IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

GFI WISCONSIN, INC.,
f/k/a GREDE FOUNDRIES, INC.,

Appellant,

v.

REEDSBURG UTILITY COMMISSION,

Appellee.

OPINION and ORDER

11-cv-58-bbc

- -

Appellant GFI Wisconsin, Inc., formerly known as Grede Foundries, Inc., appeals an order of the bankruptcy court dismissing its adversary proceeding against appellee Reedsburg Utility Commission for the recovery of preferential transfers under 11 U.S.C. § 547. In doing so, the bankruptcy court concluded that § 547(c)(4) did not allow GFI Wisconsin to recover a preferential transfer made to creditor Reedsburg under § 547(b), despite the fact that GFI Wisconsin was bound to repay Reedsburg for a portion of the preferential transfer under another provision of the Bankruptcy Code, § 503(b)(9). GFI Wisconsin objects to what it characterizes as a windfall for Reedsburg, arguing that double payment to Reedsburg hurts other creditors.

Under § 547, debtors such as GFI Wisconsin may "avoid," or recover "transfers" (often payments) that they made to creditors within the 90-day preference period before bankruptcy, unless the creditor can assert a successful defense to the debtor's claim. Section 547(c)(4) provides that a trustee cannot avoid a transfer "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." In the underlying adversary proceeding, creditor Reedsburg successfully asserted a "new value" defense under § 547(c)(4), based on its having provided "new value" to the estate in the form of electricity after the debtor's preferential transfer.

In a separate proceeding not at issue in this appeal, Reedsburg successfully asserted a claim under 11 U.S.C. § 503(b)(9) for administrative priority payment for the value of some of the electricity it supplied to GFI Wisconsin in the 20-day period before GFI filed for bankruptcy. A fully-funded reserve has been set aside for payment of that claim.

This appeal raises questions about the relationship between Reedsburg's new value defense under § 547(c)(4) and its administrative priority claim under § 503(b)(9). Both sections offer protections to creditors like Reedsburg that continue to engage in business with a debtor in its run-up to bankruptcy. However, GFI Wisconsin contends that the

bankruptcy court erred by allowing Reedsburg to both (1) claim an administrative expense under § 503(b)(9) of the code for the value of electricity it supplied to GFI Wisconsin during the 20-day period before the petition date; and (2) utilize the value of those same goods as a § 547(c)(4) new value defense to GFI Wisconsin's claim for avoidance of preferential transfers. In particular, GFI contends that because Reedsburg's § 503(b)(9) claim will be paid, Reedsburg cannot say that its pre-petition supply of electricity provided new value to GFI Wisconsin's estate or that if it did, the new value remains unrecognized.

This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a). The bankruptcy court entered an order on November 4, 2010, dismissing GFI Wisconsin's adversary proceeding, 09-AP-249-rdm. This is a final order for purposes of § 158(a) because nothing more remains to be done with respect to GFI Wisconsin's claims. In re Smith, 582 F.3d 767, 776 (7th Cir. 2009).

I conclude that Reedsburg may not receive double-credit for the value of the electricity it supplied to GFI Wisconsin in the 20-day period immediately preceding the commencement of its bankruptcy case. In particular, Reedsburg cannot satisfy the elements of a "new value" defense under § 547(c)(4)(B) because the payment of its § 503(b)(9) administrative priority claim is an "otherwise unavoidable transfer" that defeats the new value Reedsburg supplied to GFI's estate. Therefore, I am reversing the bankruptcy court's decision dismissing GFI Wisconsin's adversary proceeding.

The bankruptcy court made no findings of fact. The following summary of relevant facts and proceedings is drawn from the record of the proceedings before the bankruptcy court.

BACKGROUND

A. Facts before the Bankruptcy Court

On June 30, 2009, appellant GFI Wisconsin, formerly known as Grede Foundries, Inc., filed a chapter 11 bankruptcy petition in this district. The debtor owned several properties in Wisconsin that received electricity from appellee Reedsburg Utility Commission. During the 90-day period before the petition date (known as the "preference period"), GFI Wisconsin made several "transfers" in the form of checks to Reedsburg, totaling $1,481,458.64, all for utility service. Reedsburg continued to provide utility service to GFI Wisconsin during the preference period, including the 20 days immediately before the petition date.

