DOCKET NUMBER: 95-12383
ADV. NUMBER: 96-1169
JUDGE: M. A. Mahoney
PARTIES: One to One Communications, Scott A. Egstad, American Telecom Network, Inc.
CHAPTER: 11
ATTORNEYS: T. A. Borowski, Jr., C. K. Stanard
DATE: 7/21/97
KEY WORDS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ONE TO ONE COMMUNICATIONS Case No. 95-12383-MAM-11

Debtor

SCOTT A. EGSTAD

Plaintiff

v. Adv. No. 96-1169

AMERICAN TELECOM NETWORK, INC.
et al.

Defendants

ORDER AND JUDGMENT REGARDING ALL COUNTS OF COMPLAINT EXCEPT COUNTS I, II, XXXII AND COUNT XXXIII (AS RELATED TO COUNTS I AND II) AND RELATED MOTIONS

T. A. Borowski, Jr., Pensacola, FL for Plaintiff
Chandler K. Standard, Mobile, AL for Defendants

This case came on for trial of all issues in Counts 3, 4, 6, 8, 9, 13, 14, 16, 17, 18, 19, 20, 21, 22 and 33 which had not been dealt with by prior summary judgment orders. Trial as to Counts 1 and 2, and Count 33 (to the extent related to Counts 1 and 2), is stayed, as is trial of Count 32, until further order of the Court. The remaining counts have been dismissed or judgment entered as indicated below. The Court has jurisdiction to hear these matters pursuant to 28 U.S.C. §§ 157 and 1334 and the order of reference of the District Court. The matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2).

PROCEDURAL ISSUES

The Court dismissed the complaint against Nicholas Elliott, Debra DeVito and John Leath, individually, on August 23, 1996. On April 11, 1997, the Court dismissed American Zero Plus, Inc. and Integretal as defendants. On April 30, 1997, the Court entered a judgment by default against the Praetorian Group and Sean McCann. This left as defendants, American Telecom Network, Inc., ATN Towers, Inc., American Paytel, Inc., Unitel Corporation, American One-2-One Communications, Inc. and ATN Communications, Inc.

The Court granted summary judgment to the Examiner on various matters in this adversary prior to trial. The summary judgment orders are:

1. Order dated 1/23/97 [Docket No. 52)
2. Order dated 3/26/97 [Docket No. 87]
3. Order dated 3/26/97 [Docket No. 88]
4. Order dated 5/6/97 [Docket No. 110]
5. Order dated 5/9/97 [Docket No. 111]

The orders are incorporated by reference. They granted full summary judgment to the Examiner on the following counts:

1. Count VII—judgment for Plaintiff against ATN Towers, Inc. in the amount of $60,000.00.
2. Count X—judgment for Plaintiff against Unitel Corporation in the amount of $10,322.33.
3. Count XI—judgment for Plaintiff against American Telecom Network for $10,322.33.
4. Count XV—judgment for Plaintiff against American Telecom Network, Inc. in the amount of $65,838.43.

The orders also granted partial summary judgment to the Examiner as to various parts of other counts. Specifically, the Court ruled that there was no remaining issue as to 11 U.S.C. §§ 547(a)(3) and (5) as to any count. The Court also ruled that the Examiner had proven all but:

1) the date of the transfer as to Counts I, II, III and Count XXXIII as it applied to those counts;

2) whether any of the Defendants had acted with intent to hinder, delay or defraud creditors pursuant to 11 U.S.C. § 544 or 548(a)(1) in regard to any of the alleged transfers; and

3) whether any of the alleged transfers were for less than reasonably equivalent value pursuant to 11 U.S.C. § 544 or 548(a)(2).

The issues remaining to be tried, beside those few listed above, are solely whether defendants can establish that the transfers fit within any of the defenses to avoidability under Sections 547, 548 or 549. In a broad fashion, the defendants plead defenses under 11 U.S.C. § 547(c)(1), (c)(2) and (c)(4).

