UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	**CASE NUMBERS**
PONY EXPRESS DELIVERY SERVICES, INC., FLEET ACQUISITION CORP., and COURIER EXPRESS, INC.,	BANKRUPTCY CASE NO. 00-68309-WHD
Debtors.	
PONY EXPRESS DELIVERY SERVICES, INC. and COURIER EXPRESS, INC.,	
Plaintiffs,	ADVERSARY PROCEEDING NO. 02-6276
v.	
ANDREINI & COMPANY and LLOYD'S OF LONDON,	
Defendants.	IN PROCEEDINGS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Partial Summary Judgment filed by the plaintiff, Pony Express Delivery Services, Inc. (hereinafter the "Plaintiff"), in its capacity as debtor-in-possession, against the defendant, Andreini & Company (hereinafter the "Defendant"). This motion arises from a complaint filed by the Plaintiff in which the Plaintiff seeks to avoid and recover certain transfers in accordance with § 547 and § 550 of the Bankruptcy Code. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(F).

FINDINGS OF FACT

1. The Plaintiff filed a voluntary petition under Chapter 11 of the Bankruptcy Code on June 14, 2000. Plaintiff's Statement of Undisputed Facts, ¶ 1.

2. The Defendant acted as an insurance broker for workers' compensation and cargo insurance. Defendant's Statement of Undisputed Facts, ¶ 1.

3. The Defendant received payments for insurance premiums from customers, deposited the premium payments, less the Defendant's commission, into a trust account, and forwarded the premium payments to the insurance carrier. Defendant's Statement of Undisputed Facts, ¶ 1.

4. The Defendant received check number 5008066 from the Plaintiff and deposited the check into its trust account on May 22, 2000. Defendant's Statement of Undisputed Facts, ¶ 2.

5. On May 23, 2000, the Defendant issued checks from its trust account to insurance carriers in payment of insurance premiums that were due or overdue. Defendant's Statement of Undisputed Facts, ¶ 2.

6. Check number 5008066 was returned for insufficient funds. Defendant's Statement of Undisputed Facts, ¶ 2.

7. The Defendant re-deposited check number 5008066, but the check was again returned for insufficient funds. Defendant's Statement of Undisputed Facts, ¶ 2

8. On June 13, 2000, the Plaintiff made an electronic funds transfer in the amount of $310,422 to the Defendant for payment of the debt owed to the Defendant for the payment

of the insurance premiums. Plaintiff's Statement of Undisputed Facts, ¶¶ 4-5; Plaintiff's Reply Memorandum, n.4.

9. The Defendant retained $11,325.30 as its commission. Defendant's Statement of Undisputed Facts, ¶ 3. Following the wire transfer, the Defendant also remitted $8,783 to Superior National Insurance Company on behalf of the Plaintiff. Declaration of Roberta Moore, ¶ 18.

10. Throughout the course of the business relationship of the Defendant and the Plaintiff, the Plaintiff had never before presented the Defendant with a check that was returned for insufficient funds. Declaration of Roberta Moore, ¶ 14.

CONCLUSIONS OF LAW

A. The Summary Judgment Standard.

In accordance with Federal Rule of Bankruptcy Procedure 7056, which incorporates Federal Rule of Civil Procedure 56, this Court will grant a motion for summary judgment only in the absence of any material issue of fact so as to make the movant entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The movant has the burden of establishing that no such factual issue exists. *Id.* at 324. The Court will read the opposing party's pleadings liberally. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). As it is a drastic remedy, summary judgment only will be granted when there is no room for controversy. *United States v. Earhart (In re Earhart*), 68 B.R. 14, 15 (Bankr. N.D. Iowa 1986); *Sell v. Heath* (*In re Heath*), 60 B.R. 338, 339 (Bankr. D.

Colo.1986). Finally, the Court will examine the record to determine whether the movant's motion and supporting pleadings provide a sufficient legal basis that would entitle the movant to judgment. *Dunlap v. Transamerica Occidental Life Ins. Co.,* 858 F.2d 629, 632 (11th Cir.1988). If the movant has set forth a sufficient legal basis, judgment is proper. *Id.*

B. Preferential Transfers

Section 547 of the Code, authorizes the post-petition recovery of a debtor's pre-petition transfers that are deemed to be preferential in nature. In essence, the central purpose of § 547 is to effectuate the goal of equal treatment of creditors and to discourage creditors "from racing to the courthouse to dismember the debtor during his slide into bankruptcy." *See* H.R.Rep. No. 595, 95th Cong., 1st Sess. 177-78 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138. The elements of a preference are set forth in § 547(b), which permits a trustee or debtor-in-possession to avoid any pre-petition transfer of an interest of a 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; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time was an insider; and
> (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.

