



**IT IS ORDERED as set forth below:**

**Date: March 20, 2020**

**Barbara Ellis-Monro  
U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION**

IN RE:

BEAULIEU GROUP, LLC AND BEAULIEU  
TRUCKING, LLC,

Debtor.

CASE NO. 17-41677-BEM

CHAPTER 11

PMCM 2, LLC, as the Liquidating Trustee for  
the Beaulieu Liquidating Trust,

Plaintiff,

ADVERSARY PROCEEDING NO.  
19-4209-BEM

v.

AURIGA POLYMERS INC.,

Defendant.

**ORDER**

On July 15, 2009, Plaintiff filed a *Complaint (I) Objecting to Claims and (II) Seeking to Avoid and Recover Transfers*. [Doc. 1]. The Complaint consisted of four counts, as follows: (I) Avoidance and Recovery of Preferential Transfers; (II) Recovery of Avoided Transfers

Pursuant to 11 U.S.C. § 550; (III) Reclassification of 503(b)(9) Claim; and (IV) Disallowance of Amended Claim. On September 13, 2019, Defendant filed an Answer and Counterclaim. [Doc. 6]. Defendant asserted two counterclaims: (I) declaratory judgment that Defendant's defensive use of new value under 11 U.S.C. § 547(c)(4) does not preclude it from distribution on an administrative expense under § 503(b)(9) or from distribution on a general unsecured claim; and (II) declaratory judgment that Plaintiff cannot use § 502(d) to disallow an administrative expense. On December 3, 2019, Defendant filed a *Motion for Summary Judgment* on all counts of the Complaint and Counterclaim (the "Motion"). [Doc. 21, 23]. Plaintiff filed a Response, and Defendant filed a reply, and the Motion is now ripe for determination. The Court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(B), (F).

### **I. Summary Judgment Standard**

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056. The Court will only grant summary judgment when the evidence, viewed in the light most favorable to the nonmoving party shows no genuine dispute of material fact. *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986). A fact is material if it "might affect the outcome of the suit under the governing law ...." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A dispute of material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party has the burden of establishing its entitlement to summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The moving party

must identify the pleadings, discovery materials, or affidavits that show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. Once this burden is met, the nonmoving party cannot merely rely on allegations or denials in its own pleadings. *Hairston v. Gainesville Sun Publ'g. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). Rather, the nonmoving party must present specific facts supported by evidence that demonstrate there is a genuine material dispute. Id. When the material facts are not in dispute, the role of the Court is to determine whether the law supports a judgment in favor of the moving party. *Anderson*, 477 U.S. at 250-51, 106 S. Ct. at 2511.

When the moving party has the burden of proof at trial, that party must affirmatively show the absence of a genuine issue of material fact: it must support its motion “with credible evidence ... that would entitle it to a directed verdict if not controverted at trial.” *Celotex*, 477 U.S. at 331, 106 S. Ct. at 2557 (Brennan, J., dissenting). Upon making this showing, the burden shifts to the nonmoving party, who must produce “significant probative evidence demonstrating the existence of a triable issue of fact” to avoid summary judgment. *American Viking Contractors, Inc. v. Scribner Equip. Co., Inc.*, 745 F.2d 1365, 1369 (11th Cir. 1984). When considering summary judgment, the Court ““must not resolve factual disputes by weighing conflicting evidence[.]”” *Tippens*, 805 F.2d at 953 (quoting *Lane v. Celotex Corp.*, 782 F.2d 1526, 1528 (11th Cir. 1986)).

## **II. Undisputed Material Facts**

Defendant filed a *Statement of Material Facts* [Doc. 22] and Plaintiff filed a *Statement of Material Facts as to Which the Plaintiff Contends a Genuine Issue Exists to Be Tried* [Doc. 27]. In addition, the parties filed a *Joint Stipulation for Interim Distribution* (the

“Stipulation”) [Doc. 30], in which they agreed to certain facts without waiving their legal arguments to the Motion. The Court finds the undisputed material facts to be as follows:

Defendant is a Delaware corporation with its principal place of business in Spartanburg, South Carolina. [Doc. 22 ¶ 1; Doc. 27 ¶ 1]. Plaintiff is the Liquidating Trustee for the Beaulieu Liquidating Trust. [Doc. 22 ¶ 2; Doc. 27 ¶ 2]. Defendant sold to Beaulieu Group, LLC (the “Debtor”) polyester resins and specialty polymers used in a range of products, including textiles. [Doc. 22 ¶ 6; Doc. 27 ¶ 6]. Plaintiff seeks to avoid as preferences prepetition transfers from Debtor to Defendant in the amount of \$2,260,283.89 (the “Transfers”). [Doc. 30 ¶ 2].

