United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Yvette Gonzales v. Deming Coca Cola Bottling Co.**
Case Number: **02-01119**
Nature of Suit:
Judge Code: **S**
Reference Number: **02-01119 - S**

Document Information			
Number:	30		
Description:	Memorandum Opinion and Order re: [25-1] Motion For Summary Judgment by Yvette Gonzales .		
Size:	19 pages (36k)		
Date Received:	07/03/2003 11:08:41 AM	**Date Filed:** 07/03/2003	**Date Entered On Docket:** 07/03/2003

Court Digital Signature View History

7b 42 1a ca 35 55 67 62 13 c5 ac 5d 94 52 b9 9b 8c c3 99 ea 84 69 76 f9 b4 3b 51 e5 c4 cf 1c b2 84 ab 4b 4b f4 0c 6a cc 4e b1 fd 62 02 fd f2 8c a4 34 53 f7 d2 2e 82 2a 7b 8d cb ff e2 fb 41 fb e1 bf 70 38 44 71 d1 74 0e 8f 91 2b 1f 05 e3 ff 45 d3 c9 99 cc c4 84 8e 32 8a 0b 98 fb d4 ce 45 4f f6 6a c6 55 b4 22 5d 2e 1e b9 85 79 ac 36 d4 ac 8d 98 50 81 14 f2 51 1d 90 e6 f5 12 14 6a 0d

Filer Information	
Submitted By:	James E Burke
Comments:	*Memorandum Opinion on Plaintiff's Motion for Summary Judgment and Order (31)

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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. 02-1119 S

DEMING COCA-COLA BOTTLING CO.,
Defendant.

MEMORANDUM OPINION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and ORDER

This matter is before the Court on the Plaintiff's Motion for Summary Judgment (doc 25) and Defendant's Response (doc 26). Plaintiff is represented by her attorney Davis & Pierce, P.C. (Chris Pierce). Defendant is represented by its attorney Robert C. Floyd. This is a core proceeding. 28 U.S.C. § 157(b)(2)(F).

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).

Plaintiff's complaint seeks to avoid and recover preferential transfers. Defendant filed an answer, denying some allegations and setting out three affirmative defenses: 1) ordinary course of business under section 547(c)(2); 2) subsequent new value under section 547(c)(4); and 3) a defense based on fairness and equity[1]. Plaintiff's motion seeks summary judgment on the complaint.

STATUTORY PROVISIONS

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;

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[1]The only defenses to recovery of a preferential transfer are listed in section 547(c). Courts may not create new exceptions to section 547(b); only Congress can do that. Enserv Co. v. Manpower, Inc./California Peninsula (In re Enserv Co.), 64 B.R. 519, 520 (9th Cir. BAP 1986) (citing Waldschmidt v. Ranier (In re Fulghum Const. Corp.), 706 F.2d 171, 173 (6th Cir. 1983)), aff'd 813 F.2d 1230 (1987). Therefore, the Court cannot consider the equities of Defendant's dealings with the Debtor. Defendant's third defense therefore should be stricken.

(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.

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.
...
(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(f) provides:

For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

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.

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. Harrah's Tunica Corp. v. Meeks (In re Armstrong), 291 F.3d 517, 527 (8th Cir. 2002); 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 (10th Cir. 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. 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.[2] 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

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[2]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, 731 (9th Cir. 1994).

> 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). In other words, the Court compares the preference period to a prior period. 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 considered." Brown v. Shell Canada Ltd. (In re Tennessee Chemical Co.), 112 F.3d 234, 237 (6th Cir. 1997). See also Iannacone v. Klement Sausage Co. (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). Cf. Meridith Hoffman Partners, 12 F.3d at 1553 (Ordinary business terms under section 547(b)(2)(C) are those "when debtors are healthy.")

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 ordinary if it does not deviate from industry norm but does conform to industry custom." Classic Drywall, Inc., 121 B.R. at 75.

