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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Rodwell Pontiac Cadillac GMC Truck, Inc., Debtor.	C/A No. 93-71381-W Adv. Pro. No. 95-8003-W
Kevin Campbell, Trustee, Plaintiff, v. NationsBank of South Carolina, N.A., Defendant.	**JUDGMENT** Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Judgment shall be entered in favor of the Defendant.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
March 25, 1996.

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IN RE: Rodwell Pontiac Cadillac GMC Truck, Inc., Debtor.	C/A No. 93-71381-W *Adv. Pro. No. 95-8003-W*
Kevin Campbell, Trustee, Plaintiff, v. NationsBank of South Carolina, N.A., Defendant.	**ORDER** Chapter 7

THIS MATTER comes before this Court for trial upon the Complaint, as amended, filed by the Plaintiff, Kevin Campbell, the Chapter 7 Trustee for the Debtor ("Trustee") seeking the recovery of allegedly preferential payments from the Defendant NationsBank of South Carolina, N.A. (hereinafter the "Bank") pursuant to 11 U.S.C. §547[1].

Based upon the evidence presented in the form of stipulated facts, documentary exhibits, the testimony of three witnesses, and by taking judicial notice of the Court's records in this bankruptcy proceeding, the Court makes the following Findings of Fact and Conclusions of

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[1] Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

Law[2]:

FINDINGS OF FACT

1. On March 11, 1993 the Debtor filed for relief under Chapter 11 of the United States Bankruptcy Code.

2. On November 1, 1993 the case converted to one under Chapter 7 of the United States Bankruptcy Code.

3. On November 4, 1993, Kevin Campbell was appointed to serve as the Chapter 7 Trustee and continues to serve in that capacity.

4. The Debtor maintained several checking accounts with the Bank, including account number 022300156 ("Operating Account") and 022300164 ("Payroll Account").

5. The Debtor's banking relationship with the Bank, or its predecessors, extended over a twenty (20) year period.

6. As part of the longstanding relationship between the Debtor and the Bank, the Bank provided overdraft protection to the Debtor when necessary. In general, based upon the Debtor's representation that sufficient deposits would be made into the Operating Account prior to 10:00 a.m. that day or soon thereafter, the Bank would honor checks which were presented for payment prior to 2:00 p.m. the previous day. Second, to the extent that there were amounts honored which were greater than the deposits, those negative balances would be made positive within the next few days and the actual negative balance (checks actually honored less deposits made)

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[2] The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

would at no time exceed the average daily deposits of the Debtor in the approximate amount of $50,000.00.

7. On all occasions where the deposits made prior to 10:00 a.m. the following day were equal to or greater than the checks presented prior to 2:00 p.m. the previous day, there was not an actual negative daily balance for the previous day.

8. The Debtor did not always make sufficient deposits into the Operating Account by 10:00 a.m. to cover the previous days checks. These occasions are indicated by the negative balances in the Debtor's account.

9. During the 90 days prior to filing for Chapter 11 relief, the Debtor issued checks for which there were insufficient funds in the Operating Account.

10. During the 90 days prior to filing for relief, the Payroll Account and Operating Account showed negative daily balances on bank statements on several occasions. In many instances, deposits covering those balances were made prior to 10:00 a.m. the next day and prior to the time at which the Bank could revoke its decision to honor the checks which caused the negative balances.

11. As to the alleged preferential transfers specifically, there were no separate executed notes, Lines of Credit or any other separate debt instruments to indicate a debtor/creditor relationship.

12. On the date the Debtor filed for Chapter 11 relief, the Operating Account (number 022300156) had a positive daily balance of $324.00.

13. It is a common and regular practice in the banking industry for banks to provide overdraft protection in various amounts and at various times for its better customers. Such decisions are individualized by the bank according to its experience and past dealings with the customer and

therefore to that extent the frequency, amount or timing of allowing overdrafts is not subject to a strict industry wide standardization.

