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U.S. BANKRUPTCY COURT

New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURR'S SUPERMARKETS, INC.,
Debtor. No. 7-01-10779 SA

YVETTE J. GONZALES, TRUSTEE,
Plaintiff,
v. Adv. No. 03-1065 S

UNITED STATES POSTAL SERVICE, et al.,
Defendants.

MEMORANDUM OPINION ON USPS's
SECOND MOTION FOR SUMMARY JUDGMENT (docs 107-108)

This matter is before the Court on Defendant United States Postal Service's ("USPS") Second Motion for Summary Judgment ("Motion")(docs 107-108), Plaintiff's Response (doc 110) and USPS's Reply (doc 1116). This adversary proceeding to recover preferential transfers is a core proceeding. 28 U.S.C. § 157(b)(2)(F)[1]. The parties' representatives are listed in the service section below.

SUMMARY JUDGMENT STANDARDS

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

[1]All statutory and rule references are to the Bankruptcy Code as it existed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

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).

FACTS

The Court finds the following are undisputed:

1. Amplex Corporation ("Amplex") and the USPS entered into a stamps-on-consignment contract ("USPS Contract") on or about February 1, 1996. A copy of the Contract is attached as Exhibit 1.
2. The USPS Contract had an initial term of three years, beginning March 1, 1996 through February 28, 1999, with options for two twelve-month extensions, for a possible term of five years.
3. The USPS exercised the two options, so the contract ran for five years and ended by its own terms on February 28, 2001. Plaintiff denied this proposed fact for lack of knowledge; this was insufficient to put the fact in doubt. Rather,

Plaintiff must point to specific evidence in the record to controvert the fact[2].

4. The USPS Contract specified that Amplex would provide support for the USPS's nationwide Stamps on Consignment ("SOC") program, which was designed by the USPS to place postage stamps into commercial retail outlets for sale to the general public.

5. Under the USPS Contract, Amplex received stamps from the USPS on a consignment basis, and Amplex then entered into consignment agreements with various retailers (the "retail-consignees"), whereby Amplex provided stamps on consignment to the retail-consignees for sale to their customers.

6. Under the USPS Contract, neither Amplex nor the retail-consignees held title to the stamps at any time as, under the applicable contracts, the USPS retained title to the stamps until the stamps were sold to the general public. Plaintiff denies this proposed fact, but cites no evidence to contradict it. The issue of who held title is, in any event, probably a legal conclusion derived from examining the documents themselves.

7. Under the USPS Contract, the USPS agreed to pay Amplex a fee for its management and administration of the SOC program, to

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[2]Denials of knowledge do not meet Rule 56(e) standards. Fireman's Ins. Co. of Newark, New Jersey v. DuFresne, 676 F.2d 965, 969 (3rd Cir. 1982).

be determined by the revenues received in a Postal Service lockbox account from the retail-consignees' sales of the consigned stamps.

8. Under the USPS Contract, Amplex was fully responsible for the consigned stamp stock from the time of receipt (this responsibility was co-extensive with that of a retail-consignee during the period such entity was responsible for the stamp stock), and it was responsible for paying the USPS if the retail-consignee failed to pay over the proceeds from the sales of the consigned stamps for any reasons, including the retail-consignee's bankruptcy or insolvency.

9. Amplex and Furr's Supermarkets ("Furr's") entered into a consignment agreement on March 1, 1996. A copy of this contract is attached as the third exhibit to the Motion (but labeled exhibit 8).

10. Under the terms of the Amplex-Furr's agreement, Furr's was to pay the proceeds from the sales of the consigned stamps to a USPS lockbox account within 30 days after receiving the stamp stock from Amplex. This agreement did not purport to establish a trust, did not require segregation of the funds (unless there were a default and Amplex requested segregation), did not prohibit Furr's from co-mingling the stamp proceeds with other funds, did not impose any fiduciary-like obligations on Furr's, and did not require

Furr's to act in any fashion whatsoever regarding the stamps or the proceeds other than to pay for them within 30 days.

