Entered: October 12, 2007

Date signed October 12, 2007

JAMES F. SCHNEIDER
U. S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

In re:	*	
MEDIMAGING TECHNOLOGY, INC.,	*	Case Nos. 02-58062-JS
STANDARD MEDICAL IMAGING, INC.,		through 02-58064-JS
and E.M. PARKER CO., INC.,	*	(Jointly Administered
		as Case No. 02-58062-JS)
Debtors	*	
		(Chapter 11)
	*	

* * * * * * * * * * * * *

MEDIMAGING TECHNOLOGY, INC.	*	
and GE COMMERCIAL DISTRIBUTION		
FINANCE CORP.,	*	
Plaintiffs	*	
v.	*	Adv. Pro. No. 03-8098-JS
MALLINCKRODT, INC.,	*	
Defendant	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND AVOIDING PREFERENTIAL TRANSFERS IN THE AMOUNT OF $206,500.74.

Before the Court are cross motions for summary judgment filed in the instant complaint to avoid and recover alleged preferential transfers. For the reasons stated, the plaintiffs' motion for summary judgment will be granted, the defendant's motion for summary judgment will be denied and the relief requested in the complaint to avoid and recover preferential transfers in the amount of $206,500.74, will be granted.

FINDINGS OF FACT

1. The debtor, Medimaging Technology, Inc. ("Medimaging"), was a distributor of X-ray film, accessories and medical imaging equipment. On October 31, 2000, Medimaging entered into a "General Distributor Agreement" (the "Agreement") with the defendant, Mallinckrodt, Inc. ("Mallinckrodt"), a manufacturer of such equipment. Plaintiffs' Exhibit A.

2. Section 2 of the Agreement provided alternative terms of payment by Medimaging to Mallinckrodt, including (1) prepayment in advance of shipment, (2) cash on delivery, with payment in certified funds, (3) payment by irrevocable letter of credit, or (4) payment pursuant to open account credit terms. *Id*.

3. The parties supplemented the Agreement with a document entitled the "Tyco Healthcare Distributor Policies and Procedures" (the "Policies"). The Policies

provided for open account payment terms of 1% 30 days/net 31 days[1] on accounts owed by Medimaging to Mallinckrodt. Plaintiffs' Exhibit B, Section 1. Based upon the provisions of the Policies and the fact that Medimaging made payments to Mallinckrodt by check after invoicing and delivery of product during the entire term of their relationship, the Court concludes that Mallinckrodt was a trade creditor that extended credit to Medimaging on open account.

4. Pursuant to the Agreement and the Policies, Medimaging purchased product at a price greater than the sale price from Medimaging to its customers and Mallinckrodt reimbursed Medimaging for the difference by means of rebates.

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[1]The term, "1% 30 days/net 31 days," means that full payment of the invoice is due in 30 days, but that the buyer is entitled to a discount of 1% of the price if payment is made on or before the thirtieth day. As explained in Meigs and Meigs, *Accounting, The Basis for Business Decisions* (6th ed. 1984), p. 186:

> Manufacturers and wholesalers often sell goods on credit terms of from 30 to 60 days or more, but offer a discount for earlier payment. For example, the credit terms may be "2% 10 days, net 30 days." Those terms means that the authorized credit period is 30 days, but that the customer company may deduct 2% of the amount of the invoice if it makes payment within 10 days. On the invoice, these terms would appear in the abbreviated form "2/10, n/30;" this expression is read "2,10, net 30." The ten day period during which the discount is available is called the ***discount period***. Because a sales discount provides an incentive to the customer to make an early cash payment, it is often referred to as a ***cash discount***.

Id.

5. On May 17, 2002, Medimaging and its affiliates filed the instant Chapter 11 petition in this Court. As debtor in possession, Medimaging granted GE Commercial Distribution Finance Corporation ("GECDF") a postpetition security interest in all of its assets as adequate protection for postpetition financing and use of cash collateral. As part of a "global settlement" approved by this Court by order [P. 396] dated October 10, 2003, Medimaging assigned to GECDF the right to bring all avoidance actions that the debtor in possession was entitled to prosecute. In exchange, GECDF agreed to pay all administrative and priority claims and to distribute to the unsecured creditors 10% of the net proceeds recovered from the avoidance actions.[2]

6. On July 28, 2003, Medimaging and GECDF filed the instant complaint against Mallinckrodt to avoid and recover alleged preferential transfers in the net amount of $206,624.54, plus interest at the legal rate from the date of each transfer. The plaintiffs reduced the figure to $206, 500.74, without indicating the basis for the $123.80 reduction.

[2]On February 6, 2004, this Court entered an order [P. 441] confirming the joint plan of liquidation (the "Plan"), filed by the debtors and GECDF. The Plan memorialized the agreements between the debtor and GECDF and provided that this Court retained jurisdiction to implement the Plan.

7. On December 19, 2003, Mallinckrodt filed an amended answer in which it asserted the "ordinary course of business defense" and the "new value defense" to the instant complaint.

