

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

TOWERY PRESS, INC.,

Debtor.

BK #85-24049-WHB
Chapter 7

A. J. CALHOUN, TRUSTEE
FOR TOWERY PRESS,

Plaintiff,

v.

Adversary Proceeding
No. 86-0167

ROBERT G. WILLIAMS,
REAL ESTATE NEWS, INC.
and CENTER CORPORATION,

Defendants.

**MEMORANDUM OPINION AND
ORDER ON FRAUDULENT CONVEYANCE COMPLAINT**

This adversary proceeding was filed by the Trustee for the Debtor, Towery Press, Inc. on July 24, 1986. Former Chief Judge Leffler sua sponte abstained, and the Trustee filed a Complaint in the Chancery Court of Shelby County, Tennessee, on September 22, 1986, which action was removed to the United States District Court for this district. Subsequently, the Honorable Odell Horton, Chief Judge of the United States District Court ordered a referral of the removed state complaint to this Bankruptcy Court. An answer to the removed complaint was filed and at the trial of this adversary proceeding, beginning on July 12, 1988, the parties announced that the bench trial was to be conducted on the Shelby County Chancery Court pleadings, which had been removed to this Court, and that the plaintiff Trustee was relying upon the counts of the Chancery Court complaint as to the alleged fraudulent conveyance of the business and assets known as Real

Estate News.¹ Although the state complaint was therefore tried, that complaint alleged that the transfer was fraudulent under either applicable state or bankruptcy law.

The following findings of fact and conclusions of law are made pursuant to Bankruptcy Rule 7052, and the Court concludes that this is a core proceeding under 28 U.S.C. §157(b)(2)(H).

FINDINGS OF FACT

1. This Chapter 7 proceeding was initiated by the filing of a petition under Chapter 11 of the Bankruptcy Code on September 9, 1985. The Debtor is Towery Press, Inc. ("Towery Press" or "Debtor") and at the time of the filing of the petition, the defendant, Robert G. Williams ("Williams") was acting as its president.

2. At all times pertinent hereto, Towery Press was a Tennessee corporation owned ninety-eight percent by Center Corporation with two percent being held by members of the Towery family.

3. Prior to March 30, 1985, the Debtor had been managed by J. Robert Towery ("Towery") as President and Director of Towery Press and Center Corporation. (Defendant Exhibit 5, Transcript 7/12/88 at 109) (hereinafter abbreviated Ex. and Tr.)

4. Towery Press' principal secured creditor was Union Planters National Bank ("UP") and the Bank's related entities, Chickasaw Capital Corporation and DeSoto Capital Corporation. The Bank had as security a mortgage on the real property on Brooks Road and security interests in assets, including fixtures, furniture, equipment, inventory and accounts receivable of Towery Press.

5. Towery Press was engaged in the business of publishing and related graphics services. Among the publications in which Towery Press had an interest and which were published at the premises of Towery Press were Memphis Magazine, Dish Magazine, Touchdown, and others, including Real Estate News,

¹ By order entered July 7, 1988, Count III of the complaint was severed for trial with adversary proceeding number 87-0112.

the publication which is the subject of the instant adversary proceeding. On August 1, 1980, Towery Press, Inc. and Collier Black ("Black") formed a joint venture known as Memphis Home Buyers Guide Company ("Venture"). The Venture was formed to produce a free distribution, bi-weekly publication providing the service of advertising of real property, primarily homes, for realtors and other advertisers in the Memphis real estate community. The name of the magazine was initially Memphis Home Buyers ("Home Buyers"). The name was eventually changed to Real Estate News ("REN") in 1983. (Tr. 7/12/88 at p. 25; Plaintiff Ex. 1.) Originally, the Debtor owned 90% of REN and Black owned 10%. (Plaintiff Ex. 1.). This was subsequently changed to 80% and 20% respectively. (Tr. 7/12/88 at p. 24; Plaintiff Exs. 1 & 3).

6. The Debtor was generally to provide publishing services for REN and Black was to provide sales services. (Tr. 7/12/88 at p. 28).

7. Within a few months after beginning publication, Home Buyers magazine eliminated the only competing free distribution advertising publication for real estate in Memphis. (Tr. 7/12/88 at pp. 27-32.) At this time, REN was a 8-1/2" by 11" saddle-stitched paper, with a newsprint black/white interior and a slick color cover.

8. Between January of 1982 and May of 1985, Beverly Wolfe ("Mrs. Wolfe") was the Comptroller of Towery Press. For the last year of her employment, she was a certified public accountant and she was responsible for all financial and accounting functions. (Tr. 7/12/88 at pp. 113-114.) Until the spring of 1985, the Debtor performed the accounting function for REN and since late 1982 the accounting for REN was maintained on the Debtor's books as a division of Towery Press even though REN was a separate joint venture. (Tr. 8/5/88 at pp. 418, 422.) The accounting for the relationship among Williams, his controlled companies and Towery Press was handled by Mrs. Wolfe, and her successor, Robert J. Twele, under the instruction of the Debtor's certified public accountants, Ernst & Whinney, by the use of the Center Corporation account.

9. In 1982, Real Estate News entered into an agreement with the Memphis Board of Realtors ("Board") which has been renewed on an annual and/or monthly basis ever since, allowing Real Estate News to utilize the "realtors" trademark logo and to carry editorial copy prepared by the Memphis Board of Realtors. This agreement has been reflected on the cover of each copy of Real Estate News thereafter. (Defendant Exs. 1 & 2).

10. REN operated successfully on a bi-weekly format from its inception until approximately April of 1983, at which time, due to the requests of certain members of the Memphis Board of Realtors and competitive pressures by another independent publication, Real Estate News began to be published on a weekly basis. It was published on a weekly basis through June, 1984. (Tr. 7/12/88 at pp. 30-31.) In addition, at about this time, REN entered into its exclusive endorsement contract with the Board whereby the Board was given some control over the editorial content of REN in return for the Board's official endorsement. The contract with the Board did not guarantee any advertising revenue to REN and did not provide for sharing of revenue and expenses with the Board. The contract with the Board was later renewed in 1985. The 1985 contract was cancellable on 30 days notice; however, REN has the right to continue publication without the endorsement of the Board. (Defendant Exs. 1 & 2.) Black did not believe the Board endorsement affected the value of REN (Tr. 7/12/88 at p. 50); however, Williams believed otherwise.

11. In approximately April of 1983, REN also changed its publishing format to tabloid size with a colored photo on the front. Initially, advertising sales rose as a result of the weekly format. However, by late 1983, REN began to experience some migration of advertisers to the Commercial Appeal and began to receive competition from another free distribution real estate advertising publication founded by Micky Petrolini ("Petrolini"). (Tr. 7/12/88 at p. 31.)

12. In June, 1984, REN reverted to a bi-weekly format. (Tr. 7/12/88 at p. 32.) In addition, the format was changed to a tabloid size with the current slick cover and saddle stitching. The new cover and

production aspects increased production costs. (Plaintiff Ex. 29.) By late 1984, Petrolini's competing publication went out of business and REN was without competition in its market. (Tr. 7/12/88 at p. 32.)

13. REN has operated under the format initiated in June, 1984, to the present date.

14. REN operates on a fairly simple basis with a staff of three to four persons. Realtors purchase advertisements for a price per photo ad. REN hires photographic services on a contract basis to make the photographs, and it subcontracts for distribution work. (Plaintiff Ex. 29; Tr. 7/12/88 at pp. 25, 33, Tr. 8/5/88 at 209-211.)