11. At no time did the USPS enter into an agreement with Furr's. Plaintiff denies this proposed fact, but cites no evidence to contradict it. In addition, USPS admits that there is no express trust in this case. The Court also finds that because there was no written contract or other instrument between Furr's and the USPS, neither party had any specific duty to the other, except possibly as incidental to either the USPS Contract or the Stamp Consignment Agreement (e.g., Furr's had to pay the USPS lockbox within 30 days of any receipt of stamps from Amplex.)

12. Furr's filed a Chapter 11 bankruptcy proceeding on February 8, 2001.

13. Furr's Chapter 11 case was converted to Chapter 7 on December 19, 2001.

14. In an amended complaint to avoid preferential transfers, the Chapter 7 Trustee contended that the USPS and "stamps on consignment" had received $415,600 within the 90 days of the filing of the bankruptcy petition and further alleged that the payments were preferential.

15. The 90-day period before the February 8 bankruptcy petition began on November 10, 2000 and ended on February 7, 2001.

16. According to the payment history compiled by Amplex, attached as Exhibit 4, Furr's payments after invoicing in the eight and one-half months before the bankruptcy filing were as follows:

Invoice Date	Amount	Payment	Date	# days
04/07/00	59,400	59,400	06/09/00	63
04/28/00	59,400	59,400	05/26/00	28
05/12/00	59,400	59,400	06/09/00	28
05/26/00	59,400	59,400	06/23/00	28
06/09/00	3,881	3,881	07/31/00	52
06/16/00	59,400	59,400	07/31/00	45
06/30/00	59,400	59,400	08/14/00	45
07/14/00	59,400	59,400	08/14/00	31
08/11/00	59,400	59,400	10/10/00	60
08/26/00	59,400	59,400	11/09/00	75
09/16/00	61,380	61,380	11/17/00	62
09/29/00	59,400	59,400	11/27/00	59
10/13/00	59,400	59,400	12/11/00	59
11/03/00	59,400	59,400	01/25/01	83
11/22/00	59,400	59,400	01/25/01	64
12/01/00	59,400	59,400	01/22/01	52
01/05/01	61,200	Paid by Amplex post-petition.		
01/19/01	61,200	Paid by Amplex post-petition.		

Because this table is based on Amplex's accounting records, the date column presumably is the date the check was delivered to Amplex, not the date it cleared Furr's bank. And, the Court notes that this table differs from

Plaintiff's, which appears in Plaintiff's Motion for Summary Judgment (doc 106), Exhibit A chart 1. The Court accepts as a fact, however, that this is what Amplex's records show.

17. From May 26, 2000 to November 9, 2000, the timing of Furr's payments ranged from 28 days after invoicing to as much as 75 days after invoicing. Plaintiff denied this proposed fact for lack of knowledge; this was insufficient to put the fact in doubt. Rather, Plaintiff must point to specific evidence in the record to controvert the fact.

18. From November 10, 2000 to February 8, 2001, the timing of Furr's payments varied from 52 days after invoicing to 83 days after invoicing. Plaintiff denied this proposed fact for lack of knowledge; this was insufficient to put the fact in doubt. Rather, Plaintiff must point to specific evidence in the record to controvert the fact.

19. According to letters Amplex provided to Plaintiff during discovery, Amplex sent past due letters to Furr's on December 27, 2000 ($118,800 past due), January 4, 2001 ($178,200 past due) and January 17, 2001 (suspending stamp shipments). These letters are attached to the Motion as Exhibit 5.

20. After Amplex sent the December 27 and January 4 letters, it shipped additional stamps to Furr's on January 5 and January 19, 2001 with a total value of $122,400. Plaintiff denied

this proposed fact for lack of knowledge; this was insufficient to put the fact in doubt. Rather, Plaintiff must point to specific evidence in the record to controvert the fact.

