

**IN THE UNITED STATES BANKRUPTCY COURT
FOR DISTRICT OF DELAWARE**

IN RE:	(
	(
AMERISERVE FOOD	(
DISTRIBUTION, INC., <i>et al.</i>	(Bankruptcy No. 00-358
	(
Debtor(s)	(Chapter 11
	((Jointly Administered)
	(
AFD FUND	(
	(
Plaintiff(s)	(
	(
v.	(Adversary No. 01-1225
	(
TRANSMED FOODS, INC.	(
	(
Defendant(s)	(
	(
	(

MEMORANDUM OPINION¹

The matter before the court is a motion for summary judgment filed on behalf of Transmed Foods, Inc., in this preference action.² Debtor AmeriServe Food Distribution, Inc. filed its chapter 11 bankruptcy petition on January 31, 2000. A plan was confirmed on or about November 28, 2000. Plaintiff AFD Fund is the representative of the post-confirmation estate of Debtor. AFD avers in its complaint that transfers to Transmed in the amount of

¹The court's jurisdiction was not at issue. This Memorandum Opinion constitutes our findings of fact and conclusions of law.

²AFD Fund filed a pleading entitled "Plaintiff's Opposition to Motion of Transmed Foods, Inc. for Summary Judgment (Docket No. 21) and Cross Motion for Summary Judgment". A request for relief cannot be included in a responsive pleading but must be by separate motion. *See* Fed.R.Bankr.P. 7007, 7008, and Fed.R.Civ.P. 7, 8.

\$963,001.00 were made during the preference period on account of an antecedent debt while the Debtor was insolvent, enabling Transmed to receive more than it would have received if this were a chapter 7 and the transfers had not been made. AFD Fund avers that the transfers are therefore avoidable under 11 U.S.C. §547. In its answer to the complaint Transmed asserts the defenses of new value (11 U.S.C. §547(c)(4)) and ordinary course of business (11 U.S.C. §547(c)(2)).³ Transmed's motion for summary judgment asserts that the transfers are excepted from avoidance as preferences because they constituted payment of a debt incurred in the ordinary course of Debtor's and Transmed's business affairs, were made in the ordinary course of Debtor's and Transmed's business, were made according to ordinary business terms, and constituted new value. 11 U.S.C. §547(c)(2), (4).⁴ In the briefing AFD Fund conceded that certain transfers constitute new value. Plaintiff's Opposition to Motion for Summary

³Transmed asserts as an affirmative defense, *inter alia*, that the "property paid to Transmed may not have been property of the bankruptcy estate but property held in trust by AmeriServe for the benefit of" another company. Answer to Complaint at 2, Dkt. No. 8. This allegation is not pursued in the motion for summary judgment and there are no facts in the record before us concerning it. Therefore, to the extent summary judgment is granted, it does not encompass this point and further proceedings are necessary.

⁴Transmed also argues that the transfers cannot be recovered "because public policy does not sanction the administration of a case solely for the benefit of the trustee or professionals of the estate." Memorandum in Support of Transmed Foods, Inc. Motion for Summary Judgment, Dkt. #22, at 9. Transmed argues that under a cost-benefit analysis, the many preference actions in this case "most likely will result in minimal recovery for the estate" and the attorneys fees incurred in pursuing the preference actions will exceed potential recovery. *Id.* at 10. There is nothing in the record before us that indicates that this action is being pursued for the benefit of professionals and Transmed has no standing to raise the argument on behalf of other creditors. There is nothing in the record that indicates that the estate will realize a minimal recovery. Furthermore, neither of these considerations is part of the §547 preference analysis.

Judgment, Adv. Dkt. No. 26 at 2.⁵ Transmed asserts that the amount in dispute is \$239,366.10 and AFD Fund agrees. *Id.* See also Transmed Foods, Inc.'s Reply Brief, adv. Dkt. No. 27 at 5; Plaintiff's Opposition to Motion ... for Summary Judgment, Dkt. No. 26, at 2.

Accordingly, we will enter summary judgment for Transmed on the issue of new value and, for purposes of this motion for summary judgment only, hold that the amount in dispute is \$239,366.10. The only issues remaining regarding the motion are (1) whether the ordinary course defense renders unavoidable the payment of this amount to Transmed during the preference period, which began on November 3, 1999, (2) whether evidence of industry standards is required and, if so (3) whether it is sufficient in this case.

