



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
September 11, 2023

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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<p>In re:</p> <p>RED ROSE, INC., et al.,</p> <p style="text-align: center;">Debtors.</p> <hr/> <p>ACF FINCO I, LP,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>VALLEY GUTTER SUPPLY, INC.,</p> <p style="text-align: center;">Defendant.</p>	<p>) Chapter 11</p> <p>) Jointly Administered Under</p> <p>) Case No.: 20-12814-MKN</p> <p>)</p> <p>) Adv. Proc. No. 21-01100-mkn</p> <p>)</p> <p>) Date: August 31, 2023</p> <p>) Time: 1:30 p.m.</p>
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ORDER ON PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT¹

On August 31, 2023, the court heard the Plaintiff’s Motion for Summary Judgment brought in the above-captioned adversary proceeding (“Summary Judgment Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

¹ In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references of “AECF No.” are to the documents filed in the above-captioned adversary proceeding. All references to “Section” or “§§ 101-1532” are to the provisions of the Bankruptcy Code. All references to “Bankruptcy Rule” shall be to the Federal Rules of Bankruptcy Procedure. All references to “Civil Rule” shall be to the Federal Rules of Civil Procedure.

1 **BACKGROUND**

2 On June 11, 2020, Petersen Dean, Inc. (“PDI”) and PD Solar, Inc. (“PDS”), along with
3 fourteen other entities (collectively “Debtors”) commenced separate Chapter 11 proceedings.
4 PDI contracts with homebuilders and other general contractors to install roofing and solar panels
5 at residential and commercial projects. Projects include installations at large subdivisions as well
6 as direct consumer sales. PDI operated in California, Hawaii, Nevada, Arizona, Texas, Colorado
7 and Florida. PDS is a subsidiary of PDI engaged primarily in the installation of solar panels at
8 consumer projects.

9 On June 23, 2020, an order was entered authorizing joint administration of the PDI and
10 PDS proceedings with the remaining Chapter 11 debtors, and a separate entity known as Red
11 Rose, Inc., was designated as the lead debtor in possession. (ECF No. 94).

12 On July 13, 2020, PDI filed its schedules of assets and liabilities (“PDI Schedules”).²
13 (ECF No. 358)

14 On July 31, 2020, an order was entered authorizing the Debtors to use the cash collateral
15 of its primary pre-petition lender, ACF Finco I LP (“ACF”). (ECF No. 601).

16 On November 16, 2020, an order was entered approving a compromise that permitted,
17 *inter alia*, the avoidance claims held by the Chapter 11 estates to be pursued by ACF under an
18 arrangement to share net proceeds of any recovery. (ECF No. 1328).

19 On February 23, 2021, an order was entered approving, *inter alia*, a sale of substantially
20 all of the assets of the Debtors’ commercial division, and confirming the transfer to the
21 avoidance claims to ACF. (ECF No. 1704).

22 On July 14, 2021, ACF filed a complaint commencing this adversary against defendant
23 Valley Gutter Supply, Inc. (“Defendant”).³ (AECF No. 1). Defendant does business in

24 ² The summary of the PDI Schedules reflect total assets of \$46,197,222.36, and total non-
25 priority unsecured liabilities of \$160,525,909.97. The claims register maintained in the PDI case
26 reflects 477 proofs of claim filed to the date of the hearing on the instant motion in the total
27 amount of \$444,974,511.31, that includes secured claims, non-priority and priority unsecured
claims, and claims filed as administrative.

28 ³ On January 8, 2021, Defendant filed a proof of claim in the PDI proceeding in the
amount of \$180,898.95.

1 California and its operations include supplying gutters and installation materials for use at the
2 project sites of PDI's customers. Under Section 547, the complaint seeks to avoid various
3 preference payments allegedly made by PDI to the Defendant within ninety days prior to
4 commencement of the Chapter 11 proceedings. ACF also seeks under Section 550 to recover the
5 avoided payments from the Defendant.

6 On March 31, 2022, Defendant answered the complaint. (AECF No. 15). Defendant
7 denies that any payments received were preferential under Section 547(b) and also alleges that
8 defenses to such payments exist under Section 547(c).