15. The Debtor provided artwork and printing services to REN from its inception and through the Debtor's Chapter 11 proceeding. In addition, from 1983 until April or May of 1985, the Debtor also handled the accounting, billing and collection functions for REN. All services provided by the Debtor to REN were charged to REN. (Plaintiff Ex. 29; Tr. 7/12/88 at p. 79.)

16. Since REN contracts for most of its services, the publication itself does not require much office space. Although REN has continued marketing efforts with the realtor community, the publication has no sales force per se. (Plaintiff Ex. 29, p. 4.)

17. Due to the exclusive niche which REN occupies in the bi-weekly advertising market in Memphis, and because advertising fees are collected by realtors from individual agents and remitted to REN, REN's collection experience with its accounts receivable has always been good. (Tr. 7/12/88 at pp. 45-46.)

18. Day-to-day management of REN was entrusted to its managing editor. In addition, Towery and Black were involved in the overall management of the publication. Management time for both Towery and Black were minimal. Black was the primary contact with the Board and larger realtor advertisers prior to January, 1985. (Tr. 7/12/88 at pp. 32-33, 40, 41.)

19. During 1983 and 1984, the Debtor had various financial difficulties. During this time, 98% of the Debtor's stock was owned by Center Corporation ("Center"). Center was owned 50% by Towery and 50% by Williams. Center also owned 85% of the stock of International Building Systems, Inc. ("IBS").

Williams owned the remaining 15% of IBS. (Tr. 7/12/88 at pp. 85-86.) During this period of time, the Debtor occupied space in a building owned by Williams and located at 960 Tennessee Street, Memphis, Tennessee. (Tr. 7/13/88 at p. 280.)

20. International Building Systems, Inc. was also related to International Building Systems, Ltd., ("IBS, Ltd."), another entity controlled by Williams. IBS, Ltd. was a company which had generated substantial sums from international operations, and was the source of at least some of the funds which Williams transferred to Towery Press. Funds would commonly flow from IBS, Ltd. to IBS, then to Center and then to Towery Press.

21. At some point prior to 1985, Towery Press developed cash flow problems, as a result of which its operations were not generating enough cash to meet all of its obligations. In order to fund the shortfall, Williams lent Towery Press substantial sums of money. All sums of money of whatever kind or nature transferred by Williams to Towery Press were recorded by means of a single clearing account on Towery Press' books in the name of Center Corporation. The Center Corporation account is described in the record as Plaintiffs' Exhibit 15.

22. Beginning approximately in late 1983, the Debtor began divesting itself of various assets. In late 1983 or early 1984, the Debtor sold a publication known as Satellite Dish magazine to Williams and a group of investors. In late 1984, the Debtor also ceased many of its actual printing operations and began to subcontract for these services for REN and other publications of the Debtor. During this period of time, Towery was the president of the Debtor and Williams was an officer and director of the Debtor. (Tr. 7/13/88 at p. 256; Ans. of Williams.)

23. In late 1984, the Debtor's financial condition worsened. During this period of time, Towery discussed filing bankruptcy with Williams and the Debtor's attorney, Thomas Cates since Towery did not know how to manage the financial obligations of the Debtor. (Tr. 7/12/88 at p. 108.) Nevertheless, REN

remained a profitable venture during this same period of time. (Tr. 7/12/88 at pp. 45, 79.) REN was generally contributing about \$10,000.00 in monthly revenue to the Debtor. (Tr. 7/12/88 at p. 79).

24. In the middle of January of 1985, it became apparent to Towery that the Debtor would not have sufficient funds to meet the company's month-end payroll. Towery told Williams that approximately \$25,000.00 would be needed to meet the Debtor's payroll. Williams told Towery that Williams would be able to make a short-term loan to the Debtor to cover the payroll. (Tr. 7/12/88 at pp. 80-81.)

25. Based on Williams' representations that he would cover the payroll, the Debtor issued payroll checks. On the day following the distribution of the payroll checks, the Debtor needed to obtain funds from Williams in order to make the checks good. At that time, Towery went to Williams to verify that the \$25,000.00 payment would be made. At that time, Williams requested Towery to execute a document dated January 31, 1985, which purported to sell the Debtor's 80% interest in REN to Williams for \$60,000.00. (Plaintiff Ex. 3.) This was the first time that Towery had been approached regarding the sale of REN. (Tr. 7/12/88 at pp. 80-83.) After the Debtor signed the REN sales agreement, Williams advanced \$25,000.00 to the Debtor from IBS. (Tr. 7/12/88 at pp. 80-83.)

26. Towery advised Williams that Black had a contractual first right of refusal to purchase the Debtor's interest in REN. Williams told Towery not to worry about that provision and that Williams would take care of Black. Williams also told Towery that REN was being transferred to protect Williams' and the Debtor's interest in REN. It was Towery's understanding that REN would continue to benefit Towery Press. (Tr. 7/12/88 at pp. 82, 89-90.) The \$60,000.00 purchase price was not discussed or negotiated between Williams and Towery. (Tr. 7/12/88 at pp. 82, 103.) At the time that Towery signed the sales agreement, he believed that the \$60,000.00 was not a fair price for a sale of the Debtor's interest in REN, (Tr. 7/12/88 at pp. 82-83) and there was some doubt in Towery's mind about what the Debtor and Williams were doing. (Tr. 7/12/88 at p. 101.)

27. Williams and Towery later executed another document changing the effective date of the sale of REN from January 31, 1985, to March 1, 1985. See Plaintiff Ex. 4. At this later date, according to Towery, \$60,000.00 was still not a fair price. (Tr. 7/12/88 at p. 83.)

28. In approximately April of 1985, Towery attended a meeting at the office of attorney Lytle Nichol along with Williams, Black and other attorneys. At this meeting, Williams represented to Black that Williams had paid \$90,000.00 for the Debtor's 80% interest in REN. Upon Williams making this statement, Towery left the room because of his belief that Williams' statement was untrue. (Tr. 7/12/88 at pp. 39, 84.) Black, at that time, believed the 80% to be worth more than \$90,000.00. (Tr. 7/12/88 at p. 39). Black was never asked to make a financial contribution to REN at the time in 1985 Williams injected funds to the debtor. (Tr. 7/12/88 at p. 54.)

29. In January of 1985, REN had sufficient working capital in its own accounts receivable to operate. (Tr. 7/12/88 at pp. 72, 107.)

30. Sometime prior to January of 1985, the Debtor had granted a security interest in its accounts receivable to Chickasaw Capital Corporation ("Chickasaw") and UP. During this period of time, the Debtor would ordinarily collect the accounts receivable owed to REN. In April of 1985, Chickasaw attempted to collect REN receivables as part of its security interest in the Debtor's accounts receivable by sending collection letters directly to REN's account debtors. (Tr. 7/12/88 at p. 35.) At this point, Black spoke with Peter Crawford of UP and discovered that Chickasaw and UP claimed the receivables of REN. This was the first time that Black learned that the Debtor had sold its 80% interest in REN to Williams. (Tr. 7/12/88 at pp. 35, 36.) Black had never been advised previously that any of REN's assets were pledged to Union Planters Bank or its affiliates on a line of credit for Towery Press. (Tr. 7/12/88 at p. 55)

31. As a result of Chickasaw's claim to REN receivables, a deal was struck between the Debtor and Chickasaw whereby Chickasaw was to collect REN's accounts receivable in a lock box and remit a portion back to REN or the Debtor. (Plaintiff Ex. 20; Tr. 7/12/88 at pp. 136-137) Eventually, UP remitted to

Real Estate News, Inc. \$120,999.39 of receivables. (Plaintiff Ex. 13.) This figure included the accounts receivable owing to REN which were on the Debtor's books and records as of March, 1985. (Tr. 7/13/88 at pp. 234-235.)

