

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**THE CONSOLIDATED FGH
LIQUIDATING TRUST**

CASE NO. 01-52173 EE

f/k/a

**FRIEDE GOLDMAN HALTER, INC.,
Et al., Jointly Administered**

**LIQUIDATING TRUSTEE FOR THE
CONSOLIDATED FGH LIQUIDATING
TRUST**

Plaintiff

VS.

ADV. PROC. NO. 03-05088 EE

**SOUTHERN INSPECTION SERVICES, INC.
Defendant**

OPINION

Before the Court is the Motion for Partial Summary Judgment (Dkt. #37) filed by the defendant in this adversary proceeding, Southern Inspection Services, Inc., and the opposition thereto filed by the Liquidating Trustee for The Consolidated FGH Liquidating Trust (Dkt. #41). Having considered the matter, the Court concludes that the Motion should be granted in part and denied in part as set out below.

I. FACTUAL BACKGROUND

1. Friede Goldman Halter, Inc. and certain affiliates (the “Debtors”) commenced petitions for relief under Chapter 11 of Title 11 of the United States Code by filing voluntary petitions. Friede Goldman Delaware, Inc. filed a Chapter 11 petition on April 16, 2001. Friede

Goldman Halter, Inc. filed its Chapter 11 petition on April 19, 2001. Each of the other Debtors, including Friede Goldman Offshore, Inc. (“FGO”) filed their petitions on April 20, 2001, except Amcane International, Inc. and Sabre Personnel Associations, Inc., which filed petitions on June 1, 2001. The Chapter 11 cases were consolidated under Case No. 01-52173 SEG.¹

2. On April 14, 2003, an Adversary Complaint to avoid and recover preferential transfers was filed by Friede Goldman Halter, Inc. and its affiliated, jointly administered debtors in possession and the Official Unsecured Creditors Committee of Friede Goldman Halter, Inc., against Southern Inspection Services, Inc. (“SIS”).² The Liquidating Trustee for the Consolidated FGH Liquidating Trust was subsequently substituted as proper party plaintiff in the proceeding. The complaint alleges that FGO made preferential transfers to SIS in the sum of \$311,461.50, and that the transfers are avoidable and recoverable pursuant to 11 U.S.C. § 547(b) and § 550(a).³

3. The Amended Answer filed by SIS raises affirmative defenses including that transfers were contemporaneous exchanges for new value pursuant to 11 U.S.C. § 547(c)(1), that transfers were made in the ordinary course of business according to ordinary business terms pursuant to § 547(c)(2), that transfers did not enable SIS to receive more than it would have received in a

¹ A list of the entities constituting the consolidated Debtors is contained in footnote 1 of the Adversary Complaint filed April 14, 2003, and in footnote 1 of the Answer and Opposition to Southern Inspection Services, Inc.’s Motion for Summary Judgment filed December 23, 2008.

² The Liquidating Trustee’s Answer and Opposition to Southern Inspection Services, Inc.’s Motion for Partial Summary Judgment indicates that SIS was a vendor of FGO on the contract between FGO and Petrodrill Four Limited and Petrodrill Five Limited to build two semi-submersible oil drilling rigs.

³ Exhibit “A” to the Complaint lists check numbers and dates of eight transfers totaling \$311,461.50.

Chapter 7 proceeding, and that SIS provided new value to the Debtors that was not secured by an otherwise avoidable security interest and on account of which the Debtors did not make an otherwise unavoidable transfer to or for the benefit of SIS pursuant to 11 U.S.C. § 547(c)(4).

4. In response to a Clerk's Notice indicating inactivity in the adversary proceeding, the Liquidating Trustee filed a responsive pleading on July 10, 2008, indicating that the matter was scheduled for mediation on September 8, 2008. A Notice of Failed Mediation was filed December 9, 2008.