11 U.S.C. § 547(b). The trustee or debtor-in-possession bears the burden of proving each of the above-stated elements. *See* 11 U.S.C. § 547(g).

In the present controversy, none of the five preference elements are in dispute. First, the Defendant does not dispute that the payments were made for the benefit of a creditor or that the payments were made on account of an antecedent debt owed by the debtor. The undisputed facts show that the Plaintiff owed the money for the insurance premiums on the date that the money was wire transferred. Second, for the purposes of § 547(b)(3), a debtor is presumed to be insolvent during the preference period. *See* 1 U.S.C. § 547(f). The Defendant has not provided any evidence that the Plaintiff was solvent on the transfer date. Third, as for the requirement in subsection (b)(4) that the transfer occur "on or within 90 days before the date of the filing of the petition," the Defendant received the funds at issue via wire transfer on June 13, 2000, one day before the Plaintiff filed its petition. Thus, the transfer in question falls within the preference period. Additionally, the Defendant does not dispute that the payment of the funds allowed the Defendant to receive more than it would have received if the case were a case under Chapter 7 and the payment had not been made.

As there remains no dispute of material fact as to any of the elements of § 547(b), the Court finds that the Plaintiff has established a *prima facie* case that the transfer of $310,422 constitutes a preferential transfer within the meaning of § 547(b). However, this finding does not foreclose the question of whether the Plaintiff is entitled to a judgment. Although the Defendant has conceded that the $11,325.30, which the Defendant retained as its commission, is an avoidable, preferential transfer, the Defendant has asserted an affirmative

defense and has also raised the issue of whether, as to the remainder of the $310,422, the Defendant is a "transferee" within the meaning of § 550, such that the Plaintiff is entitled to recover the remainder of the avoided transfer from the Defendant.

C. *Ordinary Course of Business Defense*

The Defendant has asserted that the transfer, although preferential, cannot be avoided because the transfer was made in the ordinary course of business, within meaning of § 547(c)(2). Section 547(c)(2) provides that:

> The trustee may not avoid . . . 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.

11 U.S.C. § 547(c)(2).

Since the statute is phrased in the conjunctive, three separate elements must be satisfied in order for the exception to apply. *Logan v. Basic Distribution Corp. (In re Fred Hawes Org., Inc.)*, 957 F.2d 239, 243-44 (6th Cir. 1992); *Bonapfel v. Lubold (In re Family Home Sales Ctr., Inc.)*, 65 B.R. 176, 178 (Bankr. N.D. Ga. 1986) (Drake, J.). The Defendant has the burden of establishing that a material issue of fact exists with respect to each of the three elements. *Family Home Sales Ctr.*, 65 B.R. at 178; *see also Miller v. Florida Mining*

and Materials (In re A.W. & Assoc., Inc.), 136 F.3d 1439, 1441 (11th Cir. 1998) (since this exception operates as an affirmative defense, creditor bears burden of proving each of the three elements); *Advo-System, Inc. v. Maxway Corp.*, 37 F.3d 1044, 1047 (4th Cir. 1994) (recipient of alleged preferential transfer has the burden of proving by a preponderance of the evidence that the transfer satisfies each of § 547(c)(2)'s three subsections).

First, the Defendant must establish that the subject transfers were payments on debts incurred by the Plaintiff within the ordinary course of business or financial affairs of both parties. *See* 11 U.S.C. § 547(c)(2)(A). The record in this case reflects that the Plaintiff purchased various types of insurance coverage in order to operate its business. The record also reflects that the Plaintiff regularly purchased insurance through the Defendant, an insurance broker. Accordingly, it is clear that the debts were incurred within the ordinary course of business of both parties.