On September 25, 2009, Reedsburg filed a claim for administrative priority status under § 503(b)(9) for the value of the electricity it provided GFI Wisconsin during the 20-day period, which it said was $395,207.52. GFI Wisconsin objected to the claims on several grounds, one of which was that electric services are not "goods" for purposes of § 503(b)(9). In an order dated June 1, 2010, the bankruptcy judge denied GFI's objections and allowed

Reedsburg's § 503(9)(b) claims. On November 12, 2010, this court affirmed the bankruptcy court's decision and GFI Wisconsin appealed the decision to the Court of Appeals for the Seventh Circuit, where it is pending.

On November 12, 2009, GFI Wisconsin filed adversary proceeding 09-AP-249-rdm under 11 U.S.C. § 547, seeking to avoid and recover the money it paid Reedsburg during the 90-day preference period before the bankruptcy petition was filed. In its complaint, GFI Wisconsin alleged in part that the transfers were not made in the ordinary course of business under § 547(c)(2) and that the transfers were not entirely offset by "new value" provided by Reedsburg to GFI Wisconsin under § 547(c)(4). Specifically, GFI Wisconsin contended that the electricity Reedsburg provided in the 20 days before the petition date could not be considered "new value" because the value of that electricity already had been granted post petition administrative priority as a result of Reedsburg's § 503(b)(9) claim.

On January 28, 2010, Reedsburg filed its answer in the adversary proceeding, alleging that the transfers were made in the ordinary course of business pursuant to § 547(c)(2) and were completely offset by "new value" provided by Reedsburg to GFI Wisconsin pursuant to § 547(c)(4).

At some point before November 4, 2010, the parties stipulated that if all the electricity Reedsburg provided during the 90 days before GFI Wisconsin filed for bankruptcy protection were considered in the new value analysis, GFI Wisconsin's preference claim

would be completely offset and Reedsburg would have no liability for preferential transfers. However, if the electricity provided during the 20-day period before the bankruptcy petition were not counted as new value as a result of Reedsburg's § 503(b)(9) claim, Reedsburg would have received a preferential payment in the amount of $410,899.75.

B. Sale of GFI Wisconsin's Assets

On November 4, 2009, GFI Wisconsin entered into an Asset Purchase Agreement with Iron Operating, LLC n/k/a Grede, LLC, by which GFI Wisconsin agreed to transfer substantially all of its assets to Grede LLC. Under the agreement, the new Grede LLC promised to pay any § 503(b)(9) administrative claims asserted against GFI Wisconsin. The sale closed on February 5, 2010. GFI Wisconsin transferred cash and assets to Grede LLC and Grede LLC set up a separate account at Bank of America in the amount needed to pay Reedsburg's § 503(b)(9) claim.

C. Ruling of the Bankruptcy Court

On November 4, 2010, an evidentiary hearing in the adversary proceeding was held in the bankruptcy court. At the hearing, the bankruptcy judge heard evidence regarding the relationship between GFI Wisconsin and Reedsburg, including payment history, payment terms and the nature of each party's business. R. 105, dkt. #59 in 09-AP-249-rdm

(adversary proceeding). Following the hearing, the judge concluded that the transfers were not made in the ordinary course of GFI Wisconsin's business, id. at 179-80, but that the transfers were completely offset by new value provided by Reedsburg to GFI Wisconsin following transfers, id. at 182-84. In his oral ruling, the judge concluded that Reedsburg may recover the value of the utility services it provided during the 20-day period as an administrative expense under 11 U.S.C. § 503(b)(9), and also as a "new value" offset under 11 U.S.C. § 547(c)(4). Id. He reasoned that the electricity provided in the 20 days before the petition was new value and was not offset by Reedsburg's § 503(b)(9) claim because only pre-petition payments by the debtor could offset pre-petition new value under § 547(c)(4)(B). Because the § 503(b)(9) payment was not made before the petition date, it did not defeat the new value Reedsburg had supplied. The judge also concluded that even if a post petition payment of a § 503(b)(9) claim could defeat new value, in this case, the new Grede LLC, not GFI Wisconsin, would pay the § 503(b)(9) priority claim. Id. at 183-84. Thus, the payment would not be by "the debtor" as required under § 547(c)(4)(B). Having so ruled, the bankruptcy judge dismissed GFI Wisconsin's adversary proceeding.