9 On November 1, 2022, an Order Regarding Pretrial and Trial Matters ("Scheduling
10 Order") was entered. (AECF No. 25). That Scheduling Order scheduled a two-day trial to
11 commence on September 25, 2023, through video appearances of all parties, counsel, and
12 witnesses. A pretrial conference also was scheduled for September 6, 2023, and various
13 deadlines were set for the conduct of trial.

14 On May 12, 2023, ACF filed the instant Summary Judgment Motion, accompanied by a
15 Separate Statement of Undisputed Facts ("SUF"),⁴ and a supporting Declaration of Garrett Nye,
16 Esq. ("Nye Declaration").⁵ (AECF Nos. 31, 32, and 33).

17 On June 30, 2023, Defendant filed an opposition ("Opposition"), accompanied by its
18 Separate Statement of Disputed Facts in Support of Opposition to Plaintiff's Motion for
19 Summary Judgment ("SUF Response"),⁶ and a supporting Declaration of Machaila Kowalski

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22 ⁴ The SUF sets forth 26 separate facts that ACF alleges to be undisputed.

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24 ⁵ ACF's Exhibits A through C are attached to the Nye Declaration. Exhibit A is a copy
25 of Defendant's Rule 26(a)(1) Initial Disclosures dated October 12, 2022. Exhibit B is a copy of
26 Defendant's Response to Plaintiff's First Set of Interrogatories dated November 4, 2022 ("ROG
27 Response"). There is no verification attached to the ROG Response. Exhibit C consists of
28 Defendant's responses to Plaintiff's First Request to Produce Documents dated November 4,
2022.

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28 ⁶ In its SUF Response, Defendant either admits or denies each of the factual allegations
made by ACF in the SUF, but frequently adds further factual allegations or legal argument.

1 (“Kowalski Declaration”).⁷ (AECF Nos. 43, 42, and 41).

2 On June 30, 2023, Debtors filed a motion to dismiss the Chapter 11 proceedings
3 (“Debtors Dismissal Motion”). (ECF No. 2676). Debtors represented, inter alia, that the
4 Chapter 11 estates are administratively insolvent and insufficient assets exist to confirm a
5 Chapter 11 plan. See Debtors Dismissal Motion at 8-9.

6 On July 25, 2023, ACF filed a reply (“Reply”). (AECF No. 48).

7 On August 2, 2023, a hearing was conducted on the Debtors Dismissal Motion and the
8 court ordered of the Chapter 11 cases to be converted to Chapter 7.

9 SUMMARY JUDGMENT STANDARDS

10 A motion for summary judgment is governed by Civil Rule 56 which is applicable in this
11 adversary proceeding under Bankruptcy Rule 7056. See *Silva v. Smith’s Pac. Shrimp, Inc. (In re*
12 *Silva)*, 190 B.R. 889, 891 (B.A.P. 9th Cir. 1995). Summary judgment may be granted only if
13 “the movant shows that there is no genuine dispute as to any material fact and that the movant is
14 entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). For summary judgment purposes
15 “[m]aterial facts are those that may affect the outcome of the case.” Farmer v. Las Vegas Metro.
16 Police Dep’t, 423 F.Supp.3d 1008, 1013 (D. Nev. 2019), citing *Anderson v. Liberty Lobby, Inc.*,
17 477 U.S. 242, 248 (1985). Findings of fact may not be entered because summary judgment may

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20 ⁷ Defendant’s Exhibits A through E are attached to the Kowalski Declaration. Exhibit A
21 consists of a Customer Open Balance report for the period from October 2, 2019 through April 1,
22 2020 (“Open Balance Report”). The report identifies the invoice numbers for goods delivered to
23 PDI, the date of the delivery, the date that payment is due, and the aging date beyond when
24 payment was due as of the date the report was generated. According to the Open Balance Report
25 printed on April 16, 2020, there were open invoices during that period totaling \$282,675.92.
26 Exhibit B consists of hard copies of various email exchanges between Employees of PDI and the
27 Defendant during the time period of November 25, 2019 and March 26, 2020 (“Email
28 Exchanges”). Exhibit C consists of copies of Payment Receipts dated February 5, 2020
(\$83,951.51), February 12, 2020 (\$4,997.45), February 24, 2020 (\$5,010.38), March 3, 2020
(\$5,153.68), **March 16, 2020 (\$10,112.36), April 13, 2020 (\$6,044.78), May 14, 2020**
(\$84,622.11), and June 2, 2020 (\$20,127.70). The Payment Receipts identify the invoices to
which the payments were applied. Exhibit D is a copy of a letter dated April 28, 2020, from
Defendant’s counsel demanding certain responses by April 30, 2020. Exhibit E consists of
copies of various invoices from the Defendant to PDI for goods supplied and paid between
August 25, 2020 and December 15, 2020.

