IT IS ORDERED as set forth below:

Date: November 28, 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. 06-6498
Sea Products, Inc.,	
Defendant.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court conducted a trial in this adversary proceeding on July 24, 2008. Based on the evidence presented at trial, the Court makes the following Findings of Fact and Conclusions of

Law pursuant to Fed. R. Bankr. P. 7052, which incorporates Rule 52 of the Federal Rules of Civil Procedure.

On November 4, 2004, Rhodes, Inc. filed a petition initiating a Chapter 11 case under case no. 04-78434; two related entities filed petitions on the same date. On May 23, 2006, the Court confirmed Debtors' Third Amended Plan pursuant to which certain causes of action, including the claims made here, were vested in Rhodes, Inc., to be prosecuted under the direction and control of Joel H. Dugan as liquidating agent.

Rhodes, Inc. operated a chain of furniture stores in 13 states and at the time of filing its bankruptcy case had been in the retail furniture business for decades. For approximately thirteen years prior to the petition date, Rhodes purchased furniture for resale from Defendant Sea Products, Inc.

Beginning in late August 2004 and ending in late October 2004, Rhodes, Inc. made eight transfers to Defendant by check in payment of various invoices for furniture sales to Rhodes. The checks issued by Rhodes to Defendant during the preference period are identified below.

Check No.	Check Date	Clear Date	Check Amount
678139	August 25, 2004	August 31, 2004	$10,121.14
680920	September 17, 2004	September 21, 2004	$31,580.05
681420	September 22, 2004	September 28, 2004	$32,030.88
681929	September 27, 2004	October 1, 2004	$12,114.45
682757	October 6, 2004	October 8, 2004	$129,342.20
683093	October 7, 2004	October 13, 2004	$61,277.26
684416	October 20, 2004	October 22, 2004	$11,111.80
685098	October 27, 2004	November 1, 2004	$15,644.77
Total Check(s): 8		**Total Amount:**	$303,222.55

It is undisputed that these transfers occurred during the 90-day period preceding November 4, 2004, the date on which Rhodes, Inc. filed its bankruptcy petition, and that the payments were in satisfaction of or on account of an antecedent debt owed to Defendant by Rhodes before the

payments were made. Pretrial Order entered on February 25, 2008, p. 7. At trial Defendant further stipulated that Rhodes, Inc. was insolvent when each of the transfers was made and that the transfers enabled Defendant to receive more than it would have received if the case were under Chapter 7, each of the transfers had not been made and Defendant had received payment on the debt to the extent provided by title 11 of the United States Code. These stipulations establish that the transfers totaling $303,222.54 are avoidable preferences under 11 U.S.C. § 547(b), subject to affirmative defenses asserted by Defendant pursuant to 11 U.S.C. § 547(c)(2) and (c)(4). The trial was limited to the resolution of those affirmative defenses.

Section 547(c) provides in relevant part:

> (c) The trustee may not avoid under this section a transfer--
>
> . . .
>
> (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;
> . . .
>
> (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

---

[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.

> (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor[.]

Defendant had the burden of proving each element of its affirmative defenses. 11 U.S.C. § 547(g).

A. Ordinary Course of Business Defense.

With respect to the first element of section 547(c)(2), there is no disagreement that the debts owed by Rhodes to Defendant that Rhodes paid during the preference period were incurred in the ordinary course of business of the parties. Defendant failed to prove the second element of its ordinary course defense, as explained below.

With respect to the third element, Defendant objects to the admissibility of the testimony of the expert witness for Plaintiff, William F. Perkins, concerning ordinary business terms in the furniture industry relating to payment of invoices on the ground that his opinion lacked a reliable foundation for admission under the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Court disagrees. Mr. Perkins based his opinion on ordinary business terms on two recognized compilation of business statistics. As one engaged for many years in dealing with business issues presented by financial distress and as a forensic accountant, he is plainly competent to express an expert opinion based on such compilations, just as an appraiser of real estate can base a opinion on value without personal knowledge of comparable sales.

Ironically, Mr. Perkins' testimony was essential to the ordinary course defense because Mr. Ted Wecker, Defendant's principal, based his testimony on this point exclusively on his personal experience. Mr. Wecker was not an expert witness and gave no testimony to show that his experience was representative of the industry as a whole. His testimony did not differ materially from that of Mr. Perkins, but if his testimony is discounted and Mr. Perkins' testimony

were excluded, Defendant's ordinary course of business expense would fail, resulting in a judgment about four times as large as the Court is entering.