OPINION

When a district court reviews a bankruptcy court order, the district court applies a "clearly erroneous" standard to questions of fact, Fed. R. Bankr. P. 8013, and reviews

questions of law and the application of law to fact *de novo*. Mungo v. Taylor, 355 F.3d 969, 974 (7th Cir. 2004). In this case, the facts are not in dispute, so I am applying a *de novo* standard of review to the bankruptcy court's order.

The issue on appeal is whether the bankruptcy court erred in finding that the electricity provided by Reedsburg during the 20-day period prior to the date GFI Wisconsin filed its bankruptcy petition may be included as new value for the purposes of 11 U.S.C. § 547(c)(4), where such electricity was the subject of an allowed administrative expense claim under 11 U.S.C. § 503(b)(9). This issue boils down to whether Reedsburg's allowed administrative expense claim under 11 U.S.C. § 503(b)(9) was "an unavoidable transfer" made by GFI Wisconsin pursuant to 11 U.S.C. § 547(c)(4).

A. The New Value Defense under § 547(c)(4)

Section 547 of the Bankruptcy Code allows the trustee or debtor-in-possession to avoid and recover preferential transfers made by a debtor to a creditor during the 90-day preference period before the debtor's petition date, so long as the transfers meet certain criteria set forth in 11 U.S.C. § 547(b). In this case, it is undisputed that GFI Wisconsin's preference transfers to Reedsburg satisfied the requirements of § 547(b). The Code provides for this avoidance, or recovery, of preferential payments in order to avoid a pre-petition

scenario in which a debtor pays its most important creditor in order to continue operations to the detriment of other creditors. Mortenson v. National Union Fire Insurance Co. of Pittsburgh, Pa., 249 F.3d 667, 671 (7th Cir. 2001). The creditor that receives a preferential payment diminishes the value of the estate that is available to other creditors. Thus, § 547(b) is intended to prevent a debtor from favoring one creditor in its run-up to bankruptcy. Id.

Section 547(c) provides several defenses that a creditor may assert against a trustee or debtor-in-possession who seeks to avoid or recover a preferential transfer. 11 U.S.C. § 547(c). The "new value defense" offers protection for pre-petition transfers a creditor receives where the creditor later delivers goods or services, and thus "new value," to the debtor:

> The trustee may not avoid under this section a transfer . . . 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[.]

Id. § 547(c)(4). The Code defines "new value" as "money or money's worth in goods, services, or new credit, or release . . . but does not include an obligation substituted for an existing obligation." 11 U.S.C. § 547(a)(2).

Congress intended § 547(c)(4) to encourage creditors to continue doing business with troubled debtors by protecting transfers received by creditors from preference actions, to the extent that the creditors provided goods that replenished the estate during the preference period. In re Armstrong, 291 F.3d 517, 525 (8th Cir. 2002); see also In re Pillowtex Corp., 416 B.R. 123, 130 (Bankr. D. Del. 2009) (Section 547(c)(4) "is designed to encourage trade creditors to continue dealing with troubled businesses, and . . . to treat fairly a creditor who has replenished the estate after having received a preference.") The exception applies most often to revolving credit relationships; protecting a creditor who extends a "revolving credit" to a debtor is not unfair to other creditors because preferential payments are replenished by the preferred creditor's extensions of new value to the debtor. Matter of Toyota of Jefferson, Inc., 14 F.3d 1088, 1091 (5th Cir. 1994).

B. Administrative Priority under § 503(b)(9)

Section 503(b)(9) of the Bankruptcy Code also provides creditors protection for the value of goods provided to the debtor in the run-up to bankruptcy. Specifically, § 503(b)(9) provides administrative priority to recovery of "the value of goods received by the debtor within the 20 days before the commencement [of the bankruptcy case] in which the goods have been sold to the debtor in the ordinary course of such debtor's business." 11 U.S.C. 11§ 503(b)(9).

C. Reedsburg's New Value Defense and Administrative Priority Claim

The question before the court is whether Reedsburg can utilize a new value defense if it also receives payment for its § 503(b)(9) administrative claim where both its new value defense and its administrative claim are predicated upon the same goods. As the creditor asserting the new value defense, Reedsburg has the burden of establishing the elements of the defense. 11 U.S.C. § 547(g).