Prior to, during and after the trial, the Court also took under submission several related motions:

1. American Telecom Network, Inc.'s motion to file a late claim;

2. American Telecom Network, Inc.'s motion to reconsider order of March 26, 1997 granting summary judgment;

3. Examiner's oral motion for sanctions for failure to produce discovery; and

4. Examiner's motion for entry of partial final judgment.

FACTS[1]

The Debtor, One to One Communications, Inc. (One to One), is a telecommunications industry company. Prior to its bankruptcy filing on July 13, 1995, and until August 1995, it offered long distance telephone service to customers through use of switches it used or owned and contracts with network providers such as MCI, Sprint, U.S. West and IXC. At one point, One to One had its own operator services system to connect calls and had its own telemarketing department. Today, One to One is a "switchless reseller" of telephone services. It garners groups of customers for whom it obtains actual service through another provider, and, as middleman, obtains a profit from the difference in what it charges its customers and the rates the provider charges.

One to One was purchased by American Telecom Network, Inc. (ATN) in November 1993. Upon purchase, it became part of the ATN web of companies. ATN is the parent company of ATN Towers, Inc., American Paytel, Inc., Unitel Corporation, American One-2-One Communications, Inc., ATN Communications, Inc. and One to One.

ATN operated itself and its subsidiaries in many respects as if they were one entity. The books and records of the corporations were all kept separately. However, funds were moved among the businesses as needed. Each company's general ledgers contained Intercompany Accounts Payable and Intercompany Accounts Receivable for all of the other corporations. The evidence showed that One to One loaned funds to almost all of the entities at least one time and

[1]Some exhibits were conditionally received due to the discovery issues addressed in the opinion, due to order of witnesses, and other reasons. The Court concludes it is appropriate to admit all exhibits which were offered and only conditionally received at trial.

borrowed from each entity as well. As to payments to affiliates and third party payees, Nicholas Elliott determined who would be paid.

One to One had its corporate offices at 1509 Government Street, Mobile, Alabama, until March 22, 1996, when it terminated its lease and moved elsewhere. The building is owned by an ATN subsidiary, ATN Towers, Inc.

The payroll for One to One was paid by ATN with advances or repayments of the payroll costs of One to One being made when funds were available at One to One. The other subsidiaries' payrolls were similarly handled. The Chief Financial Officer, Debra DeVito, testified that this procedure was used for administrative convenience. It allowed establishment of only one tax account, and centralized bookkeeping regarding employees.

One to One had a Fixed Asset Ledger which listed its fixed assets at book value. It showed accumulated depreciation. One to One kept a copy of the Fixed Assets Ledger which Debra DeVito updated throughout the year. The certified public accountant for One to One, John Sassaman, also kept a copy which he updated in conjunction with his audit each year, after reviewing appropriate records.

American Paytel, Inc., Unitel Corporation, American One-2-One Communications, and ATN Communications, Inc. were all sister subsidiaries together with One to One. All of the subsidiaries were purchased or formed by ATN. The evidence presented did not clearly establish what each entity's business was. They all appeared to be related to the telecommunications industry. Some of their business related in part to One to One. American One-2-One sold customer accounts to One to One. ATN Communications bought accounts from One to One. Commissions were paid by some entities to others.

There are facts pertinent to each count which need to be discussed separately. The Court will address them by count.

Count III

One to One, through the Examiner, alleges it transferred a switch located in Mobile, Alabama to ATN on February 28, 1995. One to One alleges that the switch had a value of $2,296,090 according to Examiner Exhibit 71. Examiner Exhibits 40 and 42 show that assets the Examiner alleges included the switch were transferred at a value of no more than $55,851.47.

The documents presented at trial and One to One's use of the Mobile switch raised questions about the ownership of the switch. Mr. Robert Beach, former CEO of American Long Distance Services, Inc. (ALDS), testified that the switch was always owned by ALDS until ALDS transferred the switch to ATN in March 1993. Prior to its bankruptcy, ALDS was also an affiliate of ATN. One to One used the switch even though it did not own it. Defendant's Exhibit 57 documented the transfer.