1 only be granted where there are no disputed issues of fact. See Animal Legal Def. Fund v. U.S.
2 Food & Drug Admin., 836 F.3d 987, 989-90 (9th Cir. 2016).

3 A genuine issue of material fact exists when “the evidence is such that a reasonable jury
4 could return a verdict for the nonmoving party.” Id. The moving party’s evidence is judged by
5 the same standard of proof applicable at trial. See Celotex Corp. v. Catrett, 477 U.S. 316, 323
6 (1986); see also Southern Calif. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003).
7 The burden of proof is on the party seeking the summary judgment, but the inferences are
8 viewed in favor of the opposing party. See Eastman Kodak Co. v. Image Technical Services,
9 Inc., 504 U.S. 451, 456 (1992); see also Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 987
10 (9th Cir. 2006). Determinations of intent or credibility generally are ill-suited for disposition by
11 summary judgment. See Fogel Legware, etc. v. Wills (In re Wills), 243 B.R. 58, 65 (B.A.P. 9th
12 Cir. 1999). Once the moving party demonstrates the absence of disputed material facts, the
13 responding party must provide admissible evidence raising a genuine dispute. The responding
14 party cannot rely solely on conclusory allegations unsupported by factual data. See Farmer v.
15 Las Vegas Metro. Police Dep’t, 423 F.Supp.3d at 1014 (“the nonmoving party cannot avoid
16 summary judgment by relying solely on conclusory allegations that are unsupported by factual
17 data [. . .] Instead, the opposition must go beyond the assertions and allegations of the
18 pleadings and set forth specific facts by producing competent evidence that shows a genuine
19 issue for trial.”) (external citations omitted).

20 DISCUSSION

21 Section 547(b) spells out five elements of an avoidable preference that must be
22 established by a preponderance of the evidence: (1) an interest of the debtor in property must be
23 transferred to or for the benefit of the creditor; (2) the transfer must be on account of an
24 antecedent debt owed by the debtor before the transfer was made; (3) the transfer must have been
25 made while the debtor was insolvent; (4) the transfer must have been made on or within 90 days
26 before the bankruptcy case is filed;⁸ and (5) the transfer must enable the creditor to receive more

27 ⁸ For “insiders” of the debtor, the transfer must have been made within one year before
28 commencement of the bankruptcy case. No one suggests that the Defendant is an insider under
bankruptcy law. See 11 U.S.C. § 101(31)(b).

1 than the creditor would receive in a Chapter 7 liquidation, the transfer had not been made, and
2 the payment is made in accordance with bankruptcy law. See 11 U.S.C. § 547(b).

3 Under Section 547(f), a debtor is presumed to have been insolvent on and during the 90
4 days immediately preceding commencement of the bankruptcy case.

5 Section 547(c) spells out nine specific defenses to a preferential transfer that a creditor
6 may establish by a preponderance of the evidence. See 11 U.S.C. § 547(c).

7 Defendant asserts three of them here: (1) the parties must have intended the transfer to
8 be a contemporaneous exchange for new value given to the debtor, AND, the transfer in fact
9 must be a substantially contemporaneous exchange (“Contemporaneous Exchange Defense”)⁹;
10 (2) the debt was incurred in the ordinary course of the debtor’s business between the debtor and
11 the creditor, AND the transfer was made in the ordinary course of business between the parties,
12 or, made according to ordinary business terms (“Ordinary Course of Business Defense”)¹⁰; and
13 (3) the transfer was made to the creditor to the extent that after the transfer was made, the
14 creditor gave new value to the debtor that is not secured by an otherwise unavoidable security
15 interest AND on account of which the debtor did not make an unavoidable transfer to or for the
16 benefit of the creditor (“Subsequent New Value Defense”).¹¹

17 There is no genuine dispute that Defendant received payments from PDI. There is no
18 dispute that Defendant was paid on the following dates in the following amounts:

DATE	AMOUNT
March 17, 2020	\$10,112.36 ¹²

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23 ⁹ See 11 U.S.C. § 547(c)(1).