On July 16, 2017, Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. [Doc. 22 ¶ 7; Doc. 27 ¶ 7]. The 90th day before Debtor’s bankruptcy filing was April 17, 2017. [Doc. 22 ¶ 8; Doc. 27 ¶ 8]. Before Debtor filed for bankruptcy, Defendant delivered to Debtor \$4,290,630.12 in goods, for which Defendant was not paid by Debtor as of the petition date. [Doc. 22 ¶ 9; Doc. 27 ¶ 9].

Defendant delivered to Debtor at least \$3,523,307.74 of goods in the 90-day period preceding Debtor’s bankruptcy filing for which payment was not received (the unpaid goods that Defendant delivered to the Debtor in the 90-day period preceding the Debtor’s bankruptcy filing are collectively referred to as the “Goods”). [Doc. 22 ¶ 10; Doc. 27 ¶ 10]. The Goods that Defendant delivered to Debtor in the 90-day period preceding Debtor’s bankruptcy filing were sold on credit and were not secured by an otherwise unavoidable security interest. In fact, Defendant did not have a security interest in those Goods. [Doc. 22 ¶ 11; Doc. 27 ¶ 11]. The Goods Defendant shipped to Debtor subsequent to the Transfers exceeds the amount of the Transfers. [Doc. 22 ¶ 12; Doc. 27 ¶ 12]. At least \$694,502.55 in Goods was delivered within 20 days of Debtor’s bankruptcy petition date. [Doc. 22 ¶ 13; Doc. 27 ¶ 13].

Based on the foregoing, Defendant filed an amended general unsecured claim (“Claim No. 1799”) in the amount of \$3,596,127.57 and a claim predicated on 11 U.S.C. § 503(b)(9) (the “503(b)(9) Request”) in the amount of \$694,502.55. [Doc. 30 ¶ 1]. The 503(b)(9) Request is allowed in the amount of \$273,382.76. [Doc. 30 ¶ 8]. The remainder of the 503(b)(9) Request in the amount of \$421,119.79 is the subject of dispute (the “Disputed Portion”). [Doc. 30 ¶ 8].

Defendant agrees that the prepetition Transfers it received from Debtor in the total amount of \$2,260,283.89 constitute preferences under 11 U.S.C. § 547(b). [Doc. 30 ¶ 3]. Plaintiff agrees the subsequent new value defense under § 547(c)(4) provides a defense to the avoidance of all but the last of the Transfers in the amount of \$421,119.79. [Doc. 30 ¶ 5].

On March 14, 2018, Debtor, affiliated debtors, and the Official Committee of Unsecured Creditors filed a First Amended Joint Plan of Liquidation (the “Plan”) in the Bankruptcy Case. [Doc. 22 ¶ 18; Doc. 27 ¶ 18]. On May 2, 2018, this Court entered its Order Confirming First Amended Joint Plan of Liquidation Proposed by Debtors and Official Committee of Unsecured Creditors (the “Confirmation Order”). [Doc. 22 ¶ 19; Doc. 27 ¶ 19]. The Plan became effective on June 4, 2018 (the “Effective Date”). [Doc. 22 ¶ 20; Doc. 27 ¶ 20].

Pursuant to the terms of the Plan, on the Effective Date, all the assets of Debtor, including all causes of action belonging to Debtor, were transferred to the Liquidating Trust. [Doc. 22 ¶ 21]. Although Plaintiff does not dispute this fact, it objects because this fact is an incomplete summary of the Plan and is inconsistent with the Liquidating Trust Agreement and Confirmation Order when read and construed together in determining the relative rights and obligations of Debtor, Plaintiff, and other parties in interest. [Doc. 27 ¶ 21].

