IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
UNITED TAX GROUP, LLC,	)	Case No. 14-10486 (LSS)
	)	
Debtor.	)	
	)	
George L. Miller, Chapter 7 Trustee,	)	
	)	
Plaintiff,	)	Adv. Proc. No. 16-50088 (LSS)
	)	
v.	)	
	)	Re: Docket. No. 73
Edward Welke	)	
	)	
and	)	
	)	
John Does 1- 100	)	
	)	
Defendants.	)	

OPINION

This is a preference action. For the reasons set forth below, summary judgment is granted in favor of Defendant.

Procedural Posture

United Tax Group, LLC filed a voluntary bankruptcy petition on March 5, 2014. On April 27, 2018, George L. Miller, as chapter 7 trustee ("Trustee" or "Plaintiff") filed his Second Amended Complaint against Edward Welke and John Does 1 – 100.[1] On May 17,

[1] D.I. 52. This is one of many lawsuits between Trustee and SWZ Financial II, LLC ("SWZ") or someone affiliated in some way with SWZ. Further history of this particular lawsuit can be found in (i) the Mem. Op., D.I. 22 and (ii) the Mem. Order Granting Cross-Mot. to Amend and Denying Mot. to Dismiss, D.I. 51

2018, Defendant Welke filed his Answer and Affirmative Defenses to the Second Amended Complaint.[2] Plaintiff has not named any John Does. Mediation was not successful.

On March 31, 2020, Defendant filed his Motion for Summary Judgment[3] together with his Opening Brief[4] in support thereof and supporting exhibits, including the Welke Affidavit[5] and the Sabella Affidavit.[6] Plaintiff filed his Answering Brief[7] on March 23, 2020, including Trustee's Declaration.[8] Defendant's Reply Brief[9] with further exhibits was filed on April 10, 2020.

Jurisdiction

Jurisdiction exists over this adversary proceeding pursuant to 28 U.S.C. § 1334 and this is an enumerated core proceeding in 28 U.S.C. § 157(b)(2)(F). I may enter a final order on this matter which arises under the United States Bankruptcy Code.[10]

Findings of Fact

There are no material facts in dispute. United Tax was in the tax resolution business. At varying times from January, 2011 through November 13, 2013, Debtor had three

---

[2] D.I. 54.

[3] D.I. 73

[4] Opening Br. in Supp. of Def.'s Mot. for Summ. J. ("Opening Brief"), D.I. 73-1

[5] Opening Brief Ex. D (Welke Aff.), D.I. 73-5.

[6] Opening Brief Ex. C (Sabella Aff.), D.I. 73-5.

[7] Br. in Resp. to Def.'s Mot. for Summ. J. ("Answering Brief"), D.I. 76.

[8] Decl. in Supp. of Answering Br. ("Miller Decl."), D.I. 76-3.

[9] Reply Br. in Supp. of Mot. for Summ. J. ("Reply Brief"), D.I. 78.

[10] Defendant Welke has filed a proof of claim. Accordingly, the preference litigation is part of the claims allowance process. *Katchen v. Landy*, 382 U.S. 323, 330-31, 335 (1966).

business credit card accounts "(Accounts") with American Express ("American Express" or AmEx") as follows:[11]

Type of Account/No.	Statement Dates	Statement Issued to	Mailing Address
SimplyCash Business Credit Card account ending 7-12007	January 20, 2011 through January 20, 2013[12]	United Tax Group Ward Welke	Ward Welke United Tax Group 675 W Indiantown Rd, Ste 201 Jupiter FL 33284-7556
Business Gold Rewards account ending 5-51003	July 12, 2012 through December 12, 2012[13]	United Tax Group Ward Welke	Ward Welke United Tax Group 253 Marlberry Cir. Jupiter FL 33458-2849
Business Gold Rewards account ending 5-52001	January 11, 2013 to November 11, 2013[14]	United Tax Group Ward Welke	Ward Welke United Tax Group 253 Marlberry Cir. Jupiter FL 33458-2849

American Express does not permit a business to open an account without a named individual serving as the "Basic Cardmember."[15] If the current Basic Cardmember is no longer associated with the company or no longer wants to be the Basic Cardmember, then the AmEx account must be closed or the company must propose another person to replace the Basic Cardmember.[16] Welke opened each of the Accounts in Debtor's[17] name and was the sole Basic Cardmember at all relevant times.[18]

---

[11] *See generally* Opening Brief Exs. A, B, D.I. 73-2, 74-3–4. Exhibit B is spread across two docket entries, so for simplicity's sake I will refer to the Bates stamps on the exhibit.