8. On April 16, 2004, the plaintiffs filed a motion for summary judgment [P. P. 21]. On May 17, 2004, Mallinckrodt filed its own motion for summary judgment [P. 24].

9. According to the plaintiffs' motion, the average number of days between date from invoice until payment during the pre-preference period (October 31, 2000-February 16, 2002) was 87 days, with a range in number of days from date of invoice to payment of 0 to 395, and that 140 times during the pre-preference period, Medimaging was at least 100 days late in paying invoices.

10. The plaintiffs allege that Mallinckrodt placed Medimaging on "credit hold"[3] in February 2002, based upon the failure of Medimaging to remit payments for invoices dating from November 2001. Mallinckrodt disputes the allegation.

11. The plaintiffs assert that during the 90-day prepetition preference period between February 16, 2002 and May 17, 2002, Medimaging paid Mallinckrodt a total of $941,698.72. The parties agreed that $735,197.98, in the form of rebates, should

[3]The term "credit hold" denotes the suspension or revocation by the seller of the buyer's ability to purchase goods on credit, and the substitution of a more restrictive method of payment, usually payment in advance or cash on delivery.

be deducted from that amount, representing new value supplied by Mallinckrodt, leaving at issue the amount of $206,500.74. The invoices that add up to the $735,197.98 credit are represented as credit memos.

12. The plaintiffs alleged that payments made during the preference period did not conform to the Agreement and the Policies and were on average 94 days late, with a range of payments from 0 to 126 days.

13. The following five checks are the source of the alleged preferential payments: (1) Check No. 21016 in the amount of $104,555.60; (2) Check No. 137032 in the amount of $23,767.23; (3) Check No. 137118 in the amount of $26,157.36; (4) Check No. 21107 in the amount of $32,070.75; and (5) Check No. 137468 in the amount of $20,073.60. Mallinckrodt Exhibit No. 6; Plaintiffs' Exhibit G. As indicated above, the total amount of all five checks is $206,624.54.

14. Check No. 21016 (the "first check") in the amount of $104,555.60, dated February 13, 2002, which cleared the drawee bank on March 8, 2002, paid invoices ranging in dates from November 7, 2001-December 3, 2001. Thus, from date of invoice to the date when the first check was honored, the invoices paid thereby ranged in age from 95-121 days.

15. Check No. 137032 (the "second check") in the amount of $23,767.23, dated February 4, 2002, which cleared the drawee bank on March 8, 2002, paid 28 invoices

ranging in dates from November 1-30, 2001. Thus, from date of invoice to the date the second check was honored, the invoices paid thereby ranged in age from 98-127 days.

16. Check No. 137118 (the "third check") in the amount of $26,157.36, dated February 13, 2002, which cleared the drawee bank on March 7, 2002, paid three invoices, ranging in dates from November 27, 2001-December 4, 2001. Thus, from date of invoice to the date the third check was honored, the invoices paid thereby ranged in age from 93-100 days.

17. Check No. 21107 (the "fourth check") in the amount of $32,070.75, dated March 4, 2002, which cleared the drawee bank on March 11, 2002, paid 28 invoices, ranging in dates from December 4, 2001-January 2, 2002. Thus, from date of invoice to the date the fourth check was honored, the invoices paid thereby ranged in age from 68-97 days.

18. Check No. 137468 (the "fifth check") in the amount of $20,073.60, dated March 4, 2002, which cleared the drawee bank on March 11, 2002, paid 22 invoices ranging in dates from December 6-20, 2001. Thus, from date of invoice to the date the fifth check was honored, the invoices paid thereby ranged in age from 81-95 days.

19. The schedules filed by the debtor in possession indicate that on the petition date, May 17, 2002, Medimaging had assets of $29,007,588.31, as opposed to

liabilities of $55,653,179.23. Medimaging listed unsecured debts of $27,427,780.21.

20. Medimaging scheduled Mallinckrodt as a nonpriority, unsecured creditor holding a claim in the amount of $1,418,503.22. On September 6, 2002, Mallinckrodt filed an unsecured claim "for goods sold" in the amount of $1,491,611.53. Proof of Claim No. 190.

21. According to the summary of schedules, on the petition date, Medimaging did not have enough assets to pay its secured or priority claims *and* Mallinckrodt.

CONCLUSIONS OF LAW

SUBJECT MATTER JURISDICTION AND STANDING

1. This Court has subject matter jurisdiction over the instant complaint filed pursuant to Sections 547 and 550 of the Bankruptcy Code to avoid recover alleged preferential transfers, which is a core proceeding "arising under" Title 11 of the United States Code. 28 U.S.C. §§ 157(a)(2)(f) and 1334 (b).

2. In addition, the instant adversary proceeding is within the postconfirmation subject matter jurisdiction of the bankruptcy court, pursuant to the provisions of the confirmed joint Chapter 11 plan of liquidation. *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831 (4th Cir.2007).