32. In January 1985, the necessary operating expenses for REN included printing costs, employees and contract labor. (Tr. 7/12/88 at p. 53.) Very limited equipment or fixtures were needed. (Tr. 7/12/88 at p. 54.)

33. Williams subsequently conveyed his 80% interest in REN to a corporation controlled by him, Real Estate News, Inc. ("REN, Inc."). (Williams answer ¶13.)

34. Black, through his corporation Marcol Publishers, Inc., and Williams/REN, Inc. entered into a written agreement May 1, 1985, purporting to acknowledge that Williams or REN, Inc. owned 80% of REN and Black owned 20%. That document also provided for a profit split of 75% to Williams and 25% to Black, and for a payment in the event of either man's death in return for that party's interest in REN - - \$75,000.00 to Williams' estate or \$25,000.00 to Black's estate. (Plaintiff Ex. 2) The fact that Black executed this document does not bind the trustee or creditors of the debtor to any conclusion concerning the transfer of the debtor's interest in REN.

35. On December 31, 1986, Black received \$12,500.00 as his 25% share of the profit from REN, and Williams would have received 75% of the profit or \$37,500.00. (Tr. 7/12/88 at p. 47)

36. REN paid and continues to pay a management fee per week to Williams and Black of \$650.00 each. (Tr. 7/12/88 at p. 47)

37. Black believed that creditors were denied fair compensation for REN. (Tr. 7/12/88 at p. 70) Although Black has a vested interest in the business and obviously desires to sever Williams from REN, Black understood that an avoidance by the Trustee could permit anyone to bid on REN. (Tr. 7/12/88 at pp. 71-72).

38. Approximately \$25,000.00 was needed to cover the Debtor's payroll in January 1985. The balance of the \$60,000.00 stated consideration was intended to pay other debts of the Debtor, although Towery did not know which debts Williams intended to pay. (Tr. 7/12/88 at p. 87).

39. Williams was aware that the Debtor was in financial distress in early 1985. (Tr. 7/12/88 at p. 135; 7/13/88 at p. 238).

40. In the spring of 1985, Mrs. Wolfe made journal entries on the Debtor's books reflecting two transfers of \$25,000.00 each made by IBS to the Debtor during the month of January, 1985. These entries were shown as debits on the intercompany account between the Debtor and Center. At the time these entries were made, Mrs. Wolfe was not told that the loans actually represented the purchase price for REN. She did not account for \$60,000.00 because she did not have that amount of funds to account for. (Tr. 7/12/88 at pp. 117-118.) Ms. Wolfe did not learn that Williams had purchased the Debtor's interest in REN until April of 1985, when she was requested to set up REN as a separate company for accounting purposes. Ms. Wolfe was requested to set up such books as of January 31, 1985. She protested due to the fact that the Debtor's books for February and March had already been closed. Thereafter, Ms. Wolfe was told that the transaction would be dated March 1, 1985. Pursuant to these instructions, Ms. Wolfe made entries in the Debtor's books which removed income and expenses related to Real Estate News for the month of March. (Tr. 7/12/88 at pp. 113-115.) In addition, Ms. Wolfe removed \$58,422.59 in accounts receivable from the books of the Debtor based on her understanding that the accounts receivable had been sold to Williams as part of REN. (Plaintiff Ex. 6; Tr. 7/12/88 at pp. 115-116.) These accounts receivable were the only asset of REN which were shown on the Debtor's books. (Tr. 7/12/88 at p. 116.) A debit entry was also made in the Center intercompany account which increased the amount which Center owed to the Debtor. (Plaintiff Ex. 7, Tr. 7/12/88 at pp. 120-122) The transfer of nearly \$60,000.00 in REN accounts receivable to Williams had the effect of reducing assets of the Debtor. (Tr. 7/12/88 at p. 151)

41. When Ms. Wolfe removed the accounts receivable, income and expenses of REN from the books of the Debtor, no corresponding entry was made to reflect a purchase price of \$60,000.00, although such an entry was made in August of 1985, by Mr. Robert Twele ("Twele"). Ms. Wolfe testified that no such entry was made because no sales proceeds could be identified. (Tr. 7/12/88 at pp. 117-118.) In April, Williams advised Ms. Wolfe that a \$30,000.00 payment made by IBS to First American Bank ("First American") was part of the purchase price for REN. (Tr. 7/12/88 at p. 118.)

42. At the time that IBS made the \$30,000.00 payment to First American, the Debtor was not indebted to First American at all. Further, the \$30,000.00 payment was made pursuant to a settlement agreement between Williams and IBS arising out of a complaint filed by First American. The Debtor was not a party to the First American complaint and had not guaranteed IBS' or Williams' debt to First American. Consequently, the Debtor did not receive any benefit as a result of the \$30,000.00 payment to First American. (Tr. 7/13/88 at pp. 270-271; Plaintiff's Ex. 27 & 28.) Since the Debtor was not indebted to First American, Ms. Wolfe did not make any accounting entry on the Debtor's books reflecting the \$30,000.00 payment from IBS to First American. (Tr. 7/12/88 at p. 120.)

43. Between 1982 and May of 1985, REN, operated as a division of the Debtor, never experienced bad debts of \$59,000.00 in a single annual accounting period. (Tr. 7/12/88 at pp. 45, 86, 123.) The asserted \$59,000.00 bad debts for REN was not sufficiently documented. (Tr. 7/13/88 at pp. 217-218.) The federal income tax return filed by the Debtor in 1984 reflects bad debts of \$51,551.00 for the entire company. (Tr. 7/13/88 at pp. 219-221; Plaintiff Ex. 26.) This tax return has never been amended to reflect other bad debts. (Tr. 7/13/88 at p. 222) Prior to early 1984, REN's expenses for deliveries, insertions, photography and editorial were recorded as expenses under REN's divisional income statements of contract labor. (Tr. 7/12/88 at p. 123-124.)

44. After Williams acquired the Debtor's 80% interest in REN, Williams hired Twele as comptroller for REN. Twele has been comptroller of IBS and other Williams' companies since May, 1985.

(Tr. 7/13/88 at p. 195) He also served as comptroller of Towery Press from May, 1985 to July, 1986. (Tr. 7/13/88 at p. 197) Twele found the books and records of the Debtor to be "sloppy" and "incomplete." (Tr. 7/13/88 at p. 197) Twele confirmed that Ms. Wolfe lacked any details of the sale of REN, and Twele recorded the sale in August, 1985, as a \$60,000.00 receivable for the Debtor from Center, which had the effect of reducing Center's claim against the Debtor. (Tr. 7/13/88 at pp. 198-199, 211) Twele prepared books and records of REN which show that Williams or REN, Inc. received March 1985, REN receivables in the amount of \$56,524.54, the only assets on the books in May, 1985. (Tr. 7/13/88 at p. 199) In December of 1985, or January of 1986, Steve Balton ("Balton"), then accountant for Black, spoke with Twele regarding the books and records of REN. At that time, Twele advised Balton that Williams had purchased the accounts receivable of REN from the Debtor as of March 1, and that these receivables were shown on REN's records as a note payable to Williams. (Plaintiff Ex. 13; Tr. 8/5/88 at pp. 385-387; Tr. 8/5/88 at pp. 234-235.) Although there is some evidence indicating that the Debtor actually collected a portion of the March accounts receivable, these collections were shown as a debt owing from the Debtor to REN. This demonstrates that these receivables had been purchased by Williams and is consistent with Ms. Wolfe's testimony that she was instructed to remove the March receivables from the Debtor's books since the receivables had been purchased by Williams. Further, it appears that REN's accounts receivable collected by UP subsequent to March 1, 1985, were charged against the Debtor on its books and were repaid to REN when UP remitted these receivables to REN and by the Debtor rendering services to REN. When all credits were applied, the Debtor only owed REN approximately \$13,973.00. To the extent that this balance is in any way attributable to the Debtor's collection of the March 1 receivables, this debt reflects that Williams had acquired the March receivables when he purchased the Debtor's interest in REN. (Tr. 7/12/88 at pp. 116; Tr. 8/5/88 at 387-388; Plaintiff Ex. 6, 6A, 35; see also Tr. 7/13/88 at pp. 229-232.)

