UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re<br><br>AMES DEPARTMENT STORES, INC., *et al.*,<br><br>Debtors. | Chapter 11<br>Case No. 01-42217 (REG)<br><br>Jointly Administered |
| AMES MERCHANDISING CORPORATION,<br><br>Plaintiff,<br><br>*against*<br><br>REVERE MILLS INC.,<br><br>Defendant. | Adversary Proceeding<br>No. 03-03951 (REG) |
| AMES MERCHANDISING CORPORATION,<br><br>Plaintiff,<br><br>*against*<br><br>REVERE MILLS INC.,<br><br>Defendant. | Adversary Proceeding<br>No. 03-08325 (REG) |

DECISION AFTER TRIAL

APPEARANCES:

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BEFORE: ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding under the umbrella of the chapter 11 cases of Ames Department Stores and affiliates, debtor Ames Merchandising Corporation (**"Ames"**) seeks to recover allegedly preferential transfers made by wire and check to defendant Revere Mills, Inc. ("**Revere**"). After trial, the Court determines that the wire transfers were not preferential, but that the check transfers were.

## Findings of Fact[1]

### 1. *Background*

On February 20, 2001, Ames, a department store chain, entered into a master agreement, referred to as the "'new' towel program"[2] (the "**Original Program**"), to purchase towels from Revere, a towel manufacturer.[3] The letter memorializing the Original Program specified styles of, and cost quotes for, towels to be purchased by Ames from Revere. It included *forecasted* quantities of goods, in the amounts Ames *anticipated* purchasing over the intended two year period covered by the agreement.[4]

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1 To shorten this Decision, the Court limits its citations to the most significant matters.

2 *See* Pl. Ex. F, Feb. 20, 2001 Letter from Revere to Ames. "New" was used to distinguish it from a previous towel program Ames had recently discontinued with another manufacturer.

3 Ames contends that this agreement was more than a "master agreement," and in fact bound the parties to purchases in the quantities, and at the prices, for which it provided. For reasons discussed below, the Court disagrees.

4 *See* Pl. Ex. F, Feb. 20, 2001 Letter from Revere to Ames (emphasis added).

Cost quotes under the Original Program were based on the goods being delivered FOB Pakistan, and on Ames ordering the forecasted quantities listed.[5] Under this agreement, Revere would invoice Ames once the goods were at the port in Karachi, Pakistan. Then Ames would pay the independent manufacturers in Pakistan, at which time these manufacturers would remit to Revere its share of the profits, and Revere would release the towels to Ames at the Pakistani port. Ames would then be responsible for shipping the goods from Pakistan to its stores in the U.S. The agreement was not exclusive for either party.

As an additional incentive for Ames, the agreement included $850,000 in "markdown money," against which Ames could credit its purchases.[6] This money was intended to offset losses Ames would incur in selling off its remaining stock of towels that had been acquired from a previous supplier.[7] Initially, the "markdown money" was contingent on Ames meeting the forecasted volume of towel purchases,[8] but Ames objected to that term, and the parties agreed that the $850,000 would be available to set off *any* purchase Ames made over the two-year course of the Original Program, even if Ames didn't order as many towels as projected.[9]

Hypothetically, therefore, if Ames had ordered only $850,000 worth of towels, credited the entire purchase against its markdown money, and ceased ordering from

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5 *See id.* ("All cost [*sic*] quoted are F.O.B. Pakistan and based on forecasted ratio noted below. . . . Markdown money is based on meeting forecasted volume.").

6 *See id.*

7 Transcript of Trial (Dec. 9, 2008) ("**Trial Tr.**") 39-40.

8 *See* Pl. Ex. F, Feb. 20, 2001 Letter from Revere to Ames. ("Markdown money is based on meeting forecasted volume.").

9 *See* Pl. Ex. G, Feb. 26, 2001 Letter from Ames to Revere ("[D]uring our negotiation for the towel program there was never any discussion about the mark down money being contingent on making the projected buy numbers.").