The second element that the Defendant must prove is that the transfers were made in the ordinary course of business or financial affairs of the Plaintiff and the Defendant. *See* 11 U.S.C. § 547(c)(2)(B); *see also In re Magic Circle Energy Corp.*, 64 B.R. 269, 273 (Bankr. W.D. Okla. 1986) ("the cornerstone of this element of a preference defense is that the creditor needs [to] demonstrate some consistency with other business transactions between the debtor and the creditor"). The Plaintiff contends that the Defendant cannot show that the Plaintiff made the wire transfer in the ordinary course of business. The Plaintiff argues that the undisputed facts establish that both the method and timing of the payment were out of the Plaintiff's normal course of dealing with the Defendant. Additionally, the

Plaintiff asserts that the fact that the Plaintiff ceased doing business with the Defendant after making the payment further supports a finding that the payment was not made in the ordinary course of business between these parties.

It is undisputed that the Plaintiff first attempted to pay the debt with a bank draft and later replaced the payment with a wire transfer after the draft was returned for insufficient funds. It is also undisputed that the Plaintiff had never before presented an "NSF" check to the Defendant and had never before paid the Defendant for insurance premiums with a wire transfer. Finally, the Defendant does not dispute the fact that the payment was made late or that the Plaintiff ceased doing business with the Defendant following the payment. However, the Defendant does not agree with the Plaintiff that these facts support a conclusion that the payment was not made in the ordinary course of business. The Defendant argues that the fact that the payment was late actually supports a finding that the payment was made in the ordinary course because it was common for the Plaintiff to make late payments. In support of its contention that the Plaintiff often made late payments to the Defendant, the Defendant has submitted the affidavit of Roberta C. Moore, the Defendant's accounting manager. Ms. Moore has averred that, based upon the attached invoices, the Plaintiff typically paid its insurance premiums from two to six months after the invoice date. Declaration of Roberta Moore, ¶ 21.

In considering whether a payment has been made within the ordinary course of business between the debtor and the creditor, bankruptcy courts typically review the past payment history between the parties and compare that history with the course of conduct

between the parties during the preference period. *Fred Hawes Org.*, 957 F.2d at 244; *Yurika Foods Corp. v. United Parcel Serv. (In re Yurika Foods Corp.)*, 888 F.2d 42, 45 (6th Cir. 1989); *Marathon Oil Co. v. Flatau (In re Craig Oil Co.)*, 785 F.2d 1563, 1566-67 (11th Cir. 1986); *Brizendine v. Barrett Oil Distribs., Inc. (In re Brown Transp. Truckload, Inc.)*, 152 B.R. 690, 691-92 (Bankr. N.D. Ga. 1992) (Drake, J.). Specifically, courts have considered: 1) the timing of the payments; 2) the method of payment; 3) whether the payment was made in response to any unusual collection activities; 4) whether the payment was unusually large; and 5) whether the debtor ceased business operations prior to making the payment. *See In re Craig Oil Co.*, 785 F.2d at 1566-68.

"[I]f late payments were the standard course of dealing between the parties, they shall be considered as within the ordinary course of business under section 547(c)(2)." *Yurika Foods*, 888 F.2d at 44 (citation omitted); *accord Lovett v. St. Johnsbury Trucking*, 931 F.2d 494, 498 (8th Cir. 1991). However, even when late payments were the norm, the Court must determine if the payments during the preference period were delayed beyond the Plaintiff's normal payment interval. *See In re Home Sewing Enterprises, Inc.*, 173 B.R. 790, 795-96 (Bankr. N.D. Ga. 1993) (Cotton, J.).

The Plaintiff has submitted Exhibit B, attached to the affidavit of James R. Begnaud, the Plaintiff's Director of Finance, which appears to be invoices generated by the Defendant and sent to the Plaintiff. The invoices indicate that the Defendant billed the Plaintiff for the following policies:

W99D195128- Workers' Comp Coverage May 18, 1999 - May 18, 2000-
Invoice Date: 03/06/2000 Installment Premium: $40,713

W99D195132- Workers' Comp Coverage May 18, 1999 - May 18, 2000-
Invoice Date: 03/06/2000 Premium: $132,536

W99D177470- Workers' Comp Coverage June 1, 1999 - June 1, 2000-
Invoice Date: 01/04/2000 Installment Premium: $45,723
Invoice Date: 02/09/2000 Installment Premium: $45,723
Invoice Date: 03/06/2000 Installment Premium: $45,727

The total of these invoices is $310,422, and the invoices appear to be the invoices that the Plaintiff intended to pay with the wire transfer. The invoices are dated from January 2000 through March 2000, and the Plaintiff paid the invoices on June 13, 2000. Accordingly, the invoices were paid from three to six months past the invoice date. This time frame is consistent with the testimony of Roberta Moore that the Plaintiff historically paid its premiums between two and six months after the invoice date. Given this consistency between the timing of the Plaintiff's payment of these invoices and the Plaintiff's pre-preference period conduct, the Court finds that the fact that the payments were late is not, in and of itself, sufficient to defeat the Defendant's ordinary course defense.