[12] Opening Brief Ex. B, at Welke000019–000270.

[13] *Id.* at Welke000271–000334.

[14] *Id.* at Welke000335–000434.

[15] Welke Aff. ¶ 4; Opening Brief Ex. A, at 212. In the Welke Affidavit, Welke uses the nomenclature "Basic Cardholder." The Cardmember Agreements use the nomenclature "Basic Cardmember." I will use the term Basic Cardmember.

[16] Opening Brief Ex. A, at 212.

[17] Welke Aff. ¶ 3.

[18] *Id.* ¶ 4.

Debtor used the Accounts to purchase, on credit, normal business items, most notably customer leads.[19] All of the charges on the Accounts were for goods and services used by Debtor in its business operations.[20] American Express billed monthly for the charges incurred on the Accounts.

Between March 11, 2013 and October 1, 2013 (the preference period),[21] Debtor made twenty-three payments totaling $250,328.91 (the "Transfers") to American Express on the Accounts,[22] as follows:

Date	Amount
03/11/2013	$10,000.00
03/15/2013	$10,000.00
03/22/2013	$15,000.00
04/01/2013	$25,000.00
04/15/2013	$10,000.00
04/16/2013	$15,000.00
04/24/2013	$15,000.00
04/30/2013	$20,000.00
05/10/2013	$ 5,000.00
05/17/2013	$ 7,000.00
05/22/2013	$15,000.00
06/04/2013	$15,000.00
06/11/2013	$10,000.00
06/17/2013	$10,000.00
07/17/2013	$28,898.73
07/17/2013	$10,000.00
07/24/2013	$10,000.00
07/29/2013	$ 5,789.34

[19] *Id.* ¶ 5.

[20] *Id.*

[21] Trustee asserts that Welke is an insider and so a one-year preference period is appropriate. Welke does not contest the length of the preference period in the Motion for Summary Judgment.

[22] Trustee also sought to avoid an additional $2,500 transfer made on 9/13/2013 and a $2,500 transfer made on 10/1/2013. In his Opening Brief, Defendant asserts that the second 9/13/2013 transfer is duplicative and that there is no evidence of a $2,500 payment on 10/1/2013. Opening Brief 3–4. In support, Defendant points to the AmEx statements attached as Exhibits A and B to the Opening Brief. Plaintiff does not respond to these contentions or point to any contrary facts.

08/09/2013	$ 3,500.00
08/23/2013	$ 3,500.00
08/27/2013	$ 2,500.00
09/13/2013	$ 2,500.00
09/23/2013	$ 1,640.84

Additionally, on July 26, 2014, Allerand, LLC or an affiliate of Allerand LLC (collectively, "Allerand") made a payment of $20,000 to AmEx on the then-current Account, and on September 19, 2014, Allerand made a payment of $16,903.48 to AmEx on the then-current Account.[23] Both of these payments were made on behalf of and for the benefit of Welke.[24]

Legal Standard

On a motion for summary judgment under Federal Rule of Civil Procedure 56(c), as made applicable to bankruptcy proceedings through Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is granted only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Material facts are those that might affect the outcome of the litigation. A movant must support his motion by citing to particular parts of the record, including documents, affidavits or declarations, admissions and interrogatory answers.[25]

"Once the movant presents sufficient proof in support of the motion, the burden shifts to the nonmoving party to show "'genuine issues of material fact still exist and that summary judgment is not appropriate.'"[26] Unsubstantiated allegations are not enough. A

[23] Sabella Aff. ¶¶ 3–4.

[24] *Id.*

[25] Fed. R. Civ. P. 56(c)(1).

[26] *In re Powerwave Technologies, Inc.*, 2017 WL 1373252 (Bankr. D. Del. April 13, 2017) (citing *Miller v. JNJ Logistics, LLC (In re Proliance Int'l Inc.)*, 514 B.R. 426, 429 (Bankr. D. Del. 2014)).

party asserting that a fact is genuinely disputed must also support his position by competent evidence.[27] "There must be sufficient evidence upon which a reasonable trier of fact could return a verdict in favor of the nonmoving party."[28]

As for preference actions specifically, § 547(g) provides that the trustee bears the burden of proof on the elements of an avoidable transfer enumerated in §547(b) while the defendant bears the burden of proof on the defenses enumerated in §547(c).