5. On December 4, 2008, SIS filed its Motion for Partial Summary Judgment and Affidavit of Betty K. Mallette ("Mallette"), President of SIS. In the Motion, SIS claims that the pleadings and discovery on file and the Affidavit of Mallette indicate that there exists no genuine issue as to any material fact and that SIS is entitled to judgment as a matter of law as to all amounts sought to be avoided, except \$218.25.

6. In its Motion for Partial Summary Judgment, SIS sets forth that the Debtors were in the business of converting, retrofitting and repairing offshore drilling rigs and that SIS performed nondestructive testing services for FGO. SIS has admitted to receipt of payments in connection with services performed for FGO.

7. As to check No. 5009763 issued January 12, 2001, in the amount of \$16,179.00, that cleared the banking institution on January 19, 2001, SIS avers in its Motion that the transfer does not constitute a preference in that the transfer was not made on or within 90 days before the April 20, 2001 filing date of FGO's petition.

8. As to check No. 5009984 issued January 19, 2001, in the amount of \$25,016.00, SIS contends that it provided nondestructive testing services to FGO subsequent to the delivery of

the check. SIS asserts that services were provided between January 22, 2001 and February 8, 2001, and that the value of those services was \$24,797.50.⁴ SIS contends that the services were not secured by any security interest and that FGO did not make any transfer in payment for these services to or for the benefit of SIS and that it is entitled to the protection of the subsequent new value defense.

9. Similarly, SIS contends that it provided such services between February 12, 2001, and April 19, 2001, subsequent to the delivery of check No. 5010489 in the amount of \$35,655.00, No. 5010490 in the amount of \$2,717.50 and No. 5010491 in the amount of \$21,577.00, and that the value of those services totaled \$73,418.75.

10. SIS also contends that payments from Fireman's Fund Insurance Company ("FFIC")⁵ that were made pursuant to surety bonds issued in connection with the construction of the semi-submersible oil drilling rig "Amethyst," do not constitute transfers of interests of the Debtors in property and may not be avoided.⁶

11. The Affidavit of Betty K. Mallette in support of the Motion states that she is the President of SIS, that she is familiar with the books and records of SIS, and that she has personal

⁴ The Affidavit in support of the motion lists the value as \$27,797.50.

⁵ The Defendant, SIS, indicates by its Motion and Affidavit that FFIC issued check No. 1012 in the amount of \$62,494.50 on March 19, 2001, and check No. 1027 in the amount of \$147,822.50 on March 21, 2001. However, documentation provided by the Plaintiff in Exhibit "A" to the Complaint, reflects an April 18, 2001 date for two separate transfers of \$112,946.50 and \$34,876.00 that equal the \$147,822.50 amount.

⁶ The Liquidating Trustee's Answer and Opposition to Southern Inspection Services, Inc.'s Motion for Partial Summary Judgment sets forth that FFIC issued performance and payment bonds on the Petrodrill Contracts. The Liquidating Trustee also states that FGO entered into a General Indemnification Agreement with FFIC to be indemnified for losses, costs and expenses.

knowledge of the matters set forth therein. The Affidavit sets out that the delivery date for check No. 5009984 was January 19, 2001, and that the delivery date of checks Nos. 5010489, 5010490, and 5010491 was February 12, 2001.⁷ The Affidavit further delineates invoice numbers and dates, dates of work performed, and dollar amounts for nondestructive testing services between January 22, 2001 and February 8, 2001, in the amount of \$27,797.50, as well as invoices for services between February 19, 2001 and April 12, 2001, in the amount of \$73,418.75. The Affidavit states that the charges were not secured by any security interest and that FGO did not make any transfer in payment for these services to or for the benefit of SIS. The Affidavit further sets out that FFIC issued check No. 1012 in the amount of \$62,494.50 and check No. 1027 in the amount of \$147,822.50 payable to SIS pursuant to surety bonds relative to the drilling rig “Amethyst.”