As of the date of the Motion, neither Debtor nor Plaintiff had made any distributions on either Defendant's Claim No. 1799 or Defendant's 503(b)(9) Request. [Doc. 22 ¶ 22; Doc. 27 ¶ 22]. However, the Stipulation provided for interim distributions to Defendant in the amount of \$273,382.76 for the undisputed portion of Defendant's 503(b)(9) Request and distributions in the amount of approximately 2.2% on Defendant's Claim No. 1799 within five days of the filing of the Stipulation. [Doc. 30 ¶ 10].

### III. Analysis

#### **A. Counts I and II: Avoidance and Recovery of Preferential Transfers; Counterclaim I: Defensive Use of New Value Under 11 U.S.C. § 547(c)(4) and Distribution on an Administrative Expense Under § 503(b)(9)**

The Complaint seeks to avoid \$2,260,283.89 in Transfers from Debtor to Defendant as preferences under § 547(b)<sup>1</sup> and to recover that amount from Defendant under § 550.<sup>2</sup> As noted above Defendant concedes that the Transfers are avoidable. In addition, Plaintiff concedes the Defendant has a defense under § 547(c)(4) as to all but the Disputed Amount of \$421,119.79. Therefore, Defendant is entitled to summary judgment on Counts I and II of the Complaint to the extent of \$1,839,164.10.

The remaining question is whether the Disputed Amount is avoidable or whether it is subject to a defense under § 547(c)(4). The Disputed Amount makes up part of Defendant's 503(b)(9) Request.<sup>3</sup> Administrative expense claims under § 503(b)(9) are accorded priority under

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<sup>1</sup> A preference consists of a "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).

<sup>2</sup> To the extent a transfer is avoided under § 547, the trustee can recover the property transferred or its value from the initial transferee, among other things. 11 U.S.C. § 550(a).

<sup>3</sup> The Bankruptcy Code provides for allowance as an administrative claim of "the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. § 503(b)(9).

§ 507(a)(2). The Liquidating Trust has set aside reserves sufficient to pay the full amount of Defendant’s 503(b)(9) Request. [Doc. 27, Ex. 1 ¶ 9].

Section 547(c)(4) sets forth a defense to preference as follows:

(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[.]

11 U.S.C. § 547(c)(4). Under this section, known as the subsequent new value defense, if the debtor makes a preferential payment to the creditor and the creditor thereafter provides the debtor with new value, that new value is a defense to a preference claim so long as the debtor does not make an “otherwise unavoidable transfer” on account of that new value. New value is defined in part as “money or money’s worth in goods, services, or new credit[.]” *Id.* § 547(a)(2).

Plaintiff does not dispute that Defendant provided goods to Debtor after receiving the Disputed Amount from Debtor. Therefore, Defendant has established the first element of the subsequent new value defense because, after the preferential transfer of the Disputed Amount, Defendant gave new value to Debtor. As to the second element of the defense, the parties disagree about whether Debtor made an otherwise unavoidable transfer on account of that new value.

This issue was raised in a separate adversary proceeding brought by Plaintiff. *PMCM2, LLC v. Fabric Sources, Inc.*, AP No. 19-4026 (Bankr. N.D. Ga.) (“Fabric Sources”). In *Fabric Sources*, the Court extensively considered the arguments on both sides of the issue and held

that when funds have been held in reserve to pay § 503(b)(9) claims in full, then there has been an otherwise unavoidable transfer on account of new value for purposes of § 547(c)(4). [Id., Doc 39]. The Court further held that distributions on account of a general unsecured claim do not deplete a creditor's new value defense. The Court adopts its reasoning in *Fabric Sources* for this proceeding and will not restate that reasoning in full here. In summary, payment, or reserves for full payment, of a creditor's § 503(b)(9) administrative expense will offset that creditor's new value defense to a preference. Or, conversely, if the creditor successfully asserts a new value defense, it cannot receive payment of a § 503(b)(9) claim to the extent it is based on the same new value. The Court reaches this conclusion based on the plain language of the statute and the Eleventh Circuit's interpretation of § 547(c)(4) in *Kaye v. Blue Bell Creameries, Inc. (In re BFW Liquidation, LLC)*, 899 F.3d 1178 (11th Cir. 2018). Under the plain language of the statute, payment of a § 503(b)(9) claim is an otherwise unavoidable transfer. It is a post-petition transfer that is authorized by the Bankruptcy Code; therefore, it is not avoidable under § 549. In addition, the plain language of the statute includes no requirement that the otherwise unavoidable transfer occur pre-petition. This interpretation is supported by the statutory history in that the predecessor to § 547(c)(4) included a temporal limitation on the payment of new value that was omitted from § 547(c)(4).<sup>4</sup> The bankruptcy policies of encouraging creditors to continue doing business with financially distressed creditors and of equality of distribution also support this interpretation.