21. Furr's did not pay for the January 5 and January 19, 2001 stamp shipments before it filed its February 8, 2001 bankruptcy petition. Plaintiff denied this proposed fact for lack of knowledge; this was insufficient to put the fact in doubt. Rather, Plaintiff must point to specific evidence in the record to controvert the fact.

22. In the Response to the Motion, Plaintiff attached the affidavit of Sandra Dunlap, which included the following sworn testimony:

> 3. During the period from November 1, 2000 through February 8, 2001, every business day each Furr's grocery store deposited its daily sales receipts in a local bank account. This included any sales proceeds from the sale of postage stamps.
> 4. No Furr's grocery store ever made any attempt to segregate the postage stamp proceeds from other sales proceeds, but instead comingled all proceeds into its local bank account.
> 5. Every night the daily deposits, including any proceeds from the sale of stamps, of each local bank account would be "swept" into a Wells Fargo bank account in Albuquerque, New Mexico (the "Blocked Account"), leaving the local bank accounts at or near a "zero" balance.
> 6. While Furr's Supermarkets, Inc. was shown as the "owner" of the Blocked Account, Furr's had no access to the funds that were swept into the Blocked Account. Rather, such

> funds were wired every business day to Furr's secured lenders.
> 7. Furr's obtained operating cash, including cash to pay for goods and services, by obtaining advances on a line of credit from Furr's secured lenders. The advances were deposited into a different account at Wells Fargo in Albuquerque, New Mexico (the "Operating Account"). The amount of the advances was based on a borrowing base formula set out in the loan documents between Furr's and the secured lenders.
> 8. Furr's would, as needed, wire-transfer funds from the Operating Account to an account at the First National Bank of Fairfield, Montana (the "Disbursement Account"). Furr's wrote most of its checks from the Disbursement Account.
> 9. All checks payable to "Stamps on Consignment" were drawn on the Disbursement Account.
> 10. No money from the Blocked Account ever went to the Operating Account or the Disbursement Account.

23. In the Response to the Motion, Plaintiff also refers to the affidavit of Sandra Dunlap attached as Exhibit C to the Plaintiff's own motion for summary judgment (doc 106), which included the following sworn testimony:

> 3. From 1994 until approximately June, 1999, Furr's generally paid its bills within stated terms or close to them, and had sufficient cash to do so.
> 4. Between 1994 and mid-1999, Furr's ordinary course of business with its product vendors would be to order product from a vendor as needed, receive shipment of the product, receive an invoice for the product, process the invoice, and then pay the invoice with a check that was mailed within the agreed-upon payment terms, or close to them.
> 5. Between 1994 and mid-1999, Furr's vendors never or almost never made repeated calls to Furr's for payment, placed Furr's on

> credit hold, tightened Furr's credit limits, threatened to withhold shipments of goods, or took similar actions to collect past due accounts.
> 6. In general, Furr's cash flow situation worsened throughout 2000 until the bankruptcy filing on February 8, 2001.
> ...
> 24. Before the fall of 1999, Furr's vendors never withheld shipments until a payment was received.

DISCUSSION

USPS's Motion for summary judgment is based on two theories: 1) that Furr's had no interest in the proceeds of the stamp sales, so that there was no transfer "of an interest of the debtor in property" as is required by 11 U.S.C. § 547(b); and 2) alternatively, the transfers were made in the ordinary course of business under 11 U.S.C. § 547(c)(2). Each will be addressed.

THE PROPERTY DEFENSE

Under Bankruptcy Code Section 541(a)(1) the filing of a bankruptcy petition creates an estate comprised of all legal or equitable interests of the debtor in property as of the commencement of the case wherever located and by whomever held. An exception to this broadly encompassing estate is found in Section 541(d), which provides:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to

> the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Therefore, if a debtor holds property as a trustee only the debtor's bare legal title passes to the bankruptcy estate. This means that if a creditor can establish that a claim is really an amount held in trust for his or her benefit, the creditor in effect gets paid in full ahead of the debtor's creditors outside of the bankruptcy process.