The court may grant summary judgment "if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *Carter v. McGrady*, 292 F.3d 152, 157, n.2 (3d Cir.2002)(citations omitted). The parties assert that there are genuine disputes of material fact. AFD Fund disputes that the payments during the preference period were within Debtor and Transmed's historical payment practices and points out that Transmed offered no evidence on the requisite element of ordinary course in the industry. In its reply brief, Adv. Dkt. No. 27, Transmed asserts that the affidavits submitted by the parties regarding ordinary course of business establish that there are issues of material fact regarding accommodations Transmed

⁵Transmed asserts that the "Garland Rule", articulated in *In re Garland*, 19 B.R. 920 (Bankr.E.D.Me. 1982), permits a creditor to apply new value against immediately preceding preferences and against all prior preferences. We do not rule on the applicability, viability, or legitimacy of *Garland* as the parties agree that the dispute centers on the whether \$239,366.10 is subject to the ordinary course defense under 11 U.S.C. §547. The court notes that the actual difference between the payments between December 3, 1999, and January 4, 2000, and the new value given between December 3, 1999, and that date is \$197,054.10.

extended to Debtor during the preference period. We disagree that material facts are in dispute. The only dispute concerns the interpretation of the facts with respect to the ordinary course defense. "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party If the evidence is merely colorable ... or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted).

The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624, 64 S.Ct. 724, §727, 88 L.Ed. 967 (1944). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, 2171, n. 11, 76 L.Ed.2d 277 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Id. at 251-52.

There is no dispute that the transfers were on account of an antecedent debt to a creditor, made within ninety days prepetition while the Debtor was insolvent and that enabled Transmed to receive more than it would if this case were a chapter 7 and the transfer had not been made. 11 U.S.C. §547(b). But for the defenses of §547(c), the transfer would be avoidable.

Prepetition Period History Between the Parties

We disagree that the material facts are in dispute for purposes of ruling on the ordinary course defenses. AFD states in its opposition to the motion for summary judgment, Dkt. No. 26, that

[t]he Transfers were made on 102 invoices, which were aged from 30 to well over 90 days from the invoice date... The mean aging of the 102 invoices paid by the Transfers was 78 days... While these invoice agings ranged from 30 to 133 days, only two of the 102 paid invoices were made faster than 57 days, and 22 were aged over 90 days.

Dkt. No. 26 at 3. *See also* Declaration of Diana Moog, Chief Financial Officer of AFD Fund, at Dkt. No. 26. Transmed asserts that during the preference period it received payment from Debtor "on the average of 62 days from the date of the invoice [and] received payment from the Debtor prior to the preference period on the average of 45 days from the date of the invoice", Dkt. No. 22 at 8, and that the "minor deviations" from the payment history are attributable to computer problems Debtor experienced in November of 1999. *Id.* Exhibit A to Transmed's brief in support of its motion for summary judgment lists the shipping dates (which are the invoice dates) from December 14, 1995, through November 2, 1999, the invoice amount, the date the invoices were paid from January 2, 1996, through January 10, 2000, the amounts paid, and the aging. It is clear from this Exhibit that the aging of the payments received by Transmed during the preference period (November 3, 1999, to the date of filing of the bankruptcy on January 30, 2000) was much greater than that of payments received before the preference period.⁶ Transmed asserts that the preference period payment

⁶Exhibit A shows no payments received during November of 1999.

history did not differ substantially from the pre-preference period payment course of dealing but its own exhibit belies that statement. Transmed asserts that the difference in timing of payments was attributable to a computer problem Debtor had in November of 1999. However, an examination of the exhibit establishes that the payments made in December of 1999 relate to shipments two and three months before the payment date whereas pre-preference payments were made as a rule within less than 30 days.⁷ Exhibit A shows no shipments after November 2, 1999, and it is not disputed that on Exhibit A the shipment date is the invoice date. The payments shown on Exhibit A made during the preference period relate to invoices issued 90 to 120 days prepetition. The parties' history shows that these payments were not in the usual course of Debtor's and Transmed's business where, between January of 1996 and March of 1999, account aging rarely exceeded 36 days.

Ordinary Course of Business Between Debtor and Transmed -- 11 U.S.C. §547(c)(2)(A)

The parties did business for ten years prepetition. Transmed asserts that generally it received payment from Debtor between 20 and 45 days from the date of invoice and that the average time between invoice and payment during the preference period was 62 days. AFD asserts that the mean average period was 78 days during the ninety days prepetition. Regardless of which average is used in this case, i.e., either 62 days or 78 days, the result is the same because the account aging history before the preference period was generally much less

⁷We also note that the chart on pages 3 to 6 of Transmed's Memorandum in support of its motion for summary judgment, Dkt. No. 22, purport to show shipment of new value to Debtor and payments with respect thereto. However, the payments do not appear on Exhibit A, at least not in the same amounts or dates.