24 ¹⁰ See 11 U.S.C. § 547(c)(2).

25 ¹¹ See 11 U.S.C. § 547(c)(4).

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27 ¹² The payment received on or about March 16, 2020, was applied to invoices dated
28 **September 27, 2019**, October 31, 2019, and November 6, 2019. See ROG Response No. 11 at
9:1-2. The payment was received 172 days (5 months and 19 days) after the earliest invoice, and
132 days (4 months and 11 days) after the latest invoice.

April 13, 2020	\$6,044.78 ¹³
May 15, 2020	\$84,622.11 ¹⁴
June 3, 2020	\$20,127.70 ¹⁵
June 3, 2020	\$798.43 ¹⁶
TOTAL	\$121,705.38

See SUF Response Nos. 3, 4, 5, 6, and 7; ROG Response No. 11 at 11:6-10. There is no dispute that PDI was past due in the amount of \$194,645.82 as of January 30, 2020. See SUF Response No. 15. There is no apparent dispute that on April 16, 2020, there were open invoices during that period totaling \$282,675.92. See discussion at note 7, *supra*. There is no genuine dispute that PDI filed its voluntary bankruptcy petition on June 11, 2020, along with the other Debtors.

¹³ The payment received on April 13, 2020, was applied to an invoice dated November 4, 2019. See ROG Response No. 11 at 9:7-8. The payment was received 161 days (5 months and 9 days) after the invoice.

¹⁴ The payment received on May 15, 2020, was applied to invoices dated October 2, 2019, October 4, 2019, November 6, 2019, November 7, 2019, November 8, 2019 (8 separate invoices of the same date), November 11, 2019 (3 separate invoices of the same date), November 12, 2019, November 14, 2019 (2 separate invoices of the same date), November 15, 2019 (4 separate invoices of the same date), November 19, 2019, November 20, 2019 (3 separate invoices of the same date), November 21, 2019 (5 separate invoices of the same date), November 22, 2019, November 25, 2019, December 2, 2019 (2 separate invoices of the same date), December 4, 2019, December 6, 2019, December 9, 2019 (2 separate invoices of the same date), December 10, 2019 (2 separate invoices of the same date), December 18, 2019 (4 separate invoices of the same date), December 19, 2019, December 20, 2019 (4 separate invoices of the same date), December 23, 2019, December 26, 2019, and **December 30, 2019** (2 invoices of the same date). See ROG Response No. 11 at 9:10 to 10:23. The payment was received 226 days (7 months and 13 days) after the earliest invoice, and 137 days (4 months and 15 days) after the latest invoice.

¹⁵ The payment received on or about June 3, 2020, was applied to invoices dated December 10, 2019, December 13, 2019, December 18, 2019, and **December 30, 2019**. See ROG Response No. 11 at 10:25 to 11:2. The payment was received 176 days (5 months and 24 days) after the earliest invoice, and 156 days (5 months and 4 days) after the latest invoice.

¹⁶ The payment received on or about June 3, 2020, was applied to an invoice dated November 13, 2019. See ROG Response No. 11 at 11:7. The payment was received 203 day (6 months and 21 days) after the invoice.

1 There is no dispute that all five payments occurred within 90 days before the bankruptcy filing.
2 There is no dispute that PDI is presumed to have been insolvent during that 90-day period and
3 that no evidence has been presented to the contrary. There is no dispute that the value of PDI's
4 assets are far exceeded by the amount of the claims filed in the bankruptcy estate. See note 2,
5 supra.

6 Although the material facts are not in dispute, Defendant argues that it could have
7 recorded a lien on the project at which PDI contracted with a third-party. Defendant posits that if
8 it had liened a project at which its goods were used, it could have been paid by the project owner
9 all of the amounts that PDI had paid during the preference period. As a result, Defendant
10 suggests that contrary to the requirement of Section 547(b)(5), it did not receive more than it
11 would have been paid in a Chapter 7 liquidation without the transfer. However, the focus of
12 Section 547, like all of the avoiding powers, is on transfers of interests of the debtor in property
13 rather than a transfer of the property interests of others. Preferential transfers occur when a
14 debtor engages in transfers of its property that favor one creditor over another. Exactly that
15 situation occurred here when Defendant chose to forgo the protection of obtaining a lien against
16 the project. See SUF Response Nos. 3 and 22. Had the Defendant done so, it might well have
17 induced the particular project owner to satisfy the lien that had been placed on its own property
18 and then seek its relief against PDI, such as withholding payments under the contract. Instead of
19 exercising its inchoate lien rights, Defendant chose to demand and obtain payments on the
20 outstanding debts from PDI during the preference period. Absent any contrary evidence in the
21 record, the court concludes that there is no genuine dispute that all of the elements of a
22 preferential transfer exist under Section 547(b). The question then is whether there are any
23 genuine disputes of material fact as to the merits of the three defenses raised by the Defendant
24 under Section 547(c).