Parties' Arguments

Defendant asserts that the ordinary course of business defense shields all Transfers from avoidance. As part of the defense, Defendant compares the AmEx invoice date to the date of Debtor's payment during the pre-preference period ("Historical Period") as well as the same range for the Transfers. Alternatively, Defendant contends that all but $3,706.97 of the Transfers are protected by the subsequent new value defense. Finally, Defendant asserts that Plaintiff cannot show insolvency during the relevant period.

Plaintiff counters that Defendant's methodology for determining ordinary course is flawed and creates factual disputes. Trustee also contends that the new value defense is not available to Defendant because: (i) Welke did not provide new value to Debtor, (ii) there is no evidence that the charges on the AmEx account benefitted Debtor and (iii) Welke cannot claim subsequent new value for paid new value. Finally, Plaintiff contends that Defendant

---

[27] Fed. R. Civ. P. 56(c)(2).

[28] *Powerwave*, 2017 WL 1373252, at *2 (citing *Miller v. Westfield Steel, Inc. (In re Elrod Holdings Corp.)*, 426 B.R. 106, 109 (Bankr. D. Del. 2010)).

misconstrues Plaintiff's expert report thereby demonstrating genuine issues of material fact that preclude summary judgment.[29]

Discussion

Section 547 serves two purposes:

> On the one hand the preference rule aims to ensure that creditors are treated equitably, both by deterring the failing debtor from treating preferentially its most obstreperous or demanding creditors in an effort to stave off a hard ride into bankruptcy, and by discouraging the creditors from racing to dismember the debtor. On the other hand, the ordinary course exception to the preference rule is formulated to induce creditors to continue dealings with a distressed debtor so as to kindle its chances of survival without a costly detour, or a humbling ending in, the sticky web of bankruptcy. *In re Molded Acoustical Prods., Inc.*, 18 F.3d 217, 219 (3d Cir. 1994). Thus the court's general inquiry in these preference cases is to determine whether the payments to a creditor made in the 90 days preceding a filing for bankruptcy were in response to a zealous creditor's attempt to collect on a debt through preferential treatment ahead of other creditors, or an attempt by the debtor to maintain normal business practices in hope of staving off bankruptcy.[30]

Defendant's primary arguments are that he has defenses to the alleged preferential Transfers, so I will start there.

A. The Ordinary Course of Business Defense Shields all Transfers from Avoidance

Section 547(c)(2) provides:

> The Trustee may not avoid under this section a transfer—(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—
>
> (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
> (B) made according to ordinary business terms.

Defendant argues that the Transfers were payment of debt incurred by Debtor in the ordinary business affairs of Debtor and AmEx and that the Transfers were made in the

---

[29] There is also an underlying current that somehow Debtor was paying Welke's bill and that Debtor itself had no obligation to AmEx. There is no evidence supporting this proposition.

[30] *In re Glob. Tissue L.L.C.*, 106 F. App'x 99, 102 (3d Cir. 2004).

ordinary course of business between the two. As such, Defendant does not rely on industry standards; rather, he argues that he meets the subjective test.[31]

The subjective test looks for "normal payment practices between the parties."[32] Courts look at various factors, with no one factor being dispositive.[33] Those factors include: "(1) the length of time the parties engage in the type of dealings at issue; (2) whether the subject transfers were in an amount more than usually paid; (3) whether payments at issue were tendered in a manner different than from previous payments; (4) whether there appears to have been an unusual action by the debtor or other creditor to collect on or pay the debt; and (5) whether the creditor did anything to gain an advantage (such as additional security) in light of the debtor's deteriorating condition."[34]

The parties took different approaches to the subjective test. Defendant performed a "pure range analysis." He compared the time between the invoice date and payment date for the Historical Period to the same dates for the Transfers during the preference period. Performing that analysis using all three Accounts, Defendant determined a range of -23 to 70 days for the Historical Period and a preference period range of -1 to 51 days. Defendant concludes that all alleged preferential payments were made within the ordinary course as all Transfers fall cleanly within the range of payments in the Historical Period.

---

[31] *Powerwave*, 2017 WL 1373252, at *3; *In re FBI Wind Down, Inc.*, 581 B.R. 116, 138–39 (Bankr. D. Del. 2018).

[32] *FBI Wind Down*, 581 B.R. 138-29.

[33] *In re Managed Storage Int'l, Inc.*, No. 09-10368 (MWF), 2020 WL 1532390, at *8 (D. Del. Mar. 31, 2020) (citing *Burtch v. Revchem Composites, Inc.*, 463 B.R. 302, 306 (Bankr. D. Del. 2010)).

[34] *FBI Wind Down*, 581 B.R. at 139.