If one seeks to establish that there is a trust, the burden is on the claimant to establish the existence of the trust and to identify the property held in trust. City of Farrell v. Sharon Steel Corp., 41 F.3d 92, 95 (3rd Cir. 1994); In re Morales Travel Agency, 667 F.2d 1069, 1071 (1st Cir. 1981)(Decided under former law). "It is beyond peradventure that, as a general rule, any party seeking to impress a trust upon funds for purposes of exemption from a bankruptcy estate must identify the trust fund in its original or substituted form." Sender v. The Nancy Elizabeth R. Heggland Family Trust (In re Hedged-Investments Assoc., Inc.), 48 F.3d 470, 474 (10th Cir. 1995)(quoting First Federal of Michigan v. Barrow, 878 F.2d 912, 915 (6th Cir. 1989).)

USPS admits that there is no express trust involved in this case. It argues, however, that the Court should apply federal

common law[3] to declare a constructive trust for its benefit. The Court will not address the difficult issue of whether federal common law or state law should apply[4] because, even assuming there were a constructive trust, USPS is still not entitled to summary judgment. The Sandra Dunlap affidavit creates a genuine issue of fact of whether the trust fund can be identified and traced[5]. See Bangor & Aroostook Railroad, 320 B.R. at 238 n. 22:

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[3]Federal common law provides a more expansive definition of an implied trust than does state law. Federal common law imposes a trust when an entity acts as a conduit, collecting money from one source and forwarding it to its intended recipient. Howard v. Burlington Northern & Santa Fe Railway Co. (In re Bangor & Aroostook Railroad), 320 B.R. 226, 235 (Bankr. D. Me. 2005) (quoting Official Comm. Of Unsecured Creditors of the Columbia Gas Transmission Corp. V. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.), 997 F.2d 1039, 1056 (3rd Cir. 1993), cert. denied, 510 U.S. 1110 (1994).)

[4]See Bangor & Aroostook Railroad, 320 B.R. at 234-240 for a discussion of the issues involved in making such a decision. And compare, e.g., Union Pacific Railroad Co. V. Moritz (In re Iowa Railroad Co.), 840 F.2d 535 (7th Cir.), cert. denied, 488 U.S. 899 (1988)(Declining to apply federal common law to a railroad regulatory issue in the bankruptcy context) with, e.g. City of Springfield v. Lan Tamers, Inc. (In re Lan Tamers, Inc.), 281 B.R. 782 (Bankr. D. Mass. 2002), aff'd., 329 F.3d 204 (1st Cir. 2003), cert. denied, 540 U.S. 1047 (2003)(Applying federal common law to a telecommunications issue in the bankruptcy context.)

[5]Federal courts apply the intermediate balance rule when tracing.

> The intermediate balance rule is founded on two key principles. First, when a trustee commingles trust funds and personal funds, any funds removed from the commingled account are presumed to be personal funds. In other words, funds held in trust will remain in a commingled account for as long as possible. National Bank v. Insurance Co., 104 U.S. 54, 26 L.Ed. 693 (1881). Second, "where one has deposited trust funds

(continued...)

> Even were I to conclude that the interline freight charge balances paid to the defendants were trust funds, I could not enter summary judgment in the defendants' favor on the record before me. Although following Penn Central [In re Penn Central Transp. Co., 486 F.2d 519 (3rd Cir. 1973)] would trigger application of the "expansive" federal common law trust concepts articulated in Columbia Gas, I would still have to apply trust principles in considering the defendants' resulting entitlements. As trust beneficiaries, they would yet be required to establish, by way of a "lowest intermediate balance" analysis, that the funds paid to them were indeed trust funds--a point on which this record contains no evidence.

In summary, whether or not USPS is a constructive trust beneficiary, there is a genuine issue of material fact regarding whether USPS can trace any or all of the trust. Summary judgment should be denied as to the Property Defense.