The Defendant also contends that the change in the method of payment should not foreclose a finding that payment falls within the ordinary course of business between the parties. The Defendant objects to the Plaintiff's argument as "disingenuous," and argues that the Plaintiff should not be allowed to use the change in method of payment against the Defendant after the Plaintiff failed on two occasions to pay the debt with a bank draft. Further, the Defendant cites to this Court's decision in *In re Brown Transport Truckload, Inc.*, 161 B.R. 735 (Bankr. N.D. Ga. 1993) (Drake, J.), for the proposition that "[s]imple changes in the amount of credit that a creditor is willing to extend to a debtor, and changes

in method of payment by a debtor to a creditor are not enough to make the business relationship not ordinary."

In *Brown Transport*, the debtor made the payment at issue by wire transfer and had never made a payment in that manner during the course of its dealings with the defendant. The Court did not find the change in payment method to be sufficient, in and of itself, to support a finding that the transaction was outside the ordinary course. The Court noted that requiring payments to be made in the same manner on every occasion would not be sound business practice. *Id.* However, *Brown Transport* is distinguishable from the instant case.

In *Brown Transport*, there was no evidence that the change in method of payment was a direct result of the debtor's financial difficulties or an unusual collection activities of the creditor. In this case, it is clear from the undisputed facts that the Plaintiff initiated the wire transfer because two prior attempts to pay the debt by the usual method had failed. The reason why the debtor changed its method of payment is relevant to the inquiry of whether the change is substantial enough to render the payment outside of the ordinary course of dealings between the parties. The fact that the Plaintiff's prior attempts to pay by check failed and prompted the wire transfer, a method of payment never before used by the Plaintiff to pay a debt to the Defendant, supports the conclusion that this transaction was significantly different than those between the parties in the pre-preference period.

Additionally, the change in payment method is not the only factor that the Plaintiff is relying upon to show that the transaction was not in the ordinary course of the parties' dealings. The Plaintiff has pointed to the fact that the payment was overdue and that the

Plaintiff's failed attempts to pay the debt in the normal manner prompted the Plaintiff to wire transfer the funds. The Court finds that the Defendant has pointed to no undisputed facts that would establish that this transaction was ordinary as between these parties. Accordingly, the Court finds that the Defendant's ordinary course of defense must fail.[1]

D. *The Contemporaneous Exchange for New Value Defense*

The Defendant also alleges that $15,000 of the transfer at issue is excepted from avoidance pursuant to § 547(c)(1). A transfer that qualifies as a preference may nonetheless be shielded from avoidance if the creditor provides "new value" to the debtor. Section 547(c)(1)(A) provides that a trustee cannot avoid a transfer "to the extent that such transfer was intended by the debtor and the creditor . . . to be a contemporaneous exchange for new value given to the debtor" and was "in fact a substantially contemporaneous exchange." 11 U.S.C. § 547(c)(1). The term "new value" is defined in the Bankruptcy Code as "money or money's worth in goods, services, or new credit, . . . but does not include an obligation substituted for an existing obligation." 11 U.S.C. § 547(a)(2). The Defendant bears the burden of proving that it extended new value to the Plaintiff's estate. *See* 11 U.S.C. § 547(g).

The theory behind the new value exception is that a creditor who truly gives new value in exchange for a preferential transfer has not depleted the debtor's estate to the detriment of other creditors. 1 DAVID G. EPSTEIN ET AL., BANKRUPTCY § 6-25 at 592 (1992).

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[1] The third and final element the Defendant would need to prove is that the transfers were made according to ordinary business terms. *See* 11 U.S.C. § 547(c)(2)(C).

According to the Eleventh Circuit,

> [s]ection 547(c)(1) protects transfers only "to the extent" the transfer was a contemporaneous exchange for new value. A court must measure the value given to the creditor and the new value given to the debtor in determining the extent to which the trustee may void a contemporaneous exchange. This provision indicates that a creditor seeking the protection of section 547(c)(1) must prove with specificity the new value given to the debtor. Furthermore, the applicable statutory definition of "new value" that Congress provided in section 547(a)(2) expressly requires that the creditor prove the specific valuation of the "new value." The relevant language for the purpose of deciding this case is the section's definition of "new value" as "money or money's worth in goods, services, or new credit." This language necessarily requires a specific dollar valuation of the "new value"– the "money's worth"– that the debtor received in the exchange.

