IT IS ORDERED as set forth below:

Date: November 24, 2008

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NOS. 04-78434 through 04-78436 (Jointly Administered)
Rhodes, Inc., et al.,	CHAPTER 11
Debtors.	JUDGE MASSEY
Joel H. Dugan, as Liquidating Agent for the Bankruptcy Estates of Rhodes, Inc., et. al.,	
Plaintiff,	
v.	ADVERSARY NO. 06-6479
Graphic Advantage, Inc.,	
Defendant.	

ORDER ON MOTION FOR SUMMARY JUDGMENT

In this adversary proceeding Plaintiff Joel H. Dugan, as Liquidating Agent for the Bankruptcy Estate of Rhodes, Inc., seeks to avoid as preferences pursuant to 11 U.S.C. 547(b)

eight transfers made by Debtor Rhodes, Inc. to Defendant Graphic Advantage, Inc. within ninety days before Rhodes filed its bankruptcy petition on November 4, 2004 and to recover from Defendant pursuant to 11 U.S.C. § 550(a) the aggregate amount of those transfers totaling $187,387.03. On July 17, 2008, Plaintiff moved for summary judgment.

Section 547(b) of the Bankruptcy Code sets out the elements of a voidable preference. It provides:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
>
> > (1) to or for the benefit of a creditor;
> >
> > (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> >
> > (3) made while the debtor was insolvent;
> >
> > (4) made--
> >
> > > (A) on or within 90 days before the date of the filing of the petition; or
> > >
> > > (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer 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.

Section 547(f) provides that "[f]or 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." The affidavit of Plaintiff, which is attached to his Statement of Uncontested Facts,

provides sufficient evidence to satisfy all five elements of an avoidable preference with respect to each of eight transfers from Rhodes, Inc. to Defendant identified in the complaint and in the Statement of Uncontested Facts.

Defendant responded to the motion on August 13, 2008 and supported its response with the affidavit of Nancy Couch, Defendant's principal. In its response, Defendant contested the second, third and fifth elements of a preference. But the primary thrust of its case is its reliance on three defenses in section 547(c) of the Bankruptcy Code, which are (1) contemporaneous exchanges for new value, (2) ordinary course of business and (3) new value. The relevant subsections of section 547(c) provide as follows:

> (c) The trustee may not avoid under this section a transfer--
>
> (1) to the extent that such transfer was--
>
> > (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
> >
> > (B) in fact a substantially contemporaneous exchange;
>
> (2)[1] 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;

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[1] Section 547(c)(2) was amended in the Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005 and now requires the creditor to prove the first element and either the second element or the third one, instead of all three. Pub.L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. § 547(c)(2) (2006)). The amendment has no bearing here, because all material facts occurred before the amendment.

. . .

(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[.]

"[T]he 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." 11 U.S.C. § 547(g).

Pursuant to Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bankr. P. 7056, a party moving for summary judgment is entitled to prevail if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material for the purposes of summary judgment only if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden to establish that no genuine factual issue exists where it has the burden of proof. *Celotex*, 477 U.S. at 323; Clark v. Coats & Clark, Inc., 929 F.2d 604 (11th Cir. 1991). The movant must point to the pleadings, discovery responses or supporting affidavits that tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The court must construe this evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986); *Rollins v.*

TechSouth, Inc., 833 F.2d 1525 (11th Cir. 1987). "If there is a conflict between the parties' allegations or evidence, the non-moving party's evidence is presumed to be true and all reasonable inferences must be drawn in the non-moving party's favor. *Shotz v. City of Plantation, Fla*., 344 F.3d 1161, 1164 (11th Cir.2003)." *Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306, 1314 (11th Cir. 2007).

Mr. Dugan's affidavit, including its exhibits, establishes facts satisfying all of the elements of an avoidable preference under section 547(b) with respect to each of eight transfers totaling in the aggregate $187,387.03.

In its response to Plaintiff's Statement of Uncontested Facts, Defendant denied that the transfers at issue were to or for the benefit of Defendant, that the transfers were on account of an antecedent debt, and that Rhodes was insolvent at the time of the transfers. The Statement of Uncontested Facts omitted any reference to the element that the transfers enabled Defendant to receive more than it would have received if the case had been under Chapter 7, the transfers had not been made and Defendant had received payment of the debts in accordance with the Bankruptcy Code. In its answer Defendant denied that allegation set forth in the Complaint.