25 **I. Contemporaneous Exchange Defense.**

26 According to the evidence presented by ACF, Defendant acknowledges that the five
27 payments made during the 90-day preference period were applied to invoices for goods that the
28 Defendant delivered no earlier than September 27, 2019 and no later than December 30, 2019.

1 At the very least, the five payments were made 132 days after the applicable invoice date. See
2 notes 12, 13, 14, 15 and 16, supra. Under the best of circumstances, PDI's five payments were
3 made far more than four months after the Defendant delivered the subject goods.

4 The parties disagree on whether the delay was consistent with an intent for there to be a
5 contemporaneous exchange for new value.¹⁷ Irrespective of such an intention,¹⁸ however, the
6 new deliveries were not substantially contemporaneous in fact. Defendant's internal records
7 indicate that invoices to PDI were due 45 days after goods are delivered. See Open Balance
8 Report at VGS000228-VGS000231. Instead of being made within 45 days after the goods were
9 delivered, the payments were made at least 132 days later. In other words, Defendant's records
10 indicate that it took PDI almost three times longer to pay the subject invoices than when the
11 invoices were due. Whatever the intentions of the parties, the five payments during the
12 preference period were not substantially contemporaneous. Because both elements of the
13 Contemporaneous Exchange Defense must be present, the statutory requirements have not been
14 met. Therefore, the court concludes that the affirmative defense under Section 547(c)(1) is not
15 available to the Defendant.

16 **II. Ordinary Course of Business Defense.**

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19 ¹⁷ Defendant concedes that as early as November 25, 2019, it treated PDI's account as
20 "past due" and communicated its concern over nonpayment to PDI. See Email Exchanges dated
21 November 25, 2019 at VGS000084-85; dated January 22, 2020 at VGS 000113; January 30, 2020
22 at VGS 000144; dated January 31, 2020 at VGS000161. Defendant acknowledged receipt of the
23 first payment on March 17, 2020, while reiterating that PDI's account "has been running in
24 excess of 60-90 days past due." See Email Exchanges dated March 17, 2020 at VGS000202.

25 ¹⁸ In support of its Contemporaneous Exchange Defense, Defendant argues that the
26 parties intended the subject payments to have been contemporaneous. In connection with its
27 Ordinary Course of Business Defense, however, Defendants also attest that "in early 2019 VGS
28 orally agreed and payments were commonly made 5-6 months out, which was in the ordinary
course of VGA's (sic) business practice with Petersen Dean." See ROG Response No. 5 at 5:11-
13; ROG Response No. 13 at 13:23-25; ROG Response No. 15 at 15:17-22. It is not clear
whether Defendant is conflating the temporal aspects of the former defense with the commercial
elements of the latter defense. Because an essential element of the Contemporaneous Exchange
Defense is absent, however, it is unnecessary to reconcile these apparently contradictory
positions as to the parties' intent.

1 According to the evidence presented by ACF, as well as that offered by the Defendant,
2 both parties had an existing business relationship beginning as early as 2014. See Kowalski
3 Declaration at ¶ 3.¹⁹ ACF does not dispute that PDI had a relationship within the ordinary course
4 of business within the industry. No one disputes that PDI used the goods supplied by the
5 Defendant on specific construction projects owned by third-parties. ACF maintains, however,
6 that the subject payments were not made in the ordinary course of business between PDI and the
7 Defendant, nor were they made in accordance with ordinary business terms.