CONCLUSIONS OF LAW

A Trustee may recover, for the benefit of the estate, pre-petition transfers which are voidable preferences, but bears the burden of proof to demonstrate all elements proscribed in §547(b) by a preponderance of the evidence, which means that the facts asserted must be more probably true than false. In re Southco, Inc., 91-05576, C-92-8221 (Bkrtcy. D.S.C. 6/7/93). This section provides in part:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property --
>
> (1) to or for the benefit of a creditor;
>
> (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 --
>
> (A) on or within 90 days before the date of the filing of the petition; ...
>
> (5) that enables such creditor to receive more than such creditor would receive if --
>
> (A) the case were a case under chapter 7 of this title ...;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title ...

11 U.S.C. § 547(b).

However, § 547(c) provides certain defenses to a preferential transfer recovery. In particular in this case, the Bank alleges that even if the Trustee is able to meet his burden of

proof as to the existence of preferential transfers, the ordinary course of business exception found in §547(c)(2) acts as an absolute defense to the recovery of the transfers. This section provides:

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

11 U.S.C. § 547(c). In order to prevail under the ordinary course of business defense, as that term is defined in § 547(c)(2), the Bank will bear the burden of proving that the debt (being the deposits to cover the overdraft protection) was incurred in the ordinary course of the business affairs of the Debtor and the Bank; the payments were made in the ordinary course of the business affairs of the Debtor and Bank; and the transfers were in harmony with the range of terms prevailing in some relevant industry's norms. In re Hoffman Associates, 90-02419, C-91-8293 (Bkrtcy. D.S.C. 4/25/95). In the Bankruptcy Court for the Eastern District of Virginia's In re Springfield Contracting Corp. opinion, the Court noted that:

> [T]he Code does not define the phrases "incurred in the ordinary course of business" or "according to ordinary business terms." Bigelow, 956 F.2d at 486 (citing 4 Collier on Bankruptcy ¶ 547.10 at 547-50 to -51 (15th ed. 1990)). Courts testing "ordinariness" under § 547(c)(2) focus on the prior conduct of the parties, the amount of the payments, the timing of the payments, the common industry practice, and whether payment resulted from any unusual action by either the debtor or creditor. The focus of the inquiry must analyze the business practices unique to the particular parties. Waldschmidt v. Ranier (In re Fulghum Constr. Corp.), 872 F.2d 739, 743 (6th Cir.1989). This inquiry is "particularly factual." In re First Software Corp., 81 B.R. 211, 213 (Bankr.D.Mass.1988).

> Section 547(c)(2)(A) and (B) contemplate a subjective test: Was the debt and the transfer ordinary as between the debtor and creditor? See Production Steel, Inc. v. Sumitomo Corp. (In re Production Steel), 54 B.R. 417, 423 (Bankr.M.D.S.Tenn.1985). To be subjectively ordinary implies some consistency with other business transactions between the parties.

In re Springfield Contracting Corp., 154 B.R. 214, 222 (Bkrtcy.E.D.Va. 1993). As this District has also recognized:

> There is no precise test for determining whether a particular transfer was consistent with an established ordinary course of business. Instead the inquiry must be made on a case by case basis, focusing on the business practices which were unique between the parties. In re Fulghum Constr. Corp., 872 F.2d 739, 743 (6th Cir. 1989). Courts generally look to the prior conduct of the parties and whether payment resulted from an unusual action of the debtor or creditor. The application of the ordinary business exception requires a "peculiarly factual analysis". Advo-System, 37 F.3d at 1047 (quoting In re First Software Corp., 81 B.R. 211, 213 (Bankr. D. Mass. 1988).

In re Thornton White, Inc., 2:94-2497-1 (D.S.C. 4/27/95)(F.B. Hawkins).

Whether providing overdraft protection to a Debtor is within the ordinary course of business between the applicable parties and therefore a defense to a preference recovery is dependent upon the facts of the case and not a per se rule of law. Courts which have found that overdraft protections were within the ordinary course of business include In re Schmidt, 26 B.R. 89 (Bkrtcy. D. Minn. 1982), In re Fulghum Const. Corp., 872 F.2d 739 (6th Cir. 1989) and In re Butz, 31 B.R. 893 (Bkrtcy. S.D. Ohio. 1983). Courts which have found that overdraft protections were not within the ordinary course of business include In re Prescott, 805 F.2d 719 (7th Cir. 1986) and In re Hill Oil, 143 B.R. 207 (Bkrtcy. C.D. Ill. 1992). Court finding overdraft protections not being in the ordinary course of business related to postpetition transactions in

Chapter 11 cases include In re Lite Coal Mining Company, 122 B.R. 692 (Bkrtcy. N.D. W. Va. 1990), In re SMB Holdings, Inc. 77 B.R. 29 (Bkrtcy. W.D. Pa. 1987) and In re Garofalos Finer Foods, Inc., 164 B.R. 955 (Bkrtcy. N.D. Ill. 1994).