The second element of the ordinary course defense under section 547(c)(2) is a showing that the transfers at issue were "made in the ordinary course of business or financial affairs of the debtor and the transferee."

> As to §§ 547(c)(2)(A) and 547(c)(2)(B), a court's focus is on the specific relationship between the parties and the particular course of dealing between the parties. Courts look to a variety of factors to determine if the payments in question were ordinary as between the parties:
>
> > Among factors courts consider in determining whether transfers are ordinary in relation to past practices are: (1) the length of time the parties were engaged in the transaction at 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) whether the creditor took advantage of the debtor's deteriorating financial condition.
>
> *In re Midway Airlines, Inc*., 180 B.R. 1009, 1013 (Bankr.N.D.Ill.1995) (citing *In re Grand Chevrolet, Inc*., 25 F.3d 728, 732 (9th Cir.1994) (citations omitted)).

Barber v. Golden Seed Co., Inc., 129 F.3d 382, 390 (7th Cir. 1997). *See also, In re Hechinger Inv. Co. of Delaware, Inc*.. 489 F.3d 568, 578 (3rd Cir. 2007). *Compare In re Craig Oil Co.*, 785 F.2d 1563, 1567-1568 (11th Cir. 1986) ("Thus, untimely [late] payments are more likely to be considered outside the ordinary course of business and avoidable as preferences.")

The one factor here which carries the day is the timing of some of the payments of invoices in October 2004. All of the invoices of Defendant at issue here provided for terms of "net 60." Mr. Perkins prepared a written report and testified concerning his analysis of the timing of payments of Defendant's invoices. In computing time to payment, Mr. Perkins assumed that Rhodes received an invoice three days after its date and measured the time of payment from the receipt to the date on which the check paying that invoice cleared. It would not change the result if the time to payment were measured from the date of each invoice either to

the date on which the check paying that invoice cleared or to the date of the check. But the words "time to payment" below mean the time period measured from three days after an invoice date to the date on which the check paying that invoice cleared.

Beginning with a check dated August 4, 2003 and ending with a check dated July 19, 2004, Rhodes issued 68 checks that paid 331 invoices of Defendant totaling in the aggregate $2,406,726.61. The time to payment of invoices comprising 94.22% of the dollar amount of all invoices during that period, or $2,267,615.83, was between 54 and 66 days. The average number of days to payment was 59.6 days and the median number of days to payment was 59.0, each with a standard deviation of 9.4 days. (Expert Report of William F. Perkins, Trial Exhibit 12, Report Exhibit II).

Defendant's Exhibit 7 shows what Defendant's records reflect as to the dates of invoices issued by Defendant to Rhodes from 2002 forward through October 30, 2004 and the dates on which certain of those invoices were paid. The far right hand column showing the number of days elapsed from invoice to payment date is at best incomplete. Most of the checks shown paid several invoices having different dates, but the computer program used by Defendant to prepare Exhibit 7 computed the time to payment for only one of the invoices. Hence, Exhibit 7 is useless as a means to prove the ordinary course of business of Defendant and Rhodes with respect to the timing of payments. It should be noted, however, that there is no dispute about the dates of invoices and checks and the dates on which checks cleared; hence, Mr. Perkins' Report Exhibit II is unassailable.

During the preference period, Rhodes delivered to Defendant 8 checks that paid 71 invoices totaling in the aggregate $303,222.54. The time to payment of 65 of these invoices totaling $185,729.06 was between 61 and 66 days. One invoice in the amount of $14.16 was

paid in 74 days. The time to payment of the remaining fifteen invoices totaling $117,478.33 was between 25 and 43 days. By contrast, only 4 invoices out of the 331 invoices paid during the one-year period preceding the preference period were paid in fewer than 54 days – three in 45 days and one in 44 days. The transfers paying these 16 invoices were not made in the ordinary course of business of Rhodes and Defendant because they were made far outside the norm of payment of Defendant's invoices, which was a cluster of dates within 6 days of either side of 60 days from the date of each invoice, a range that closely reflected the terms of payment of "net 60." Hence, Defendant proved its ordinary course defense with respect to payments of 65 invoices totaling $185,729.06, leaving $117,493.49 in avoidable preferences, subject to possible further reduction based on the new value defense.