Revere, then Revere would have had no legal recourse to enforce the remainder of the Original Program.[10] In addition, for the first year Revere agreed to give Ames a 2% rebate on all purchases, a 1% warehouse allowance, and a $50,000 advertising credit.[11]

On May 21, 2001, the parties revised the Original Program, creating a modified master agreement (the "**Revised Program**").[12] This was the operative master agreement during the preference period.

Under the Revised Program, the towels were shipped FOB Port of Entry *New York* (rather than Pakistan), and significantly, Ames agreed to "wire all payments due to Revere *prior to* the release of possession for each container and/or PO # to Ames."[13]

Revere was therefore responsible for shipping the goods to New York, and raised the prices of the towels accordingly to account for the increased shipping costs. The increase in price was otherwise revenue-neutral.[14]

Under the Revised Program, payments would go directly to Revere rather than to the independent factories.[15] Revere benefited from this arrangement because Pakistani currency transaction restrictions prevented the independent factories from remitting to Revere the amounts it was owed, and Ames benefited because the revised deal allowed it to delay payment on the towels until they arrived in New York.

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10 Trial Tr. 38-39 (Vanden Berge's testimony to this understanding). *See also* Pl. Ex. F, Feb. 20, 2001 Letter from Revere to Ames; Pl. Ex. G, Feb. 26, 2001 Letter from Ames to Revere (Ames' specific rejection of any linking of the "markdown money" to the quantity of towels purchased).

11 *See* Pl. Ex. F, Feb. 20, 2001 Letter from Revere to Ames.

12 *See* Def. Ex. D, May 21, 2001 Letter from Revere to Ames.

13 *Id.* (emphasis added).

14 Vanden Berge Aff. at ¶ 16.

15 Def. Ex. D, May 21, 2001 Letter from Revere to Ames.

The general process for the manufacture and sale of towels to Ames, from that point on, was as follows: Revere had agreements for the manufacture of towels with two independent factories in Pakistan, and one in Turkey. Even prior to receiving purchase orders from Ames specifying quantities and colors of towels, Revere could instruct these factories to begin the manufacturing process – to purchase and weave the yarn into fabric, for example.[16]

When Ames needed towels, it would send a purchase order specifying the quantities and styles of towels it needed. Revere would inform the independent factories of Ames' order specifications, and the manufacturers would complete the orders. Revere would then package the goods according to Ames' instructions, and ship them, at Revere's expense and risk, to the port in New York, where they would be stored with a customs broker.

The goods would take approximately five to six weeks to ship from Karachi to New York. Once the towels were stored with the customs broker in New York, Revere would invoice Ames. When Ames paid on the invoice, through some combination of utilizing its markdown credit and wiring money to Revere, Revere would orally notify the customs broker, which would then release the goods to Ames for transport to Ames' own warehouses for re-sale.

2. *The Wire Transfers*

Sometime after the February agreement, most likely in March of 2001, Ames placed eight such purchase orders with Revere, specifying the quantities and styles of

[16] Trial Tr. 42.

towels desired.[17] In accordance with the procedures described above, Revere shipped the orders to New York in eight separate shipments, which arrived at the customs broker in June, July, and August of 2001. After each shipment, Revere then invoiced Ames for the cost of the towels and shipping, and Ames made payment using its markdown credit and five wire transfers to Revere.[18]

Ames then took possession of the towels. The parties have stipulated that in each of the eight shipments, Ames ordered the towels, Ames then paid for the towels and/or expended a portion of its markdown credit, and Ames then accepted delivery of the towels, failed to revoke acceptance, and re-sold the towels to its retail customers.

*3. The Check Transfers*

Ames also periodically purchased towels from Revere prior to the February 20, 2001, agreement. Ames made payment for these purchases either by check or wire transfer. During the Preference Period, Ames paid Revere with two checks, totaling $259,872.40.