3. The plaintiffs have standing to file and maintain the instant adversary proceeding, pursuant to Section 1123(b)(3) of the Bankruptcy Code and the provisions

of the confirmed joint plan of liquidation. Plan, § VI; 11 U.S.C. §1123(b)(3). This is true regardless of the fact that any recovery by the plaintiffs will confer a more substantial benefit upon GECDF as a secured creditor than that realized by unsecured creditors as a body. The debtor's estate will benefit because the right of GECDF to receive 90% of any sums recovered was the *quid pro quo* for its postpetition financing of the debtor's administrative expenses and costs of liquidating its claims, coupled with the unsecured creditors' agreement that they will receive the remaining 10% of all recoveries. *Cf. Gonzales v. Conagra Grocery Prods. Co. (In re Furr's Supermarkets, Inc.),* ___ B.R.___, B.A.P. 10th Cir. Aug. 15, 2007), 2007 WL 2317546 at *3-*4 (where no funds would be paid to general, unsecured creditors, standing nevertheless existed for secured creditor to avoid and recover preferences in return for postpetition financing of debtor and satisfaction of administrative expenses of the bankruptcy estate.).

4. As of the date of the filing of the instant complaint, Section 547(b) of the Bankruptcy Code provided as follows:

> (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; or

(B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enable such creditor to receive more than 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) (2004).

5. The legislative history of Section 547(b) contains the following statement:

> A preference is a transfer that enables a creditor to receive payment of a greater percentage of his claim against the debtor than he would have received if the transfer had not been made and he had participated in the distribution of the assets of the bankrupt estate. The purpose of the preference section is two-fold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally.

> The operation of the preference section to deter "the race of diligence" of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section-that of equality of distribution.

H.R. Rep. No. 95-595, at 177-78 (1977), reprinted in 1978 U.S.C.C.A.N. 5963.

6. Section 547(b) of the Bankruptcy Code authorizes trustees and debtors-in-possession to avoid transfers of a debtor's interest in property, "*if* five conditions are satisfied and *unless* one of seven exceptions defined in subsection (c) is applicable." *Union Bank v. Wolas (In re ZZZZ Best Co.)*, 502 U.S. 151, 154, 112 S. Ct. 527, 529, 116 L. Ed. 2d 514, 520 (1991) (emphasis in original).

7. "Even though a transfer may be determined to have been preferential, it may not be avoided if the transferee can prove entitlement to a defense under § 547(c)." *Field v. Md. Motor Truck Assoc., Workers Comp. Self-Ins. Group (In re George Transfer, Inc.)*, 259 B.R. 89, 93 (Bankr. D. Md. 2001). One such defense is that of transfers made in the "ordinary course of business." *Rinn v. MTA Employees Credit Union (In re Butler)*, 85 B.R. 34, 36 (Bankr. D. Md. 1988) (citing 11 U.S.C. § 547(c)(2)). Section 547 (c)(2) formerly provided[4], as follows:

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[4]The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), "dramatically" altered the "ordinary course of business" defense of Section 547 (c)(2). *See* Tabb, *The Brave New World of Bankruptcy Preferences*, 13 Am. Bankr. Inst. L. Rev. 425, 428 (2005). As amended, the section now provides separate, alternative defenses of "ordinary course of business" in § 547(c)(2)(A) and "ordinary business terms" in § 547(c)(2)(B), thereby lightening the burden of the transferee. The decision in the instant case is

(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)(2) (2004).

CROSS MOTIONS FOR SUMMARY JUDGMENT AND BURDENS OF PROOF

8. Federal Rule of Civil Procedure 56, which governs summary judgment,[5] provides as follows:

Rule 56. Summary Judgment.

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse

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based upon the provisions of Section 547 that were in effect before the BAPCPA amendments became effective October 17, 2005. *But see Hutson v. Branch Banking & Trust Co. (In re National Gas Distributors, LLC)*, 346 B.R. 394, (Bankr.E.D.N.C.2006) (holding that even after BAPCPA, the meaning of "ordinary business terms" was unchanged from prior law.).

[5]Fed. R. Civ. P. 56 is made applicable to proceedings in bankruptcy by Fed. R. Bankr. P. 7056.

party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts

> thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.
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> (f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.
>
> (g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Fed. R. Civ. P. 56.

9. Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with 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." Fed. R. Civ. P. 56(c).

10. The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986). After a movant makes a properly supported summary judgment motion, the nonmovant has the burden of setting forth specific facts showing the existence of a genuine issue of fact and must come forward with an affirmative showing of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986).

11. Because the plaintiffs and defendant have each moved for summary judgment, each bears the initial burden set forth in Rule 56(c). Thus, when cross motions for summary judgment are filed, "each movant bears the burden of establishing that no genuine issue of material fact exists." *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 538-9 (5th Cir. 2004), *cert. denied*, 546 U.S. 816, 126 S. Ct. 342, 163 L. Ed.2d 54 (2005).

12. Each motion must be considered on its own merits and all facts and inferences are viewed in the light most favorable to the nonmoving party. *Terwilliger v. Terwilliger*, 206 F.3d 240, 244 (2d Cir. 2000).