In the instant case, Mary I. Lee ("Ms. Lee"), an assistant vice president in the Bank's Georgetown branch who has been working for the Bank, or its predecessor, for the past nine years, testified that the Debtor and the Bank have had a relationship for over twenty years and that the Bank has "been through hard times with them, ups and downs with them." Ms. Lee testified that it was the Bank's ordinary business practice with the Debtor over the years to pay checks as long as the Debtor had deposits to cover any overdrafts on that day or very shortly thereafter and that this practice did not change within the ninety (90) days preceding the filing of the bankruptcy. Implicit to that testimony is that the Debtor would have negative daily balances at times.

Walter E. Standish, III ("Mr. Standish"), a senior vice-president who has been with the Bank or its predecessors for twenty-three (23) years, corroborated Ms. Lee's testimony and further testified that this was the accepted and general practice of the Bank with all of their best customers and, to the best of his knowledge, the practice of other banks as well with their best commercial customers. While such testimony regarding the business relationship between the Debtor and the Bank and the general practices in the banking industry was somewhat general and may appear self serving in the context of this case, it was not refuted by any witness offered by the Trustee, including his rebuttal witness, David W. Rodwell, Jr. ("Mr. Rodwell").

Mr. Rodwell, who was chiefly involved in the management of the Debtor only after his father became ill and had to step down from the day to day management of the Debtor, did not

dispute and, in fact, praised the longstanding practice of the Bank of providing such overdraft protection to the Debtor. Mr. Rodwell, however, did testify that the need for such protection increased as the Debtor slid deeper into financial distress.

Based upon the testimony of the witnesses and the exhibits, it appears clear that the Bank has met the requirements of § 547(c)(2)(A) and (B) in that alleged transfers would be considered in payment of a debt incurred by the Debtor in the ordinary course of business of the Debtor and the Bank, and made in the ordinary course of business of the Debtor and the Bank.

However, the requirements of § 547(c)(2)(C), that the alleged transfer was made according to ordinary business terms, requires additional examination. The authority in the Fourth Circuit on this subsection is Advo-System, Inc. v. Maxway Corp., 37 F.3d 1044, 1049 (4th Cir. 1994). As the Fourth Circuit stated:

> In summary, we hold that subsection C requires an objective analysis ... [W]e read subsection C as establishing the requirement that a creditor prove that the debtor made its pre-petition preferential transfers in harmony with the range of terms prevailing as some relevant industry's norms. That is, subsection C allows a creditor considerable latitude in defining what the relevant industry is, and even departures from that relevant industry's norms which are not so flagrant as to be "unusual" remain within subsection C's protection. In addition, when the parties have had an enduring, steady relationship, one whose terms have not significantly changed during the pre-petition insolvency period, the creditor will be able to depart substantially from the range of terms established under the objective industry standard inquiry and still find a haven in subsection C. Molded Acoustical, 18 F.3d at 226.

Advo-System, 37 F.3d at 1050. In essence, the Fourth Circuit has held that the necessity of demonstrating an "industry standard" is to be viewed under a sliding-scale approach: that is, the need to conform to some objective industry standard is lessened the longer the consistent relationship between the parties has been established. "[T]he extent to which a transaction may

vary from 'industry norms' will in turn depend upon the length of time over which 'the pre-insolvency relationship between the debtor and creditor was solidified'" Id. at page 13, citing In re Molded Acoustical Prods., Inc., 18 F.3d 217, 220 (3d Cir. 1994).