Defendant relies heavily on Mr. Wecker's testimony that it was very loyal to Rhodes and went the extra mile in trying to help Rhodes survive. The parties presented different versions of whether Defendant put any pressure on Rhodes to make faster payments. Such factual issues sometimes make a difference in a close case. This case, however, is not close. Even if the Court accepts Defendant's positions on these points, loyalty and the absence of threats or pressure do not alone constitute a get-out-of-preference free card or erase the pattern of payment in the 30 days preceding bankruptcy, which was well outside the normal pattern of payment, the ordinary course of business previously conducted by Defendant and Rhodes.

B. New Value Defense.

Section 547(c)(4) permits a creditor to reduce the amount of an avoidable preference by the amount of new value delivered by the creditor to the debtor subsequent to the date of that voidable preference so long as the debtor did not make an otherwise unavoidable transfer to the creditor in respect of that new value. Mr. Ted Wecker, Defendant's principal, testified that it

purchased goods shipped to Rhodes primarily from a supplier in Mexico but also from suppliers in China and in Illinois. He further testified that goods described in an invoice were shipped on the invoice date and would be received at a Rhodes warehouse two to three weeks later. But Mr. Wecker had no personal knowledge of when goods shipped by Defendant's supplier arrived at a Rhodes warehouse.

The amounts of potentially avoidable transfers (after eliminating transfers made in the ordinary course of business and prior to credit for new value) and the dates on which they were made are shown in the chart below and in more detail in Report Exhibit IV to Mr. Perkins' Expert Report, Plaintiff's Trial Exhibit 12.

Date of Transfer	Potentially Avoidable Transfers
September 21, 2004	$14.16
October 8, 2004	$63,261.67
October 13, 2004	$27,461.09
October 22, 2004	$11,111.80
November 1, 2004	$15,644.77
TOTAL	$117,493.49

In order to prove its case under section 547(c)(4), Defendant had to show that it delivered unpaid new value to Plaintiff after one or more of the above dates but before the petition date.

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[.]

In its post-trial brief, Defendant identified three invoices shown in the table below that, it argued, reflected new value given to Rhodes. Defendant introduced all three invoices as part of

its Exhibit 13. The last column in the table shows the amount of credit that Mr. Perkins gave Defendant for those invoices in his Report Exhibit IV. The invoice date was the shipping date.

Invoice No.	Invoice Date	Invoice Amount	Credit in Perkins Report
4699	September 21, 2004	$34,483.74	$0.00
4719	October 5, 2004	$10,760.00	$0.00
4730	October 8, 2004	$39,560.58	$38,382.44

Each invoice stated that it was F.O.B. Mexico. F.O.B. is a delivery term meaning "free on board." If the buyer and seller contract on terms of F.O.B. point of destination, the seller bears the risk and cost of delivering the goods to that point, at which title passes to the seller. If the buyer and seller agree to F.O.B. point of origin, the seller's obligation is to deliver the goods to a carrier that will transport the goods to the buyer, and title would pass at the point of origin.

Mr. Wecker testified that notwithstanding the F.O.B. term, his company paid the freight costs for delivery of goods described in the three invoices identified above from a Mexican supplier to the border at Laredo, Texas, where they were processed through customs. Defendant was the importer of record and responsible for getting the goods through customs and paying duties and fees. Once goods cleared customs in Laredo, they were delivered to a different carrier engaged by Rhodes to transport the goods from Laredo to its warehouse.

Plaintiff contends that because each invoice included the term "F.O.B. Mexico," delivery to Rhodes occurred on the date of each invoice. This is a legal conclusion, not a factual one. Mr. Dugan and Mr. Donald Parker testified that Rhodes could have included the value of goods placed on trucks in Mexico in its borrowing base, thereby contending that Rhodes owned the

goods and had the risk of loss at that time, but those statements are also a legal, not a factual, conclusion.

Plaintiff's contention concerning the significance of the term "F.O.B. Mexico" is without merit because the arrangement for shipment in Mexico did not require Defendant to place the goods in the hands of a carrier, to provide documents to enable Rhodes to obtain possession of the goods and to notify Rhodes of the shipment at that time. See O.C.G.A. §§ 11-2-319(a) and 11-2-504.[2] Had it been otherwise, Rhodes would have been the importer, responsible for complying with customs regulations, and would have been responsible for paying the freight. As Mr. Wecker testified, however, Defendant was the importer of the goods and paid the freight to the U.S.-Mexico border. After the goods cleared customs, they were transferred to a different carrier engaged by Rhodes for delivery to its warehouse.