Defendant made no evidentiary showing to rebut Plaintiff's evidence (1) that Defendant cashed the checks constituting the transfers in payment of debts owed to it and (2) that the debt evidenced by each invoice was incurred no later than the date of each such invoice and was paid several days after the date of such invoice. Debtor was presumed to be insolvent throughout the preference period. 11 U.S.C. § 547(f). Defendant offered no evidence to show otherwise. Its assertion in paragraph 15 of its Response to Plaintiff's Statement of Uncontested Facts that Plaintiff possessed a report of an expert that Rhodes was solvent is not evidence of solvency and

raises no issue of fact that would rebut the presumption of insolvency. The debts of Rhodes to Defendant were paid in full during the preference period, but, as Mr. Dugan stated in his affidavit, unsecured creditors of Rhodes will not be paid in full.

In summary, Defendant has not made a showing that there is any issue of fact concerning any of the elements of an avoidable preference with respect to any of the transfers. Plaintiff proved all such elements. Accordingly, the only issue remaining to be decided is the extent to which Plaintiff is entitled to summary judgment with respect to each of the three affirmative defenses asserted by Defendant, as to which it has the burden of proof.

> When the nonmoving party has the burden of proof at trial, the moving party is not required to "support its motion with affidavits or other similar material negating the opponent's claim," *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553, in order to discharge this "initial responsibility." Instead, the moving party simply may " 'show[ ]'-that is, point[ ] out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Id.* at 324, 106 S.Ct. at 2554. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial. *Id*. at 331, 106 S.Ct. at 2557 (Brennan, J., dissenting). If the moving party shows the absence of a triable issue of fact by either method, the burden on summary judgment shifts to the nonmoving party, who must show that a genuine issue remains for trial. Fed.R.Civ.P. 56(e); *Chanel, Inc. v. Italian Activewear, Inc*., 931 F.2d 1472, 1477 (11th Cir.1991). If the nonmoving party fails to "make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552, the moving party is entitled to summary judgment.

U.S. v. Four Parcels of Real Property, 941 F.2d 1428, 1437-1438 (11th Cir. 1991) (footnotes omitted).

Here, Plaintiff asserts that Defendant has not shown facts establishing all of the elements of its defenses. Plaintiff did not attempt to show that Defendant could not prove one or more elements of each of its defenses. Defendant failed to provide evidence that would satisfy

elements of each of the first two defenses, but there is enough evidence with respect to the new value defense to require a trial on that defense.

1. Contemporaneous Exchanges.

Under section 547(c)(1), Defendant had to show (1) that it and Rhodes intended each payment made by Rhodes to be a contemporaneous exchange for new value given by Defendant in the form of delivery of goods or services by Defendant and also (2) that with respect to each payment, there was a "substantially contemporaneous exchange for new value." "The classic example [of a transaction covered by §547(c)(1)] is when parties intended a cash sale, one party accepted a check instead of cash, and the party recorded the check several days after the sale. *See In re Vance*, 721 F.2d 259, 261 (9th Cir.1983) ('There is no indication in the legislative history that Congress intended section 547(c)(1) to be a general exception covering a variety of transactions.')." *In re Smith's Home Furnishings, Inc*., 265 F.3d 959, 965 fn. 4 (9th Cir. 2001).

In paragraph 13 of her affidavit Ms. Couch stated in part,

> At all times, payment was always timely and completely made with the understanding and express agreement, between me and the Rhodes executives with whom I worked, that I could not afford to extend credit to Rhodes, such that my invoices were always, effectively, paid in a *substantially* contemporaneous manner, with the only delay being that short time needed by Rhodes to actually process payments and prepare checks, plus any delay associated with the mail.

(Emphasis added.) In paragraph 14 of her affidavit, she stated, ". . . Rhodes processed invoices immediately upon shipment of each project. These invoices were processed in the next payment cycle, usually within ten (10) days period of time. New projects requested for new promotions would begin after payment was received for the previous promotion ordered."

> The critical inquiry in determining whether there has been a contemporaneous exchange for new value is whether the parties intended such an exchange. *In re Wadsworth Building Components,* 711 F.2d 122, 124 (9th Cir.1983); *In re Chemical*

> *Separations Corp*., 38 B.R. 890, 897 (Bankr.E.D.Tenn.1984); 4 COLLIER ON BANKRUPTCY ¶ 547.37 at 547-124 ("Whether the parties at the outset intended the exchange to be contemporaneous is determinative.").