In this case the Debtor and the Bank, and its predecessors, had a business relationship which extended over twenty (20) years. The Debtor was started by David W. Rodwell, Sr. in the 1960's and upon his illness, Mr. Rodwell took over the management of the Debtor. Mr. Rodwell testified to the Debtor's longstanding business relationship with the Bank, and that since the 1980's the Debtor would at times have negative daily balances which necessitated overdraft protection by the Bank. He further testified that negative daily balances were usually of short duration, but not always only over a one or two day period, and may happen several times a year. This was the accepted practice with the Bank.

Although Ms. Lee did not directly manage the Debtor's accounts during the time in question, she testified that she did supervise the account manager and affirmed that the Bank would have followed its normal procedures with respect to honoring checks before 10:00 a.m. for the previous day provided the Debtor promised and demonstrated the ability to make sufficient deposits into the account that day to "cover" the overdrafts. Mr. Standish corroborated the testimony of Ms. Lee concerning the Bank's policies and procedures to honor or return checks before 10:00 a.m. and further stated that it was his experience that this occurred everywhere he had been in his career with longstanding customers and regularly occurred at other banks. Ms. Lee further testified that this banking procedure with this Debtor had not significantly changed in the 9 years since the time she began working at the Georgetown branch.

Based upon the testimony of the Bank's witnesses, which was not contradicted by the

Trustee but actually supported to some degree by the Trustee's rebuttal witness Mr. Rodwell, the Bank has established that there was a long standing relationship between the Debtor and the Bank to honor overdrafts and conduct business in this manner. While the Bank did not present evidence of the exact number of years of this practice or the historical length of the overdraft protection and despite Mr. Rodwell's testimony that the frequency of the need for overdraft protection increased as the Debtor's financial stress increased, the weight of the evidence establishes that this business practice between the Debtor and Bank existed for a long number of years and, while it may have varied in amount based on the Debtor's need at the time, the overdraft protection generally was provided up to an amount of approximately $50,000.00. While this amount may seem unusual for an overdraft protection, in an overall consideration of the amounts of the daily and cumulative transactions between the Debtor and the Bank, it does not appear to be out of the ordinary. Furthermore, it appears that under the standards of the banking industry in general, regular overdraft protection for longstanding commercial customers is usual. While the Bank did not specifically establish the banking industry's relationship with automobile dealers as the industry standard, it did offer credible and sufficient evidence regarding the banking industry in general and the Bank's own policies regarding overdraft protections for its "better commercial customers".

Finally, the Bank's actions in this case fit within the policy reasons which support the ordinary course defense; that is, to encourage creditors with longstanding business relationships with a debtor to maintain those relationships in periods of financial stress rather than to abandon the debtor.

As has been stated, the Bank has the burden of proving the transfers were made in the

ordinary course of business by a preponderance of the evidence pursuant to §547(g) which is "synonymous with the term 'greater weight of the evidence.'" In re Southco, Inc., 91-05576, C-92-8221 (Bkrtcy.D.S.C. 6/7/93) citing In re Kelton Motors, Inc., 130 B.R. 170, 174 (Bankr. D.Vt. 1991). The Court finds that due to the consistent and long term nature of the Debtor's and Bank's relationship which did not significantly change during the prepetition insolvency period, that any departure from the relevant banking industry norms is not to be characterized as unusual or a gross departure within the meaning of this section. Therefore, the Bank has met its burden of proof in this case. Furthermore, upon the shifting in the burden, the Trustee failed to offer any sufficient contradictory evidence regarding the length or consistency of the relationship between the Debtor and the Bank or to indicate a different industry standard or norm other than the banking industry at large.

For all of the foregoing reasons, and without a finding that all of the elements of a preferential transfer were proven by the Chapter 7 Trustee and without ruling upon the Defendant's other defenses,[1] the transactions between the Debtor and the Bank were within the ordinary course of business as defined in §547(c)(2). It is therefore

ORDERED, that Judgment shall be entered in favor of the Defendant.

AND IT IS SO ORDERED.

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[1] The Court questions the adequacy of the Bank Statements and summaries as introduced into evidence to provide all of the necessary information for a determination of the remaining disputed elements required to establish a preferential transfer and as necessary to determine the validity of certain other defenses raised in the Defendant's pleading. Even assuming arguendo that all of the requirements of § 547(b) are established, the Court need look no further at this time than the defense established by § 547(c)(2).

John E Waites

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
March 25 1996.