exchanges. While it may be true that Nabisco would not have shipped new product

without the promise of contemporaneous payment, see Nabisco's Revised Brief p. 23, that does not prove that Debtor intended the checks it issued to be contemporaneous. Second, Nabisco's own charts demonstrate that payments during the preference period were 15.6 to 17.6 days late (Defendant's Revised Brief, ¶ 51) See also Ciccarelli Affidavit ¶¶ 16-18 and Jasensky Affidavit ¶ 11. At trial, Nabisco needs to explain how late payments can represent contemporaneous exchanges. The record also does not indicate how Defendant applied these payments -- to old debt, or to the current shipments. The Court will therefore deny summary judgment on this defense.

B. The following facts, B1 through B10, are material because the Court must compare the pre-preference period to the preference period to determine if there has been a change in payment behavior, a factor for a section 547(c)(2)(B) analysis[4]. Classic Drywall, Inc., 121 B.R. at 75. The comparison should be with a period "preferably well before" the preference period, presumably before the Debtor started experiencing financial problems. Tolona Pizza Products, 3 F.3d at 1032. "Generally, the entire course of dealing is

[4]Because a creditor must establish all three elements for a section 547(c)(2) defense and the Court finds that there are material fact questions regarding section 547(c)(2)(B), the Court will not address disputed facts relating to section 547(c)(2)(C).

considered." Brown v. Shell Canada Ltd. (In re Tennessee Chemical Co.), 112 F.3d 234, 237 (6th Cir. 1997). See also Meridith Hoffman Partners, 12 F.3d at 1553 (ordinary business terms are those "when debtors are healthy"); Iannacone v. Klement Sausage Co., Inc. (In re Hancock-Nelson Mercantile Co.), 122 B.R. 1006, 1013 (Bankr. D. Minn. 1991) (baseline period should extend back into the time before debtor became distressed). These facts are also material to the four part analysis of Sunset Sales, Inc. 220 B.R. at 1020-21. Because the Court finds that there are disputed facts, the Court will deny both Plaintiff's Motion and Nabisco's Motion on the Ordinary Course of Business Defense.

B1. Between 1994 and mid-1999 Furrs generally paid its bills within the terms agreed upon by the parties, or close to them. Compare Plaintiff's Motion ¶ 2, Doyle Affidavit ¶¶ 5, 6, 9, Chavez Depo p. 12 l. 11, Dunlap Affidavit ¶ 3 with Chavez Depo p. 12 l. 20, Dunlap Affidavit ¶ 9, Fine Affidavit ¶ 5.

B2. Between 1994 and mid-1999 Furr's vendors did not make repeated calls for payment, place Furrs on credit hold, tighten Furr's credit limits, threaten to withhold shipments, or take similar actions to collect past due amounts. Compare Plaintiff's Motion ¶ 4, Dunlap Affidavit ¶ 5, Doyle Affidavit ¶ 11 with Janesky Affidavit ¶ 5.

B3. By March, 2000, cash flow had become a serious problem. Compare Plaintiff's Motion ¶ 11, Chavez Depo p. 15-16 with Schirmang Affidavit ¶¶ 4-9.

B4. By the late summer or fall of 2000, it became common knowledge in the vendor community that Furr's was not paying its bills as agreed and had cash flow problems. At about that time vendors began to attempt to collect their past due amounts and reduce their exposure to the risk of nonpayment. Compare Plaintiff's Motion ¶ 20, Chavez depo p. 18, Smart depo p. 19 with Schirmang Affidavit ¶¶ 4-9; Janesky Affidavit ¶¶ 13-15.

B5. By June or July of 2000 Furr's shelves began to get bare. Compare Plaintiff's Motion ¶ 21, Chavez depo p. 17, Mortensen depo p. 22, Smart depo p. 13 with Jasensky Affidavit ¶¶ 9-11, 25.

B6. Before the fall of 1999 Furr's vendors never withheld shipments until a payment was received. Compare Plaintiff's Motion ¶ 33, Dunlap Affidavit ¶ 17, Fine Affidavit ¶ 11 with Jasensky Affidavit ¶ 5, Chavez depo pp. 31-32, Doyle depo pp. 71-73.

B7. Before fall, 1999 it was very unusual for Furr's senior management or merchandising personnel to be forced to deal with the credit departments of Furr's vendors. By late 2000,

Furr's senior management had to negotiate with credit departments on a daily basis. Compare Plaintiff's Motion ¶ 34, Doyle Affidavit 11, Smart depo p. 15, Chavez depo p. 20, Mortensen depo p. 378, Smart depo pp. 15-16 with Schirmang Affidavit ¶¶ 1-7, Ciccarelli Second Affidavit ¶ 3, Ciccarelli Affidavit ¶ 5.

B8. Certain checks Furr's issued to Nabisco during the preference period were voided and reissued and certain were forced through the accounting system so they could be paid early. Compare Plaintiff's Motion ¶¶ 39-40, Kefauver Affidavit ¶¶ 4-5, and Second Supplemental Affidavit of Rachel Kefauver ¶¶ 7-12 (which is an attachment to Doc. 47, Plaintiff's Reply) with Nabisco's unsupported statements in response that it was unaware of this behavior, and Exhibit B to Kefauver Affidavit that early payments were in fact credits.

B9. During the preference period Nabisco called Furr's requesting payment 3 to 6 times per week. Compare Plaintiff's Motion ¶ 45, Troncosa depo pp. 106-07 with Nabisco's statement that there is no evidence in the record of that number of calls, and Nabisco Documents 00292 through 00348.

B10. Nabisco placed Furr's on credit hold and would only ship products to Furr's in exchange for payments on past due

invoices. Compare Plaintiff's Motion ¶ 46, Smart depo pp. 47-49, Chavez depo pp. 83-100, Thuma Affidavit ¶ 3 (Nabisco documents 310, 320, 324, 325, 327, 329, 331, 335, 337, 338, 340, 341, 346), Jasensky depo 40-42, 44, and Plaintiff's Reply ¶ 1.1 and Nabisco e-mails cited therein with Jasensky Affidavit ¶¶ 4-12.

C. The Court finds that there are material fact questions related to Nabisco's Subsequent New Value defense. Compare Defendant's Revised Brief ¶¶ 62-65, Jasensky Affidavit ¶¶ 19-22 with Kefauver Affidavit ¶¶ 3-14, Fine Affidavit ¶¶ 3-9. It is also clear to the Court that the parties have disagreements with respect to credits applied and certain invoices omitted from the listings. Therefore, the Court will deny summary judgment on this defense also.

IT IS ORDERED that Plaintiff's Motion for Summary Judgment is denied.

IT IS ORDERED that Defendant's Motion for Summary Judgment is denied.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on June 20, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the following:

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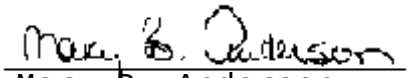

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