13. Therefore, the filing of cross motions for summary judgment does not require the granting of judgment for either movant as a matter of law. "When faced with cross-motions for summary judgment, the court must review each motion

separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.'" *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003), *quoting Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 62 n. 4 (1st Cir.1997). The fact that the parties have filed cross motions for summary judgment does not require that the litigation be resolved without trial at the summary judgment stage. It is possible, therefore, that in any given case involving genuine disputes of material fact that neither party filing cross motions would be entitled to summary judgment having failed to meet its burden under Fed. R. Civ. P. 56.

"When faced with cross-motions [for summary judgment], the normal course for the trial court is to 'consider each motion separately, drawing inferences against each movant in turn.'" *Wright v. Keokuk County Health Center*, 399 F. Supp.2d 938, 946 (S.D. Iowa 2005), quoting *EEOC v. Steamship Clerks Union Local 1066*, 48 F.3d 594, 603 n. 8 (1st Cir.1995).

14. In deciding whether to grant one of the cross motions for summary judgment on the instant preference complaint, the issue is whether the well-pleaded, undisputed material facts indicate that payments made to the defendant are avoidable and recoverable pursuant to 11 U.S.C. §§ 547 and 550, or whether the same, undisputed material facts indicate that the defendant has a valid defense to the complaint pursuant to 11 U.S.C. § 547(c)(2). Each movant on cross motions for

summary judgment bears an initial burden under Rule 56(c) of establishing the absence of a genuine issue concerning any material fact, and when each has met that burden, Rule 56(e) requires each respondent to produce affidavits or other evidence to prove the existence of a genuine dispute of material fact, which the court must then view in a light most favorable to the opposing party. *Cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-161, 90 S.Ct. 1598, 1608-10, 26 L. Ed.2d 142, 154-6 (1970).

15. The Fourth Circuit has emphasized that the question central to the assessment of a motion for summary judgment is whether a reasonable trier of fact could find in favor of the non-moving party, viewing the evidence in the light most favorable to the nonmoving party. *Mercantile Peninsula Bank v. French (In re French)*, ___ F.3d ___, 2007 WL 2410874 (4th Cir. Aug. 27, 2007).

THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

16. "The plaintiff in a preference action bears the burden of proving all of the elements of a preference set forth in Section 547(b)." *Wasserman v. Village Assocs. (In re Freestate Mgt. Servs., Inc.)*, 153 B.R. 972, 979 (Bankr. D. Md. 1993), (citing 11 U.S.C. § 547(g)). Section 547(g) of the Bankruptcy Code provides, as follows:

> (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.

Id. "A prima facie case for an avoidable preference under 11 U.S.C. § 547(b) is made by showing the following: (1) a transfer, (2) of an interest of the debtor in property, (3) to or for the benefit of a creditor, (4) for or on account of an antecedent debt owed by the debtor before such transfer was made, (5) made while the debtor was insolvent, (6) if the creditor was not an insider, made on or within 90 days before the date of the filing of the petition, (7) which enabled such creditor to receive more than he would have received if the transfer had not been made while the debtor continued into bankruptcy." *Kirtley v. Consol. Nutrition, L.C. (In re Freeny)*, 187 B.R. 711, 715 (Bankr. N.D. Okla. 1995).[6]

17. The standard of proof required to prove the elements of a preference is by a preponderance of the evidence. *Collier on Bankruptcy* ¶ 547.13 (15th ed. 2007).

18. The plaintiffs also have a burden to produce evidence to negate the defendant's affirmative defense of "ordinary course of business." *In re Freeny*, 187 B.R. at 716. "Even where the issue sought to be disposed of was an affirmative defense, as to which defendant would bear the burden of proof at trial, yet on motion for summary judgment 'it was plaintiff's obligation, not defendant's, to produce the

[6]The plaintiffs must prove their required elements in order to make out a *prima facie* case that a preferential transfer occurred in order to require the defendant transferee to mount a defense. Thus, it is possible that the plaintiffs could prove all of the elements of Section 547(b) and not be entitled to summary judgment if the defendant transferee were able to bear its burden of proof under Section 547(c).

necessary extraneous material to expose this defense as unmerited,' and granting summary judgment where this obligation had not been met was reversible error." *In re Curtis*, 38 B.R. 364, 367 (Bankr. N.D. Okla. 1983), quoting *Jacobson v. Md. Cas. Co.*, 336 F.2d 72, 75 (8th Cir. 1964), *cert. denied*, 379 U.S. 964, 85 S.Ct. 655, 13 L. Ed.2d 558 (1965).

19. In order to satisfy § 547(b)(5) it must be shown that (1) the creditor was unsecured; (2) the creditor holds a non-priority claim; and (3) the estate will not distribute a 100% payout to unsecured creditors. The first two elements are undisputed.

20. Had Medimaging filed a Chapter 7 liquidation instead of a Chapter 11 reorganization, Mallinckrodt would not have received a 100% distribution on its claim after payment of priority claims. Accordingly, the plaintiffs have satisfied the requirements of Section 547(b)(5).