Plaintiff has a multi-pronged response. Plaintiff first argues that genuine issues of fact exist with respect to whether the debtor or creditor engaged in any unusual collection or payment activity and the circumstances under which payments were made. But, Plaintiff does not elaborate on these contentions. Plaintiff puts forth no evidence of unusual collection activity or change in Debtor's payment habits. Rather, this argument appears to be Trustee's usual refrain that both Welke and Sabella have credibility issues and therefore a trial is *per se* necessary.[35] Defendant responds with a full-throated defense of Welke and Sabella.

As Plaintiff concedes, the ordinary course and new value analysis is partly a mathematical exercise. I conclude that even if any general credibility issues exist, they do not impact the aspects of the new value and ordinary course analysis that are driven by hard facts—dates of payments, due dates and review of credit card statements. Defendant has submitted all AmEx statements from which this information is gleaned. And, Trustee has put forth no facts—much less credible facts—that contradict this element of the analysis. It is also telling that Trustee did not sue American Express to recover the Transfers.

Plaintiff next argues that Defendant incorrectly includes all three Accounts in its ordinary course analysis. Plaintiff argues that the three Accounts are different as Account 7-12007 "appears" to have had a lower credit limit with a revolving balance while Accounts 5-10003 and 5-20001 required the entire monthly balance to be paid each month. From this, Plaintiff contends that Account 7-12007 should be excluded from any ordinary course analysis. Defendant responds that Debtor essentially had one business credit card account

[35] Answering Brief 7.

at a time and that there are only a few months of overlap while Debtor was transitioning from Account 7-12007 to Account 5-10003. Defendant argues that he was the Basic Cardmember on all Accounts and that all Accounts were used to pay Debtor's business expenses. Defendant also argues that, notwithstanding any terms requiring payment of the balance in full at the end of the month, Debtor did not pay off any of the Accounts on a monthly basis and always carried a forward balance.

I conclude that it is appropriate to include the payment history of all three Accounts in the ordinary course analysis. The Accounts reflect the entire history of the relationship between Debtor and AmEx. Debtor used the AmEx Accounts to pay for its business expenses. Those expenses include marketing leads from Google Inc, mailing expense to USPS and Federal Express, and charges to Staples and Office Depot.[36] Welke was the Basic Cardmember on each Account. As reflected in the AmEx statements, Defendant is correct that Debtor had one AmEx Account at a time; the statements reflect that the minimal overlap was a transition period. And, Debtor carried balances forward each month and made multiple payments in each month. Any differences between Account 7-12007 and the other two Accounts are immaterial to the question of the payment history.

Plaintiff next challenges the use of a range of payments analysis as inappropriate. Citing two out-of-district cases, Trustee argues that this type of analysis has been rejected by bankruptcy courts in traditional supplier-customer matters. The reasoning employed by these courts is that the total range methodology "invariably captures outlying payments that

[36] Plaintiff submitted no evidence that charges were for anything other than office expenses. Miller's statement in his Declaration that "In response to the discovery requests, Welke did not provide documents memorializing the expenses paid on the credit card statements which are appended as exhibits to the Motion" does not create a disputed material fact.

'skew the analysis of what is ordinary.'"[37] Defendant counters that courts in this district regularly use the pure range analysis.[38]

Defendant is correct. The pure range analysis is regularly used in this district and is an acceptable methodology for an ordinary course analysis in appropriate circumstances.[39] As collected in *Powerwave*, courts have found the following historical period ranges to be acceptable in a range analysis:

Case	**Range in historical period**[40]
American Home Mortgage	7 to 67 days after invoice date
Elrod Holdings	35 to 73 days after the invoice date
JLS Chem	0 to 33 days from the invoice date
Bridge Associates	65 to 168 days and 45 to 135 days from the invoice date
Brothers Gourmet	0 to 31 days after the due date
H.L. Hansen Lumber	outer limit of 74 days after invoice date
Homes of Port Charlotte	28 to 76 days after invoice date

What the *Powerwave* Court found unacceptable was a range in the Historical Period of 34 to 371 days.

---

[37] Answering Brief 10 (citing *Davis v. R.A. Brooks Trucking, Co., Inc. (In re Quebecor World (USA), Inc.)*, 491 B.R. 379 (Bankr. S.D.N.Y. 2013); *Moltech Power Systems, Inc. v. Tooh Dineh (In re Moltech Power Systems, Inc.,)*, 327 B.R. 675, 681 (Bankr. N.D. Fla. 2005)).