Matter of Prescott, 805 F.2d 719, 727-728 (7th Cir. 1986). The statements made by Ms. Couch in her affidavit show only that Rhodes agreed to expedite payment of invoices (on its next cycle of cutting checks following an invoice date) so that invoices would be paid most of the time about 10 to 16 days after their respective dates. Her assertion that Defendant had to be paid promptly to enable it to continue in business and that Rhodes agreed to prompt payment does not establish an agreement that payment would occur contemporaneously with the delivery of Defendant's products to Rhodes. In some instances, the exchange of a check for product paid for by that check may have been substantially contemporaneous, as Ms. Couch appears to contend, but that fact would not demonstrate that Defendant and Rhodes ever intended there to be as their standard business practice a contemporaneous exchange of a check for product. Hence, Defendant failed to satisfy the first element of section 547(c)(1).

2. Ordinary course of Business.

The ordinary course of business defense has three elements: (1) the debt paid must have been incurred in the ordinary course of the businesses of the debtor and the transferee, (2) the preferential transfer made must have been made in the ordinary course of the businesses of the debtor and the transferee, and (3) the preferential transfer must have been made according to ordinary business terms.

> The purpose of the ordinary course of business defense is "to leave undisturbed normal financial relations," *In re Craig Oil Co.*, 785 F.2d 1563, 1566 (11th Cir.1986), which enables "the struggling debtor to continue operating its business." Wolas, 502 U.S. at 161, 112 S.Ct. at 533. A creditor who asserts this defense bears the burden of proving each of the three elements. *In re A.W.*, 136 F.3d at 1441.

> Although the first two elements of the defense pertain to the conduct of the parties toward one another, the third element involves a broader inquiry. *Id.* at 1442-43. A creditor must show that the disputed transaction was made both in the course of regular dealings between the parties and in accordance with the standards of the relevant industry. *Id.* (citing *In re Tolona Pizza Prods. Corp*., 3 F.3d 1029, 1033 (7th Cir.1993)). If the creditor fails to prove that the transfer conformed to the industry standard, then the trustee avoids the preference.

In re Issac Leaseco, Inc., 389 F.3d 1205, 1210 (11th Cir. 2004).

Defendant established that the debts owed by Rhodes to Defendant were incurred in the ordinary course of their respective businesses. Whether the payments made were in the ordinary course of those businesses is somewhat problematical. But the Court need not analyze the data to resolve that issue because, as its counsel acknowledged at the hearing on the motion for summary judgment, Defendant provided no evidence that any transfer was made "according to ordinary business terms" as required by section 547(c)(2)(C). Nor has Defendant shown that there is no relevant industry standard reflecting the billing experiences of firms providing products and services to retailers comparable to those provided by Defendant to Rhodes.

In paragraph 18 of her affidavit, Ms. Couch described some of the services Defendant provides and stated that "Defendant is unaware of any other similar service provider providing all of these comprehensive services in our market niche in our market area." This statement falls far short of showing the absence of a relevant industry standard.

3. New Value.

Defendant's final affirmative defense is the new value exception set out in section 547(c)(4), which requires the creditor to show that after it received a preferential transfer, it gave new value to the debtor that was not secured by an unavoidable security interest and on account of which the debtor did not make an otherwise unavoidable transfer to Defendant.

> The exception of section 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.

5-547 Collier on Bankruptcy-15th Edition Rev. P 547.04. *See also, In re Jet Florida System, Inc*. 841 F.2d 1082, 1083-1084 (11th Cir. 1988).

The term "new value" is defined in section 547(a)(2) as follows:

> "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation[.]

Defendant contends that it delivered new value to Rhodes following preferential transfers from Rhodes to Defendant. Plaintiff argues that Defendant failed to offer admissible evidence that it "provided unpaid new value."

Plaintiff is mistaken. In Defendant's answer to Interrogatory No. 4, which Plaintiff filed as part of his evidence to support his motion, Defendant asserts that it gave new value as reflected in spreadsheets attached to its answers to interrogatories. (Document no. 18, Attachment no. 2, p. 12.) The answers of Defendant to the interrogatories were verified under penalty of perjury. *(Id*. at p. 36.) The relevant portion of one of the spreadsheets shows the invoices which Defendant paid with checks constituting the transfers at issue. Under the framework for analyzing a motion for summary judgment on issues where the nonmoving party has the burden of proof explained by the Court of Appeals in *U.S. v. Four Parcels of Real Property, supra,* this evidence is sufficient to show that genuine issues exist concerning Rhodes' receipt of products described in the invoices. Defendant was not required to file a second copy of

its answers under oath to Plaintiff's interrogatories in order for the Court to consider that evidence.