8 As previously discussed, as early as November 25, 2019, Defendant repeatedly sought
9 payment of the outstanding invoices from PDI. After those efforts were unsatisfactory,
10 Defendant turned to its legal counsel for the matter. See SUF Response No. 22. Thereafter,
11 counsel transmitted a demand letter dated April 28, 2020, setting a deadline of April 30, 2020,
12 before a collection suit would be commenced. See discussion at note 7, supra; see also
13 Defendant's Exhibit D. After that letter was transmitted, the third, fourth and fifth payments
14 were made on May 15, 2020 and June 3, 2020, totaling \$105,548.24. Nothing in the Open
15 Balance Report or the Payment Receipts suggest that this activity was typical of the business
16 dealings between the parties.

17 Defendant's sworn interrogatory response,²⁰ however, was that "in early 2019 VGS
18 orally agreed and payments were commonly made 5-6 months out, which was in the ordinary
19 course of VGA's (sic) business practice with Petersen Dean." See discussion at note 18, supra.²¹

20 ¹⁹ The Summary Judgment Motion is supported by the Nye Declaration, one of ACF's
21 counsel, rather than an employee or representative of PDI. The Opposition is supported by the
22 Kowalski Declaration who is an employee of the Defendant and involved in the day-to-day
23 operations of the business. There is no apparent dispute that "Since approximately 2014, Debtor,
24 PD Solar, Inc./Petersen-Dean, Inc., constantly ordered new supplies from VGS, generally on a
weekly basis and often on a daily basis, in large sums." See Kowalski Declaration at ¶3.

25 ²⁰ ACF offered the ROG Response as its Exhibit B to support its SUF. The exhibit is
26 signed by Defendant's counsel and is not accompanied by a verification. Neither party to the
instant motion, however, objects to the court's consideration of the ROG Response.

27 ²¹ The ROG Response, however, does not identify the individuals who participated in the
28 oral agreement, does not specify an actual date agreement was reached, and does not point to any
written memorialization of the agreement.

1 This appears to be contrary to Defendant's treatment of PDI's invoices in its Open Balance
2 Report. See discussion at 9, supra. But if the parties' business relationship began in 2014, it is
3 not clear whether they reached similar agreements over a 5-6 year period. In other words,
4 evidence presented by both parties indicates that there is a factual dispute as to the ordinary
5 course of business and ordinary business terms between these particular parties. On this record,
6 the court cannot conclude whether there is merit to Defendant's assertion of the Ordinary Course
7 of Business Defense under Section 547(c)(2).

8 **III. Subsequent New Value Defense.**

9 According to the evidence presented by ACF, as well as that offered by the Defendant,
10 the five payments made during the 90-day period were followed by only one transfer of new
11 goods prior to the commencement of the Chapter 11 on June 11, 2020. That delivery of new
12 value was in the amount of \$46,089.01 and made after the March 17, 2020 payment, but before
13 the April 14, 2020 payment. See SUF Response No. 10; see also Open Balance Report, printed
14 April 16, 2020, at VGS000230-231.²² It is undisputed that no other new goods were provided
15 before the June 11, 2020 bankruptcy petition date. See SUF Response No. 11.²³ In light of that
16 delivery to PDI after the March 17, 2020 payment, ACF concedes that Defendant provided new
17 value subsequent to that payment in accordance with Section 547(c)(4). See Reply at 8:6-8. As

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²² The ten open invoices specified in SUF Response No. 10 are listed in those pages of
23 the Open Balance Report. The report indicates that each listed invoice is due 45 days after the
24 invoice date. Because all ten of the subject invoices were not yet due as of the date the Open
25 Balance Report was printed, none of them appear in the aging column.

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²³ There also is no dispute that after PDI filed for bankruptcy protection, it continued
operations and even paid invoices to the Defendant from August 25, 2020 through December 15,
2020. Those payments, of course, were not made before the filing of the Chapter 11 petition and
the invoices were for postpetition obligations entitled to administrative expense priority under
Section 503(b)(1)(A).