Count IV

One to One transferred assets the Examiner alleges were worth $131,555.28 to ATN on February 28, 1995. ATN does not dispute this date or value. (One to One alleged the entry at "1615-10 AL" was the Mobile switch but, as stated below, the Court concludes otherwise.) In exchange, One to One got an intercompany account receivable from ATN in the amount of $131,555.28.

The Bill of Sale which transferred the personal property is in evidence at Examiner Exhibit 40. The bill transferred all assets acquired by One to One after June 28, 1994 and before February 28, 1995. After this date, One to One owned no furniture, fixtures or equipment.[2]

Debra DeVito testified that the President of One to One, Nicholas Elliott, wanted to clean up the books and records of One to One for year-end purposes. The assets were transferred at their depreciated book values. Unidentifiable assets were written off or retired. She prepared a Bill of Sale to document the transferred assets after year-end and took it to Nicholas Elliot to sign.

Count VI

One to One transferred $155,150 to ATN Towers, Inc. (Towers) from August 1, 1994 through July 7, 1995. The individual transfers were as follows:

DATE	CHECK NO./REF.	BANK	AMOUNT
8/1/94	1139	Compass	$ 4,500.00
9/26/94	1262	Compass	2,500.00
10/10/94	Transfer	Compass	6,500.00
11/1/94	1353	Compass	14,000.00
10/11/94	1403	Compass	2,000.00
11/17/94	1428	Compass	1,500.00
1/27/95	491	Compass	3,150.00
2/2/95	501	Compass	20,000.00
2/20/95	557	Compass	12,500.00
3/6/95	584	Compass	12,000.00

[2]There was evidence that One to One did own a Siemens switch after that date but never had possession of it.

DATE	CHECK NO./REF.	BANK	AMOUNT
3/24/95	636	Compass	30,000.00
4/4/95	71875	Compass	20,000.00
4/25/95	57	Compass	10,000.00
4/30/95	I/C Loan	Compass	20,000.00
5/3/95	Rep I/C Loan	Compass	1,800.00
6/14/95	Bank Transfer	Compass	1,100.00
6/15/95	Bank Transfer	Compass	2,500.00
6/19/95	817	Compass	2,200.00
7/11/95	Rep I/C Loan	Compass	4,000.00
7/7/95	1006	Compass	2,900.00
TOTAL			$ 155,150.00

Debra DeVito testified that some of the amounts were rent payments by One to One for the space it occupied at 1509 Government Street; other sums were loans to Towers or were replacements of loans to One to One by Towers. Defendants' Exhibits 6 and 7 illustrate this. Only $71,000 represented actual rents paid. Other money was advanced as needed by Towers to One to One or vice versa. The advances were for emergency situations. Otherwise, the advances would have been made by ATN itself.

Count VIII

One to One transferred $100,589.54 to American Paytel, Inc. in two checks:

DATE	CHECK NO./REF.	BANK	AMOUNT
9/30/94	1320	Compass	$100,468.84
10/31/94	1427	Compass	120.70
TOTAL			$100,589.54

Defendants' Exhibit 8 shows the transfers. American Paytel loaned $100,000 on July 6, 1994 to One to One to cover an overdraft in One to One's account at Central Bank of the South. One to One repaid the advance on September 30, 1994. One to One also paid American Paytel $120.70 per month for auto insurance on Mr. Jon Leath's vehicle. Mr. Jon Leath was an officer of One to One at that time.

The overdraft created an emergency for One to One which Debra DeVito had been instructed to cover "from wherever [she] could get it." The overdraft was created by network payments of $75,000 per week to U.S. West, $40,000 per week to GTE and $26,000 per week to IXC. American Paytel had funds available which could be utilized and the need was immediate. From July 14, 1994 to the bankruptcy filing, One to One had only two transactions with American Paytel, Inc.

Count IX

On August 30, 1995, One to One transferred $10,322.33 to Unitel Corporation by Debtor's check number 1051 from Interstate Bank in Arizona. Unitel and One to One had no business relationship. They were connected only as sister affiliates. Debra DeVito testified that the $10,322.33 was repayment of an intercompany loan balance One to One owed Unitel prepetition. The Court has already ruled in the Examiner's favor as to Count X and the unavoidability of this postpetition transfer in its order of January 23, 1997.