45. There are discrepancies in the actual booked expenses for REN and the reconstructions performed by Mr. Twele, who made numerous adjustments to the books of REN (Tr. 7/13/88 at p. 202;

Defendant Ex. 7), and Balton testified that all of the expenses imputed by Twele are not reflected on the books of the Debtor. Some of the expenses and overhead were estimated and over-stated by Twele. (Tr. 7/12/88 at pp. 161-168; see also Tr. 7/13/88 at pp. 203-211; 223-227).

46. Twele confirmed that the only consideration for the transfer of the Debtor's 80% in REN to Williams was Twele's August 1985 entry of the \$60,000.00 reduction in the Center receivable. (Tr. 7/13/88 at p. 211) In his investigation for this trial, Twele was advised by Williams that Williams, through his controlled companies, paid \$98,500.00 for REN. (Tr. 7/13/88 at p. 212; Plaintiff Ex. 8) However, in an earlier deposition, Twele had stated that no one had told him Plaintiff's Exhibit 8 represented consideration for the sale; further, he was advised that the \$98,500.00 represented funds "required by Towery Press to insure continuing operations." (Tr. 7/13/88 at pp. 213-214) When asked on cross-examination if this constituted a change in his testimony, after a long and nervous delay, Twele responded affirmatively. (Tr. 7/13/88 at p. 214)

47. The advances of cash by Williams to REN were necessary because of Union Planters' hold on the accounts receivable; however, after REN regained control of its receivables, it could finance its own operations. (Tr. 7/13/88 at p. 216) This is consistent with the other proof that REN was a profitable business.

48. Williams claimed that the Debtor was obligated along with IBS to First American Bank on a \$400,000.00 loan and that an IBS payment to First American of \$30,000.00 was part of the consideration for the REN transfer. (Tr. 7/13/88 at pp. 240-241) However, that is not consistent with other proof, including the testimony of Ms. Wolfe.

50. Williams supports the \$60,000.00 consideration by his testimony that this amount was needed to meet the Debtor's "immediate needs" and that the \$60,000.00 was "just a fair number." (Tr. 7/13/88 at pp. 242) This self-serving conclusion is contradicted by other proof on the value of the business, as well as by the conflicting testimony that Williams paid \$98,500.00. Williams gave no instruction to Ms. Wolfe, the

comptroller at the time of the transfer. (Tr. 7/13/88 at p. 243) He said that it was not his "function to tell [Ms. Wolfe] how to deal with Towery Press books." (Tr. 7/13/88 at p. 266)

51. At the trial, Williams on cross-examination, stated that he paid \$60,000.00 -- not \$98,500.00 -- by "check and transfer" for the Debtor's 80% interest in REN. (Tr. 7/13/88 at pp. 263-264) No satisfactory explanation was given by Williams for the \$98,500.00. (Tr. 7/13/88 at p. 264) In the Debtor's statement of affairs, signed by Williams, the transfer to Williams is reported for \$85,000.00. (Tr. 7/13/88 at p. 266) He explained that this represented the money he "had in REN." (Tr. 7/13/88 at p. 267)

52. Insider transactions were obviously commonplace, as evidenced by loans from the Debtor to Williams as a shareholder of \$904,000.00 (Tr. 7/13/88 at 272; Plaintiff Ex. 26), as well as by comparable loans from Williams to Center and then to the Debtor. (Tr. 7/13/88 at pp. 279-280).

53. Williams' company IBS made several loans to REN totalling \$72,000.00, of which \$62,000.00 was repaid between July 26, 1985, and October 30, 1985. (Tr. 7/13/88 at pp. 200-201; Defendant Ex. 6).

54. Center Corporation filed a proof of claim for \$140,042.17 (Plaintiff Ex. 7) and this claim amount includes three payments by IBS, Inc., IBS, Ltd. and Center to Towery Press, totalling \$80,000.00. (Plaintiff Ex. 8; Tr. 7/12/88 at pp. 177-178).

55. On January 31, 1985, Center Corporation owed an account to the Debtor of approximately \$160,000.00. (Tr. 7/12/88 at p. 150)

56. Williams signed the proof of claim for \$140,042.17 due his Center Corporation from Towery Press, the Debtor. (Tr. 8/5/88 at pp. 268-269; Plaintiff Ex. 7).

57. In the present proceeding, the plaintiff's expert, Z. Christopher Mercer ("Mercer"), testified that the value of the Debtor's 80% interest in REN was \$240,000.00 and that \$60,000.00 was not a reasonably equivalent value. Mercer's valuation was for the first quarter of 1985. (Tr. 8/5/88 at p. 203; Plaintiff Ex. 29)

58. The defendant's expert, Dr. Douglas Southard, ("Dr. Southard") testified that the fair market value of the Debtor's 80% interest in REN was \$30,000.00 as of January 31, 1985. (Tr. 8/5/88 at p. 302; Defendant Ex. 9)

59. Although there are some minor differences in their reports, both experts agreed on the general administrative cost required to operate a business such as REN. Both used the same income approach for calculating fair market value. (Tr. 8/5/88 at pp. 280, 324). The most significant difference accounting for the discrepancy in the two expert's opinions is the time period which each expert used in analyzing the historical income of REN. (Tr. 8/5/88 at p. 334) Mercer examined historical income and expense data for years from December, 1981, through the first quarter of 1985. (Tr. 8/5/88 at pp. 208-218; Plaintiff Ex. 29, pp. 11, 15-20.) Mercer determined that REN had an average annualized net income of \$100,000.00 and that a willing purchaser would pay approximately three times these earnings or \$300,000.00 in order to acquire the business. Thus, Mercer valued the Debtor's 80% at \$240,000.00. (Tr. 8/5/88 at pp. 224-225)

60. Dr. Southard valued REN as of January 31, 1985, and found the fair market value of the old business to be \$30,000.00. Thus, 80% interest in REN would be worth only \$24,000.00. Dr. Southard basically used the same capitalization rate as Mercer and approximately the same administrative costs. However, in reviewing the historical income of REN, Dr. Southard's analysis only takes into consideration the period of July, 1984, through January 1985. (Tr/ 8/5/88 at p. 299; Def. Ex. 9.)

61. Based on this seven-month analysis, Dr. Southard arrived at projected annualized earnings for REN of \$10,000.00, even though Dr. Southard's restated pro forma net income of REN shows a net pre-tax income of \$125,594.00 for fiscal year 1983, and \$63,968.00 for fiscal year 1984. (Def. Ex. 9.)

62. Both Mercer and Dr. Southard rely in their reports upon a treatise by Dr. Shannon Pratt ("Pratt"). Upon cross examination, Dr. Southard conceded that Pratt was considered authoritative and that Pratt's treatise states that the most commonly selected historical period for evaluation of earning capacity is five years. (Tr. 8/5/88 at pp. 342-343.)

63. Although Dr. Southard acknowledged that the five year period is a normal period for review in most situations, he maintained that a seven month period was the only appropriate period in the present case. (Tr. 8/5/88 at p. 334.) Mercer's analysis, on the other hand, included historical data as far back as 1981.

