UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

THE CONSOLIDATED FGH LIQUIDATING TRUST **CASE NO. 01-52173**

f/k/a

FRIEDE GOLDMAN HALTER, INC., et al., Jointly Administered

OAKRIDGE CONSULTING, INC. AND OCEAN RIDGE CAPITAL ADVISORS, L.L.C. AS LIQUIDATING TRUSTEE FOR THE CONSOLIDATED LIQUIDATING TRUST
Plaintiff

v. **ADV. NO. 03-05084**

AIRCOMFORT, INC.
Defendant

OPINION

The matter before the court is the motion for summary judgment filed by Aircomfort, Inc., the defendant in the above styled adversary proceeding. Having considered the pleadings, supporting documentation and briefs submitted by the parties, the court concludes that the motion for summary judgment filed by Aircomfort, Inc. should be denied.

I. FACTUAL BACKGROUND

1. On April 19, 2001, Friede Goldman Halter, Inc. ("FGH") filed a petition for relief under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Mississippi. On April 20, 2001, each of the other debtors in these jointly

administered cases filed a voluntary petition under Chapter 11, with the exception of Friede Goldman Delaware, Inc. which filed on April 16, 2001, and Amcan International, Inc., Sabre Personnel Associates, Inc. And Halter-Calcasieu, L.L.C. which filed on June 1, 2001.

2. A complaint to avoid and recover preferential transfers was field by FGH against Aircomfort, Inc. on April 14, 2003. The plaintiff alleged that one of more transfers were made to the defendant within 90 days preceding the filing date totaling $550,521.49. The payments were made to Aircomfort as a vendor of FGO on a contract between FGO and Ocean Rig ASA for completion of construction of a semi-submersible drilling rig. The debtor requests that the transfers be avoided pursuant to 11 U.S.C. § 547(b) and § 550(a). Oakridge Consulting, Inc. and Ocean Ridge Capital Advisors, L.L.C. as Liquidating Trustee for the Consolidated FGH Liquidating Trust was subsequently substituted as proper party plaintiff.

3. Aircomfort, Inc. subsequently filed its motion for summary judgment claiming entitlement to summary judgment as a matter of law because the payments in question were offset by new value, or in the alternative, because the payments were made in the ordinary course of business. Aircomfort claims that the plaintiff seeks recovery of $550,521.49 based on two checks, one dated January 19, 2001 in the amount of $150,319.49 and the second dated January 29, 2001 in the amount of $400,202.00. Aircomfort claims that new value in goods and services was given in the total amount of $824,035.84, which consisted of $166,466.00 after the January 19th check, and $657,869.84 after the January 29th check. Aircomfort also claims that the routine for payment of invoices did not change significantly in the preference period from the pre-preference period and that payments were made on an average of 35 days after invoice.

II. CONCLUSIONS OF LAW

The matter before the court is a core proceeding pursuant to 28 U.S.C. § 157. The court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. § 157 and § 1334.

Aircomfort, Inc. has requested summary judgment pursuant to Federal Rule of Civil Procedure 56, made applicable by Federal Rule of Bankruptcy Procedure 7056.

> "Summary judgment is proper when the pleadings and evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 529 (5th Cir.2005). The initial burden to demonstrate that no genuine issue of material fact exists is on the movant. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Upon showing there is an absence of evidence to support an essential element of the non-movant's case, the burden shifts to the party opponent to establish that there is a genuine issue of material fact in dispute. *Id.* at 322, 106 S.Ct. 2548.

Condrey v. SunTrust Bank of Georgia 431 F.3d 191, 197 (5th Cir. 2005). The Circuit has also stated that:

> To obtain summary judgment, 'if the movant bears the burden of proof on an issue ··· because ··· as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the ··· defense to warrant judgment in his favor.' " *Chaplin*, 307 F.3d at 372 (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986)) (emphasis supplied).

Martin v. Alamo Community College Dist. 353 F.3d 409, 412 (5th Cir. 2003).

Having reviewed the pleadings, supporting documentation, and legal arguments presented by counsel for the attorneys, the court concludes, based on the authorities and arguments cited in response and briefs submitted by the plaintiff, that the motion for summary judgment should be denied. Aircomfort has presented the ordinary course of business defense pursuant to 11 U.S.C. § 547(c)(2). As pointed out by the plaintiff, Aircomfort has not proven by a preponderance of the

evidence the elements of § 547(c)(2). Furthermore, there are material issues of fact including the issues regarding the payment range, unusual collection practices, and the timing and manner of payments between others creditors and debtors in the offshore industry. Summary judgment is not appropriate at this time.

Aircomfort also argues entitlement to the new value exception pursuant to § 547(c)(4). The court agrees with the plaintiff's position that the net result method of computing payments has been rejected by the Fifth Circuit and that certain invoices did not replenish the estate and should not be used in the new value calculation. The plaintiff does indicate that there remains a recoverable preference of $305,609.51.[1]

The court concludes that Aircomfort has not met its burden and proof by a preponderance of the evidence on the defenses asserted, and that there are genuine issues of material fact and summary judgment is not appropriate at this time.

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 31st day of March, 2006.

/s/ Edward R. Gaines
EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

[1] By this statement, the plaintiff appears to concede that it is no longer seeking recovery of the total amount of $550,521.49 asserted in the complaint.

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