than that during the preference period. Moreover, we note that the average number of days during the preference period was 78 days.⁸

Between January 2, 1996, and through March of 1999 the account aging rarely exceeded 36 days. There were some aberrations. For example, on May 7, 1998, Transmed received a payment based on an invoice dated November 4, 1997. The payment was received 184 days after the invoice date in that instance. A second payment was received that same day based on an invoice from December 1, 1997, which was 157 days post-invoice. Again, On June 5, 1998, 238 days after the invoice of October 10, 1997, Transmed received a payment. These three payments were in the amounts of \$193.20, \$385.60, and \$72.30, respectively. The usual payments were in the tens of thousands of dollars. It is apparent that the three aberrational payments were due to some sort of account reconciliation.

In this case, the parties' dispute concerning the average number of days between invoice and payment during the preference period does not constitute a dispute of material fact inasmuch as that period reflects numbers vastly different from the pre-preference history between Debtor and Transmed. It is evident from the four year history provided by Transmed in Exhibit A to its brief in support of its motion for summary judgment, Adv. Dkt. No. 22, that, during the time preceding the preference period, from September 1999 to November 1999 there were occasions when the number of days between invoice and payment spiked to more than 60 days and sometimes even more than 90 days and was consistently higher during that

⁸The total number of days in the account aging column on Exhibit A from December 2, 1999, through January 10, 2000, is 6,566. The total number of entries was 84, resulting in an average aging of 78 days during the prepetition period.

pre-preference period.⁹ Before that pre-preference period, however, the time between invoice and payment ranged from 19 days to approximately 36 days at most.

Ordinary Business Terms -- 11 U.S.C. §547(c)(2)(C)

Ordinary business terms are those ordinary in the parties' industry. "[T]he more cemented [as measured by duration] the pre-insolvency relationship between the debtor and the creditor, the more the creditor will be allowed to vary its credit terms from the industry norm yet remain within the safe harbor of §547(c)(2)." *In re First Jersey Securities, Inc.*, 180 F.3d 504, 513 (3d Cir. 1999), quoting *In re Molded Acoustical Products, Inc.*, 18 F.3d 217, 225 (3d Cir. 1994). In *In re Molded Acoustical Products Inc.*, 18 F.3d 217 (3d Cir. 1994), the court found that the evidence of the industry standard was "sketchy", *id.* at 222, it was not required that "the creditor must prove the existence of some single, uniform set of industry-wide credit terms". *Id.* at 224. Further,

we think that the duration of the parties' relationship is logically pertinent to the touchstone of the statutory policies undergirding §547(c)(2), policies which we must always keep within our sights especially when trying to make sense out of such terse language as is found in §547(c)(2). Furthermore, we are persuaded that resort to the length of the parties' relationship will remedy many of the defects otherwise apparent in that section.

Id. If may be that the parties' terms "depart so grossly from what has been established as the industry's norms that they cannot be seriously considered usual and equitable with respect to the other creditors". *Id.* at 226.

⁹The dates provided on Transmed's Exhibit A to its brief in support of its motion for summary judgment are the dates the checks were "received at bank." AFD asserts that the dates used are the dates the checks cleared. Whether we use the date of delivery of payment or the date the checks were honored, the result in this case does not change inasmuch as the focus of the dispute herein is account aging and it is clear from Exhibit A that there is a significant change between the preference period and the pre-preference period.

Although evidence of consistency between the parties' practices and industry norms diminishes in significance where the parties have a longstanding history, nonetheless some evidence of industry norms is needed, especially where the parties' practices, *inter se*, varied. The analysis in *In re Color Tile, Inc.*, 239 B.R. 872 (Bankr.D.Del. 1999), follows that in *Molded Acoustical Products*; i.e., industry norms are of lesser significance than ordinary business practices of lengthy duration. *Color Tile* has been cited as standing for the "apparent proposition that a transferee can satisfy §547(c)(2)(C) without presenting any industry standard evidence if certain conditions are met." *In re Allegheny Health, Education and Research Foundation (Scharffenberger v. United Creditors Alliance Corp.)*, 292 B.R. 68, 83 (Bankr.W.D.Pa. 2003). In *Color Tile*, however, there was evidence of record. The court found it sufficient, given the nature of the dispute in that case, and noted that "evidence of industry standards is not the *sole* determinative factor because the parties had a lengthy and consistent history" 239 B.R. at 876 (emphasis added).