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[17] Trial Tr. 41, 43. Neither party has been able to produce copies of these purchase orders.

[18] The payments occurred as follows:

> On June 25, 2001, Ames wired $55,573.20 to Revere.
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> On July 6, 2001, Ames wired $52,712.48 to Revere.
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> On July 17, 2001, Ames wired $60,556.32 to Revere, and used $101,050.00 of its "markdown money" credit.
>
> On July 19, 2001, Ames wired $650,000 to Revere, and used $323,904.64 of its "markdown money" credit, as payment for four separate invoices, resulting from four separate purchase orders.
>
> On August 8, 2001, Ames wired $95,050.08 to Revere, and used $7.20 of its "markdown money" credit.

The total amount of the wire transfers was $913,892.08. The total amount of markdown credit used was $424,961.84. *See* Joint Pre-Tr. Order at ¶¶ III.8-14; Vanden Berge Aff. at ¶¶ 21, 23.

After these payments, Revere advanced some new value to Ames, and, after application of the Code's 547(c)(4) new value defense, Revere's exposure has been stipulated to be limited to $61,843.60.[19]

Prior to the Preference Period, and before Ames was insolvent, Ames used a computerized system in the normal course of its business that generated checks for all domestic invoices for which Ames had confirmation of receipt of merchandise. This system would automatically generate checks when payments were due on these invoices, and the Ames accounts payable department would routinely mail the checks as they were generated. As a result, payments to vendors were prompt.

Beginning in May, 2001, in response to a lack of liquidity, Ames ceased sending checks automatically as they were printed. Executives of Ames convened daily meetings to discuss funds availability. At these meetings, the participants would discuss which payments to disburse, which to delay, which to accelerate, which to pay partially, and which not to pay at all. Unmailed checks were kept in a "mail bucket" in the locked office of Susan Cotter, the Director of Payables for Ames.[20]

During the Preference Period, Ames made two transfers by check to Revere. The first check, for $194,262.80, was printed on May 8, 2001, was received by Revere on May 21, 2001, and cleared on May 22, 2001. The second check, for $65,609.60, was printed on May 30, 2001, received by Revere on June 12, 2001, and cleared on June 13, 2001. No documentation or testimony is available to indicate the day the checks were actually mailed by Ms. Cotter. These checks were issued to pay the invoices sent to Ames by Revere on March 5, 2001, and March 26, 2001, respectively. No evidence has

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19 Joint Pre-Tr. Order at ¶ III.4.

20 Trial Tr. 20.

been offered by either party as to the actual delivery date of the goods purchased by the checks, other than the stipulation by the parties that roughly $200,000 of the amount of the checks is unavoidable due to the "subsequent new value defense."[21] Prior to the Preference Period, Ames generally paid Revere's invoices punctually, using its computerized automatic payment system.

*4. Procedural History*

Ames filed for chapter 11 relief on August 20, 2001. In June and August of 2003, Ames filed two complaints to recover the $913,892.08 in wire transfers, and the $259,872.40 in check transfers, made to Revere during the 90-day Preference Period.

*5. Other Factual Findings*

To avoid repetition, other factual findings are discussed in connection with the legal matters to which they related.

## Discussion

Preferential transfers, referred to colloquially as "preferences," are recoverable in civil actions under the Code because they run contrary to the goal of equality of treatment amongst creditors—one of the longest standing, and fundamental, principles of American bankruptcy law. It is not unlawful or otherwise improper to receive a preference, but when the requirements of the Code are satisfied, and no applicable defense is available, preferences must be returned to the estate, so they then may be made available for the entirety of the unsecured creditor community.

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[21] Joint Pre-Tr. Order at ¶ III.4.

To establish the avoidability of a preferential transfer, section 547(b) of the Code requires the Trustee to demonstrate by a preponderance of the evidence that the transfer was:

> (1) to or for the benefit of a creditor;
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> (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 [during the preference period]. . . ; and
>
> (5) . . . [enabled the creditor] to receive more than such creditor would receive [if the creditor received payment on the debt in a chapter 7 liquidation, rather than through the transfer]. . . .