12. There were no attachments to the Affidavit.

13. In its Answer and Opposition to the Motion for Partial Summary Judgment, the Liquidating Trustee concedes, on page 4, paragraph 12, that check No. 5009763 in the amount of \$16,790.00 cleared the banking institution on January 19, 2001 and that it is not recoverable under 11 U.S.C. § 547. The transfer was outside of the 90 day period required to constitute an avoidable transfer under 11 U.S.C. § 547(b)(4)(A).⁸

⁷ Exhibit “A” to the Complaint lists “Check Date” and “Posted Date” for each check but does not list delivery dates.

⁸ See, *Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386 (1992)(transfer by check under § 547(b) is deemed to occur on the date the drawee bank honors it). Cf., *Official Committee of Unsecured Creditors v. Columbia Forest Products, Inc. (In re Hardwood P-G, Inc.)*, No. 06-50057, Adv. No. 06-5278, 2007 WL 1728653, at *9 (Bankr. W.D.Tex. 2007)(for purposes of § 547(c) new value analysis the date of transfer is the date that the check is received by the creditor).

14. As to the remaining payments, the Liquidating Trustee asserts that there are issues of material fact regarding the dates of delivery of checks and value of services rendered as set forth by SIS, and further asserts that the Mallette Affidavit is inadmissible hearsay pursuant to Fed. R. Evid. 802 and 803 and Fed. R. Civ. P. 56(e), and that there is no documentation to support the allegations as required by Fed.R.Civ.P. 56(e). The Liquidating Trustee further asserts factual issues regarding security interests,⁹ indemnification agreements, and whether services replenished the estate.

II. CONCLUSIONS OF LAW

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

The Liquidating Trustee requests relief against SIS in its Complaint pursuant to 11 U.S.C. § 547 and § 550. Section 547(b) provides that:

- (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
 - (1) to or for the benefit of a creditor;
 - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
 - (3) made while the debtor was insolvent;
 - (4) made--
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
 - (5) that enables such creditor to receive more than such creditor would receive if--
 - (A) the case were a case under chapter 7 of this title;

⁹ To support its argument that there is a genuine issue of material fact regarding the existence of a security interest for purposes of § 547(c)(4)(A), the Liquidating Trustee provided documentation that referred to a lien. Exhibit “A” to the Liquidating Trustee’s Answer and Opposition to the Motion is a March 31, 2001 correspondence relating to a Release of Lien.

- (B) the transfer had not been made; and
- (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

SIS asserted the subsequent new value defense provided by 11 U.S.C. § 547(c) in its Answer to the Complaint, and that defense serves as one of the bases upon which SIS moves for Partial Summary Judgment. Section 547(c) provides that:

- (c) The trustee may not avoid under this section a transfer –
...
 - (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –
 - (A) not secured by an otherwise unavoidable security interest and;
 - (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

11 U.S.C. § 547(c)(4).

Subsection (g) of § 547 provides that, “the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.” 11 U.S.C. § 547(g).

In its Motion for Partial Summary Judgment, SIS contends it is entitled to the new value defense under 11 U.S.C. § 547(c)(4), that payments by FFIC are not recoverable on the basis that the Debtors did not have a property interest in the funds as required under § 547(b), and that one of the transfers is outside the preference period. The Liquidating Trustee has conceded, as stated above, SIS’s assertion that the payment made by check No. 5009763, in the amount of \$16,179.00, that cleared the banking institution on January 19, 2001, is not recoverable as the transfer made by that check was outside the 90 day period prescribed in 11 U.S.C. § 547(b).

There being no genuine issue as to any material fact as to the transfer represented by that payment, the Court finds that SIS is entitled to a judgment as a matter of law as to that amount and that the Motion for Partial Summary Judgment by SIS should be granted to that extent.

Summary judgment is requested pursuant to Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, which provides that, “[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In *Gibson v. Potter*, 264 Fed. Appx. 397 (5th Cir. 2008) the court stated:

“Summary judgment is proper when there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” *Id.* (citing Fed.R.Civ.P. 56(c)). “The evidence and inferences from the summary judgment record are viewed in the light most favorable to the nonmovant.” *Minter v. Great Am. Ins. Co. of N.Y.*, 423 F.3d 460, 465 (5th Cir.2005).

The moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] ... which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant meets this burden, the burden shifts to the nonmovant “to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Id.* at 322, 106 S.Ct. 2548.

Id. at 399-400. *See also, James v. Gonzalez*, No. 6-06-0418, 2008 WL 4692412, at *2 (S.D.Tex. 2008)(the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an “absence of a genuine issue of material fact,” citing *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir.2005)); *Condrey v. SunTrust Bank of Georgia*, 431 F.3d 191, 197 (5th Cir. 2005); *Malacara v. Garber*, 353 F.3d 393, 404 (5th Cir. 2003).

In *Official Committee of Unsecured Creditors v. Columbia Forest Products, Inc. (In re Hardwood P-G, Inc.)*, No. 06-50057, Adv. No. 06-5278, 2007 WL 1728653 (Bankr. W.D.Tex. 2007), the court stated:

Defendants have moved for summary judgment in their favor regarding the affirmative defenses under section 547(c). When defendant moves for summary judgment on an affirmative defense, the positions are reversed; defendant bears the burden of producing evidence to make its prima facie case, whereupon plaintiff bears the burden of producing or identifying evidence in the record placing in doubt the facts underlying the affirmative defense. *Hardwood P-G, Inc. v. Wright Capital Corp. (In re Hardwood P-G, Inc.)*, No. 06-5121-LMC, 2007 WL 781710 at *1 (Bankr.W.D.Tex. March 9, 2007); *see also* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 10A Federal Practice & Procedure § 2727 (3d ed.1998) (discussing burdens of proof on summary judgment).

Id. at *1.

The Liquidating Trustee argues that, “[f]or Southern Inspection to receive protection under § 547(c)(4), it must show that it gave new value after each preferential transfer, that the new value given was not secured by an otherwise unavoidable security interest, and that FGO must not have made an otherwise unavoidable transfer to or for the benefit of Southern Inspection.” Answer and Opposition to Southern Inspection Services, Inc.’s Motion for Summary Judgment at 13. The Liquidating Trustee further argues that the Affidavit of Mallette is inadmissible:

Southern Inspection establishes the transfer dates based on the Affidavit of Betty Mallette. However, the Affidavit of Betty K. Mallette is inadmissible hearsay under FRE 56(e), 802 and 803. Rule 56(e) requires the party to attach sworn or certified copies of all documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment. *Daily Press, Inc. v. United Press Int’l*, 412 F. 2d 126, 133 (6th Cir.), *cert. denied*, 396 U.S. 990, 90 S. Ct. 480, 24 L.Ed. 2d 453 (1969), *see also* *Beyene v. Coleman Sec. Servs., Inc.*, 854 F. 2d 1179, 1181 (9th Cir. 1988)(stating that “[i]t is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment”). There is no supporting

documentation or admissible evidence other than a statement in the affidavit supporting Southern Inspection's transfer dates . . . [T]his Court should deny the Summary Judgment Motion as there are questions of material fact concerning the transfer date of the checks at issue.

Answer and Opposition to Southern Inspection Services, Inc.'s Motion for Partial Summary Judgment at 15.¹⁰ *See, Macuba v. Deboer*, 193 F.3d 1316, 1322-23 (11th Cir.1999)(general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment and that 56(e) requires that affidavits be made on personal knowledge); *Martin v. John W. Stone Oil Distributor, Inc.* 819 F.2d 547, 549 (5th Cir. 1987)(court may not consider hearsay evidence in affidavits, citing Rule 56(e)).

SIS responded to the Liquidating Trustee's position that the Affidavit of Mallette is inadmissible hearsay by arguing that as President of SIS, Mallette is familiar with the books and records of SIS, and that her Affidavit states that she has personal knowledge of the matters set forth.

Fed. R. Civ. P. 56(e) provides the following as to affiant's personal knowledge and as to required attachments to affidavits:

(e) Affidavits; Further Testimony.