21. For purposes of establishing when a preferential transfer occurred pursuant to 11 U.S.C. § 547(b), the date a check is honored by a drawee bank is considered to be the date of transfer, *Barnhill v. Johnson*, 503 U.S. 393, 112 S.Ct. 1386, 118 L. Ed.

2d 39 (1992). Accordingly, the dates of the transfers in this case were on March 7, 8 and 11, 2002, well within the 90-day preference period.[7]

22. The undisputed facts indicate that the debtor was insolvent during the period when the transfers were made, based not only upon the statutory presumption of insolvency, but also factually established by the debtor's own schedules. Accordingly, the plaintiffs have satisfied their burden of proving insolvency. 11 U.S.C. § 547(b)(3).

23. While Mallinckrodt does not dispute the fact that the plaintiffs have satisfied the requirements of Sections 547(b)(1), (b)(2) and (b)(4), namely, that the transfers were to or for the benefit of Mallinckrodt; that they were made on account of an antecedent debt owed by Medimaging; and that the transfers were made within 90 days of the petition date, Mallinckrodt has argued alternatively that the debtor

[7]For purposes of defenses available under § 547(c), the date of delivery is considered to be the date the transfer occurred. *Trinkoff v. Porters Supply Co., Inc. (In re Daedalean, Inc.)*, 193 B.R. 204, 212 (Bankr. D. Md. 1996), citing *Nat'l Enterprises, Inc. Liquidating Trust v. Tee-lok Corp. (In re National Enterprises, Inc.)*, 174 B.R. 429, 432 (Bankr .E.D.Va. 1994); *Durham v. Smith Metal and Iron Co. (In re Continental Commodities, Inc.)*, 841 F.2d 527 (4th Cir. 1988). However, other than the dates appearing on the checks themselves, namely February 4 and 13, and March 4, 2002, there is no evidence in the record of the dates of delivery of the checks. Neither side has raised an issue regarding the dates of the transfers and both have treated the date the checks were honored by the drawee bank, *i.e.*, when the checks were paid, as the dates when the transfers occurred.

received new value for the transfers or that the transfers were made in the ordinary course of business.

24. The plaintiffs have acknowledged that substantial new value was received by the debtor in the amount of $735,197.98. The bases for this acknowledgment were the rebates given to Medimaging by Mallinckrodt, which were indicated on exhibits offered by both parties. By joint letter from counsel dated September 21, 2007, both sides agree that "these rebates would be more correctly termed 'credit memos,' that they are in the form of credits, and that they did not involve shipments of product by Mallinckrodt to Medimaging in the amounts shown." *Id.*

THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

25. "Once a trustee makes a prima facie case of preference, the burden to prove defenses shifts to the party asserting them." *Clark v. Balcor Real Estate Fin., Inc. (In re Meredith Millard Partners)*, 12 F.3d 1549, 1553 (10th Cir. 1993). The burden is on the transferee to prove that "the transfer was (A) incurred in the ordinary course of both the debtor's and the creditor's business; (B) made and received in the ordinary course of their respective businesses; and (C) "made according to ordinary business terms." *Fiber Lite Corp. v. Modeled Acoustical Prods., Inc. (In re Molded Acoustical Prods., Inc.)*, 18 F.3d 217, 219 (3rd Cir. 1994); and because the three elements are conjunctive, the transferee must prove each of the three elements in Section 547(c)(2)

to avail itself of the defense. *Lubman v. C.A. Guard Masonry Contractor, Inc. (In re Gem Constr. Corp. of Va.)*, 262 B.R. 638, 654 (Bankr. E.D. Va. 2000). The failure to establish any one of the three elements prevents the creditor from successfully asserting this defense. *Seaver v. Allstate Sales & Leasing Corp. (In re Sibilrud)*, 308 B.R. 388, 393 (Bankr. D. Minn. 2004). The standard of proof to sustain a defense to a preference action is also by a preponderance of the evidence. *Collier on Bankruptcy* ¶ 547.13 (15th ed. 2007); *Advo-System, Inc. v. Maxway Corp.*, 37 F.3d 1044, 1047(4th Cir.1994); *Miller & Rhoads, Inc. Secured Creditors' Trust v. Robert Abbey, Inc. (In re Miller & Rhoads, Inc.)*, 153 B.R. 725, 727-28 (Bankr. E.D.Va. 1992).

26. The defendant is not entitled to summary judgment . The issue of whether exceptions apply to the complaint are subject to material disputes of fact. *See Harman v. First Am. Bank of Md. (In re Jeffrey Bigelow Design Group, Inc.)*, 956 F.2d 479, 485-6 (4th Cir. 1992).

27. The "ordinary course of business" defense is an affirmative defense that the transferee must establish by a preponderance of the evidence. *Advo-System, Inc.* 37 F.2d at 1047; *Logan v. Basic Distrib. Corp.*, 957 F.2d 239, 242 (6th Cir.1992); *Miller v. Florida Mining and Materials (In re A. W. & Assoc., Inc.)*, 136 F.3d 1439, 1441 (11th Cir.1998).