From January to June 1995, One to One transferred the following monies to Unitel:

DATE	CHECK NO./REF.	BANK	AMOUNT PAID BY ONE TO ONE	AMOUNT REPAID BY UNITEL	BALANCE DUE TO ONE TO ONE
1/20/95	Loan	Compass	$ 15,000.00		$ 15,000.00

DATE	CHECK NO./REF.	BANK	AMOUNT PAID BY ONE TO ONE	AMOUNT REPAID BY UNITEL	BALANCE DUE TO ONE TO ONE
2/28/95	Unitel check			15,000.00	0.00
3/21/95	Unitel check			10,000.00	-10,000.00
3/24/95	638	Compass	10,000.00		0.00
5/18/95	713	Compass	5,000.00		5,000.00
5/25/95	753	Compass	7,000.00		12,000.00
5/31/95	Check*		23,322.33		-11,322.33
6/20/95	Wire transfer	Compass	1,000.00		-10,322.33
TOTAL UNPAID AT FILING OF BANKRUPTCY					$ -10,322.33

*Check of third party to Unitel, deposited to One to One.

Debra DeVito indicated that the transactions in Counts IX and X were interconnected as part of ATN and its subsidiaries' ordinary course of business. Every subsidiary and ATN engaged in intercompany advances and repayments. The advances were in differing amounts and in different forms. The January 20 check was a cashier's check. The March 24, May 18 and May 25 checks were One to One checks. The June 20 transfer was by wire.

Unitel gave funds to One to One, in part, by endorsing three checks from Sprint to One to One to prevent a hold on the checks. There was no evidence offered as to the purposes of the advances except that Ms. DeVito generally indicated the money was used for operations.

Count XIII

One to One transferred $110,800.00 to American One-2-One Communications, Inc. as follows:

DATE	CHECK NO./REF.	BANK	AMOUNT
12/27/94	1470	Compass	$ 14,000.00
12/20/94	1467	Compass	36,000.00
12/30/94	422	Compass	20,000.00
1/6/95	435	Compass	25,000.00
2/6/95	511	Compass	5,000.00
3/1/95	574	Compass	2,000.00
4/7/95	700	Compass	2,000.00
4/25/95	58	Compass	5,000.00
5/30/95	Repay Loan AM121	Compass	1,800.00
TOTAL			$ 110,800.00

Ms. DeVito testified that this money was repayment of advances to One to One by American One-2-One for emergency needs of One to One. The payments according to Ms. DeVito were "representative" of advances on commissions owed American One-2-One. The numbers are rounded instead of exact because they are advances on commissions. There was no reconciliation of the sums with commissions due American One-2-One.

Count XIV

On August 31, 1995, One to One paid American One-2-One $259,000 for 8,634 Automatic Numbering Identifications (ANIs) or customer accounts. Count XIV seeks return of $132,000 of that sum paid to American One-2-One. The remaining $127,000 is included in Count XIX. ANIs are the telephone numbers of individuals that access other telephones through a Bell network. ANIs are a line to a Bell network. This sale was postpetition.

There was no evidence that any other such sales of ANIs to One to One from any source had ever occurred. In fact, Richard Courtney, the current president of ATN, testified that buying the ANIs to generate revenues put One to One in a new line of business as a switchless reseller.[3]

Count XV

One to One made payments to ATN postpetition in the following amounts:

DATE	CHECK NO./REF.	BANK	AMOUNT
7/27/95	1112	Bank of Mobile	$ 50,000.00
8/16/95	1513	Compass	9,000.00
10/10/95	1258	First Interstate	6,838.43
TOTAL			$ 65,838.43

Checks No. 112 and 1513 repaid prepetition advances. There was no testimony as to the purposes of the advances. The loans repaid by Check No. 1112 occurred on 4/28/97, 5/9/95, 5/22/95 and 5/24/95. The loans repaid by Check No. 1513 were made on 5/13/95 and 6/19/95.