[38] Reply Brief 7 (citing *In re Managed Storage Int'l, Inc.*, 601 B.R. 261 (Bankr. D. Del. 2019); *FBI Wind Down*, 581 B.R. 116; *In re Am. Home Mortg. Holdings, Inc.*, 476 B.R. 124 (Bankr. D. Del. 2012); *In re Brothers Gourmet Coffees, Inc.*, 271 B.R. 456 (Bankr. D. Del. 2002).

[39] *Powerwave*, 2017 WL 1373252, at *6 (analyzing range method, batch method, dollar-weighted average days sales outstanding method, and inter-quartile range method and stating: "[t]here is no set mathematical formula to determine whether preferential payments were made in the ordinary course. Rather, courts may consider a variety of mathematical formulas when deciding the consistency among payments."); *Managed Storage Int'l*, 2020 WL 1532390, at *7 (citing *FBI Wind Down*, 581 B.R. at 141; *Am. Home Mortg.*, 476 B.R. at 138) ("The Bankruptcy Court's consideration of a payment range rather than an average is well-supported by Third Circuit law, as noted above [referencing *Glob. Tissue*, 106 F. App'x at 102].").

[40] *See also FBI Wind Down*, 581 B.R. at 141-142 (liquidating trustee not contesting that acceptable ranges are 28 to 104 days from invoice date and 6 to 132 days from invoice date).

While perhaps on the broader side of certain of the above ranges, a range of -23 to 70 days from invoice date is acceptable for a pure range analysis. Further, if the one outlier payment of 70 days from invoice date is removed from the Historical Period (to solve the ill certain courts have noted), the range is -23 to 55 days. In either circumstance, the range from invoice date to payment date during the preference period is -1 to 51 days and all Transfers fall within the range for the Historical Period. Thus, if I were to adopt this methodology, all Transfers would be protected by the ordinary course of business defense.

Finally, Plaintiff does his own ordinary course mathematical analysis. Using only the two Business Gold Rewards Accounts, Trustee calculates an average days to pay of -5 with an 11 day standard deviation to compute a range of -16 days to 5 days for the Historical Period. Employing this analysis, Plaintiff states that only five Transfers totaling $44,500 are protected by the ordinary course of business defense and the remaining Transfers totaling $217,414.46 are avoidable. Defendant responds that reliance on this average payment analysis distorts the payment activity, but in any event, if the entire Historical Period is used, the Trustee's analysis would yield an average of 12 days with a standard deviation of 21.63 or a range of -9.62 days to 33.64 days. Calculating exposure using this analysis reduces Defendant's preference exposure to $72,125.12. Further, Defendant argues that excluding two additional Transfers paid within 34 and 35 days of invoice reduces Defendant's exposure further to $38,898.73. Defendant justifies excluding these additional transfers because they are not significantly outside the bounds of the result reached with the Trustee's methodology.

I have already concluded that it is appropriate to include all three Accounts in the ordinary course analysis, so if I were to adopt Plaintiff's methodology, I would use

Defendant's calculations including his conclusion with respect to the two additional transfers falling just outside the calculated range.[41] Thus, I would find that Defendant's maximum exposure under the ordinary course analysis is $38,898.73.

Neither party discussed how a court should choose between different methodologies when examining the mathematical portion of the ordinary course of business analysis. Both methods are valid, but yield different results—or more correctly, yield different information. Given the dual purpose of the statute as enumerated at the outset of this discussion, I see no reason to choose a methodology. Looking at the payments themselves, both parties' suggested methodologies and the information gleaned therefrom, their respective arguments and all of the other factors that courts consider in light of the purpose of the statute, I conclude that the Transfers were in the ordinary course of business between Debtor and AmEx and according to ordinary business terms. The Transfers are sufficiently similar to payments made in the Historical Period. In both periods, Debtor made multiple payments per monthly invoice, payments were made in specific amounts (i.e. $1,825.32) or in rounded amounts (i.e. $2,000), payments were made both before and after the due date and a balance was carried over almost every month. Moreover, Trustee has submitted no evidence to support even an inference that payments were tendered in a different manner during the preference period than they were in the Historical Period, that there was any unusual

[41] *See, e.g., Am. Home Mortg.*, 476 B.R. at 138 (citing to *Elrod Holdings* for the proposition that payments made just outside the range of payments in the pre-preference period can still be made within the ordinary course.)

collection action or that Welke (or American Express) did anything to gain an advantage to obtain payments.[42]

The ordinary course of business defense is factual in nature, but there are no facts in dispute here. Rather, I have applied the law to the undisputed facts supplied by Defendant through competent evidence. Summary judgment is granted.