In a preference action, the Trustee seeking to recover the preferential transfer has the burden of proving the avoidability of the transfer under section 547(b) of the Code, and once he or she does so, the party against whom recovery or avoidance is sought has the burden of proving that a preference exception applies under section 547(c) of the Code.[22] Thus, Ames has the burden of demonstrating that the wire and check transfers were in exchange for an antecedent debt under 547(b), and, as relevant here (with the extent of new value having been agreed on), Revere has the burden of demonstrating that such transfers were in the ordinary course under 547(c). The party with the burden of proof must demonstrate each required element by a preponderance of the evidence.[23]

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22 *See* 11 U.S.C. § 547(g) ("For the purposes of this section, the 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.").

23 *See Lawson v. Ford Motor Co.* (*In re Roblin Indus., Inc.*), 78 F.3d 30, 39 (2d Cir. 1996) (defendant must establish a preference exception by a preponderance of the evidence); *Young v. Scandore Paper Box Corp.* (*In re Lucasa Int'l, Ltd.*), 13 B.R. 596, 598 (Bankr. S.D.N.Y. 1981) (plaintiff must demonstrate the avoidability of a preferential transfer by a preponderance of the evidence).

Here satisfaction of the first, third, fourth and fifth of the above-listed requirements is undisputed. But the Court finds that Ames failed to satisfy its burden of showing the second requirement (in exchange for an antecedent debt) with respect to the wire transfers, though Ames did so with respect to the check transfers. The Court further finds, with respect to Revere's defenses to the respective wire transfer and check transfer claims, that Revere met its burden to show that the wire transfers were contemporaneous exchanges for new value, but that Revere failed to satisfy its burden of proof on its ordinary course defense with respect to the check transfers.

## I.

## The Wire Transfers

Ames contends that its wire transfers to Revere were preferential transfers, avoidable under section 547(b), and not subject to any exceptions under 547(c). But for the reasons below, this Court finds that the wire transfers are not avoidable, as they were not on account of an antecedent debt and in any event were contemporaneous exchanges for new value.

### *A. Antecedent Debt*

While "antecedent debt" is not defined by the Code, caselaw has defined it as "a debt incurred before the transfer was made. A debt is 'incurred' when the debtor becomes legally obligated to pay."[24] While what it means for a debtor to be "legally obligated to pay" has been a subject of debate and variant outcomes in the cases (particularly over whether the legal obligation arises when payment "becomes due" on

[24] *Enron Corp. v. Whalen (In re Enron Corp.)*, 357 B.R. 32, 39 (Bankr. S.D.N.Y. 2006).

the one hand, or at the commencement of the agreement, on the other),[25] the Court need not focus on that distinction here. Even under the standard most favorable to Ames—assuming, without deciding, that the legal obligation arose when the relevant agreement was formed—the wire transfers here cannot be considered to be on account of an antecedent debt.

Ames first contends that its legal obligation to pay Revere stemmed from its Revised Program agreement with Revere. But the Court cannot agree. As discussed above, the Revised Program was simply a master agreement, describing terms that would apply to future purchase/sale contracts.

The Revised Program significantly lacked obligations on the part of buyer and seller to purchase and sell any objectively verifiable quantity of towels. It expressly contemplated the possibility that Ames would not order its forecasted quantities.[26] Ames' own objections to the Original Program indicate that Ames did not want its markdown credits contingent on its ordering the full forecasted quantity of towels, plainly acknowledging that it did not perceive itself as bound to meeting the projected buy numbers.[27] The testimony of John Vanden Berge, then-president of Revere, credibly confirms that Revere likewise did not perceive Ames as bound to make any particular amount of purchases under the Revised Program.[28] The Revised Program was not sufficiently binding on Revere or Ames to create a legal obligation on the part of Ames to

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25 *See id.* at 39-46 (discussing the various ways in which courts have interpreted "antecedent debt").