In the matter before us, on the issue of industry norms, Transmed provided the affidavit of its officer manager, Kathleen Pannebaker. *See* Exhibit B to Memorandum in Support of Transmed Food, Inc.'s Motion for Summary Judgment, Dkt. No. 22. The affiant states that Transmed is one of the largest olive wholesalers, has numerous customers, provides similar credit terms to other customers, and receives payment in the same manner as it does from Debtor. Memorandum at 8, Dkt. No. 22; *id.* at Exhibit B, ¶ 4, ¶ 11. However, it does not detail what those arrangements with other customers are nor whether those arrangements are similar to the history between Transmed and Debtor during the preference period or during the pre-preference period. Nonetheless, the parties' history during the preference period differed

significantly from that of the pre-preference period. For purposes of this motion for summary judgment, we accept as true that Transmed is one of the largest olive wholesalers and maintains similar credit arrangements with its other customer. Whether this would be sufficient evidence of industry standards in another context, we do not decide. For purposes of this issue, we find that the parties' pre-preference period history is in line with industry standards as stated by Transmed, Debtor having made no offer of contrary information. We also find, however, that the evidence provided regarding the last four years establish that the parties' history during the preference period was not consistent with their prior practice.

Transmed's motion for summary judgment cannot be granted.

Summary

The parties agree that Transmed's new value defense is applicable. Therefore, Transmed's motion for summary judgment will be granted in part with respect to this defense in the amount of \$723,634.90. The Debtor's history of payment in relation to invoice dates grew from 25.28 days in 1995-1996 to 47.66 days in the year before the preference period. However, during the preference period, payment aging skyrocketed to an average of 78 days between invoice and payment dates. We find that the remaining payments in the amount of \$239,366.10 made to Transmed during the preference period and not subject to the new value defense were not in the ordinary course of the parties' business and, therefore, Transmed's motion for summary judgment shall be denied in this regard. In addition, a status conference will be scheduled to address any issues remaining unresolved in this adversary.

An appropriate order will be entered.

DATE: *Aug. 18, 2003*

Judith K. Fitzgerald
Judith K. Fitzgerald
United States Bankruptcy Judge

cc: Laura Davis Jones, Esquire
Michael R. Seidl, Esquire
Pachulski, Stang, Ziehl, Young & Jones P.C.
919 North Market Street, 16th Floor
P.O. Box 8705
Wilmington, DE 19899-8705

Andrew W. Caine, Esquire
10100 Santa Monica Blvd., Suite 1100
Los Angeles, CA 90067

Brian A. Sullivan, Esquire
Werb & Sullivan
3000 Delaware Avenue, 10th Floor
P.O. Box 24056
Wilmington, DE 19899

F. Thomas Rafferty, Esquire
Ober, Kaler, Grimes & Shriver
120 E. Baltimore Street
Baltimore, MD 21202-1643

United States Trustee
844 King Street
Suite 2313
Wilmington, DE 19801

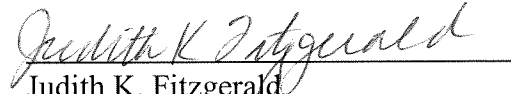
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	(
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	(
TRANSMED FOODS, INC.	(
	(
Defendant(s)	(
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	(

ORDER

AND NOW, this 18 day of Aug, **2003**, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED, ADJUDGED, and DECREED** that the motion of Defendant Transmed Foods, Inc., is **GRANTED in part and DENIED in part**. The motion is **granted** with respect to the new value defense and, therefore, \$723,634.90 of the amount alleged to be due in the complaint is unavoidable as a preferential transfer. The motion is **denied** with respect to the ordinary course of business defense and, therefore, \$239,366.10 remains subject to challenge.

It is **FURTHER ORDERED** that a status conference and pretrial conference are scheduled for **August 25, 2003, at 1:45 p.m.**, U.S. Bankruptcy Court, 824 Market Street, 6th Floor, Courtroom #2, Wilmington, Delaware.


Judith K. Fitzgerald
United States Bankruptcy Judge

cc: Laura Davis Jones, Esquire
Michael R. Seidl, Esquire
Pachulski, Stang, Ziehl, Young & Jones P.C.
919 North Market Street, 16th Floor
P.O. Box 8705
Wilmington, DE 19899-8705

Andrew W. Caine, Esquire
10100 Santa Monica Blvd., Suite 1100
Los Angeles, CA 90067

Brian A. Sullivan, Esquire
Werb & Sullivan
3000 Delaware Avenue, 10th Floor
P.O. Box 24056
Wilmington, DE 19899

F. Thomas Rafferty, Esquire
Ober, Kaler, Grimes & Shriver
120 E. Baltimore Street
Baltimore, MD 21202-1643

United States Trustee
844 King Street
Suite 2313
Wilmington, DE 19801