B. The New Value Defense Shields All but $3,706.97 from Avoidance

For the sake of completeness, I will also address Defendant's new value analysis. Defendant argues that he has a complete new value defense for all Transfers except for the Transfer on 9/13/2013 in the amount of $2,500 which is only partially protected by subsequent new value and the 9/20/2013 Transfer in the amount of $1,640.48 which is wholly unprotected, for a total preference exposure of $3,706.97. Defendant attaches his analysis as Exhibit G to the Opening Brief. It is a standard analysis detailing, by monthly statement, payments made to American Express and purchases made by Debtor.

Plaintiff does not challenge the actual new value calculation. Rather, he makes the following arguments: (i) Welke, himself, provided no new value to Debtor; (ii) Defendant provided no evidence that the purchases made by Debtor and charged to the AmEx Accounts benefitted Debtor and (iii) any new value provided must "remain unpaid" under the Third Circuit's *New York City Shoes*[43] decision. None of these arguments prevail.

---

[42] *See In re LMCHH PCP, LLC*, 2020 WL 3702889, at *2 (Bankr. E.D. La. July 6, 2020) (listing four factors courts use when considering ordinary course of business defense).

[43] *See In re New York City Shoes, Inc.*, 880 F.2d 679, 680 (3d Cir. 1989).

(i) *Welke Provided New Value or is Entitled to the Benefit of New Value Provided by American Express*

For purposes of a preference analysis, "new value" is defined as "money or money's worth in goods, services, or new credit."[44] Defendant argues that he provided new value in one of two ways. Defendant argues that he extended new credit to Debtor by continuing to serve as the Basic Cardmember on the Accounts. Welke argues that this accommodation to the Debtor permitted the acquisition and continued use of the Accounts, without which Debtor would not have had the use of the Accounts to pay for its operating expenses. Welke also equates his continued accommodation to a guarantor or an extension of credit to Debtor.[45] In response, Plaintiff argues that Welke is not American Express and did not extend any credit to Debtor. He also argues that Welke's status as co-obligor does not constitute new value as he is not like an institutional bank.

In *Kumar Bavishi*,[46] the Third Circuit looked at the meaning of new value in the context of the contemporaneous exchange defense to a preference action. There, debtor, a limited partnership, required $200,000 in funding for operating expenses. The lending institution was unwilling to lend without the personal guarantee of the limited partners. While under no legal obligation to do so, the limited partners provided their personal guarantees. One of the limited partners insisted that the limited partnership agree to pay off a portion of the partnership's existing debt as a condition to providing his guarantee. The

---

[44] 11 U.S.C. § 547(a)(2).

[45] Welke also asserts he is entitled to the benefit of the two payments by Allerand to AmEx. Trustee does not challenge this contention. In any event, the evidence is uncontroverted that Allerand paid these amounts to AmEx for the benefit of Welke. Accordingly, these payments constitute new value.

[46] *In re Kumar Bavishi & Assocs.*, 906 F.2d 942 (3d Cir. 1990).

partnership did so and that payment, of $33,000, was subsequently challenged by the trustee in bankruptcy as a preference.

The Third Circuit framed the question before it as: "whether executing a personal guarantee to a lending institution, to enable the debtor to obtain additional credit which it would not otherwise have been accorded, qualifies as money or money's worth in goods, services or new credit with the meaning of section 547(a)(2), such that a contemporaneous exchange for new value took place as required by section 547(c)(1)."[47] And, it answered the question "yes." In doing so, the Court was unwilling to "fracture" the transaction into separate and distinct pieces (lending, guarantee, retirement of existing debt), but rather looked at "the brute facts of financial life in this transaction." The financial reality was that the financial institution would not lend without the personal guarantee, which was new value. The Court also cited with approval the analysis in *Sider Ventures*,[48] which concluded that a guarantor provides new value when it causes the lender to provide new money to a debtor:

> Elemental fairness requires that guarantors be treated consistently so that if they are charged with the burden of the principal debtor's payments to the creditor they can assert those same transactions to their benefit for the purpose of establishing new value in an appropriate case.

---

[47] *Id.* at 945. The limited partner also argued that $40,000 he paid the lending institution postpetition on account of his guarantee of the $200,000 loan was new value. The Third Circuit did not address this separate defense as the allegedly preferential transfer was completely shielded by the contemporaneous value defense.

[48] *In re Sider Ventures & Servs. Corp.*, 33 B.R. 708, 712 (Bankr. S.D.N.Y. 1983), *aff'd*, 47 B.R. 406 (S.D.N.Y. 1985).