Jet Florida, Inc. v. Am. Airlines, Inc. (In re Jet Florida Sys., Inc.), 861 F.2d 1555, 1558-59 (11th Cir. 1988) (internal citations omitted); *see also Miller v. Bodek & Rhodes, Inc. (In re Adelphia Automatic Sprinkler Co.)*, 184 B.R. 224, 228 (E.D. Pa. 1995) ("a party seeking the shelter of section 547(c)(1) must prove the specific measure of the new value given the debtor").

In this case, the Defendant asserts that the Plaintiff received $15,000 worth of insurance coverage in exchange for the transfer at issue. The Plaintiff contends that all of the insurance coverage purchased in exchange for the $310,422 wire transfer, had expired before the June 13th wire transfer and that the Plaintiff ceased doing business with the Defendant thereafter. Accordingly, the Plaintiff asserts that the Defendant did not provide additional value to the estate after the payment. The Plaintiff has submitted the affidavit of James R. Begnaud, the Plaintiff's Director of Finance, in support of this contention. *See* Affidavit of James R. Begnaud, ¶ 5. In his affidavit, Begnaud references invoices, attached

to the affidavit as Exhibit B, which were originally to be paid with the check that was returned for insufficient funds. As noted above, the invoices indicate that the Defendant billed the Plaintiff for the following policies: 1) W99D195128- Workers' Comp Coverage May 18, 1999 - May 18, 2000; 2) W99D195132- Workers' Comp Coverage May 18, 1999 - May 18, 2000; and 3) W99D177470- Workers' Comp Coverage June 1, 1999 - June 1, 2000. The total of the premiums billed under these invoices is $310,422. The affidavit and the accompanying documentation support the Plaintiff's contention that the wire transfer was made to replace a draft, which was presented for payment of these invoices. The invoices reflect that the insurance coverage purchased by the Plaintiff with the premiums paid on June 13, 2000 all expired on either May 18, 2000 or June 1, 2000, almost two weeks before the Defendant received the funds.

However, the Defendant submits that $15,000 of the funds transferred on June 13, 2000 were transferred in payment of premiums for insurance coverage, provided by Security Co. of Hartford (FFMcGee), which did not expire until July 1, 2000. See Declaration of Roberta Moore, ¶ 19. The Defendant has presented an invoice, dated February 28, 2000, which indicates that the Defendant billed the Plaintiff for a premium in the amount of $15,000 for motor truck cargo insurance. The policy number is referenced as CCIMG78205, and the term of the policy is stated as June 1, 1999 through July 1, 2000.

Nonetheless, the Plaintiff argues that, regardless of whether the Defendant provided insurance coverage after the date of the wire transfer, as a matter of law, the Court cannot find that the payment made by the Plaintiff on June 13, 2000 was a contemporaneous

exchange. The Plaintiff cites to the Eleventh Circuit Court of Appeals' decision in *In re Standard Food Servs., Inc.*, 723 F.2d 820 (11th Cir. 1984), for the proposition that a payment made by wire transfer that replaces a dishonored check cannot be considered to be a substantially contemporaneous transaction.

In *Standard Food Services*, the court held that a payment made by a cashier's check, which replaced a dishonored check, was not protected from avoidance by the new value exception. *Id.* In that case, the defendant delivered goods to the debtor on June 26th and 27th. The debtor paid for the goods by check on June 27th. The defendant deposited the check on June 30th, and the check was dishonored on July 3rd. The defendant accepted a cashier's check from the debtor on July 8. The defendant argued that the exchange of the goods on June 27th for the original check was intended to be, and, in fact was, a contemporaneous exchange for new value. The defendant pointed to the legislative history of § 547(c)(1) in support of its contention that a check tendered and presented for payment within thirty days of the delivery of goods or services is intended to be and can be considered to be a substantially contemporaneous exchange. *Id.* at 821 (citing S. Rep. No. 989, 95th Cong., 2d Sess. 88, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5874; H.R. Rep. No. 595, 95th Cong., 2d Sess. 373 *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 6329). The court disagreed, noting that additional language found within the legislative history indicated that the fact that the original payment had been dishonored changed the nature of the transaction from a contemporaneous exchange to a credit transaction. Accordingly, when the defendant "received the cashier's check on July 8th, the

check satisfied the preexisting debt and therefore was not a contemporaneous exchange for new value." *Id.*