As a starting point, the parties agree that, after GFI Wisconsin submitted preferential transfers to Reedsburg, GFI Wisconsin received electricity valued at approximately $400,000 from Reedsburg in the 20 days before the petition date. GFI Wisconsin concedes that Reedsburg has satisfied the first element of § 547(c)(4) because GFI received new value from Reedsburg, but it contends that Reedsburg cannot meet the requirements of § 547(c)(4)(B) because GFI "ma[d]e an otherwise unavoidable transfer to or for the benefit of" Reedsburg on account of the new value. Id. § 547(c)(4)(B).

In particular, GFI Wisconsin contends that because Reedsburg's § 503(b)(9) claim has been allowed and is fully funded, an "otherwise unavoidable transfer" has been made for the benefit of Reedsburg on account of the new value it provided. Reedsburg concedes that payment of the § 503(b)(9) claim is on account of the new value it provided in the 20 days before the petition date and that it is "unavoidable" under the Code. However, Reedsburg contends that the § 503(b)(9) payment is not an "unavoidable transfer" within the meaning

of § 547(c)(4)(B) because only transfers made pre-petition are relevant to § 547(c)(4)(B) and § 503(b)(9) payments (transfers) always occur post petition. Alternatively, Reedsburg contends that even if post petition payments could fall under § 547(c)(4)(B), the post petition payment in this case does not satisfy the statutory requirements because it will not be paid by the debtor and will not diminish the debtor's estate. Finally, Reedsburg contends that the policies and purposes of the Bankruptcy Code support its position.

1. Post petition transfers under § 547(c)(4)(B)

Reedsburg contends that it may assert the new value defense so long as the new value it provided GFI Wisconsin was unpaid as of the date GFI filed its bankruptcy petition. In other words, Reedsburg contends that post petition payments to a creditor, such as payment of a § 503(b)(9) claim, cannot negate a new value defense.

Some courts, including the bankruptcy court below, have accepted this argument. For example, in In re Commissary Operations, 421 B.R. 873, 878 (Bankr. M.D. Tenn. 2010), the bankruptcy court stated that the "plain language of § 547 closes the preference window at the petition, limiting the § 547(c)(4) defense to new value supplied and payments made *before* the debtor crosses into bankruptcy." (Emphasis in original) (quoting In re Phoenix Restaurant Group, Inc., 317 B.R. 491, 496 (Bankr. M.D. Tenn. 2004)). The "plain language" to which those courts and Reedsburg are referring is the statement in §

547(c)(4)(B) that "the *debtor* did not make an otherwise unavoidable transfer . . . ."

Reedsburg contends that the reference to "the debtor" closes the § 547(c)(4) analysis at the petition date because the filing of a bankruptcy petition divests the *debtor* of "all legal or equitable interests of the debtor in property." 11 U.S.C. § 541(a)(1). Thus, post petition, only the bankruptcy estate or the debtor-in-possession would have anything to transfer to a creditor. In other words, because the "debtor" becomes the "debtor-in-possession" upon filing a petition under Chapter 11, by definition, any post petition transfer is not made by the "debtor." Under Reedsburg's theory, a creditor could rely on "new value" even if the value was satisfied by unavoidable, post petition transfers by the debtor-in-possession. See also Phoenix Restaurant, 317 B.R. at 496-97 ("Had Congress intended § 547(c)(4)(B) to account for payments made post petition, the section would have included something like 'an otherwise unavoidable transfer of an interest of the estate in property to or for the benefit of such creditor.' Instead, Congress disqualified only new value paid for by 'the debtor' with an otherwise unavoidable transfer.").

I am not persuaded by Reedsburg's argument that the reference to the "debtor" in § 547(c)(4)(B) imposes a temporal limitation. Neither the Code nor Supreme Court precedent supports Reedsburg's narrow definition of the term "debtor" or "debtor-in-possession." The Code's definition of "debtor" does not suggest that this entity ceases to exist upon the filing of a bankruptcy petition; rather, the Code provides only that the term "debtor" means

"person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(13). This definition does not limit the applicability of the term "debtor" to the debtor's status as a pre-petition entity. In addition, under § 1101(1) of the Code, "debtor-in-possession" means "debtor."

The Supreme Court has explained that debtor and debtor-in-possession are "the same 'entity.'" National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513, 527-28 (1984) (explaining that debtor-in-possession is "'same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent a bankruptcy filing"). This makes sense, because the Bankruptcy Code includes several references to the "debtor" that necessarily include the debtor-in-possession or events that may occur post petition. For example, 11 U.S.C. § 1121 refers to the *debtor's* right to file a reorganization plan. This reference includes the debtor-in-possession, the proponent of most Chapter 11 plans. Similarly, § 1142(a) requires the "debtor" to carry out a Chapter 11 plan. Because this occurs post petition, the term "debtor" necessarily includes the debtor-in-possession.