Check No. 1258 dated 10/10/95 is a check paying off the balance of the intercompany account of One to One with ATN. The account showed that on July 13, 1995, ATN owed One to One $88,680.06. ATN continued to be a debtor to One to One postpetition until 10/01/95 when One to One owed ATN $6,838.43 after paying an equipment lease payment to ATN on the Harris equipment. Some of the payments are for workers compensation premiums, unemployment insurance, health insurance, and "A6" work. Other sums are simply denominated

[3]Prior to One to One's rights to the network being terminated in July and August of 1995 due to payment defaults, One to One had network and switch access.

as loans. From the date of filing, ATN improved its position by $81,841.65. Of that sum, the following amounts are proven ordinary expenses of One to One:

7/27/95	121 Workers comp	$ 891.38
7/31/95	121 UT SUI rate adjustment	2,500.00
7/31/95	121 Workers comp (AZ)	582.33
8/23/95	121 Workers comp	848.94
9/11/95	121 Form 941 taxes	1,925.19
8/8/95	121 Network-CTS	3,109.86
8/17/95	121 Network-ITN	8,323.21
8/17/95	121 Network-LCI	5,000.00
8/30/95	121 Network-LCI	5,247.69
TOTAL		$28,428.60

Other amounts paid postpetition are not clearly proven to be postpetition expenses (e.g., no testimony about "121 A6 work-CarlosA"); the amounts needed court authorization before payment and none was shown (e.g., "Stanard & Mark," and "121 audit fee" and "Munger & Munger"); or the amounts were not clearly explained to the Court (e.g., "121 discount copier").

Count XVI

One to One transferred the following additional sums to ATN after its bankruptcy filing:

DATE	CHECK NO./REF.	BANK	AMOUNT
8/4/95	006	Bank of Mobile	$ 25,732.95
9/5/95	1069	First Interstate	10,000.00
9/5/95	1071	First Interstate	5,000.00
9/22/95	Wire	First Interstate	10,732.95
10/1/95	Wire	First Interstate	15,771.81

DATE	CHECK NO./REF.	BANK	AMOUNT
TOTAL			$ 67,237.71

As indicated, some transfers were by check and some by wire.

The check for $25,732.95 was for the August 1995 payment to One to One's equipment lease with ATN. Check No. 1069 for $10,000 was a partial payment of One to One's September 1995 lease payment (presumably the equipment lease). Check No. 1071 was also a partial payment of $5,000 on the lease. The 9/22/95 payment was an amount which paid the remainder of the September 1995 equipment lease. The October 19, 1995 wire of $15,771.91 was for equipment lease payments too, Debra DeVito testified, although the sum does not correspond to any of the proper numbers. Ms. DeVito indicated that the equipment was in use by One to One until 10/19/95. ATN never filed a relief from stay motion to terminate the lease.

Count XVII

One to One transferred the following additional sums to ATN after the filing of the bankruptcy case:

DATE	CHECK NO./REF.	BANK	AMOUNT
8/31/95	1053	First Interstate	$ 6,000.00
9/1/95	1054	First Interstate	6,000.00
TOTAL			$ 12,000.00

The checks indicate on the memo line that Check No. 1053 was "Last Pymnt Aug Rent" and Check No. 1054 was "Payment on September rent."

One to One did occupy the premises owned by ATN Towers, Inc. until March 22, 1996. Therefore, ATN Towers, Inc. had an administrative expense claim in One to One's estate. However, these checks were payable to Towers' parent corporation, ATN. Ms. DeVito testified they were simply made payable to the wrong payee.