Based on the foregoing, Defendant is not entitled to summary judgment on Counts I and II of the Complaint as to the Disputed Amount or on Counterclaim I with respect to its

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<sup>4</sup> Section 60(c) of the Bankruptcy Act of 1898, codified at 11 U.S.C. § 96(c), was the predecessor to § 547(c)(4), and it provided as follows: "If a creditor has been preferred, and afterward in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, *the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy* may be set off against the amount which would otherwise be recoverable from him." 11 U.S.C. § 96(c) (1976) (emphasis added).



503(b)(9) Request. Defendant is entitled to summary judgment on Counterclaim I with respect to Claim 1799.

**B: Count III: Reclassification of 503(b)(9) Claim**

In Count III of the Complaint, Plaintiff seeks to reclassify any portion of Defendant's 503(b)(9) Request that is included in a subsequent new value defense. As stated above, Defendant can either seek payment of the Disputed Amount under § 503(b)(9) or it can use the Disputed Amount in its new value defense. But, it cannot do both. Therefore, Defendant is not entitled to summary judgment on Count III of the Complaint.

**C. Count IV: Disallowance of Amended Claim**

In Count IV of the Complaint, Plaintiff seeks to disallow Claim No. 1799 under 11 U.S.C. § 502(d), which provides that if a transfer is avoided, any claim the creditor has against the estate is disallowed until the avoided property or its value is paid to the trustee. Defendant argues that because it has a complete defense to the preference, Plaintiff is not entitled to a recovery such that there is no basis for disallowance of Claim No. 1799. However, as stated above, Plaintiff's new value preference defense is limited by the extent to which Plaintiff seeks payment on its 503(b)(9) Request. Because Defendant has conceded the Transfers are avoidable and it has not shown it has a complete defense, Defendant is not entitled to summary judgment on Count IV of the Complaint.

**D. Counterclaim II: Disallowance of 503(b)(9) Request**

Defendant's Counterclaim II requests a declaratory judgment that its 503(b)(9) Request cannot be disallowed under § 502(d). The Complaint did not seek to disallow Defendant's 503(b)(9) Request under § 502(d)(2). Instead, the Complaint expressly excluded the 503(b)(9) Request from disallowance under § 502(d). [Doc. 1 at 9 ¶ D; Doc. 27 ¶ 25]. Plaintiff does seek to

reclassify the Disputed Amount of Defendant's 502(b)(9) Request to a general unsecured claim, but to the extent Defendant's 503(b)(9) Request is allowed, it cannot be disallowed under § 502(d). *See Southern Polymer, Inc. v. TI Acquisition, LLC (In re TI Acquisition, LLC)*, 410 B.R. 742, 750-51 (Bankr. N.D. Ga. 2009) (Diehl, J.). Therefore, Defendant is entitled to summary judgment on Counterclaim II to the extent its 503(b)(9) Request is allowed.

#### **IV. Conclusion**

For the reasons stated herein, it is ORDERED that Defendant's Motion for Summary Judgment GRANTED in part and DENIED in part as follows:

As to Counts I and II of the Complaint, the Motion is GRANTED to the extent of \$1,839,164.10 and DENIED as to the balance of \$421,119.79.

As to Counterclaim I, the Motion is DENIED as to Defendant's 503(b)(9) request and GRANTED as to Claim 1799.

As to Count III of the Complaint, the Motion is DENIED.

As to Count IV of the Complaint, the Motion is DENIED.

As to Counterclaim II, the Motion is GRANTED to the extent Defendant's 503(b)(9) Request is allowed.

**END OF ORDER**

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