28. "Section 547(c)(2)(A) and (B) contemplate a subjective test: Was the debt and the transfer ordinary as between the debtor and the creditor?" *Huennekens v. Marx (In re Springfield Contracting Corp.)*, 154 B.R. 214, 222 (Bankr. E.D. Va. 1993).

29. The history of the parties' relationship coupled with their agreement that Medimaging would remit payments to Mallinckrodt within a 30 or 31-day period after receipt of goods leads to the conclusion that all of the transfers at issue were based upon credit extended by Mallinckrodt to Medimaging. The fact that payments on antecedent debts were made by check as "credit transactions" does not preclude the transferee of raising the defense that the transfers represented a "contemporaneous exchange for new value." *Hechinger Investment Co. v. Universal Forest Products, Inc. (In re Hechinger Investment Co.)*, 489 F.3d 568, 574-6 (3d Cir. June 7, 2007) ("Whether the parties intended a contemporaneous exchange is a question of fact to be decided in the first instance by the factfinder."). The Court finds from the extensive age of the invoices paid by the five checks in question, the fact that no new product was shipped as a result of their payment and the fact that Mallinckrodt did not extend rebates to Medimaging for any one of the payments, that the parties did not intend the five checks to represent contemporaneous exchanges for new value.

30. While the Court finds that Section 547(c)(2)(A) has been satisfied because the parties agree that the payments were on account of an antecedent debt incurred in the ordinary course of the business or financial affairs of Mallinckrodt and the debtor, Mallinckrodt has not satisfied subsection (c)(2)(B) and (C).

31. The undisputed facts indicate that during a business relationship that lasted little more than a year, the debtor was chronically late in making payments to Mallinckrodt that departed substantially from the documented terms of their agreement. While the issue of whether Mallinckrodt engaged in certain unusual collection activities against the debtor, even before the advent of the preference period, has been raised by the plaintiffs and has been disputed by the defendant, *cf. In re Gem Constr.*, 262 B.R. at 655, the Court concludes that Mallinckrodt has failed to dispute the evidence that it placed the debtor on credit hold during the preference period.

32. Likewise, with respect to whether the transactions were made according to ordinary business terms, the requirement of former subsection 547(c)(2)(C), which requires a comparison of the transactions between the parties with transactions that occur within the industry, Mallinckrodt has failed to carry its burden of proof, even by a mere preponderance.

33. In *Advo-System, Inc.*, 37 F.3d at 1048-50, the Fourth Circuit held that Section 547(c)(2)(C) requires an objective analysis and adopted the rule established by the Seventh Circuit in the case of *In the Matter of Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir. 1993), as modified and embellished by the Third Circuit in *In re Molded Acoustical Prods., Inc.*, 18 F.3d 217 (3rd Cir. 1994), quoting from the later opinion, 18 F.3d at 226, as follows:

> . . . [W]e read subsection C as establishing a 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 the 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.

Advo-System, Inc., 37 F.3d at 1050.

34. Mallinckrodt relies on the statement in *Advo-System, Inc.*, that "when the parties have 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." *Advo-System, Inc.*, 37 F.3d at 1050,

(quoting *Molded Acoustical*, 18 F.3d at 226). However, in order to qualify for such a departure from the industry norm, the creditor must provide proof that it is a member of an industry and that the industry maintains some standards of payment. This Mallinckrodt has failed to do. In support of the "ordinary course of business" defense, Mallinckrodt submitted the affidavits of Fran Merren and Julie Moore as exhibits to its motion.

35. As Judge Derby of this Court held in *Devan v. Zamoiski S.E., Inc. (In re Merry-Go-Round Enters., Inc.)*, 272 B.R. 140 (Bankr. D.Md. 2000), while affidavits may be submitted in support of a motion for summary judgment as evidence of the norms of an industry, such affidavits as those submitted by Mallinckrodt that contain mere conclusory statements to the effect that the transfers in question were made in the ordinary course of business are insufficient to prevail against the plaintiff's motion for summary judgment. *Merry-Go Round*, 272 B.R. at 145-6 (holding as inadequate conclusory affidavits containing testimony that would not be admissible at trial on the merits). The affidavits submitted by Mallinckrodt in support of its motion for summary judgment are susceptible to attack on these grounds.