(1) In General. A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented to opposed by depositions, answer to interrogatories, or additional affidavits.

¹⁰ The Liquidating Trustee, in addition, filed its Statement of Contested Material Facts and Statement of Issues of Law setting forth those issues it contends are contested.

Fed. R. Civ. P. 56(e).

In *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.* 5 F.3d 1255 (9th Cir.

1993), the court stated:

[A]n affidavit of a witness is not exempt from Rule 56(e)'s attachment requirement simply because the affidavit references documentary evidence *and* personal knowledge as a source of information. If documentary evidence is cited as a source of a factual contention, Rule 56(e) requires attachment. There was no attachment. The district court did not abuse its discretion in excluding the . . . affidavit.

Id. at 1262. *See also, Peterson v. U.S.*, 694 F. 2d 943, 945 (3rd Cir. 1982)(failure to attach key document to affidavit violated 56(e) and made summary judgment improper); *National Diamond Syndicate, Inc. v. United Parcel Service, Inc.* 897 F.2d 253, 260 (7th Cir. 1990)(summary judgment is not appropriate where uncontroverted affidavit fails to meet standards of Rule 56(e)); *Canada v. Blain's Helicopters, Inc.*, 831 F. 2d 920, 925 (9th Cir. 1987)(documents must be authenticated by and attached to affidavit); *U.S. v. Real Property Located at 475 Martin Lane, Beverly Hills Cal.*, 298 Fed.Appx. 545, 550 (9th Cir. 2008)(a court does not err by excluding affidavits where necessary supporting documents were not attached citing *Multnomah*); *Cf; Mooney v. Monumental Life Insurance Company*, 123 F. Supp. 2d 1008, 1010 (E.D. La. 2000)(checks submitted as exhibits were not properly before the court because they were not attached to and authenticated by an affidavit conforming to Rule 56(e)); *Ancar v. Murphy Oil, U.S.A., Inc.*, No. 06-3246, 2007 WL 4365436, at *1 (E.D.La. 2007)(although invoices and checks were not attached to affidavit, it complied with 56(e) because the affidavit referred to a spreadsheet, and not to the individual invoices and checks); *Love v. National Medical Enterprises*, 230 F. 3d 765, 776 (5th Cir. 2000)(affidavit of custodian of summarized record of

voluminous data attached to the affidavit complied with 56(e) where the summarized documents were made available for inspection.)

The Affidavit filed in support of the Motion for Partial Summary Judgment had no checks, invoices, or other documentation attached to support the information contained therein, including dates indicated for delivery or transfer of checks or invoices, dates of work performed, or the amounts of invoices or value of services. In addition, the Affidavit does not reflect any information to indicate that Mallette was the President of SIS at or near the time that any of these transactions may have occurred.¹¹

In *Meyer Intellectual Properties Ltd. v. Bodum, Inc.*, No. 06 C 6329, 2009 WL 323233 (N.D.Ill. 2009), the court stated that:

While “corporate officers are presumed to have personal knowledge of the acts of their corporation,” such knowledge is only presumed and may be overcome based on the factual circumstances (see 11 *Moore's Federal Practice* § 56.14[1][c] at 56-183 (3d ed. 2008)). Thus, while the personal knowledge required for affidavits (and properly drafted declarations) may “flow logically from the context of the affidavit” or declaration (*id.*), especially where the affiant or declarant is a corporate officer, the personal knowledge requirement is not met automatically simply because the affiant or declarant is such an officer.

In the analysis of whether corporate officer Perez has the requisite personal knowledge to speak on Bodum's behalf, an important consideration is whether he was employed in a position where he can be presumed to have gained personal knowledge of the relevant facts during the relevant times (see, e.g., *Aylward v. Hyatt Corp.*, No. 03 C 6097, 2005 WL 1910904, at *7-8 (N.D.Ill. Aug. 5)).

...