ORDINARY COURSE OF BUSINESS DEFENSE

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[5](...continued)
> in his individual bank account, and the mingled fund is at any time depleted, the trust fund is thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account." Schuyler v. Littlefield, 232 U.S. 707, 34 S.Ct. 466, 58 L.Ed. 806 (1914). In other words, funds deposited into a commingled account are not generally treated as trust funds. Combining these two principles leads to the conclusion that the beneficiary of a constructive trust may not retrieve more from a commingled account than the lowest balance of the account recorded at any time after the trust funds have been mingled.

United States v. NBD Bank, N.A., 922 F.Supp. 1235, 1243-44 (E.D. Mich. 1996)(Footnotes omitted.) See also Rine & Rine Auctioneers, Inc. V. Douglas County Bank & Trust Co. (In re Rine & Rine Auctioneers, Inc.), 74 F.3d 854, 858-59 (8th Cir. 1996) (When a debtor's bank account has a negative balance it is no longer possible to trace trust funds previously deposited into it.)

Section 547(c)(2) contains the "ordinary course of business defense". The statute provides:

> ©) 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
> ©) made according to ordinary business terms[.]
>
> 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 (In re Hedged-Investments Assoc., Inc.), 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).

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) requires Defendant to establish that the transfer was 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)(A)

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[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). The Court has not applied this construction in this motion for summary judgment, where the only issue is the existence of a genuine issue of material fact.

Section 547(c)(2)(A) requires Defendant to establish that the debt was incurred in the ordinary course of business of the debtor and the transferee. There is generally no problem with this prong of Section 547(c)(2). The Court assumes that Furr's and the USPS had an ordinary business relationship.

Section 547(c)(2)(B)

Section 547(c)(2)(B) requires Defendant to establish that the transfers were ordinary as between the parties, which is a "subjective test."

> 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.[7] 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.

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[7]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).

Morris v. Kansas Drywall Supply Co. (In re Classic Drywall, Inc.), 121 B.R. 69, 75 (D. Kan. 1990)(Citations omitted). To perform the Section 547(c)(2)(B) analysis, the Court must compare the pre-preference period to the preference period to determine if there has been a change in payment behavior. Id. 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 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).

While the USPS did provide some data on the historical relation of the parties, the data only extended back 8 or 9 months. Yet, the Stamps on Consignment agreement started back in 1996. The Sandra Dunlap testimony establishes that Furr's was in relatively healthy shape up until late 1999 or early 2000. USPS could have included payment records from this time period to demonstrate that there was no change in their relationship but failed to do so. Rather, the records it included compare the

preference period to a period right before the preference period when Furr's had already begun its slide into bankruptcy. USPS also admits that Amplex sent dunning letters to Furr's in late December, before the last 3 payments Furr's made to the USPS. In all, the Court finds that USPS has failed to meet its burden of proof under Section 547(c)(2)(B).

Section 547(c)(2)(C)

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, 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.[8]

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

[8] This interpretation of § 547(c)(2)(C) raises difficulties for defendants. Meridith Hoffman Partners probably would require that the Court exclude unhealthy customers from any survey of the data, thus making irrelevant evidence of USPS's treatment of delinquent customers who are having financial problems.

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., 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); 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). The Court assumes that this is one of the rare cases; the USPS is the industry. Therefore, USPS had the burden of showing that its transactions with Furr's were those used in "normal financing relations"; the kinds of terms that the USPS and debtors use in ordinary circumstances, when debtors are healthy. USPS did not provide any facts to satisfy this requirement, so the motion for summary judgment as to ordinary course of business should be denied.

CONCLUSION

The Court will deny USPS's Second Motion for Summary Judgment. USPS has not established that there are no genuine issues of material fact as to its Property Defense and its Ordinary Course of Business Defense. A separate Order will be entered denying the motion.

Honorable James S. Starzynski
United States Bankruptcy Judge

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