36. The affidavit of Fran Marren, identified as a credit analyst employed at Mallinckrodt, states that she has personal knowledge of Mallinckrodt's billing practices and records, has performed her duties for 13 years and has personal

knowledge of Mallinckrodt's billing practices with Medimaging and with other customers. The affidavit, which fails to state the nature of the affiant's employment and what her duties entailed, then expresses the conclusory opinions that payments made by Medimaging to Mallinckrodt during the 90 days before bankruptcy were made in the ordinary course of business between Medimaging and Mallinckrodt; having reviewed the invoices paid during the 90-day preference period, the affiant states the unfounded opinion that the payments were in the ordinary course; she asserts that the amount of time between Mallinckrodt's issuance of invoices and Medimaging's payment of those invoices was well within the range during which payments had been made in the past, and that no unusual collection methods were used by Mallinckrodt in its dealings with Medimaging; that the billing and payment practices between Medimaging and Mallinckrodt at all times before Medimaging's bankruptcy were within the ordinary course of business of Mallinckrodt's dealings with other buyers of the type of products Medimaging bought, *i.e.* medical imaging products. The Court finds the affidavit to be defective as containing inadmissible statements of opinion and unfounded factual conclusions, because Rule 56(e) requires that the nonmovant "must set forth specific facts showing that there is a genuine issue for trial." Quoted in Brunet & Redish, *Summary Judgment, Federal Law and Practice* § 8.7, (3d ed. 2006).

37. The declaration of Julie Moore, stated to be the director of client services at American Credit and Equity Specialists, suffers from similar defects. Ms. Moore states in her affidavit that she was formerly employed at McKesson Medical-Surgical Corp., U.S. Foods, Sexton Corp., and Lintex Linen Corp.; that her employment (although the affidavit does not detail the nature of that employment) involved a knowledge of the medical imaging equipment industry and related products. The affidavit states that she has 16 years' experience in this industry, but does not say what she was doing during that time; that she has "a sound knowledge of the types of products sold by Mallinckrodt to Medimaging and of sale practices in this industry." From this base, the affiant makes the statement that "In this industry, it is ordinary for buyers to take 90 days to pay their invoices," and that after having reviewed that the invoices and billing history between Mallinckrodt and Medimaging, she concludes that during the 90 days immediately preceding the filing of bankruptcy, Mediating's payments to Mallinckrodt were within the ordinary course of business for this industry." As with the affidavit of Ms. Marren, the Court finds the affidavit of Ms. Moore conclusory, without foundation or other factual basis. In addition, "self-serving and conclusory statements unsupported by specific facts are not acceptable under the rule." *Kearney v. J. P. King Auction Co., Inc.*, 265 F.3d 27, 36-37 (1st Cir. 2001); *Taylor v. Rodriguez*, 238 F.3d 188 (2d Cir. 2001); *Santiago v. Canon U.S.A., Inc.*, 138

F.3d 1, 5-6 (1st Cir. 1998); *Norman v. Taylor*, 25 F.3d 1259, 1262-64 (4th Cir. 1994). To the extent that Mallinckrodt has submitted the latter affidavit as containing an expert opinion, it is woefully deficient. While it may be admissible as containing the affiant's opinion, Federal Rules of Evidence 701 and 704, the affidavit falls short of the proof necessary to sustain the "ordinary course" defense.

38. Finally, the defendant submitted as its Exhibit 11, the declaration of Dennis Gulley, identified as "Credit Supervisor" at Mallinckrodt, which refers to a number of credit holds noted in a printout of the debtor's account records kept by Mallinckrodt in the ordinary course of its business. In his affidavit, Mr. Gulley states that, "[w]ith an account like Medimaging's, where the customer would occasionally fall behind in its payments, it would be ordinary practice for Mallinckrodt to place the customer on credit hold when its account was past due, and then remove the credit hold when the account was brought current." Gulley Affidavit, ¶ 6. The Court accepts the affidavit as an admission against interest as proof that Mallinckrodt placed the debtor on credit hold, as contended by the plaintiffs. The affiant's opinion regarding the ultimate issue of whether such action was within the ordinary course of business, while admissible pursuant to Federal Rule of Evidence 704, is not sufficient to create a genuine dispute as to a material fact so as to preclude the granting of summary judgment against Mallinckrodt.

39. Mallinckrodt has failed to produce any competent evidence to show that there was an objective standard of payment terms and practices in any industry of which it was a member.

40. In support of their motion for summary judgment, the plaintiffs attached the affidavit of Marjorie Kenney, the debtor's former manager of accounts payable, together with certain exhibits. Employed by Medimaging for six years prior to the filing of the bankruptcy on May 17, 2002, Ms. Kenney states in her affidavit that she worked the entire time in the Accounts Payable Department processing invoices for payment and dealing with vendors, including Mallinckrodt. During the period which includes February and March 2002, she states that Medimaging was not paying its vendors, including Mallinckrodt, in a timely fashion, which is an unsupported conclusion. There is no foundation given for what was "timely." The question to be decided by the Court at this juncture, given the history of the parties' relationship, is whether the payments were "ordinary." In addition, Ms. Kenney's affidavit ventures into hearsay when she states that "At the relevant times, Mallinckrodt threatened to place Medimaging on credit hold, or had actually done so, refusing to ship additional product until certain invoices were paid." In support of this statement, she refers to certain notes (Exhibit C) made in January 2002 by another employee in her department purporting to record hearsay from a Bob Schulte, a representative of Mallinckrodt,

which the Court deems inadmissible. Likewise, the affidavit refers to an internal memo (Exhibit E) produced by another Medimaging employee named Gail Holloway dated February 21, 2002, purporting to list certain companies, including Mallinckrodt, that had placed Medimaging on credit hold. The Court finds Exhibit E to be inadmissible as hearsay. Finally, the affidavit makes reference to a facsimile (Exhibit D) alleged to have been received from Mr. Schulte dated February 4, 2002, that would be admissible as an admission against interest.

The Court finds, however, that the fax appears merely to be an inquiry regarding payments and not the "smoking gun" the plaintiffs believe it to be. Therefore, while admissible, Exhibit D does not establish for purposes of summary judgment that Mallinckrodt engaged in unusual collection activities so as to negate the "ordinary course" defense. The Court will therefore sustain the objection of Mallinckrodt to the admission of Exhibits C and E, and overrule its objection to Exhibit D.

41. Exhibit F to the plaintiffs' motion is a different matter. It is a four-page document entitled "**IMAGING DOMESTIC INVOICES ONLY - TOP TWENTY CUSTOMERS OVER 30 DAYS PAST DUE AS OF 3/31/02**," and was produced by Mallinckrodt in discovery. It purports to be a list of overdue accounts, and the name "Medimaging Technology Inc." appears first on the list. The item appears to have been

prepared internally and retained by Mallinckrodt in the ordinary course of its business. Of significance is the entry that appears to refer to the Medimaging account history:

> Account was on hold in early March. Checks received and additional monies were promised by the end of March - Did not come in. Talking to purchasing director and interim CFO. Ed Powers assisting. Credit hold decision next week.

Exhibit F appears to be admissible as an admission against interest and, assuming its proper authentication, would be admissible at trial. Together with the dates of the five checks, Exhibit F establishes the unrebutted fact that Mallinckrodt had placed Medimaging on credit hold at the time the five checks were received by Mallinckrodt.

42. Mallinckrodt has failed to demonstrate the existence of a standard range of payments within the industry that comports with the range of payments made in the instant case. *In re Molded Acoustical Prods., Inc.*, 18 F.3d at 226; *In re National Gas Distributors, LLC*, 346 B.R. at 404-5.

43. If anything, the terms contained in the printed documents, including invoices, to which the parties agreed, support the contrary finding that the payments in question where "grossly overdue" according to any standard.

44. As the Fourth Circuit stated, "we do not accept Advo's argument that a creditor can satisfy subsection C by simply asserting that it was the industry norm to extend credit and to 'work with' customers." *Advo-System*, 37 F.3d at 1052. This is

the very argument advanced here by Mallinckrodt. Viewing the evidence in the light most favorable to Mallinckrodt, *In re French*, *supra*, the Court finds that a reasonable trier of fact could not find in favor of Mallinckrodt on this point.

45. The placement of a credit hold on the Medimaging account unless and until the transfers at issue were made indicates that Mallinckrodt had knowledge of the debtor's financial straits and that pressure was exerted by Mallinckrodt to force the debtor to make the contested payments. The fact that any one or all of the transfers in question were made at a point when Mallinckrodt had placed the debtor on credit hold, which is the sort of unusual collection activity by a creditor that cannot be considered to be in the ordinary course dealings with a debtor or in an industry, precludes the granting of summary judgment to Mallinckrodt. This Court finds that a reasonable trier of fact could not find in favor of Mallinckrodt, even viewing the evidence in the light most favorable to it as the non-moving party, *In re French*, *supra*, the plaintiffs are entitled to summary judgment.

46. In short, because Mallinckrodt has failed to sustain its burden of proof pursuant to Section 547(c)(2)(B) and (C) that the payments in question were "ordinary," because they were made under the duress of a credit hold, and according to "ordinary business terms," and because there is no proof that they conformed to any industry standards, summary judgment will be awarded to the plaintiffs.

WHEREFORE, the plaintiffs' motion for summary judgment will be GRANTED, the defendant's motion will be DENIED, and judgment will be entered in favor of the plaintiffs for the avoidance and recovery of preferential transfers in the net amount requested of $206,500.74.

ORDER ACCORDINGLY.

END OF OPINION

cc: Alan J. Perlman, Esquire
Mariaelena Prohac Gayo-Guitian, Esquire
Noah S. Bloomberg, Esquire
Adorno & Yoss LLP
350 E. Las Olas Boulevard
Suite 1700
Ft. Lauderdale, Florida 33301

Stephen F. Fruin, Esquire
Cameron J. Macdonald, Esquire
Whiteford Taylor & Preston L.L.P.
Seven Saint Paul Street
Baltimore, Maryland 21202

Counsel to the Plaintiffs

Jennifer A. Merlo, Esquire
David M. Brown, Esquire
Spencer Fane Britt & Browne LLP
One North Brentwood Boulevard, Suite 1000
St. Louis, Missouri 63105

Lori S. Simpson, Esquire
Bishop, Daneman & Simpson, LLC
2 North Charles Street, Suite 500
Baltimore, Maryland 21201

Counsel to the Defendant.

Mark A. Neal, Esquire
Assistant U.S. Trustee
2625 U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201