The same analysis applies here. In order for Debtor to open and maintain an account with American Express, Debtor was required to provide a Basic Cardmember.[49] By opening the Accounts and continuing to be the Basic Cardmember on the Accounts, Welke enabled Debtor's ability to purchase new goods and services. Like the limited partners' personal guarantee in *Kumar Bavishi*, Welke's agreement to be—and continue to be—the Basic Cardmember enabled Debtor to obtain additional credit which it would not otherwise have been accorded. And, as in *Sider Ventures*, "elemental fairness" requires that Welke be able to use American Express' extension of further credit to Debtor for his benefit in establishing new value. For either or both of these reasons, I conclude that Welke provided new value to Debtor.[50]

(ii) *Benefit to Debtor is not an Element of the New Value Defense to a Preference Action*

Plaintiff also argues that Defendant provided no evidence that the purchases made by Debtor and charged to the AmEx Accounts benefitted Debtor. The only evidence before me is that the charges on the Accounts were for goods and services used by Debtor in its operations; there is not a scintilla of evidence to the contrary.[51] Further, Trustee cites no

---

[49] *See, e.g.*, Opening Brief Ex. A, at 212 ("You must tell us if the Basic Cardmember is no longer an employee or officer of the Company or does not want to the Basic Cardmember. In that case, you must either close the Account, or propose another person to replace the Basic Cardmember.").

[50] *See Stoebner v. San Diego Gas & Elec. Co. (In re LGI Energy Sols., Inc.)*, 746 F.3d 350, 353–56 (8th Cir. 2014) (analyzing tri-party relationship in connection with new value defense).

[51] Defendant submitted as exhibits the AmEx monthly statements as well as the Welke Affidavit. Trustee complains that Welke did not submit the underlying documentation for each charge (presumably, each receipt received for a purchase). Answering Brief 12-13. That documentation is not required. Trustee also argues that Welke, together with other defendants in a separate adversary proceeding, stripped Debtor of assets it presumably purchased on the Accounts. *Id.* This sounds more in fraudulent conveyance or some other cause of action. In any event, allegations in other actions do not strip Welke of his new value defense.

authority for the proposition that the goods purchased with credit obtained must have benefitted Debtor in order for a defendant to assert a valid new value defense.[52]

(iii) *New Value Need Not Remain Unpaid*

Finally, Trustee argues based on *New York City Shoes* and *Winstar Communications*,[53] that in the Third Circuit any new value provided to Debtor must remain unpaid. In *New York City Shoes*, the Third Circuit stated:

> The three requirements of section 547(c)(4) are well established. First, the creditor must have received a transfer that is otherwise voidable as a preference under § 547(b). Second, *after* receiving the preferential transfer, the preferred creditor must advance "new value" to the debtor on an unsecured basis. *Third, the debtor must not have fully compensated the creditor for the "new value" as of the date that it filed its bankruptcy petition. See In re Almarc Manufacturing, Inc.*, 62 B.R. 684, 686 (Bankr.N.D.Ill.1986). If a creditor satisfies these elements, it is entitled to set off the amount of the "new value" which remains unpaid on the date of the petition against the amount which the creditor is required to return to the trustee on account of the preferential transfer it received. *Id.*[54]

As Defendant points out, in making this argument Trustee ignores both *Friedman's*,[55] a subsequent Third Circuit decision, in which the Court concludes that a portion of the italicized sentence is *dicta*, and subsequent opinions from this court concluding that the entire italicized sentence is *dicta* and that new value need not remain unpaid.[56] I agree with the previous opinions of this court. There is nothing in the statute that speaks to "unpaid"

---

[52] This argument also sounds more in constructive fraudulent conveyance, a count that the Trustee originally filed, but later withdrew when required to replead.

[53] *In re Winstar Commc'ns, Inc.*, 554 F.3d 382 (3d Cir. 2009).

[54] *New York City Shoes*, 880 F.2d at 680.

[55] *In re Friedman's Inc.*, 738 F.3d 547, 552 (3d Cir. 2013).

[56] *Proliance*, 514 B.R. at 432–33 (collecting cases); *Powerwave*, 2017 WL 1373252, at *9 (collecting cases).

new value; rather, this nomenclature is a shorthand way of referring to the new value defense.[57]

Section 547(c) provides that the trustee may not avoid a transfer which satisfies the requisites of § 547(b) to the extent that after such transfer, new value was given "on account of which new value the debtor did not make an otherwise unavoidable transfer." This requires a two-step analysis. One, was new value provided after the transfer (i.e. a subsequent advance) and two, did the debtor repay the new value with an otherwise unavoidable transfer? The first step is usually easy. It requires simply the recognition of a subsequent advance. So, for example, in the typical debtor-vendor relationship with a running account, did the vendor ship more goods or extend more credit after the allegedly preferential transfer? Here, American Express and Welke provided new value by the extension of new credit each time Debtor made a purchase.