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, and further elaborated that "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

[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,...”).

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 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.

Defendant concedes in its Response, at 8, that it cannot meet the objective test of section 547(b)(2)(C) as required by Tulsa Litho Co. v. BRW Paper Co. (In re Tulsa Litho Co.), 229 B.R. 806 (10th Cir. BAP 1999) and In re Sunset Sales, 220 B.R. 1005. Defendant instead urges that where there has been a long relationship between the creditor and debtor, the objective test and conformity with industry standards can be ignored, citing Grant v. Renda Broadcasting Corp. (In re L. Bee Furniture Co., Inc.), 250 B.R. 757 (Bankr. M.D. Fla. 2000).

L. Bee Furniture Co. is based upon an interpretation of Miller v. Florida Mining and Materials (In re A.W. & Assoc., Inc.), 136 F.3d 1439 (11th Cir. 1998), in which the 11th Circuit adopted the majority view that section 547(c)(2)(C) requires bankruptcy courts to consult industry standards in classifying a disputed transfer. Id. at 1442 (listing cases). Not finding enough direction in the 11th Circuit case, the L. Bee Furniture Co. court noted that A.W. & Assoc., Inc. referred to Tolona Pizza for the proposition that:

> "Ordinary business terms" refers to the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside the broad range

> should be deemed extraordinary and therefore outside the scope of subsection C.

136 F.3d at 1443 (quoting Tolona Pizza, 3 F.3d at 1033; emphasis in original). The L. Bee Furniture Co. court also noted, 250 B.R. at 761-62, that the Eleventh Circuit cited approvingly to Molded Acoustical, which "countenances a greater departure from the range of terms the longer the pre-*insolvency* relationship between the debtor and creditor was solidified", 18 F.3d at 220 (emphasis in original). Molded Acoustical described a "sliding-scale window", through which long-standing relationships would be given more flexibility to stray from established industry terms and still be "ordinary." Id. at 225. The L. Bee Furniture Co. court then reviewed the Fourth Circuit's adoption and interpretation of Molded Acoustical in Advo-System, Inc. v. Maxway Corp. (In re Maxway Corp.), 37 F.3d 1044, 1049 (4th Cir. 1994), where the Fourth Circuit also characterized 547(c)(2)(C) as a "sliding-scale window". L. Bee Furniture Co. applied the sliding-scale window to the facts before it and found that, despite the fact that the debtor was paying late with post-dated checks, the behavior was "not so idiosyncratic as to fall outside the broad range of industry standards.[4] The relationship between the parties was cemented,

[4] For evidence of industry standards, it appears the L. (continued...)

therefore the range of permissible deviation from industry standards is much greater than it otherwise would be." 250 B.R. at 764.

Perhaps L. Bee Furniture Co. applied the law as it exists in the 3rd, 4th, and 11th circuits[5]. However, the "sliding-scale window" has not been adopted by the 10th Circuit, which

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[4](...continued)
Bee Furniture Co. court relied only on the testimony about the defendant's own practices from the defendant's general manager/ vice-president from 1991 through 1996, and the general manager of defendant since 1996. Most cases would find this evidence insufficient. See, e.g., Gulf City Seafoods, Inc. v. Ludwig Shrimp Co. (In re Gulf City Seafoods, Inc.), 296 F.3d 363, 368 n.5 (5th Cir. 2002)(Defendant must provide evidence of credit arrangements of other creditors and debtors in the industry.)(Emphasis in original.) See also In re Fred Hawes Organization, 957 F.2d at 245-46 (requiring more than just the testimony of defendant's president showing how defendant deals with other customers who pay late.)