26 *See* Pl. Ex. F, Feb. 20, 2001 Letter from Revere to Ames ("All cost [*sic*] quoted are F.O.B. Pakistan and based on forecasted ratio noted below. . . . Markdown money is based on meeting forecasted volume."); Def.'s Ex. D, May 21, 2001 Letter from Revere to Ames.

27 *See* Pl. Ex. G, Feb. 26, 2001 Letter from Ames to Revere ("[D]uring our negotiation for the towel program there was never any discussion about the mark down money being contingent on making the projected buy numbers.").

28 Trial Tr. 38–39.

pay Revere, such that Ames could claim it was paying an antecedent debt when it transferred the wire payments to Revere.

Ames asserts, in the alternative, that a legal obligation was created when Revere began manufacturing the towels, because Revere could have sought damages for breach of contract if Ames had subsequently canceled. This right to damages, Ames contends, constitutes an "unmatured right to payment," generating a claim under the broad definition in section 101(12) of the Code and thus an antecedent debt to Revere.[29] But Ames, which bears the burden of proof on this issue, has failed to establish which, if any, contract would have been breached if Ames had refused payment on the goods once they were delivered to the warehouse, and the Court has seen none. While one or more contracts giving rise to antecedent debt might have arisen from Purchase Orders Ames sent to Revere (which arguably could have then created obligations to pay, making the debt antecedent),[30] Ames did not offer any original Purchase Orders, and failed to prove that any Purchase Orders created binding contracts.

As Ames has failed to demonstrate that a prior right to payment existed before the transfers, this Court cannot find that an antecedent debt existed.

### *B. Contemporaneous Exchanges*

Additionally, and assuming, *arguendo*, that an antecedent debt existed—either from the missing purchase orders or from Revere's shipping of the towels—the Court rules that the wire transfers were contemporaneous exchanges for new value.

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29 Pl. Mem. of Law in Opp. to Def's Motion for Summ. Judgment, 3.

30 *See, e.g.*, *HLI Creditor Trust v. Hyundai Motor Co. (In re Hayes Lemmerz Int'l Inc.)*, 329 B.R. 136, 141 (D. Del. 2005) (finding an antecedent debt because "the Debtors became legally bound to pay on the day they signed the purchase order for the machines").

Section 547(c)(1) of the Code provides an affirmative defense to an action for an allegedly preferential transfer if that transfer was a "contemporaneous exchange for new value." The purpose of this exception was to prevent transactions that are technically "on account of an antecedent debt," but were not really credit transactions, from being avoided.[31]

To establish this defense, a defendant must demonstrate, by a preponderance of the evidence:

> (1) that new value was received in exchange for the transaction;
>
> (2) that the parties intended the transaction to be a contemporaneous exchange; and
>
> (3) that the transaction was, in fact, a substantially contemporaneous exchange. [32]

When considering each of these three elements, the Court notes distinctions between the benchmarks for the determination of the "exchanges" of 547(c) and the "antecedent debt" of 547(b). While "antecedent debt" focuses on when the debtor became "legally obligated to pay" (and therefore requires the court to look to the difference in time between the *creation of the binding obligation* and the transfer), the focus of a 547(c) "exchange" is on the time between *delivery* and the transfer.[33] While, due to a lack of evidence, there may be some dispute as to when Ames was obligated to pay Revere, there is no dispute that every payment preceded the delivery of the towels,

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[31] *See Gower v. Ford Motor Credit Co. (In re Davis)*, 734 F.2d 604, 606 (11th Cir. 1984).

[32] *See id.*

[33] *See, e.g.*, *HLI Creditor Trust*, 329 B.R. at 140, 141 (finding intent for a substantially contemporaneous exchange in the fact that "payment was due upon delivery of the machines," and finding "critical to the Court's analysis" of whether a substantially contemporaneous exchange occurred the "time between when the Debtors took possession of the machines and when the check was delivered," but finding that the debt *was* antecedent to the payment, as the obligation was incurred "on the day [the debtors] signed the purchase order for the machines").

and the exchanges occurred substantially contemporaneously. In fact, these transactions walked, talked and quacked like C.O.D. transactions; they easily satisfy the individual requirements for finding a 547(c) contemporaneous exchange.

*1. Receipt of New Value*

The first element that Revere must demonstrate for this exception is that the exchanges were made for new value given to the Debtor. "New value" is defined in section 547(a)(2) of the Code as "money or money's worth in goods, services, or new credit. . . ."[34] Here, for each transfer, Ames accepted delivery of the towels simultaneously with, or shortly after, wiring payment to Revere. Ames' estate was not diminished by the transfer, and Ames received new value in exchange for the payment. This element is met.

Ames nevertheless disputes this, on two grounds. Ames first argues that since delivery of the towels was merely performance under an asserted existing contract, the delivery of the towels would not constitute new value. Ames secondly argues that because of the $850,000 "markdown money," Revere was required to deliver $850,000 of towels even in the absence of any payment by Ames, and therefore Ames did not receive new value for its transfers. Neither argument is persuasive.

First, as the Court has noted, the Revised Program cannot be found to be an existing contract. Here, as the Court found, the Revised Towel Program was merely a master agreement between the parties, outlining a mechanism for towel purchases, forecasting probable purchases—rather than creating an obligation to purchase specific towels at specific times.

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[34] 11 U.S.C. § 547(a)(2).

Second, Ames' argument that Revere was obligated to deliver $850,000 worth of towels, regardless of payment, because it owed that much to Ames due to the markdown credit), is unpersuasive, because Ames' argument misstates the arrangement. The language of the Revised Program itself, and the testimony of the parties, make clear that Ames was entitled to use the markdown credit as payment for towels, but was not required to expend it, or any part of it, on the *first* $850,000 worth of towels,[35] nor was Ames required to purchase towels in that or any other amount. The existence of markdown credits did not oblige Revere to deliver, or Ames to buy, $850,000 worth of towels prior to the transaction.

Revere could not deliver towels to Ames and automatically deduct Ames' markdown credits. To use the $850,000 markdown credit, Ames was required to send a "payment" in the form of a document indicating the amount Ames wished deducted from its markdown credit.

Because Ames had complete discretion over when and to what degree it would use the credits to purchase towels from Revere, the expenditure of the credits was essentially the equivalent of the expenditure of cash.[36]

For these reasons, the Court regards Ames' reliance on *Gouveia v. RDI Group* (*In re Globe Bldg. Materials)*[37] to be misplaced. The *Globe Building Materials* agreement did not link the timing of payments to the delivery of goods. As the court there noted, "[t]he payment obligation was not tied to RDI's delivery of any specific system

35 Trial Tr. 50-54. (emphasis added).

36 *See, e.g., Montgomery v. Third National Bank in Nashville (In re Montgomery)*, 983 F.2d 1389, 1394, (6th Cir. 1993) (finding that credits given to a debtor by a bank were in "economic substance" the same as if the bank had handed the debtor "currency which he promptly handed back for application against his debt").

37 484 F.3d 946 (7th Cir. 2007) ("*Globe Building Materials*").

components. Instead, the initial contract obligated RDI to deliver parts as they became available . . ." and "the payment schedule and delivery schedule were not coordinated, and no payments were tied to specific deliveries."

A more apt comparison can be found in *Silverman Consulting, Inc. v. Canfor Wood Products Marketing* (*In re Payless Cashways, Inc.*), ("*Payless*"), in which the parties had negotiated an agreement under which the debtor would buy lumber as needed, and delivery was contingent on payment prior to, or at the time of, delivery. [38] The court in that case found that "the key issue [in making a "new value" determination] . . . is when did the contracts contemplate value would be given. Was it . . . when the goods were shipped, in which case . . . these were standard credit-type transactions . . . [o]r was it . . . when the goods were delivered, in which case these were essentially cash on delivery transactions."[39] In the case here, as in *Payless*, the shipping terms created a contract under which the transferee "retained title to, and control over, the goods until the goods were delivered."[40] Likewise, this was in substance a C.O.D. transaction, by which new value was given to Ames only after it transferred the funds to Revere.

As noted above, the Revised Program between Ames and Revere specifically tied payments to the delivery of shipments of towels, and the wire transfers corresponded directly with the invoices for specific orders. With each of these transactions, Revere delivered to Ames "new value" it was previously not obligated to deliver, and did so substantially contemporaneously with the transfer of payment.

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[38] *See* 306 B.R. 243, 246 (8th Cir. B.A.P. (Mo.) 2004).

[39] *Id.* at 253.

[40] *Id.* at 253-54; Def.'s Ex. D, May 21, 2001 Letter from Revere to Ames.

*2. Intended Contemporaneous Exchange*

The intent of the parties is a question of fact, and the burden is on Revere to demonstrate that the parties intended the wire transfers to be exchanged contemporaneously for the towels. Revere has done so.

Since testimony as to intent, after the fact, can be self serving and subject to legitimate question, courts often use circumstantial evidence to determine the intent of the parties.[41] For example, the court in *Payless* considered four circumstances significant in evaluating the intent of the parties for a contemporaneous exchange: first, that the parties had agreed that payment would be made by wired Electronic Fund Transfer, in order to address concerns about the debtor's ability to pay; second, that the parties had negotiated an agreement whereby payment would always be prior to or contemporaneous with delivery of the goods (in that case, lumber); third, that the contracts were all "destination contracts," FOB the facilities of the *debtor*; and finally, that in none of the transfers did the debtor receive the lumber prior to the time it wired the transfer payment.[42]

Here, strikingly similar evidence points overwhelmingly toward the conclusion that the parties intended the exchange to be contemporaneous, and this Court so finds. The Revised Program makes clear that "Ames agrees to wire all payments due to Revere prior to the release of possession for each container and/or PO # to Ames."[43] The affidavits and testimony of Aschenbrand, Ames' purchaser at the time, and Vanden

41 *See, e.g., Payless,* 306 B.R. at 249.

42 *See id.* at 250.

43 Def.'s Ex. D, May 21, 2001 Letter from Revere to Ames.

Berge, Revere's president at the time, confirm this understanding.[44] Their testimony is credible. Further, the towels were all delivered FOB New York,[45] making these "destination contracts," whereby Ames would not obtain possession or any ownership right in the towels until after Ames paid for them.[46] The fact that in each of the exchanges, the wire transfers preceded the delivery of the goods, and delivery took place within six days of the transfer, further buttresses this conclusion that these were contemporaneous exchanges.[47]

There is no countervailing testimony or evidence. The existence of a non-binding, overarching, master agreement specifying general terms for the repeated sale of goods over a period of time does not prevent the parties from intending that the individual "exchanges" thereunder be "contemporaneous."

Because the evidence demonstrates that the parties intended these transactions to be contemporaneous, Revere has established the second element of the 547(c)(1) defense.

*3. Actual Contemporaneous Exchange*

Finally, to succeed in its contemporaneous exchange defense, Revere must demonstrate that, regardless of the intent of the parties, the exchanges were, in fact, substantially contemporaneous. The record is clear on this point.

To be "substantially contemporaneous," an exchange need not be instantaneous. Courts have found exchanges to be substantially contemporaneous even when taking 7,

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44 Aschenbrand Aff. ¶¶ 14, 16; Vanden Berge Aff. ¶¶ 15, 16.

45 Def.'s Ex. D, May 21, 2001 Letter from Revere to Ames.

46 *See id*.