1 a result, ACF further concedes that it cannot avoid payment one, but continues to seek avoidance
2 of payments two, three, four and five, in the total amount of \$111,593.02. Id. at 8:9.²⁴

3 Despite only one transfer of new value after only the first payment on March 17, 2020,
4 Defendant asserts that a “net result rule” applies rather than the actual language of Section
5 547(c)(4). See Opposition at 12:4 to 13:1, citing 4 COLLIER ON BANKRUPTCY § 547.40, at 547-
6 125, 126 (15th ed. 1981) and In re Thomas W. Garland, Inc., 19 B.R. 920, 922 (Bankr. E.D. Mo.
7 1982). Under that interpretation, the total value of all goods delivered by the creditor are
8 compared to the total amount of all payments made by the debtor, regardless of whether any new
9 value was provided during the 90-day period. If the “net result” is that the debtor received
10 deliveries of a value greater than the amounts paid throughout their relationship, the creditor has
11 provided new value that is a defense to a preference claim. Defendant’s reliance on the so-called
12 net result rule, however, is misplaced. In McClendon v. Cal-Wood Door (In re Wadsworth
13 Building Components, Inc. (In re Wadsworth Building Components), 711 F.2d 122, 124 (9th Cir.
14 1983), the Ninth Circuit specifically considered and rejected the net result rule as inconsistent
15 with Congressional intent. In the forty years since Wadsworth was decided, it has not been
16 overruled and remains the law in this circuit.²⁵

17 Under these circumstances, there is no genuine dispute that the only transfer of new value
18 during the preference period was the \$46,089.01 in goods supplied after the payment of
19 \$10,112.36 on March 17, 2020, but before any of the remaining four payments during the
20 preference period. Because Defendant provided no additional new value during the preference

21 ²⁴ ACF’s concession may or may not be overly generous. See Mosier v. Ever-Fresh Food
22 Co. (In re IRFM), 52 F.3d 228, 233 & n.6 (9th Cir. 1995) (“Second, assurance must be given that
23 the creditor will not attempt to obtain double credit for a transfer. This requirement may be
24 satisfied by disallowing a creditor from asserting a separate section 547(c) defense against a
preference when the creditor has already used section 547(c)(4) to offset that preference.”)

25 ²⁵ The Ninth Circuit’s decision in Wadsworth was issued after the Collier treatise edition
26 cited by the Defendant as well as the Thomas W. Garland opinion cited by the Defendant. In the
27 subsequent Collier treatise edition, the authors observed: “The vast majority of courts and
commentators have correctly concluded that the net result rule is an ‘anachronism’ that must
28 yield to the specific congressional pronouncement of section 547(c)(4).” 5 COLLIER ON
BANKRUPTCY, ¶ 547.04[4][d] & n.121 (Richard Levin and Henry J. Sommer, eds., 16th ed.
2023).

1 period, the Subsequent New Value Defense does not otherwise apply. The court therefore
2 concludes that Defendant's assertion of the affirmative defense under Section 547(c)(4) is
3 without merit as to the second, third, fourth, and fifth payments.

4 **IT IS THEREFORE ORDERED** that the Plaintiff's Motion for Summary Judgment
5 brought in the above-captioned adversary proceeding, Adversary Docket No. 31, be, and the
6 same hereby is, **GRANTED IN PART** and **DENIED IN PART**.

7 **IT IS FURTHER ORDERED** that summary judgment is **GRANTED** in favor of
8 Plaintiff ACF Finco 1, LP, with respect to each and every element of an avoidable preferential
9 transfer under 11 U.S.C. §547(b).

10 **IT IS FURTHER ORDERED** that summary judgment is **GRANTED** in favor of
11 Plaintiff ACF Finco 1, LP, with respect to Defendant Valley Gutter Supply, Inc.'s assertion of an
12 affirmative defense under 11 U.S.C. §547(c)(1).

13 **IT IS FURTHER ORDERED** that summary judgment is **GRANTED** in favor of
14 Plaintiff ACF Finco 1, LP, as to the aforementioned four payments made by Petersen Dean, Inc.
15 on or about April 13, 2020, May 15, 2020, and June 3, 2020, with respect to Defendant Valley
16 Gutter Supply, Inc.'s assertion of an affirmative defense under 11 U.S.C. §547(c)(4).

17 **IT IS FURTHER ORDERED** that summary judgment in favor of Plaintiff ACF Finco
18 1, LP is **DENIED** with respect to Defendant Valley Gutter Supply, Inc.'s assertion of an
19 affirmative defense under 11 U.S.C. §547(c)(2). The burden of proof remains with Defendant
20 Valley Gutter Supply, Inc. to establish the requirements of that affirmative defense at trial.

21
22 Copies sent via CM/ECF ELECTRONIC FILING

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25 ATTN: OFFICER OR MANAGING AGENT
26 4530 N. WALNUT RD.
27 NORTH LAS VEGAS, NV 89081

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