The existence of a factual dispute is highlighted by the affidavit of Ms. Couch in which she states (1) that each invoice attached as an exhibit to Defendant's Answer "indicates the shipping of the materials to each store location" (Document no. 21, ¶12), (2) that "Rhodes processed invoices immediately upon shipment of each project" (Document no. 21, ¶14), (3) that "[t]he Debtor did receive subsequent New Value on account of the transfers identified in Interrogatory No. 1, because . . . the payments permitted the continuation of our business relationship, each permitting not only the shipment of the work that was being paid for, but also the undertaking of our new work on the next project, with the production work being completed prior to invoice and the production, shipment and delivery of new projects typically following payment. " (Document no. 21, ¶16).

It is true that the answer that Defendant gave to Interrogatory No. 4 included many irrelevant invoices and payments outside the preference period. It is also true, however, that Interrogatory no. 4 uses the term "new value," defined in 547(a)(2), and that the contents of the invoices relevant to this dispute contain language describing products that could qualify as new value. Had Plaintiff wanted more detailed information, he could have asked more pointed questions.

To the extent that Plaintiff is arguing that Defendant can have no new value defense because no invoice was "unpaid," the Court disagrees. COLLIER explains the point by giving an example:

> Another timing question that has arisen is whether new value extended can be used to shield only the immediately preceding preference, or whether it can also provide a shield

> for earlier preferences to the extent that the new value is the dollar amount of the immediately preceding preference.
>
> > Example: On January 15 and within the 90-day preference period, Debtor makes a preferential transfer to Creditor in the amount of $15,000 for which no other defense is available. On January 20, Creditor provides $10,000 of new value to the debtor, which remains unpaid at the time of the bankruptcy. On January 31, Debtor makes a preferential transfer to Creditor in the amount of $4,000 for which no other defense is available. On February 10, Creditor provides $9,000 of new value to Debtor which remains unpaid at the time of the bankruptcy. On February 20, Debtor files bankruptcy.
>
> The majority and better reasoned rule is that the Creditor has no liability because the $9,000 of new value may shield not only the $4,000 preference that came immediately before this provision of new value, but it may also shield the $5,000 of preference vulnerability that remains from other prior but not immediately preceding transfers.
>
> If 'new value" is paid with a transfer that is subject to avoidance (or that would be subject to avoidance but for the application of the subsequent new value exception), it still qualifies as ‘new value'."

5-547 COLLIER ON BANKRUPTCY-15th Edition Rev. P 547.04(d) and (e). This commentary rests on sound decisions. See, e.g., *Matter of Toyota of Jefferson, Inc*., 14 F.3d 1088, 1091-1093 (5th Cir. 1994).

Defendant has not contested that Plaintiff would be entitled to recover prepetition interest on the amount of avoided transfers, if any, and costs.

Accordingly, Plaintiff’s motion for summary judgment is GRANTED to the extent that there is no genuine issue of fact as to Plaintiff’s case in chief pursuant to 11 U.S.C. § 547(b) and to the extent that Plaintiff is entitled to judgment on the affirmative defenses raised by Defendant pursuant to 11 U.S.C. § 547(c)(1) and (2). The motion is DENIED as to the affirmative defense of Defendant under 11 U.S.C. § 547(c)(4). Plaintiff will be entitled to entry of a judgment as a matter of law (A) avoiding as preferential those transfers in an aggregate amount up to $187,387.03 made by Rhodes, Inc. to Defendant during the 90-day period preceding the filing of

Rhodes' petition in case no. 04-78434 that are not excluded from avoidance as a result of a trial to be held on Defendant's affirmative defense pursuant to 11 U.S.C. § 547(c)(4) and (B) providing that Plaintiff recover from Defendant the aggregate amount, if any, of avoided transfers plus prepetition interest on that amount at the rate provided in 28 U.S. C. § 1961 as of November 12, 2006 (three days after the mailing of the summons and complaint initiating this adversary proceeding) and costs.

END OF ORDER