[5] "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).

defines ordinary business terms as terms that are used in usual or ordinary situations when debtors are healthy. Therefore, in the Tenth Circuit, the creditor must provide some proof of industry norms for healthy debtors and then demonstrate that its collection activity fits within those norms. The Court finds that the existence of a long-standing relationship is not a substitute for § 547(c)(2)(C). See Lawson v. Ford Motor Co. (In re Roblin Indus., Inc.), 78 F.3d 30, 41 (2nd Cir. 1996) (looking only at the relationship of the parties renders 547(c)(2)(C) surplusage). Compare Molded Acoustical, 18 F.3d at 226:

> Even when the debtor/creditor relationship has been well-settled prior to the debtor's insolvency, should the creditor be unable to fit its terms within the sliding-scale window surrounding the established industry's norm, the preferential transfer will not be deemed unavoidable by virtue of § 547(c)(2), although the terms of §§ 547(c)(2)(A) & (B) are fulfilled. That is to say, the parties' longstanding credit terms, although consistent as between them, may depart so grossly from what has been established as the pertinent industry's norms that they cannot be seriously considered usual and equitable with respect to the other creditors.

See also Maxway Corp., 37 F.3d at 1050 ("[S]ubsection C never tolerates a gross departure from the industry norm, not even when the parties have had an established and steady relationship.")

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 Enters. 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)). For the purposes of section 547(c), a preferential transfer occurs on the date the check is delivered. Id. at 488. And, the creditor extends new value when goods are shipped. Id. at 489. The delivery must occur after the preference; "[n]ew value cannot be given as an aforethought." Id. "Subsequent 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).

Discussion

The Court finds that the following facts are not subject to genuine dispute:

(1) Furr's made payments to or for the benefit of Defendant (Exhibit J, Kefauver affidavit ¶¶ 4-6);

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made (Plaintiff's facts 41, 42; Exhibit K, Interrogatory 7);

(3) made while the debtor was insolvent (Insolvency is presumed under section 547(f) and Defendant has not introduced evidence to the contrary.);

(4) made on or within 90 days before the date of the filing of the petition (Kefauver affidavit ¶¶ 4-6);

(5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title. (The Court takes judicial notice that the bankruptcy case will likely not

even pay chapter 11 administrative expenses in full; therefore unsecured creditors will receive no dividend.)

(6) Defendant did not raise a section 547(c)(1) defense of contemporaneous exchange for value. In any event, Plaintiff has established that the payments were made weeks or months after delivery of the product. Furthermore, Defendant admits that the checks during the preference period were applied to invoices approximately 48 days old. (Exhibit M, Interrogatory 5). This indicates that the exchanges were in fact not substantially contemporaneous.

(7) Defendant conceded that it cannot meet the objective test required under section 547(c)(2)(C). The Court further finds that Defendant did not establish a genuine issue of fact that the Debtor's payments were made according to ordinary business terms. Therefore, summary judgment should be granted to Plaintiff on this defense.

(8) Defendant offered evidence that contradicts Plaintiff's schedule of payments to Defendant and receipts of product from Defendant from which Plaintiff calculated the new value defense and net preference amount as set forth in the complaint. See Response Exhibit 1. Defendant has also raised a fact question related to "unbatching" invoices that may affect the value

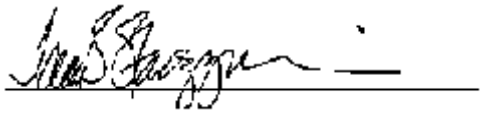
calculations. Therefore, summary judgment should be denied on Defendant's new value defense.

IT IS ORDERED that Plaintiff's Motion for Summary Judgment is granted in part as follows:

Plaintiff has established all elements of a preferential transfer under section 547(b).

Defendant has not met its burden under section 547(g) to show that there is a genuine issue of fact with respect to its first affirmative defense, the ordinary course of business defense of section 547(c)(2), and that defense is hereby overruled. Defendant's third affirmative defense, based on equitable considerations, is also overruled.

IT IS FURTHER ORDERED that Defendant's second affirmative defense, the subsequent new value defense pursuant to section 547(c)(4), remains for trial.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on July 3, 2003, 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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