The second step takes more thought. Having recognized new value, step two requires a deduct form that new value to the extent it was repaid by a transfer that, itself, cannot be avoided. So, for example, in a new value analysis of multiple transfers, if one of the transfers is shielded from avoidance by the ordinary course of business defense, then: (i) that transfer is excluded from the subsequent advance analysis (because a defendant need only have one defense to avoidance) and (ii) any new value that this transfer repaid cannot be applied in the subsequent advance calculation. In essence, the otherwise protected transfer and any new value it repaid are a wash (i.e., they net out of the subsequent advance analysis). Because of this, several courts have recognized that non-new value defenses (e.g.

---

[57] *See, e.g., In re Check Reporting Services, Inc.*, 140 B.R. 425, 440 (Bankr. W.D. Mich. 1992) (tracing history of "remains unpaid" line of cases.)

ordinary course of business, contemporaneous exchange of value) should be determined first before performing a new value analysis.[58]

As applied here, the subsequent advance calculation yields the same result under any scenario. Defendant's calculation, which ignores any other defenses, shields all but $3,706.97. If Plaintiff's ordinary course analysis is applied, it too, shields all but $3,706.97.[59] Accordingly, even if I am wrong in concluding that all Transfers are shielded by the ordinary course of payment defense, I would grant partial summary judgment in favor of Defendant based on the subsequent advance analysis thereby limiting Defendant's exposure on the Transfers to $3,706.97.

C. Insolvency

Defendant also argues that he should be granted summary judgment because Trustee has not proven that Debtor was insolvent at the time of each transfer and so cannot make his *prima facie* case. Defendant points out alleged inconsistencies in the Brownstein Report (which was made for a separate adversary proceeding in which Debtor's value at foreclosure is a main point of contention) and argues that the Court "cannot both accept his valuation and insolvency opinion because the insolvency opinion excludes assets included in Brownstein's valuation."[60] Defendant also argues that Brownstein fails to value taxpayer

---

[58] *Powerwave*, 2017 WL 1373252, at *9 (denying summary judgment on new value defense until ordinary course of business defense is determined) (citing *Wahoski v. Am. & Efrid, Inc. (In re Pillowtex Corp.)*, 416 B.R. 123, 131 (Bankr. D. Del. 2009)). Alternatively, one court has suggested that a defendant may be able to waive all defenses other than § 547(c)(4). *See Check Reporting Services*, 140 B.R. at 440.

[59] In deducting from the new value, I applied the subsequent transfers to the oldest charges made on the applicable Account in the previous billing cycle.

[60] Opening Brief 14.

contracts for purposes of revenue generation. Plaintiff denies inconsistencies and insists Defendant is misreading the Brownstein Report.

I will not resolve any inconsistencies in the Brownstein Report on this motion for summary judgment. Defendant's framing of what is before me here—a choice between accepting Brownstein's valuation or insolvency opinion—shows that there are facts in dispute. If Defendant's choice is correct, I could accept Brownstein's insolvency analysis, but reject his valuation analysis. Moreover, there is a presumption of insolvency in the 90 days before bankruptcy and Defendant has not submitted any of his own evidence to rebut this presumption. Accordingly, though I will grant summary judgment, I will not do so on this ground.

Conclusion

Defendant is entitled to summary judgment. An order will enter.

Dated: September 2, 2021

Laurie Selber Silverstein
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
UNITED TAX GROUP, LLC,	)	Case No. 14-10486 (LSS)
	)	
Debtor.	)	
	)	
George L. Miller, Chapter 7 Trustee,	)	
	)	
Plaintiff,	)	Adv. Proc. No. 16-50088 (LSS)
	)	
v.	)	
	)	Re: Docket. No. 73
Edward Welke	)	
	)	
and	)	
	)	
John Does 1- 100[1]	)	
	)	
Defendants.	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

For the reasons set forth in my Opinion of even date, **IT IS HEREBY ORDERED** that Defendant Welke's Motion for Summary Judgment is **GRANTED**.

Dated: September 2, 2021

Laurie Selber Silverstein
United States Bankruptcy Judge

[1] Plaintiff has not named any John Does.