Additionally, although the bankruptcy judge stated that he had found no case "that suggested that payment subsequent to the bankruptcy would affect" the new value defense, R. 105, at 49, dkt. #59 in 09-AP-249-rdm, several courts have concluded that post petition payments or transfers are relevant to a § 547(c)(4)(B) analysis. E.g., In re JKJ Chevrolet,

Inc., 412 F.3d 545, 553 n.6 (4th Cir. 2005) ("[P]ost-petition transfers may be considered under section 547(c)(4)(B)"); In re Phoenix Restaurant Group, Inc., 373 B.R. 541, 548 (M.D. Tenn. 2007) (post petition payment on reclamation claim defeats creditor's new value defense); In re Consolidated FGH Liquidating Trust, 392 B.R. 648, 655-56 (Bankr. S.D. Miss. 2008) (holding that post petition payments to creditor offset new value defense); In re Login Bros. Book Co., 294 B.R. 297, 300 (Bankr. N.D. Ill. 2003) (holding that return of merchandise post petition defeats new value defense because "both the plain language and policy behind the statute indicate that the timing of a repayment of new value is irrelevant."); In re Arizona Fast Foods, LLC, 299 B.R. 589, 596-97 (Bankr. Ariz. 2003) (post petition administrative expense payment of goods subject to reclamation claim defeats new value defense for same goods); In re MMR Holding Corp., 203 B.R. 605, 609-10 (Bankr. M.D. La. 1996) ("An unavoidable post-petition transfer on account of new value extended subsequent to a preference should limit the use of § 547(c)(4) by the amount of the unavoidable transfer, as without a reduction in the new value offset, the transferee would be receiving double use of the new value."); In re D.J. Management Group, 161 B.R. 5, 7-8 (Bankr. W.D.N.Y. 1993) (post petition payment offset new value defense).

In particular, in two of the three cases that have considered the precise issue of the relationship between § 547(c)(4)(B) and § 503(b)(9), the bankruptcy courts have concluded that post petition payments are relevant and can offset new value. In re Circuit City Stores,

Inc., 2010 WL 4956022, *6 (Bankr. E.D. Va. Dec. 1, 2010); In re TI Acquisition, LLC, 429 B.R. 377, 383 (Bankr. N.D. Ga. 2010) (post petition payment on § 503(b)(9) claim defeats new value). But see Commissary Operations, 421 B.R. at 878 (post petition payments not relevant to new value analysis). The two courts that have held that post petition payments are relevant conclude that the controlling question under § 547(c)(4)(B) is whether the transfer for the benefit of the creditor diminishes the value of the *estate,* making it irrelevant when the transfers were made. Circuit City, 2010 WL 4956022, at *8 n.18; TI Acquisitions, 429 B.R. at 383-84 ("Upon full payment to [the creditor], the Debtor's estate is no longer enlarged by the delivery.") Other courts have applied similar reasoning to conclude that it does not even matter whether the payment comes from the debtor. In re Kroh Bros. Development Co., 930 F.2d 648, 653 (8th Cir. 1991) ("[O]nly the effect on the estate, not the source of payment, is relevant."); Consolidated FGH, 392 B.R. at 658 (payment by third-party to creditor offsets new value where payment had effect of diminishing new value that had been extended to debtor's estate); In re Bridge Information Systems, Inc., 311 B.R. 781, 788-89 (Bankr. E.D. Mo. 2004); In re Lease–A–Fleet, Inc., 141 B.R. 853, 866 (Bankr. E.D. Pa. 1992). Under this reasoning, the timing of the transfer or payment to the creditor is irrelevant, so long as the transfer diminished the estate.

In sum, neither the Bankruptcy Code nor the case law supports the bankruptcy judge's opinion that only pre-petition events affect the new value analysis. Additionally,

because there is nothing in the language of § 547(c)(4) that limits the relevant unavoidable transfers to those arising pre-petition or otherwise suggests that post petition transfers made for the benefit of a creditor cannot offset a new value defense, I conclude that post petition unavoidable transfers are relevant to a new value defense.