64. Black, or his companies, own other real estate publications in several cities and are within the top ten publishers of this type. Therefore, he should be and is familiar with valuations of such publications as REN. (Tr. 7/12/88 at p. 42).

65. Black placed the market value of 100% of REN at \$200,000.00 in January or March of 1985. He based his valuation upon his practical knowledge of this specialized publication business, including start up costs, competition and overhead. (Tr. 7/12/88 at pp. 42-43) He believed the business to be worth more than \$200,000.00 at the present time. (Tr. 7/12/88 at pp. 60-63)

66. REN was a profitable business in January 1985. (Tr. 7/12/88 at pp. 44-45).

67. As Mr. Williams testified, valuation of going businesses is a "subjective judgment call" to a large extent, dependent upon many factors, and a multiple between two and five of earnings is one method of valuation. (Tr. 8/5/88 at p. 249) The Court is not satisfied that the Debtor and Williams engaged in a reasonable investigation of valuation of REN in early 1985 and the \$60,000.00 alleged value for the 80% interest has no convincing basis. If the books and records of REN were an unreliable indicator of value, as Williams said (Tr. 7/13/88 at p. 260), some meaningful effort at valuation was mandated in view of the impact the transfer of REN would have on creditors of the Debtor.

68. Williams attempts to place great value on the board of realtors contract, and he implies that the ease with which that contract may be terminated is a negative factor on valuation of REN. (Tr. 7/13/88 at p. 249) However, there was no proof of the threat or likelihood of such a termination. In fact, Williams has negotiated a new agreement with the board, subsequent to his purchase of REN. (Tr. 7/13/88 at pp. 250-251; Defendant Ex. 2)

69. The defendants attempted to prove that the encumbrance against REN's accounts receivable would lessen the value of the business for sale purposes. (Tr. 8/5/88 at pp. 231-232) However, Mercer testified that encumbrances are commonplace, subject to negotiation between buyer and seller, and do not affect fair market value. (Tr. 8/5/88 at p. 257) Dr. Southard also "assumed an unencumbered sale." (Tr. 8/5/88 at p. 283) The Court finds that the lien of UP against accounts receivable would not necessarily have reduced the fair market value, even if the lien would potentially have reduced the final price paid. Fair market value and sale price are not synonymous as evidenced by what Williams paid the Debtor for REN.

70. UP's asserted lien in the receivables of REN was subject to some doubt, a doubt shared by Williams. (Tr. 8/5/88 at pp. 408-409)

71. Under all the circumstances, the Court finds that the valuation of Mercer is more credible and is consistent with the testimony of Towery, Black and Ms. Wolfe to the effect that REN was a profitable venture and is more consistent with Black's valuation of the business. (Tr. 7/12/88 at p. 43.) The Court finds that a reasonable and prudent willing buyer would examine all available historical financial data and not merely the last seven months, and the Court is not convinced by Dr. Southard's justification of a lesser time frame as representative of the current earning power of the company at the time of the transaction. (Tr. 8/5/88 at p. 432)

72. In addition, Dr. Southard's valuation is inconsistent with the fact that the proof indicates that the books and records of REN prepared by Twele and the books of the Debtor reflect that Williams acquired approximately \$60,000.00 of REN accounts receivables as of March 1, 1985. (Tr. 8/5/88 at pp. 386-387; Plaintiff Ex. 13)

73. Finally, the valuation of Mercer is more consistent with the demonstrated earning capacity of REN during the time period which it operated as a bi-weekly publication from its inception through early 1983, and the manner in which it has operated since being acquired by Williams. The record reflects that REN has paid Williams management fees of \$16,900.00 in 1985; \$33,800.00 in 1986; and \$33,800.00 in

1987. (Plaintiff Ex. 10 & 11.) REN distributed net profits to Williams of \$37,000.00 for 1986, and REN has undistributed profits of \$160,633.28 and accounts receivable of \$163,829.37 as of May 31, 1988. (Tr. 7/12/88 at p. 47; Plaintiff Ex. 17.)

74. The Court also finds that Dr. Southard's valuation as of January 31, 1985, inappropriately excludes the month of February, 1985, since the record demonstrates that the transaction did not actually take effect until March of 1985. Prior to March 1, the Debtor could have sold its interest in REN's profits and accounts receivables for January and February to a bona fide purchaser. Consequently, it was not until March that that transfer took place within the meaning of 11 U.S.C. §548(d)(1). Although the Debtor's February books may not have been completed by March, 1985, the financial information on REN was easily available at the time of the transfer to Williams.

75. At trial, Williams testified that the \$60,000.00 purchase price for REN was paid through several checks and wire transfers totalling \$98,500.00. These transfers were listed on Plaintiff Ex. 8. Of these transfers, \$30,000.00 was on account of payment to First American Bank made pursuant to litigation to which Williams, and not the Debtor, was a party and was based upon a debt owed to First American by Williams, and not by the Debtor. With respect to the remaining \$68,500.00, the intercompany account between the Debtor and Center indicates that the transfers making up this balance were booked as loans from Center to the Debtor. With respect to these transfers, Center has filed a proof of claim against the Debtor seeking to recover these loans. (Plaintiff Exs. 7, 15; Tr. 7/12/88 at pp. 176-178.) These transfers cannot constitute both a purchase price and a loan. In light of the proof of claim and the fact that Ms. Wolfe was never apprised at the time that the payments were received that the transactions constituted the purchase price of REN, the Court finds no credible evidence that any of the transactions shown on Plaintiff's Exhibit 8 constituted the actual purchase price for the Debtor's interest in REN and that the only credit which the Debtor actually received for the transaction was a \$60,000.00 bookkeeping entry made on the Center intercompany account by Twele in August, 1985, which reduced the amount allegedly owed by the Debtor to Center.

76. As to whether the Debtor was insolvent on January 31, 1985, Williams stated that "[i]t was very marginal and depends on how you evaluated certain assets." (Tr. 7/13/88 at p. 274). His opinion would be the same as of March 1, 1985. (Tr. 7/13/88 at p. 275)

77. Steve Balton, a certified public accountant engaged by the Trustee, performed a solvency versus insolvency evaluation of the Debtor and prepared a January 31, 1985 balance sheet showing a stockholder's deficit of \$216,078.00. (Plaintiff Ex. 22)

78. The Court finds that between January 31, 1985, and March 1, 1985, the Debtor was insolvent. (Tr. 7/12/88 at pp. 86, 150; Tr. 8/5/88 at pp. 353-354; Plaintiff Ex. 22.)

79. The Trustee asserts that Williams was overpaid for his management services to REN; however, Williams testified that, while difficult to designate a percentage of his time to REN, he did perform valuable services. (Tr. 7/13/88 at pp. 249-250). The Court finds that both Williams and Black have performed necessary services and the Court is unable to find, on the proof offered, that either have been overpaid. While \$650.00 per week may appear high for a business which is essentially run by employees, the expertise and management supervision of Williams and Black has contributed to the success of the business, and the Trustee offered no substantial proof of a lower value.

CONCLUSIONS OF LAW

As previously observed, this adversary proceeding involved a removed state court complaint; however, the complaint alleged a fraudulent conveyance under both bankruptcy and state law. Section 548 of the Bankruptcy Code renders a fraudulent conveyance avoidable by the Trustee:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

(1) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

In addition, the Trustee asserts his right under applicable Tennessee law to avoid the transfer of REN as fraudulent. Tennessee Code Annotated - §66-3-305

Conveyances by insolvent without fair consideration declared fraudulent - Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard as to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.

§66-3-306

Conveyances by persons in business in fraud of creditors - Every conveyance made without fair consideration, when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands, after the conveyance, is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business transaction without regard to his actual interest.

§66-3-307

Conveyances before debt incurred - Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to be both present and future creditors.

§66-3-308

Conveyance with intent to defraud - Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud, either present or future creditors, is fraudulent as to both present and future creditors.

The Court concludes that the Trustee, as a hypothetical creditor and successor to creditors' interest has the authority under 11 U.S.C. §544(b) to utilize applicable state laws for avoidance purposes. See, e.g., In re Buchanan, 35 B.R. 842, 846 (Bankr. E.D. Tenn. 1983; In re Turner, 78 B.R. 166, 168-170 (Bankr. M.D.

Tenn. 1987.) Further, there is no issue concerning the timeliness of this suit. The adversary proceeding was filed July 24, 1986, within the two years for filing avoidance litigation given the Trustee under 11 U.S.C. §546(a)(1).

The solvency tests differ in wording under the Tennessee and Bankruptcy Code sections. Under the Bankruptcy Code,

§101(31) "insolvent" means -

(A) with reference to an entity other than a partnership, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of -

(i) property transferred, concealed, or removed with intent to hinder, delay or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title; and

...

The Tennessee test for insolvency is found in Tennessee Code Annotated §66-3-302:

Test for insolvency - A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on existing debts as they become absolute and matured.

It is the insolvency of the debtor, Towery Press, as transferor, which is at issue here. The solvency of Real Estate News as a separate business entity is irrelevant.

Also, Tennessee Code Annotated §66-3-304 provides its definition of "fair consideration" for fraudulent conveyance purposes:

§66-3-304. "Fair Consideration" defined. - Fair consideration is given for property, or obligation:

(1) when in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, the property is conveyed or an antecedent debt is satisfied; or

(2) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

Under the Bankruptcy Code, a transfer for fraudulent conveyance purposes is described in 11 U.S.C. §548(d) as follows:

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

As 4 Collier on Bankruptcy §548.08, p. 548-95 states:

The provision [§548(d)(1)] embraces not only recording, if necessary under state law to validate the transfer as against a bona fide purchaser, but also the taking of open possession and every other method of making the transaction good against the world pursuant to the applicable law governing the perfection of the transfer in question.

The transfer of the Debtor's 80% interest was not perfected as against a bona fide purchase until the business was effectively transferred, by purchase agreement amendment, on March 1, 1985 (or possibly even later when Ms. Wolfe effected the transaction on the debtor's books). Prior to March 1, 1985, the Debtor still had title to the assets being transferred and, in particular, the approximately \$58,000.00 in accounts receivables which were acquired on March 1, 1985. Prior to the actual transfer, these assets could have been sold by the debtor to a bona fide purchaser.

Stated differently, the transfer, for purposes of §548(d)(1), could have not taken place on January 31, 1985, since Williams acquired no interest in the February cash receipts or accounts receivable of REN (and similarly did not assume any responsibility for REN's expenses for February) and REN could have sold its February accounts receivable to a bona fide purchaser. Finally, a holding that the transaction occurred on January 31, 1985, rather than March 1, 1985, would totally nullify the clear intent of parties in executing a document which changed the effective date of the transaction to March 1. (Plaintiff's Ex. 4). See e.g., In re Messenger, 32 F. Supp. 490 (D. Ct. Penn. 1940) (transfer completed when bankrupt actually released possession of vehicle sold at previous time to transferee).

As found in the findings of fact, number 74, the Court now concludes that under §548(d)(1) the transfer of the debtor's 80% interest in REN occurred on March 1, 1985.

"Value" for fraudulent conveyance purposes is defined in §548(d)(2)(A):

(2) In this section -

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

FRAUDULENT INTENT

Both 11 U.S.C. §548(a)(1) and Tennessee Code Annotated §66-3-308 make a transfer fraudulent if actual intent to hinder, delay or defraud creditors of the transferor exists. If such intent is found, the bankruptcy court would not need to examine the amount of consideration received. 4 Collier on Bankruptcy ¶548.02[3] (15th Ed.). Here, it is the intent of the debtor/transferor which is measured rather than that of the transferee. 4 Collier on Bankruptcy ¶548.02[4] (15th Ed.). But, as in the present case, if the transferee Williams is in a position to control the debtor's decision concerning the conveyance, the dominant party's intent becomes relevant because it may be imputed to the controlled debtor. 4 Collier on Bankruptcy ¶548.02[4] (15th Ed.) (citations omitted, but see fn. 30).

The Court finds numerous "badges of fraud" in the conveyance of the debtor's 80% interest in REN from Towery Press to Williams, including: the control which Williams exerted over the Debtor's decision; the lack of negotiation between Williams and Towery; the arbitrary setting of a "sales price" of \$60,000.00 by Williams; the absence of bookkeeping entries simultaneous with the "sale;" the failure to consult with Collier Black prior to the "sale" as well as the failure to follow the Venture Agreement between Towery Press and Black; the belief of Robert Towery that the consideration given was insufficient; the inconsistent positions taken by Williams as to how much consideration was paid; the insider relationship of all parties involved in the transfer; the control which Williams exerted or could exert over the books and records of Real Estate News; the knowledge of Towery and Williams that Towery Press was in financial difficult at the time of the

transfer; the conflict between the assertion that consideration was paid, yet a proof of claim was filed and signed by Williams, attempting to recover a debt to Center, which would include at least part of the alleged consideration which was recorded as a loan from Center to the Debtor; and the insufficient consideration asserted to have been paid for Real Estate News. In addition, the testimony of Towery that he was told by Williams that the transfer was intended to protect their interests in REN speaks clearly that the intent behind the transfer was not in the interests of the creditors of Towery Press. Under Tennessee law, proof of actual fraud only requires a preponderance of the evidence. Calhoun v. Baylor, 646 F. 2d 1158, 1163 (6th Cir. 1981). However, the Trustee's proof exceeded that minimum requirement.

Taken as a whole, these badges of fraud convince the Court that the Trustee established by clear and convincing proof that there was actual intent to defraud creditors under 11 U.S.C. §548(a)(1) and Tennessee Code Annotated §66-3-308. See generally, 4 Collier on Bankruptcy, ¶948.02[5] (15th Ed.); see, e.g., Matter of Trinity Baptist Church, 25 B.R. 529 (Bankr. M.D. Fla. 1982); In re F & C Services, Inc., 44 B.R. 863 (Bankr. S.D. Fla. 1984); In re D.H. Overmyer Telecasting Co., Inc., 23 B.R. 823 (Bankr. N.D. Ohio 1982), aff'd, 53 B.R. 963 (N.D. Ohio 1984); In re Yost, 47 B.R. 697 (Bankr. W.D. Va. 1985); Macon Bank & Trust Co. v. Holland, 715 S.W. 2d 347 (Tenn. App. 1986). A "'badge of fraud' is any fact that throws suspicion on the transaction and calls for an explanation," and such proof of fraud places "the burden of going forward with proof of an explanation on the defendants." Macon Bank & Trust Co., 715 F. 2d at 349. The defendants, Williams and Real Estate News, Inc., failed to produce proof which would convince the Court that the numerous badges of fraud were overcome.

The Court concludes that the knowledge and intent of Williams, because of his obvious insider control over the Debtor, is imputed to the Debtor. Williams was clearly an insider under 11 U.S.C. §101(30). The lack of negotiation between Williams and Towery evidence the strength of Williams' controlling influence at a time when the Debtor was financially at peril. The decision to transfer REN to Williams cannot be said to be the result of a good faith, arms-length transaction. The fact that the transaction was kept secret

from Black, the other member of the REN venture, supports this conclusion. Further, the ultimatum nature of Williams' demand for REN in return for covering the Debtor's payroll supports this conclusion. Therefore, the Court further concludes that the intent of Williams is critical as to the imputed intent of the Debtor. See, e.g., Geremia v. First National Bank of Boston, 653 F. 2d 1, 7 (1st Cir. 1983); In re Roco Corp., 701 F. 2d 978, 984 (1st Cir. 1983).

The legal effect of this conveyance of the Debtor's 80% interest in REN was to keep assets of the Debtor from the reach of creditors of Towery Press, thereby hindering and delaying its creditors. That effect, coupled with the intent, constitutes an actual fraud. See, e.g., Matter of Trinity Baptist Church of Bradenton, Florida, Inc., 25 B.R. 529, 532 (Bankr. M.D. Fla. 1982). In contrast to In re Southeast Community Media, Inc., 27 B.R. 834, 841 (Bankr. E.D. Tenn. 1983), where a sale's contract provided for notice to creditors in compliance with the state's bulk sales statutes, here there was no proof that creditors were notified. This sale was only known to insiders at the time it occurred. The purpose of §548 avoiding powers is the preservation of assets of the bankruptcy estate. Matter of Bundles, 856 F. 2d 815, 824 (7th Cir. 1988); citing Martin v. Phillips (In re C. H. Butcher, Jr.), 58 B.R. 128, 130 (Bankr. E.D. Tenn. 1986). The Court concludes that §548 requires an avoidance under all of the facts and circumstances of this proceeding.

Based on the Court's findings of facts, it is apparent to the Court that Williams caused the Debtor to transfer its 80% interest in REN to Williams at a time that Towery Press was having great financial difficulties, was contemplating filing bankruptcy and was unable to meet its payroll. The Debtor's president, Towery, testified that the purchase price with Williams, an insider, was not discussed at all and that the purchase document was presented as a condition for Williams advancing funds from IBS to cover payroll checks which had already been written by the Debtor, based on Williams' assurance of making advances. The evidence indicates that Williams justified his conduct on the basis of protecting either his or the Debtor's interest in REN. The transfer was in obvious and knowing violation of the joint venture agreement which gave Black the first right of refusal before the Debtor could sell its interest in REN. Williams concluded that

neither Black nor anyone else would be interested in acquiring REN because of the circumstances involving UP. However, such a conclusion may have been unfounded and clearly does not justify Williams' ignoring the Debtor's contractual obligation to first offer REN to Black. Nor does Williams' conclusion justify ignoring the interests of creditors of Towery Press. Further, the evidence indicates that the Debtor's interest in REN was a vital part of the Debtor's asset base and was a profitable venture which contributed greatly to the Debtor's overhead. Although there is some evidence that the Debtor continued to provide services to REN after its interest was transferred to Williams, the fact remains that the asset represented by REN no longer constituted part of the assets which the creditors of the Debtor could look to for satisfaction of their claims. This is clearly demonstrated by the fact that REN has distributed to Williams profits of \$37,500.00 in 1986 and, as of May 1, 1988, has undistributed profits and accounts receivable of \$327,287.49 which were not available to the creditors of the Debtor. The very fact that REN was transferred to an insider in order to protect either Williams or the Debtor's interest in the asset demonstrates that the transfer was made with actual intent to hinder, delay or defraud existing or subsequent creditors of the Debtor. The Court concludes that the Debtor's creditors were hindered, delayed, or defrauded by this transfer. For these reasons, the transfer is avoidable by the Trustee pursuant to 11 U.S.C. §548(a)(1) as well as under Tennessee Code Annotated §66-3-308.

§548(a)(2)

In addition, the transfer is also avoidable by the Trustee under 11 U.S.C. §548(a)(2) since, among other findings, the value of the Debtor's 80% interest in REN was \$240,000.00, and Williams paid, at most, \$60,000.00, and, simultaneously, he received almost \$60,000.00 in accounts receivable of REN.

Under 11 U.S.C. §548(a)(2) there are four elements of proof required: "(1) a transfer of property of the debtor; (2) an exchange for less than reasonably equivalent value; (3) the debtor must have been insolvent on the date the transfer was made or rendered insolvent as a result of the transfer; and (4) the transfer occurred within one year preceding the petition date." In re Butcher, 72 B.R. 447, 449 (Bankr. E.D. Tenn. 1987). The

proof easily satisfied elements 1, 3 and 4. There can be no serious doubt that the Debtor was insolvent at the time of the transfer, and even if doubt exists, this transfer would have rendered the Debtor insolvent. REN was making a profit and was aiding in the support of the Debtor. A critical asset of the Debtor was lost with this transfer, and the transfer violates Tennessee Code Annotated §66-3-306 and 11 U.S.C. §548(a)(2)(B) (i) and (ii). See, e.g., Cate v. Nicely, 474 F. Supp. 567 (E.D. Tenn. 1979), aff'd in part, rev'd in part, on other grds., 656 F. 2d 230 (6th Cir. 1981).

The Court concludes that either under the Bankruptcy Code or Tennessee law tests of insolvency, Towery Press was insolvent on both January 31, and March 1, 1985. The fact that the Debtor had discussed filing bankruptcy prior to this transfer and did not have sufficient funds to meet its January payroll is strong proof of the insolvency of the Debtor. The proof offered through Mr. Balton's insolvency evaluation was clear evidence of insolvency. See, e.g., Hyde Properties v. McCoy, 507 F. 2d 301, 307 (6th Cir. 1974). The defendants did not effectively rebut this proof; in fact, Mr. Williams came close to admitting insolvency at the time of the transfer. The other insider, Robert Towery, agreed that the Debtor was insolvent. The proof of insolvency exceeds a preponderance of evidence.

The remaining element of §548(a)(2) proof concerns whether the Debtor received "reasonably equivalent value" for its 80% interest in REN. In similar manner, Tennessee Code Annotated §66-3-305 requires for fraudulent conveyance proof that the conveyance is made without "fair consideration" as defined by §66-3-304. Value is determined as of the time of the transfer. See e.g., In re 550 Les Mouches Fashions, Ltd., 24 B.R. 509, 516 (Bankr. S.D. N.Y. 1982).

From the proof and the Court's findings of fact, the Court concludes that Williams did not pay either a fair consideration or a reasonably equivalent value for the Debtor's interest in REN. The preponderance of the evidence indicates that REN was a consistently profitable venture. Both Towery, Debtor's president, and Ms. Wolfe, Debtor's comptroller, testified that REN generated an operating profit and contributed greatly to the general overhead of the Debtor. Black, who owned the other 20% of REN, was in the publishing business

and publishes similar real estate publications in eight other cities. Black testified that the fair market value of 100% of REN in January 31, 1985, was approximately \$200,000.00. Further, the evidence clearly demonstrates that REN generated sufficient revenue to fund its continued operations. Although the evidence indicates that some of those receivables were diverted to UP as a result of commingling REN's accounts receivable with other receivables of the Debtor, the record reflects that substantially all of these receivables were eventually repaid to Williams or Real Estate News, Inc. Further, there was no proof that, in an arms-length transaction, any security interest granted by the Debtor would attach to future accounts receivable generated by REN under new ownership. Thus, a willing buyer for REN would be buying a business which was capable of generating revenue sufficient to fund its operations without the need of cash infusions. In addition, the testimony of UP's attorney, Vorder Bruegge, indicates that Williams disputed UP's security interest in REN's receivables and the fact that these receivables initially went to UP was the result of an agreement reached with Williams.

The Trustee's expert, Christopher Mercer, testified that the fair market value of the Debtor's 80% interest in REN was \$240,000.00 during the first quarter of 1985. Mercer's opinion was based on a review of all of REN's available financial records and was consistent with recognized authorities which recommend that financial performance over a period of five years be reviewed in determining prospective future. On the other hand, Williams' expert, Dr. Southard, only relied upon the seven month period prior to January 31, 1985, in arriving at his valuation of \$24,000.00 for the Debtor's 80% interest in REN. Under the circumstances, it is not credible to believe that a willing buyer would only examine the last seven months of REN's financial performance in evaluating the purchase of REN. Further, Williams, as an insider, had access to and was well aware of REN's financial history going back several years. Dr. Southard's valuation exclusion of the month of February, 1988, which was a profitable month for REN is not warranted under the facts or law.

Under all of the facts and circumstances, Williams' purported purchase price of \$60,000.00, even if paid, would not constitute a reasonably equivalent value for the Debtor's interest in REN. Similarly,

\$60,000.00 would not constitute a fair equivalent for the property received under Tennessee's Uniform Fraudulent Conveyance Act. *c.f.*, Matter of Winshall Settlor's Trust, 758 F. 2d 1136, 1139 (6th Cir. 1985) ("[r]easonable equivalence . . . should be consonant with the state law of fraudulent conveyances.") "Reasonable equivalence should depend on all the facts in each case." Matter of Bundles, 856 F. 2d 815, 824 (7th Cir. 1988). Fair market value is not required to be paid, but reasonably equivalent consideration is required. The purported purchase price, whether \$60,000.00 or \$98,500.00 does not satisfy the law.

From the Court's conclusions in reference 11 U.S.C. §548(a)(1) it is obvious that the Court finds more than a "small degree of scienter or awareness of fraud." In re Ohio Corrugating Co., 91 B.R. 430, 439 (Bankr. N.D. Ohio 1988). It cannot be said that Williams came into court with clean hands. Moreover, the Trustee also sought a recovery of the management fees and profits received by Williams subsequent to the transfer. Certainly, a transferee may be liable for the return of all profits. See generally 4 Collier on Bankruptcy ¶548.07[4] (15th Ed.) However, the Trustee overlooks a critical point. The managerial services of both Williams and Black obviously aided REN in continued and increased success. An avoidance of the transfer is going to return REN to the Debtor's estate in a financially improved position. The Trustee, in other words, will reap the benefits resulting from the work of both Williams and Black. Further, the Trustee's position is that Williams should repay all management fees and profits and also receive no credit for any alleged consideration paid by Williams to the Debtor for REN. That result is too harsh.

The Court agrees that Williams should not receive further credit or a lien for the alleged \$60,000.00 or other alleged consideration. Under 11 U.S.C. §548(c) the transferee is not entitled to a lien unless value is given in good faith. "The party who seeks to establish himself as a good faith transferee within this savings clause has the burden of proof thereon." 4 Collier on Bankruptcy ¶548.10 (15th Ed.) The Court concludes that Williams did not prove by a preponderance of evidence that he paid any consideration; rather, the convincing and credible proof was that Williams, through his companies, loaned money to the Debtor. Further, Williams was not acting in good faith at the time. "Knowledge of the transferor's insolvency may, in

conjunction with other factors [which this Court finds], prevent the transferee from asserting good faith." 4 Collier on Bankruptcy, ¶548.07[2] (15th Ed.) Also, this transfer is fraudulent under both §548 and Tennessee law, and avoidances under §544 (state law) are an exception from §548(c)'s liens or credits.

Finally, assuming that Williams did in fact do more than loan money to the Debtor and assuming that the payment was either \$60,000.00 or \$98,000.00 as asserted by Williams, the credible and convincing proof is that Williams has received the benefit of some accounts receivable and \$121,500.00 in cash payments of management fees and profits. Williams has certainly obtained a return of any alleged investment. The Court reserves for determination on any objections to the proofs of claim the question of whether Williams' other companies' loans to the Debtor have been satisfied in whole or in part.

The Trustee failed to prove any value of Williams' services; instead, the Plaintiff took the position that Williams was entitled to nothing. Under all of the facts and circumstances, considering both the law and equities the Court concludes the following:

A. The Trustee is entitled to avoid the transfer of the Debtor's 80% interest. That avoidance applies to both Williams and his controlled transferee Real Estate News, Inc., an immediate or mediate transferee under 11 U.S.C. §550. A transfer back to the Debtor's estate will not be complicated, and the defendants shall transfer all assets, books and records to the Trustee.

B. The defendants should be required to account for all profits and accounts receivable and shall surrender all such assets, including the undistributed profits of REN.

C. Mr. Williams shall not be entitled to further management fees as of the date of entry of this order. However, Williams shall be entitled to retain the management fees distributed prior to the date of entry of this order. Further, Williams shall be entitled to retain the \$37,000.00 in profits already distributed, which equity will permit even though under a strict application of the law Williams would not be entitled to retain this profit distribution.

D. Further, because in part of the Court's conclusions and order concerning retention of fees and distributed profits, and based upon the Court's findings of fact and conclusions of law, Williams or Real Estate News, Inc. are not entitled to any further credit under 11 U.S.C. §548(c) for alleged consideration paid by Williams or his companies for the 80% interest in REN. The Court finds and concludes that the Court's decision has sufficiently allowed for recovery by Williams or his companies of their investments in REN by loans or inadequate consideration, however characterized.

The findings and conclusions of the Court include in part the Court's weighing of the credibility of the witnesses and documentary proof. The proof offered by the Trustee was clear and convincing, beyond the minimal requirements of preponderance of the evidence.

The Court, at trial, took under advisement the defendants' motion to dismiss and for directed verdict, which motions are now denied.

IT IS THEREFORE ORDERED:

1. The conveyance of Towery Press' 80% interest in Real Estate News is avoided and set aside as a fraudulent conveyance under 11 U.S.C. §548(a)(1); §548(a)(2); and §544(b), which includes Tennessee Code Annotated §66-3-301, et. seq.

2. The defendants, as transferee and immediate or mediate transferee, shall immediately surrender and turn over to the Trustee the Debtor's 80% in REN, including all assets, not limited to the books, records, accounts receivable, deposits, and undistributed profits.

3. The defendants shall account for all income, expenditures, and accounts receivable and payable of REN from the voidable transfer to the date of the transfer to the Trustee, and shall cooperate with the Trustee in an orderly re-conveyance.

4. The defendant Williams shall be permitted to retain management fees paid to him prior to entry of this order.

5. The defendant Williams shall be permitted to retain the \$37,000.00 in previously undistributed profits.

6. However, neither defendants Williams nor Real Estate News, Inc. shall be entitled to further management fees or undistributed profits as of the entry of this order.

7. Further, neither defendants Williams nor Real Estate News, Inc. is entitled to further credit for any loans or consideration paid or alleged to have been paid to the Debtor or to REN or on behalf of the Debtor or REN, the Court having found and concluded that the Court's decision in this memorandum opinion and order legally and equitably reimburses the defendants for any and all investments in REN.

So ordered this 15th day of January, 1989.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

cc:

Mr. A. J. Calhoun
Trustee
6263 Poplar Avenue
Suite 101
Memphis, Tennessee 38119

Mr. Henry C. Shelton, III
Attorney for Defendants
Goodman, Glazer, Greener,
Schneider & McQuiston, P.C.
1500 First Tennessee Bank Building
Memphis, Tennessee 38103

Mr. Everett B. Gibson
Attorney for Trustee
Laughlin, Halle, Gibson & McBride
Morgan Keegan Tower
50 North Front Street
Suite 650
Memphis, Tennessee 38103

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