Other courts have also concluded that "a contemporaneous exchange defense cannot involve a dishonored check" and that, regardless of how quickly the dishonored check is replaced, the subsequent payment satisfies an antecedent debt and cannot be considered payment in exchange for new value. *Endo Steel, Inc. v. Janas (In re JWJ Contracting, Inc.)*, 371 F.3d 1079 (9th Cir. 2004); *In re Barefoot,* 952 F.2d 795 (4th Cir. 1984) ("[W]hen a bounced check is given by the debtor in exchange for new value provided by a creditor, any subsequent payment to make good the bad check is not a contemporaneous exchange for new value."); *In re Stewart*, 274 B.R. 503 (Bankr. W.D. Ark. 2002), *aff'd*, 282 B.R. 871 (Bankr. 8th Cir. 2002).

In this case, the undisputed facts support a finding that the $310,422 wire transfer was made by the Plaintiff to replace a dishonored bank draft. Accordingly, under the holding of *Standard Food Services,* even if the parties intended the wire transfer to be exchanged for continued insurance coverage, the exchange could not have been substantially contemporaneous, and the Defendant's § 547(c)(1) defense must also fail.[2]

E. *Subsequent New Value Defense*

That being said, the Defendant has also asserted a subsequent new value defense in

[2] Even if the Court found the contemporaneous exchange for new value defense to be applicable, the amount of the transfer protected by the defense would be minimal. The amount excluded would include only the amount of the insurance coverage provided from the date of the transfer until the policy expired, which was only 18 days.

its answer. Section 547(c)(4) provides that a trustee may not avoid a transfer "to or for the benefit of a creditor, to the extent that, after such a transfer, such creditor gave new value to or for the benefit of the debtor . . . not secured by an otherwise unavoidable security interest; and . . . on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor." 11 U.S.C. § 547(c)(4). Section 547(c)(4) excepts subsequent advances "because it is reasoned that a creditor who contributes new value in return for payments from the incipient bankrupt, should not later be deemed to have depleted the bankruptcy estate to the disadvantage of other creditors." *In re Jet Florida System, Inc.*, 841 F.2d 1082, 1083 (11th Cir. 1988). To establish a subsequent new value defense, the creditor must show: "1) that the creditor . . . extended the new value after receiving the challenged payments, (2) that the new value . . . [was] unsecured, and (3) that the new value . . . remain[s] unpaid." *Id.*

The value of insurance coverage provided after a preferential payment has been found to constitute new value for purposes of § 547(c)(4). *Id.* (citing *In re Dick Henley, Inc.*, 45 B.R. 693 (Bankr. D. La. 1985)). The testimony of Roberta Moore indicates that, by invoice dated February 28, 2000, the Defendant billed the Plaintiff for a premium in the amount of $15,000 for motor truck cargo insurance with a term of June 1, 1999 through July 1, 2000. It would appear that the portion of this insurance coverage that remained in place after the date of the wire transfer constitutes subsequent new value. However, the only amount that would be excluded from avoidance would be the amount of the premium allocable to the new value provided, which is the cost of the insurance coverage provided from the time the

exchange was made until the policy expired (18 days). Assuming that the policy at issue covered a 365-day year, the daily cost of the coverage was $41.09, and the cost of 18 days' coverage would be $739.62. Accordingly, the amount of the avoidable transfer, less the amount excluded from avoidance pursuant to § 547(c)(4), is $309,682.38.

E. *Whether the Defendant is a "Transferee" Within the Meaning of § 550*

Finally, the Defendant asserts that it is not an initial transferee within the meaning of § 550. Accordingly, the Defendant argues that the Plaintiff cannot recover the avoided transfer from the Defendant. Section 550 permits the trustee or debtor-in-possession to recover an avoided transfer from the "initial transferee of such transfer or the entity for whose benefit such transfer was made" or "any immediate or mediate transferee of such initial transferee." 11 U.S.C. § 550(a). The Bankruptcy Code does not define the term "initial transferee." Generally, the party receiving a transfer of funds directly from the debtor is the initial transferee. *See In re Hurtado*, 342 F.3d 528 (6th Cir. 2003). However, "[n]umerous courts have recognized the distinction between the initial recipient – that is, the first entity to touch the disputed funds – and the initial transferee under section 550." *In re Finely, Kumble, Wagner, Heine, Underburg, Manley, Myerson & Casey*, 130 F.3d 52, 56 (2d Cir. 1997). "Every Court of Appeals to consider this issue has squarely rejected a test that equates mere receipt with liability, declining to find 'mere conduits' to be initial transferees. . . ." *Id.* at 57. Instead, an initial transferee is the person who exercises dominion and control over the property transferred. *See In re Chase & Sanborn*, 828 F.2d

1196 (11th Cir. 1988) ("When trustees seek recovery of allegedly fraudulent conveyances from banks, the outcome of the cases turn on whether the banks actually controlled the funds or merely served as conduits, holding money that was in fact controlled by either the transferor or the real transferee."); *Bonded Financial Svcs., Inc. v. European Amer. Bank*, 838 F.2d 890 (7th Cir. 1988). This definition of "initial transferee" is designed to protect those entities who merely collect and pass funds from one party to another, pursuant to a contractual or legal obligation to do so, and have no legal right to use the funds for any other purpose.

In this case, the Defendant contends that it acted as a mere conduit, passing the funds that were wire transferred by the Plaintiff on to the various insurance companies in payment of the premiums. Although the Defendant concedes that $11,325.30 of the funds wire transferred, which the Defendant retained as its commission is an avoidable preferential transfer, the Defendant argues that it is not the initial transferee as to the remaining funds because it lacked sufficient dominion and control over the funds. Specifically, the Defendant argues that it was contractually obligated under its agreements with the various insurance carriers to forward the funds to the insurance carriers. Accordingly, since the Defendant did not have the legal right to do with the funds as it chose, the Defendant cannot be considered to have exerted dominion and control over the funds.

Had the Defendant first received the funds and then paid them to the insurance companies, the Court would agree that the Defendant did not exert sufficient dominion and control over the funds to be considered an initial transferee. However, in this case, the

Defendant received the Plaintiff's check (number 5008066) and deposited it into its trust account on May 22, 2000. The next day, the Defendant paid the insurance carriers, with the exception of $8,783 remitted to Superior National Insurance Company after the receipt of the wire transfer, with what must have been funds other than the funds transferred by the Plaintiff, as the Plaintiff's check had not yet cleared and was in fact later returned for insufficient funds. After having re-deposited check number 5008066 and having had it returned again for insufficient funds, the Defendant finally received the funds from the Plaintiff by wire transfer on June 13, 2000. It is not clear at that point what the Defendant did with the Plaintiff's funds, but it appears beyond dispute that, other than the $8,783 later remitted to Superior National Insurance Company, the funds were not transferred to the insurance companies to pay for the Plaintiff's insurance coverage, as the Defendant had already sent funds to pay for that coverage on May 23, 2000. Under this factual scenario, it is difficult to conclude that the Defendant had no control over those funds or could not use the funds as it saw fit. At that point, the Defendant no longer had any obligation to forward those funds to the insurance companies, at least not for payment of the Plaintiff's insurance coverage. Instead, the funds actually received from the Plaintiff on June 13, 2000, were to cover funds that were advanced by the Defendant to pay for the Plaintiff's insurance coverage. When the Defendant advanced those funds on the Plaintiff's behalf, the Plaintiff became indebted to the Defendant, and, contrary to the Defendant's argument, a debtor-creditor relationship, rather than an agency relationship, was created between the parties. Accordingly, the Court must conclude that there remains no dispute of material fact and, as

a matter of law, with respect to $301,639 of the funds, the Defendant was an initial transferee within meaning of § 550(a). Accordingly, the Plaintiff is entitled to recover $301,639 of the avoided wire transfer from the Defendant.

CONCLUSION

Having carefully considered the matter, the Court concludes that Plaintiff has established that no issues of material fact remain and that it is entitled to judgment as a matter of law. Accordingly, the Plaintiff's motion for partial summary judgment is hereby **GRANTED**.

The Plaintiff, Pony Express Delivery Services, Inc., shall have a judgment in the amount of $301,639, together with post-judgment interest at the applicable federal rate, against the Defendant, Andreini & Company. A judgment shall be entered contemporaneously herewith.

IT IS SO ORDERED.

At Newnan, Georgia, this 23 day of July, 2004.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE