

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

FURRS,

Debtor.

No. 7-01-10779 SA

YVETTE J. GONZALES,

Plaintiff,

v.

Adv. No. 02-1091 S

NABISCO DIVISION OF KRAFT FOODS, INC.,

Defendant.

**MEMORANDUM OPINION ON
NEW VALUE/SUBSEQUENT ADVANCE DEFENSE**

This matter is before the Court on the parties' briefs regarding Defendant Nabisco's new value/subsequent advance defense. The parties have stipulated to the facts and filed briefs in support of their respective positions. Having reviewed the briefs and the cases cited therein, the Court finds that it should rule in favor of Nabisco on its new value/subsequent advance defense. This is a core proceeding.

FACTS

Debtor Furrs owned and operated supermarkets in New Mexico and Texas. Debtor filed a chapter 11 proceeding which was later converted to Chapter 7 and the Plaintiff in this case is the Chapter 7 trustee. The parties have stipulated that Nabisco received preferential transfers in excess of the amount addressed in this Memorandum Opinion.

Nabisco was a "DSD" (direct store delivery) vendor. DSD vendors delivered product to Furr's stores, as opposed to "warehouse" vendors, which shipped goods to the Furr's warehouse in El Paso, Texas for later distribution by Furr's.

When Nabisco delivered product to one of Furr's 71 stores pre-petition, it issued an invoice on the spot and gave the invoice to a Furr's employee at the store. The invoice information later was transmitted from the store to Furr's headquarters for processing and payment. The invoices Nabisco issued to each store were for payment of the Nabisco products delivered that day. As part of the normal course of the parties' business, the Nabisco delivery personnel from time to time would pick up Nabisco products from the Furr's stores that Nabisco had previously delivered. The picked up products were out of date, damaged in the store, overstocked, or something similar. When the Nabisco personnel picked up the products from a store, they gave a store employee a "credit memo" for the original invoice cost of the product. Thus, the parties' historical agreement and practice was that Nabisco would not charge Furr's for the returned products.

Nabisco issued about 2500 invoices and credit memos to Furr's during the preference period. The parties have not incurred the expense of recreating a detailed accounting of

each delivery invoice and returned credit memo. During the preference period, Nabisco picked up product and issued credit memos to Furrs in the total amount of \$90,180.74 and made total deliveries during the period of between \$1.26 and \$1.36 million. No credit memos were issued due to defective products. The amount and value of product returned to Nabisco during the preference period, compared to overall deliveries of product during that period, were consistent with the historical amount of product returns versus overall deliveries. The parties agree that the Court may assume that \$90,180.84 worth of products Nabisco delivered to Furrs during the preference period were returned to Nabisco, and that Nabisco did not charge Furrs for these products.

The Court will also assume 1) upon return, the products had no value, given that they were outdated, damaged in the store or were overstock; 2) the credit memos issued to Furrs were applied to subsequent invoices; and 3) that the deliveries and returns were spread evenly over the preference period. The Court also assumes that, as part of the ordinary course of the grocery business, grocery products become damaged in stores or go out of date; these overhead type items are a cost of doing business.

DISCUSSION

The parties have stipulated that there were preferential transfers, 11 U.S.C. § 547(b). The issue is application of the new value/subsequent advance defense of § 547(c)(4):

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

...

(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.

Plaintiff argues that the returned goods should be subtracted from the amount of goods delivered to determine the new value. Nabisco argues that the new value should be the total amount of goods delivered without any subtraction for returns. The obvious starting point is the statute itself:

"[N]ew 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.

11 U.S.C. § 547(a)(2). The statute, however, does not answer the question in this case; i.e., how to or whether to factor returned goods into the computation.

Plaintiff's first point is that Section 547(c)(4) requires a replenishment of the estate. There is no question

that Nabisco furnished at least \$1.2 million in product and that this replenished the estate.

Plaintiff next argues that the returned products did not replenish the estate and cannot be subsequent new value, citing Moglia v. American Psychological Ass'n (In re Login Bros. Book Co.), 294 B.R. 297, 300-01 (Bankr. N.D. Ill. 2003), Precision Masters, Inc. v. Wilson-Garner Co (In re Precision Masters, Inc.), 51 B.R. 258, 261 (Bankr. S.D. Ind. 1984) and Zeta Consumer Products Corp. v. Equistar Chemical, LP (In re Zeta Consumer Products Corp.), 291 B.R. 336, 357 (Bankr. D. N.J. 2003). Arguably these cases do stand for the proposition that a creditor does not advance subsequent new value and does not replenish an estate if the creditor delivers goods to a debtor but later gets them back. However, as Nabisco points out and the Court agrees, there is a critical difference when the returned goods have no value. The returns of the goods in the cited cases depleted the estates and preferentially favored the creditor-recipients of the goods. In this case the returned goods had no value at the time they were returned, did not deplete the Furr's estate, and did not preferentially benefit Nabisco.

The Court also disagrees with the Plaintiff's argument that the returned items had no value to the estate. In a

perfect world there may be no spoilage or shrinkage or aging of products, but in reality there always will be a decrease in saleable inventory due to these factors. And, in advance of the product becoming damaged or out of date, there is no way of determining which individual items will become worthless. There is no way Furrs could have ordered only products which would ultimately sell. Therefore, the products that eventually were returned did serve a purpose and have a value - they were the overhead that allowed there to be other grocery items on hand that did sell.

Plaintiff argues that Nabisco took into account the likelihood of returned product in the price that it charged Furrs for the product. That almost certainly was the case; one would expect that from any competent vendor. This is a bankruptcy code application, not a business school exercise. The simplified "accounting" system embodied in the preference statute does not require consideration of that more subtle cost-of-goods calculation.

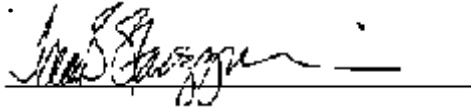
Plaintiff also argues that the fact that Nabisco did not charge for the returned goods shows that no new value was given. This is not supported by the facts. Nabisco charged for all goods delivered (including the goods which later were returned), but later issued credit memos when certain items

were returned. These credit memos were then used to pay future invoices. Therefore, the returned goods were originally paid for, but later exchanged for new inventory. If anything, these transactions benefitted the estate by exchanging inventory that had become valueless for new, valuable inventory at no cost to Furrs.

Nabisco argues that new value should be measured at the time of the transfer, not later, so that inventory which has value when delivered but later becomes valueless is treated as having value at the time of delivery. Nabisco cites Kenan v. Fort Worth Pipe Co. (In re George Rodman, Inc.), 792 F.2d 125, 128 (10th Cir. 1986), Spears v. Michigan Nat'l Bank (In re Allen), 888 F.2d 1299, 1302 (10th Cir. 1989), Jet Florida, Inc. v. American Airlines, Inc. (In re Jet Florida Systems, Inc.), 861 F.2d 1555, 1559 n. 5 (11th Cir. 1988), Sulmeyer v. Pacific Suzuki (In re Grand Chevrolet, Inc.), 25 F.3d 728, 733-34 (9th Cir. 1994); Janas v. Marco Crane & Rigging Co. (In re JWJ Contracting Co., Inc.), 287 B.R. 501, 507 (9th Cir. B.A.P. 2002), and Lowrey v. U.P.G., Inc (In re Robinson Bros. Drilling, Inc.), 877 F.2d 32, 33 (10th Cir. 1989). While these cases interpret Section 547(c)(1), both subsections (c)(1) and (c)(4) revolve around "new value" and cases interpreting (c)(1) should be instructive. These cases together hold that

"new value" is measured at the time of transfer, not at some later date. That would be particularly the case in which the loss of value occurred after delivery because of, for example, damage to the product from Furr's employees or customers, or Furr's failure to timely sell the product. The Court agrees with Nabisco.

For the reasons set forth above, the Court concludes that Nabisco need not deduct the \$90,180.74 from the amount it claims as a subsequent new value amount. The parties have reached a settlement of the remaining claims but have not yet submitted a judgment. They should incorporate the results of this opinion in that judgment.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 22, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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