2. Payment of § 503(b)(9) claim by the new owner of GFI Wisconsin's assets

Reedsburg contends that even if post petition transfers may be considered under § 547(c)(4)(B), there is no evidence in this case that payment of the § 503(b)(9) claim has diminished or will diminish the debtor's estate. In particular, Reedsburg contends that there is no evidence that the debtor's estate was diminished by $394,207.52 (the amount of Reedsburg's § 503(b)(9) claim), because it is not clear that GFI Wisconsin transferred that specific amount to Grede LLC (the purchaser of GFI's assets) solely for the benefit of Reedsburg.

I disagree. Although the record does not specify whether GFI Wisconsin transferred exactly $394,207.52 as a separate amount for the payment of Reedsburg's claims, the record establishes that GFI Wisconsin transferred assets and cash to the new Grede LLC and in exchange, Grede LLC assumed certain liabilities, including liability for payment of the allowed § 503(b)(9) claims. The assets transferred from GFI Wisconsin to Grede LLC were the assets available to pay GFI Wisconsin's general, unsecured creditors and to pay for GFI

Wisconsin's liability to § 503(b)(9) claimants, like Reedsburg. By transferring its assets and cash to Grede LLC, GFI Wisconsin parted with its interest in money that has now been set aside in a bank account for the exclusive benefit of Reedsburg. Thus, the payment of Reedsburg's § 503(b)(9) claim, whether by GFI Wisconsin itself or by Grede LLC using funds it received from GFI, reduced the value of the estate and the assets available to pay general, unsecured creditors.

3. Policy and purposes of the Bankruptcy Code

Finally, I disagree with Reedsburg's contention that allowing it to claim administrative priority as well as assert a new value defense would advance the dual policy considerations under § 547(c)(4) of encouraging lending to troubled debtors and promoting equality of treatment among creditors. In particular, Reedsburg contends that allowing it to assert a new value defense as well as a § 503(b)(9) claim encourages it and other similarly situated creditors to continue providing goods to debtors; the creditors know they will be compensated for any new value they provide. Conversely, denying Reedsburg the benefit of the new value defense would force creditors, such as itself, to choose between asserting the new value defense and enforcing its rights to statutory priority treatment for goods it supplied a debtor in the 20 days before bankruptcy. Reedsburg's Br., dkt. #4, at 12.

Reedsburg's policy arguments are not persuasive. It is asking essentially that it be

allowed to double-count its 20-day invoices, to the detriment of the estate and other creditors. Such a result does not promote equal treatment among creditors. Moreover, prohibiting a creditor from receiving payment on its 20-day invoices as part of a § 503(b)(9) administrative expense and using those same invoices as new value to offset a preference does not discourage a creditor from engaging in business with troubled debtors. The creditor knows it can either assert a § 503(b)(9) claim or a § 547(c)(4) defense to preference transfers. Under either circumstance, the creditor is paid for the value of goods it delivers to the debtor.

Finally, the purpose of the new value defense is to avoid punishing a creditor who has replenished the estate after receiving a preferential transfer. Thus, the new value defense should be limited to those situations in which the debtor's estate has actually been enhanced by the creditor's actions. Kroh Bros., 930 F.2d at 654 ("The availability of the defense, then, depends on the ultimate effect on the estate."). When a creditor receives an unavoidable post petition transfer on account of that new value, there is no replenishment.

For the reasons explained above, I conclude that establishment of the fund to pay Reedsburg's § 503(b)(9) claim constitutes an otherwise unavoidable transfer by GFI Wisconsin's estate for the exclusive benefit of Reedsburg, thus making the preference defense unavailable to Reedsburg under of § 547(c)(4)(B) of the Bankruptcy Code. Accordingly, I am reversing the bankruptcy court's decision dismissing GFI Wisconsin's adversary

proceeding for recovery of preferential transfers.

ORDER

IT IS ORDERED that the decision of the United States Bankruptcy Court for the Western District of Wisconsin allowing appellee Reedsburg Utility Commission to include as new value for the purpose of 11 U.S. C. § 547(c)(4) the value of the electricity it provided to appellant GFI Wisconsin, Inc. in the 20 days prior to the filing of appellant's bankruptcy petition, and for which appellee will receive administrative priority under 11 U.S.C. § 503(b)(9), is OVERRULED. Accordingly, and to that extent, the bankruptcy court's decision dismissing appellant's adversary proceeding against appellee for recovery of preferential transfers is REVERSED.

Entered this 10th day of May, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge