Dated: May 02, 2005
The following is SO ORDERED:

David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

In re

Green Valentine, Inc., Case No. 01-34950-K

Debtor. Chapter 7

P. Preston Wilson, Chapter 7
Trustee of the Estate of
Green Valentine, Inc.,
Plaintiff,

vs. Adv. Proc. No. 03-0570

Walter J. Wolfner,
Defendant.

MEMORANDUM AND ORDER RE PLAINTIFF'S COMPLAINT UNDER 11 U.S.C. §§ 547(b) AND 550 AND NOTICE OF THE ENTRY THEREOF

This is in the chapter 7 case of the above-named debtor, Green Valentine, Inc.

(sometimes referred to as the "Corporate Debtor" or "Debtor"), being Case No. 01-34950. The instant matter before the Court arises out of Adv. Proc. No. 03-0570, which is a complaint filed by the plaintiff, P. Preston Wilson, Chapter 7 trustee of the estate of the debtor against the defendant, Walter J. Wolfner ("Mr. Wolfner"), under sections 547(b) and 550 of the Bankruptcy Code seeking to recover an asserted avoidable preference in the amount of $48,000 plus prejudgment interest. By virtue of 28 U.S.C. § 157(b)(2)(F), this is a core proceeding.

Based on the sworn testimony of Mr. George Coleman, the former president of the debtor, and Mr. Wolfner, consideration of the 12 trial exhibits introduced at the hearing on the merits held on April 12, 2005, statements of council, and consideration of the case record as a whole, the Court renders the following findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

Although the parties have a strong difference of opinion regarding the ultimate outcome of this proceeding, many of the relevant background facts are not in substantial dispute and may be briefly summarized as follows. At all times relevant here the debtor, Green Valentine, Inc., was a Tennessee used car dealer engaged primarily, if not exclusively, in the buying and selling of classic-antique automobiles. Mr. Wolfner is a private citizen residing in St. Louis, Missouri, who entered into a business arrangement with the corporate debtor, which is the subject of the instant action.

On behalf of the corporate debtor, Mr. Scott Drake, a mutual acquaintance of Mr. George Coleman, the former president of the debtor, and also Mr. Wolfner, approached Mr. Wolfner about entering into an agreement whereby Mr. Wolfner would advance Mr. Coleman and the debtor, Green Valentine Inc., $39,000 to facilitate the purchase and subsequent resale of a 1946 Mercury. Based on his relationship with Mr. Drake, and the information supplied by Mr. Drake, Mr. Wolfner agreed to the transaction. The contemplated repayment was to occur within approximately seven days in the amount of $47,000, of which $1,000 was to be paid to Mr. Drake for facilitating the transaction. Mr. Coleman on behalf of himself and as president of the debtor, Green Valentine Inc., memorialized the contractual agreement by reducing it to writing on July 31, 2001.

The parties' agreement referred to above provided that the money may be repaid within "approximately seven (7) days." It further stated that Mr. Wolfner would retain the titles

to both the 1946 Mercury and the 1949 Chrysler “until paid.”

Mr. Wolfner wired the money to Mr. Coleman after receiving the parties’ agreement and the title to the 1946 Mercury and the certificate of registration to the 1949 Chrysler. It is important to note that Mr. Wolfner testified that he never saw the two vehicles, nor took possession of them. The only related documentary items that Mr. Wolfner had was a title issued in the State of Michigan for a 1946 Mercury and an expired certificate of registration issued in the State of Massachusetts for a 1949 Chrysler, copies of which were presented at trial, and neither of which noted Mr. Wolfner as a secured creditor, transferee, or owner of either vehicle.

The money advanced by Mr. Wolfner was ostensibly used to purchase the 1946 Mercury for subsequent resale to MBNA for $78,000, as detailed on the retail buyer’s order dated July 30, 2001, and exhibited at the trial of this action. Mr. Wolfner testified that the repayment pursuant to the parties’ agreement was not received as quickly as promised, and he began to make inquiries of Mr. Drake as to the reason for the delay. He was told that the delay was due to delivery problems. As the delay was extended, Mr. Wolfner then contacted Mr. Coleman and was assured that he would get his money. On September 4, 2001, the debtor, Green Valentine Inc., caused to be issued a cashier’s check to Mr. Wolfner for $48,000. Mr. Wolfner subsequently paid $1,000 to Mr. Drake as previously agreed. Mr. Wolfner did not release the title and certificate of registration, nor was a release of these documents requested. In oral testimony, at the trial, Mr Coleman stated that these types of sales of older vehicles are frequently completed without the necessity of titles and for this reason no release was ever requested; and that in fact, the ultimate sale to MBNA was completed based solely on the retail buyers order evidenced at trial.

On October 1, 2001, an involuntary Chapter 7 case was commenced against Green Valentine Inc., under 11 U.S.C. § 303. The order for relief was entered on October 29, 2001. P. Preston Wilson, Esquire, was appointed trustee of the estate of the corporate debtor. On May 7, 2003, the Chapter 7 trustee made demand on Mr. Wolfner for the return of the alleged preferential payment made on September 4, 2001, by the corporate debtor. Such demand was refused. On June 16, 2003 the plaintiff trustee filed the instant complaint under section 547(b) of the Bankruptcy Code seeking recovery of the asserted preference plus prejudgment interest from the date of the trustee’s first demand. Mr. Wolfner filed an answer to the plaintiff

trustee's complaint on September 25, 2003.

On July 19, 2004, the plaintiff trustee filed a motion for summary judgement pursuant to Fed. R. Bankr. P. 7056, which was denied by the Court. On April 12, 2005, the Court conducted a trial on the merits on the plaintiff trustee's instant complaint and took the matter under advisement for further consideration and deliberation.

Careful consideration of the facts and particular circumstances and applicable law in this adversary proceeding result in the following findings and conclusions.

The statutory elements of an avoidable preference are found in section 547(b) of the Bankruptcy Code. They are as follows:

> (1) a transfer of an interest of the debtor in property,
>
> (2) to or for the benefit of a creditor,
>
> (3) for or on account of an antecedent debt owed by the debtor before such transfer was made,
>
> (4) made while the debtor was insolvent,
>
> (5) made on or within ninety (90) days before the date of the filing of the petition (or between ninety (90) days and one (1) year before the date of the filing of the petition if the creditor was an insider at the time of the transfer), and
>
> (6) enables the creditor to receive more than such creditor would receive if:
>
> a. the case were a case under Chapter 7
>
> b. the transfer had not been made, and
>
> c. such creditor had received payment of such debt to the extent provided by the provisions of Title 11.

See, e.g., In re Montgomery, 983 F.2d 1389, 1392 (6th Cir. 1993).

By virtue of section 547 (g) of the Bankruptcy Code, the plaintiff bankruptcy trustee has the burden of proof on all the required elements under section 547(b). Plaintiff bankruptcy trustee contends that he has met all the technical statutory requirements of section 547(b) and should prevail. In his defense, Mr. Wolfner denies that a preference occurred and also states that the alleged preference was merely a payment made in the ordinary course of business, or in the alternative, a payment for a secured debt.

A preference may not be avoided if the transfer was:

> (1) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (2) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (3) made according to ordinary business terms.

For the defense of a payment made in the ordinary course of business, the defendant/creditor bears the burden of proving that the payment was made in the ordinary course of business per the requirements of section 547 (c)(2) of the Bankruptcy Code. *See, e.g.*, *In re Fred Hawes Organization Inc.*, 957 F.2d 239 (6th Cir. 1992).

For the purposes of considering Mr. Wolfner's assertion that the payment was made on behalf of a secured debt, a determination regarding the financial arrangement of the parties must be made. *Cf. In re Shelton Harrison Chevrolet, Inc.*, 202 F.3d 834 (6th Cir. 2000). After sifting through and carefully considering a totality of the particular facts and circumstances and applicable law, the Court is of the opinion that the corporate debtor and Mr. Wolfner entered into a written contract whereby Mr. Wolfner advanced the corporate debtor the sum of $39,000, essentially for the purchase of a 1946 Mercury for further resale to a third party. The agreement stated that repayment of the advance would be effectuated within approximately seven days. The payment was not timely made according to the contractual terms of the parties, and as such, Mr. Wolfner was left holding the papers on the 1946 Mercury and the 1949 Chrysler. These collective papers, however, one a title and the other an expired certificate of registration, did not in and of themselves provide for an actual ownership or security interest to Mr. Wolfner. Actually, neither document complied with applicable state statutes regarding perfection. In fact, neither document or the parties' agreement stated on its face that Mr. Wolfner was in any way a secured party. As such, Mr. Wolfner was in the possession of a written contract that had been breached by the corporate debtor, rather than being a secured creditor or lawful owner of the two vehicles.

The Court finds, inter alia, that on September 4, 2001, the corporate debtor "transferred", as that word is statutorily defined in section 101(54) of the Bankruptcy Code, the sum of $48,000 of its property to Mr. Wolfner in his capacity as a "creditor", as that word is defined in section 101(10) of the Bankruptcy Code, that was within 90 days of the filing of

the involuntary petition on October 1, 2001, being mindful that the word "petition" is defined in section 101(42) as the document commencing the bankruptcy case.

By virtue of section 547(f) of the Bankruptcy Code, the debtor is presumed to have been insolvent on or during the 90 days before the date of the filing of the bankruptcy petition. Mr. Wolfner did not, moreover could not, rebut the statutory presumption of insolvency. Mr. George Coleman's testimony also supports a finding of insolvency at the time of the $48,000 transfer. The transfer of the $48,000 clearly enabled Mr. Wolfner to receive more than he would have received as contemplated in section 547 (b)(5).

Mr. Wolfner testified that when he attempted to determine the disposition of the 1946 Mercury to which he held the title, he was unable to find out the location or even the current purported owner in possession of the vehicle. The case record reveals that the corporate debtor had minimal assets at the time of the $48,000 transfer and that over $2 million in unsecured claims have been filed against the estate. The Court additionally notes that the filing of the bankruptcy proof of claim form constitutes prima facie evidence of the validity and amount of the claim. *See* Fed. R. Bankr. P. 3001(f) and section 502(a) of the Bankruptcy Code.

The law ordinarily presumes that payments made by debtors to creditors are valid. Plaintiff bankruptcy trustee, by virtue of section 547(g) of the Bankruptcy Code, has the burden of proving each and every essential element found in section 547(b). The Court finds and concludes, considering a totality of the particular facts and circumstances and applicable law, that the plaintiff trustee has met the required burden of proof here by a preponderance of the evidence - that is, the plaintiff trustee has proved each and every essential element in section 547(b) of the Bankruptcy Code. Accordingly, a technical preference exists.

The Court also finds and concludes that no section 547(c) exceptions exist in favor of Mr. Wolfner. Under section 547(g) of the Bankruptcy Code, a creditor or party in interest has the burden of proof regarding asserted exceptions to a section 547(b) technical preference. The exceptions to a preference action are few. It is parenthetically noted that a fully secured creditor ordinarily has no worry in the face of an alleged preference. Here, however, the parties' agreement between Mr. Wolfner and the corporate debtor did not constitute or rise to the dignity of a security agreement. In fact and law, Mr. Wolfner is not a secured creditor. Although, understandably Mr. Wolfner may have felt assured with the possession of the title

to the 1946 Mercury, the certificate of registration to the 1949 Chrysler, and a letter from the debtor's president regarding the arrangement, naked possession of these documents do not suffice under these facts and circumstances and applicable law to create a perfected security agreement. It could be argued that Mr. Wolfner's interest here is more akin to an ownership interest rather than a security interest; however, it may be in the final analysis that Mr. Wolfner held a "junior" ownership interest.

In addition, the burden of proof for the defense and exception of the ordinary course of business under section 547(c)(2) has not been met by Mr. Wolfner. All aspects of the statutory exception must be met, both objectively and subjectively. Simply proving to the Court that the corporate debtor had dealt in this manner before with other creditors, thereby arguably satisfying the objective component, is insufficient. This, as Mr. Wolfner's testimony revealed, was a single transaction between the immediate parties. Mr. Wolfner had never dealt with the corporate debtor or Mr. George Coleman prior to the instant arrangement. Mr. Wolfner had never dealt with Mr. Scott Drake on any commercial matter such as this. Even though Mr. Wolfner testified that he trusted Mr. Drake and entered into the arrangement based on Mr. Drake's prior dealings with Mr. Coleman and the corporate debtor, this is insufficient to satisfy the subjective prong of the ordinary course of business defense as it is a defense that must be evaluated on a case-by-case factual basis and requires proof that the debt and its payment are ordinary in relation to business dealings between that creditor and that debtor. *See, e.g., In re Fred Hawes Organization Inc.*, 957 F.2d 239 (6th Cir 1992), and *In re Armstrong*, 291 F.3d 517 (8th Cir. 2002).

Considering a totality of the particular facts and circumstances and applicable law, the Court finds for the plaintiff trustee and holds that the corporate debtor's payment made to Mr. Wolfner was indeed a preferential transfer as defined above, in consideration of an antecedent debt which allowed Mr. Wolfner to realize more than he would have under a normal chapter 7 liquidation. Simply put, no section 547(c) exception is available to Mr. Wolfner.

The final matter for consideration is the matter regarding the plaintiff bankruptcy trustee's request for prejudgment interest. Prejudgment interest in preference litigation, though not mandated by statute, has been sanctioned by the Supreme Court for many years. *See, e.g., Kaufman v. Tredway*, 195 U.S. 271 (1904). *See also, e.g., White Co. v. Wells*, 42

F.2d 640 (6th Cir 1939). Prejudgment interest on a preferential transfer may be recoverable from the date of demand for a return of the preference, unless there is a sound reason otherwise. *See, e.g., In re Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845, 849 (7th Cir. 1997). The discretion as to the award of prejudgment interest rests with the trial court, and this discretion must be exercised within the bounds of the law, which means that absent a sound reason not to do so, prejudgment interest should be awarded. The Court in considering the totality of the particular facts and circumstances in this matter and applicable law finds that there is a sound reason not to award prejudgment interest. Indeed, serious and complex legal issues exist between these parties.

In this case the date of the initial demand by the plaintiff trustee occurred on May 7, 2003. Mr. Wolfner, as noted above, felt that he had a meritorious reasons why he would prevail at a trial on the merits and understandably declined to return the $48,000. On June 16, 2003, the plaintiff trustee filed the instant adversary proceeding. Discovery ensued, and a motion for summary judgement was filed and subsequently denied. As noted earlier, a trial on the merits was held on April 12, 2005. Considering the promptness of the litigation and the strong legal and equitable position of Mr. Wolfner, the Court is of the view that it would be grossly inequitable under the existing circumstances to assess prejudgment interest against Mr. Wolfner. It is for these reasons that the Court finds that prejudgment interest arising as from the date of the initial demand for the preferential transfer should not be awarded. There exists sound reasons not to assess prejudgment interest here, which should not be routinely applied in every case, but should be viewed upon the facts and merits of each particular case.

Based on all the foregoing, the Court grants the plaintiff Chapter 7 trustee's complaint regarding the preferential transfer, but denies the plaintiff trustee's complaint as to the requested prejudgment interest. The Court further authorizes the Clerk of Court for the Bankruptcy Court for the Western District of Tennessee, upon entry of this Order, to cause copies of this Memorandum and Order to be sent to the Chapter 7 trustee's attorney, Russell Savory, Esquire; Mr. Wolfner's attorney, Jack F. Marlow, Esquire; and the United States Trustee for Region 8. Accordingly,

IT IS SO ORDERED.