The material facts here bearing on the effect of the F.O.B. term are very similar to the facts in *Clark v. Messer Industries, Inc.*, 222 Ga.App. 606, 475 S.E.2d 653 (Ga.App. 1996). There, a shipper, Messer Industries, Inc., sued Georgia International Express, Inc., a common carrier, breach of contract after GIE took possession of goods from Messer for delivery to its customer, The Home Advantage, Inc. and then refused to deliver the goods or to return them to Messer. The contract between Messer and Home Advantage contained the term "F.O.B. shipping point." GIE contended that, like Plaintiff here, that the use of the F.O.B. term meant that title to the goods passed to Home Advantage upon their delivery to GIE for shipment. It was undisputed, however, that Messer was liable for the freight charges for shipping the goods to

---

[2] Georgia law applies. O.C.G.A. § 11-1-105(a); *In re Gaston & Snow*, 243 F.3d 599 (2nd Cir. 2001) (holding that in ruling on a clam based on state law, a bankruptcy court applies the law of the state in which it sits, including its choice of law rules, so long as significant federal policy is not implicated); *Cf. In re Washington*, 242 F.3d 1320 (11th Cir. 2001).

Home Advantage. Affirming the trial court's judgment in favor of Messer, the Court of Appeals opined:

> "Unless otherwise agreed," the term "F.O.B. the place of shipment" means that the seller must at that place ship the goods and bear the expense and risk of putting them into the possession of the carrier. OCGA § 11-2-319(1)(a). It is uncontested that it was otherwise agreed between all parties that the seller bore the expense, not of putting the goods in the possession of the carrier, but rather of transporting the goods to the place of destination. Consequently, the terms of the delivery were in fact "F.O.B. the place of destination." See OCGA § 11-2-319(1)(b).

Id. at 607. Here, the terms of delivery were in fact "F.O.B. Laredo."

Plaintiff thinks Defendant's inability to pinpoint delivery dates is crucial, but it is not. All that Defendant had to establish is that it delivered new value to Rhodes after a preferential payment was made and before the petition date. Mr. Wecker's testimony did just that.

Defendant introduced no documentation showing how long it took to transport each shipment of goods covered by the invoices in the above table from the Mexican supplier to the U.S.- Mexico border and how long it took each shipment to clear customs and to be delivered to Rhodes' carrier. (Defendant's Exhibits 14-17 were admitted as examples of freight bills for delivery to the U.S.-Mexico border paid for by Defendant, albeit with respect to earlier invoices.) But Mr. Wecker testified that the normal time required to deliver goods from the supplier to the U.S.- Mexico border was 7 days and that the normal time required to clear customs was 3 days. He further testified that it normally took 5 to 8 days to transport goods from Laredo to a Rhodes warehouse. He based this testimony on the fact that he received invoices from Defendant's carrier showing when goods cleared customs, on the fact that had goods not reached their intended destination when delivery was expected by Rhodes, he would have heard from Rhodes and on his knowledge of time required to ship goods based on over 15 years of experience in the

business of selling furniture. There is no dispute that Rhodes received the goods described in the three invoices.

Based on Mr. Wecker's testimony, goods described in invoice no. 4699 would have cleared customs and have been delivered to Rhodes's carrier on or about September 30, 2004. Hence, the goods described in invoice no. 4699 could not constitute new value (other than as to $14.16 preference) because Rhodes received them prior to the first avoidable preferential transfer thereafter made on October 8, 2004. Consequently, Defendant failed to prove that the delivery of goods described in invoice No. 4699 constituted new value under section 547(c)(4).

According to Plaintiff's Exhibit 12, invoice No. 4719, dated October 5, 2004, remains unpaid. Although Mr. Wecker had no personal knowledge of the precise date on which Rhodes' carrier took possession of goods sold by Defendant, his testimony was sufficient to prove that the carrier for Rhodes received the goods described in invoice no. 4719 approximately 10 days after October 5, 2004, the date of that invoice. Rhodes made an otherwise avoidable transfer to Defendant on October 8, 2004, and hence the goods described in invoice no. 4719 constituted new value received by Rhodes subsequent to that transfer.

Mr. Perkins' report conceded that goods identified in invoice no. 4730 dated October 8, 2004 constituted new value, reducing the otherwise avoidable transfer evidenced by Rhodes' check that cleared on October 8, 2004. Based on Mr. Wecker's testimony, Rhodes received those goods about 10 days after October 8, 2004, thereby providing to Rhodes new value with respect to the transfer that occurred on October 8, 2004.

Defendant is entitled new value credit for the gross amounts shown on invoices nos. 4719 and 4730 that are part of its Exhibit 13, but the Court presumes that it received appropriate credit for the goods described in those invoices, as explained below.