But it is not enough that a corporate president as declarant received

¹¹ In fact, the Court file in the bankruptcy proceeding contains an Affidavit for SIS filed August 3, 2004, relating to Proof of Claim forms, with the affiant being S. E. Mallette, “President of Southern Inspection Services, Inc.” The subject Affidavit of Betty K. Mallette, as President of SIS, was filed in December 2008. The file itself, therefore, indicates that Betty K. Mallette may not have been President of SIS at the earlier dates in 2001 surrounding the time of the transactions that are the subject of this proceeding.

information from others. That is inadmissible hearsay, not “personal knowledge” (see *Cherry Commc'ns, Inc. v. Coastal Tel. Co.*, 906 F.Supp. 452, 454-55 (N.D.Ill.1995)). To defeat a motion for summary judgment, evidence showing the existence of a genuine issue of material fact cannot be based on such hearsay. Instead only evidence that is admissible at trial may be relied on for summary judgment purposes (see, e.g., *Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 533 (7th Cir.2003)).

Id. at *4-5. Additionally, in *Fink v. Ohio Health Corp.*, No. C-2-02-1146, 2004 WL 3511614 (S.D.Ohio 2004), the court stated that:

[A] person filing an affidavit must having [sic] personal knowledge of the information therein. Fed.R.Civ.P. 56(e). While corporate officers are presumed to have personal knowledge of the affairs of their corporation, the Court cannot say that is true if the incident in question occurred, or the records were created, before the employment of the officer in question. *Reddy v. Good Samaritan Hosp. & Health Ctr.*, 137 F. Supp 2d 948, 956 (S.D.Ohio 2000). Affidavits resting on information and belief are insufficient. *Automatic Radio Mfg. Co. v. Hazeltine Research* 339 U.S. 827, 831, 70 S.Ct. 894, 94 L.Ed. 1312 (1950) (affidavit in support of motion for summary judgment made on information and belief does not comport with Rule 56(e)) (overruled on other grounds); see also *Collazos-Cruz v. United States*, 117 F.3d 1420 (table), Case No. 96-5452, 1997 WL 377037 at 2 (6th Cir.1997); *Reddy*, 137 F.Supp.2d at 956.

Id. at *3.

The Court concludes that the Affidavit submitted in support of the Motion for Partial Summary Judgment does not properly comport with the requirements of Fed. R. Civ. P. 56(e) and that the matters contained therein are inadmissible and should not be considered.¹² The Court further concludes that the movant has failed to establish requisites necessary to a § 547(c)(4) defense, and has not established the absence of a genuine issue of material fact regarding the § 547(c)(4) defense.

SIS also asserts that the payments made by FFIC were not transfers of an interest of the

¹² The Court does not reach the matter of whether or not the Liquidating Trustee has complied with requirements of Fed. R. Civ. P. 56(e).

Debtors in property for purposes of § 547(b). The Liquidating Trustee argues that the funds are property of the estate, that there were no restrictions on the use of funds advanced by FFIC, and that FFIC had no absolute obligation to the creditors. The Liquidating Trustee further suggests there is an unsettled issue as to whether SIS had a security interest in the Petrodrill Project, and that the effect of payments by FFIC was to remove new value from the estate because FGO had an obligation to FFIC under the indemnification agreement to repay FFIC. The Court concludes that the movant has not provided sufficient supporting documentation for proof regarding whether the payments made by FFIC were transfers of an interest in the Debtors, and that there are genuine issues of material fact rendering summary judgment on the matter at this time inappropriate.

The Court concludes that the Motion for Partial Summary Judgment filed by SIS should be granted in part and that SIS is entitled to judgment as to the amounts transferred represented by check No. 5009763, and that the Liquidating Trustee's request for avoidance as to that amount should be denied. The Court further concludes that the Motion for Partial Summary Judgment should be denied as to defenses asserted by SIS regarding other transfers based upon a failure to establish the absence of genuine issues of material fact.

This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052. A separate judgment will be entered consistent with these findings and conclusions pursuant to Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED this the 1st day of April, 2009.

/s/ Edward Ellington
Edward Ellington
United States Bankruptcy Judge