47 *See* Joint Pre-Trial Order ¶ 14.

or even 20, days to complete.[48] Rather than providing a bright line test, "contemporaneity is a flexible concept" requiring "a case-by-case inquiry" into the circumstances.[49] This inquiry examines a variety of relevant circumstances, including (1) "the length of delay, (2) the reason for the delay, (3) the nature of the transaction, (4) the intentions of the parties, and (5) the possible risk of fraud."[50]

Here, the goods were delivered relatively promptly after payment, and payment was specified for particular orders.[51] The longest period between payment and delivery was seven days, which this court finds to be a substantially contemporaneous exchange under these circumstances.[52] As discussed above, this payment and delivery mechanism was, in effect, a C.O.D. arrangement, which would be a paradigmatic example of a contemporaneous exchange.

Consequently, Revere has demonstrated that the exchange was for actual new value, was intended by the parties to be contemporaneous, and, in fact, was substantially contemporaneous. These elements having been shown, the wire transfers are subject to the contemporaneous exchange exception in 547(c)(1), and are thus not avoidable.

## II.

## The Check Transfers

Ames also asserts that two check transfers it made to Revere during the Preference Period were preferential transfers, and seeks to avoid and recover them. Here

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48 *See, e.g., Thompson v. McMaster (In re Fritz-Mair Mfg. Co.)*, 16 B.R. 417, 420 (Bankr. N.D. Tex., 1982); *Jahn v. First Tennessee Bank of Chattanooga (In re Burnette)*, 14 B.R. 795, 803 (Bankr. Tenn. 1981).

49 *See Lindquist v. Dorholt, In re Dornholt, Inc.*, 224 F.3d 871, 874 (8th Cir. 2000).

50 *See HLI Creditor Trust*, 329 B.R. at 140.

51 *See* Joint Pre-trial Order ¶¶ 6, 8-14.

52 *See* Vanden Berge Aff. ¶¶ 20-24.

the Court agrees, and holds that they should be avoided and that $61,843.60 should be returned to the debtor's estate.

Here Revere does not contest Ames' prima facie case that the check transfers were preferential, arguing instead that at least one of 547(c)'s exceptions apply. But Revere offers little support for its defenses. While there are bald assertions, in Revere's answer and in the pretrial order, that the checks were intended to be contemporaneous exchanges for new value, that payments were made in the ordinary course of business, and that Revere provided subsequent new value for the payments, these assertions are not supported by legal argument, or even by recitation of relevant facts. No 547(c)(1) "contemporaneous exchange" exception is available, because no evidence is offered as to the date of delivery of the goods in question. As such, it is impossible for the Court to determine the contemporaneity of the exchanges.

Nor is the ordinary course defense of section 547(c)(2) available. Although the Court can and does find that the debt to Revere was *incurred* in the ordinary course of business, this defense is nevertheless unavailable to Revere, as the facts clearly demonstrate that Ames broke with its ordinary business practices by retaining the checks and deciding who should and should not be paid, rather than mailing the checks as they were printed when payment became due. As a result, its payments were not *made* in the ordinary course of business, and no countervailing evidence has been provided demonstrating that Ames' actions conformed to "ordinary business terms."

Nor was there evidence of "new value" beyond the extent to which the parties separately agreed.

Thus, as none of the defenses have been shown to be applicable, the Court determines that the disputed amount of the check payments, totaling $61,843.60, is avoidable, and must be returned to the estate.

## Conclusion

For the reasons set forth above, this Court finds that the wire transfers from Ames to Revere are not avoidable transfers, as they were not payments for an antecedent debt, and were, in any event, contemporaneous exchanges. But Ames has made a prima facie case with respect to the check payments, and no defenses to that have been established. The check transfers are avoidable, and $61,843.60 must be returned to the estate.

Ames is to settle a judgment consistent with this ruling. The time to appeal from that judgment will run from the time of its entry, and not from the time of this decision.

Dated: New York, New York
June 10, 2010

***s/Robert E. Gerber***
United States Bankruptcy Judge