In addition to giving Defendant credit for most of invoice no. 4730, Mr. Perkins also gave Defendant credit for other invoices with numbers that do not match other invoices that are part of Defendant's Exhibit 13. Some of these invoices may be reflect portions of invoice no. 4719. But Defendant did not prove the other credits shown on Mr. Perkins's Report Exhibit IV, and the Court has no way of evaluating them.

Defendant's Exhibit 13 also included invoice nos. 4758 for $70.00, 4759 for $50.00, 4760 for $50.00 and 4761 for $50.00, dated October 30, 2004. Based on Mr. Wecker's testimony, those goods would have been delivered after November 4, 2004 and do not count as new value because the value was given to the Debtor-in-Possession and not Rhodes in its capacity as Debtor. *In re Phoenix Restaurant Group, Inc.*, 317 B.R. 491, 496 (Bankr. M.D.Tenn. 2004).

Hence, the total amount of new value provided to Rhodes that Defendant proved is $50,320.58, which is the sum of the amounts billed to Rhodes on invoice nos. 4719 and 4730.

In summary, Defendant received transfers from Rhodes during the preference period totaling $303,222.55 that but for defenses asserted by Plaintiff would be avoidable. The evidence establishes that transfers totaling $185,729.06 are not avoidable pursuant to section 547(c)(2) and that transfers totaling an additional $50,320.58 are not avoidable pursuant to section 547(c)(4), leaving net avoidable preferential transfers of $67,172.92.

Plaintiff demanded in the complaint an award of prejudgment interest from the date of each transfer and costs. The Bankruptcy Code does not specifically provide for an award of pre-judgment interest on the value of avoided preferential transfers. *In re Investment Bankers, Inc.*, 136 B.R. 1008, 1023 (Bankr. D. Colo. 1989). The decision to award pre-judgment interest in a preferential transfer action is therefore left to the sound discretion of the bankruptcy court. *In re*

Art Shirt Ltd., Inc., 93 B.R. 333, 342 (Bankr. E.D. Pa.1988). *Lowrey v. Mfrs. Hanover Leasing Corp. (In re Robinson Bros. Drilling, Inc.*), 1992 WL 535954 (W.D. Okla. 1992).

An award of interest is appropriate here because the computations needed to establish the amount of voidable transfers are relatively straight forward, notwithstanding the somewhat difficult legal analysis dealing with the timing of receipt of goods for purposes of the new value defense. Because the computation of the amount of preferential transfers is largely a matter of arithmetical calculations beyond reasonable dispute, Defendant could have tendered an amount sufficiently close to the amount of avoidable transfers to avoid significant interest charges.

"Prejudgment interest is recoverable in a preference action from the date of demand for its return by the trustee or, if there is no demand, from the date of commencement of the adversary proceeding." *Ellenberg v. Mercer (In re The Home Co.),* 108 B.R. 357, 360 (Bankr. N.D. Ga. 1989) (Cotton, J.). Most courts concur with this conclusion. *See, e.g., Sigmon v. Royal Cake Co. (In re Cybermech, Inc.),* 13 F.3d 818, 822-23 (4th Cir. 1994); *McLemore v. Third Nat'l Bank in Nashville (In re Montgomery),* 983 F.2d 1389, 1396 (6th Cir. 1993). Courts have used several bench marks as the proper interest rate, including the state legal interest rate, the prime rate and the rate under 28 U.S.C. § 1961.

This court adopts the approach of Judge Cotton in the *Home Co.* case in adopting the rate prescribed by 28 U.S.C. § 1961. "Although section 1961 only provides for post-judgment interest, most courts have concluded that the statute also applies to pre-judgment interest in a case involving a federal question in which there is no express statutory provision for such interest." *In re Home Co.,* 108 B.R. at 360. Section 1961 fixes the rate "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." The

federal rate under section 1961 for the week ending November 10, 2006 was 5.03%. The Internet address for that page is http://www.federalreserve.gov/releases/h15/20061113/. This rate is lower than Georgia's legal rate of 7%. GA. CODE ANN. § 7-4-2 ("The legal rate of interest shall be 7 percent per annum simple interest where the rate percent is not established by written contract.") Prejudgment interest on $67,172.92 at 5.03% from November 12, 2006 to November 28, 2008 is $7,295.90. Plaintiff is also entitled to recover as costs the filing fee of $250.00 and post-judgment interest on the sum of $67,172.92 at the rate of .96% per annum pursuant to 11 U.S.C.§ 1961.

IT IS SO ORDERED.

END OF ORDER