Count XVIII

One to One transferred the following additional funds to ATN after the filing of its bankruptcy case:

DATE	CHECK NO./REF.	BANK	AMOUNT	PURPOSE
7/21/95	1098	Bank of Mobile	$ 64,837.84	P/R P/E 7/8/95
7/28/95	1124	Bank of Mobile	62,916.87	P/R P/E 7/22/95
7/31/95	1131	Bank of Mobile	2,500.00	Utah rate difference 1st qtr 1994 installment
8/10/95	019	Bank of Mobile	5,000.00	P/R P/E 8/4/95
8/10/95	020	Bank of Mobile	20,000.00	Cashier check for ATN (Payroll)
8/11/95	021	Bank of Mobile	7,100.00	Payment on Payroll P/E 8/4/95
8/18/95	1515	Compass	7,000.00	Advance payment of payroll
8/22/95	1522	Compass	20,322.69	Finish paying payroll P/E 8/5/95
TOTAL			$189,677.40	

ATN, since it purchased One to One in early 1994, had provided payroll services for One to One. It did the same for its other subsidiaries. ATN sent a bill to each subsidiary for the amount due for its employees' salaries and taxes. In fiscal year 1994 ending March 31, 1995, ATN was reimbursed $2,509,759.53 by One to One for payroll expenses.

One to One initially paid a 20% management fee to ATN for its handling of payroll, accounting and other matters for it. Then, as One to One took more of management's time, all of the management staff payroll costs were assessed to One to One instead of a management fee. The people and departments assessed to One to One included Nicholas Elliott, Debra DeVito, Accounting, Credit and Collection, Accounts Receivable, Network Operations, Sales, MIS and Telemarketing. This assessment continued to August 1995 when One to One's payroll began to be handled separately.

One to One's payroll was handled in several ways. As evidenced above, sometimes payments by One to One were in arrears, sometimes in advance. Sometimes payments were in full and sometimes in part. Sometimes, if not paid immediately, they were listed in the general ledger as intercompany payables. If paid immediately, they were not posted.

One to One and the Examiner agreed that of the $189,677.40 amount claimed, $92,400.59 was paid postpetition on prepetition payroll and Utah tax rate differentials. The remaining $97,276.81 was paid postpetition on payroll earned postpetition. One to One did not obtain an order approving payment of prepetition wages after the filing of the bankruptcy case as is done in some Chapter 11 cases under a necessity theory.

Count XIX

One to One seeks to recover from American One-2-One monies transferred to it by Integretal. The Debtor's records show Integretal with an account payable to One to One of $59,329.95 on July 14, 1995. The records of One to One showed an additional postpetition account payable of $315,190.33.

Ms. DeVito explained that these entries related to One to One's purchase of 8,634 ANIs (Automatic Numbering Identifications) from American One-2-One on September 5, 1995. The

purchase price was $259,000. American One-2-One received $132,000 of funds owed to One to One by Integretal as partial payment of the purchase price on 8/23/95 and 8/30/95. The remaining $127,000 was paid by American One 2 One's receipt of additional Integretal monies in September 1995 of $143,000. That sum is shown in Count XIV. The $16,000 overpayment created by this transfer was repaid by American One-2-One to the Debtor.

Ms. DeVito testified that this sale was made to provide revenues to the then "networkless" One to One. No other ANI purchases were ever made by One to One. No court approval for the purchase and sale was ever sought.

Count XX

One to One seeks return of $17,880.93 of funds wire transferred to ATN in August and September 1995 by Zero Plus Dialing, Inc. The Examiner alleged approximately $85,000 was transferred to ATN in October 1995 in the same manner.

Ms. DeVito testified that the sums were applied by ATN to network charges of One to One which ATN had paid. There was no evidence provided as to the exact network billings or their pre- or postpetition character.

Count XXI

One to One transferred or sold "operator services" assets valued at $20,014.95 to ATN Communications, Inc. after the bankruptcy filing on August 31, 1995. This sale sold One to One's last asset on the Zero Plus side of its business. The assets sold were "COCOTs" (customer owned coin operated telephones). Telephone vendors obtain the right to put pay telephones at locations by paying a percentage fee based on volume to the owner of the location. The pay phones are programmed to use particular telephone companies such as One to One. One to One had agreements with 16 telephone vendors who had 189 telephones placed in various locations.

All the vendors had agreed to program their telephones to use One to One. Richard Courtney, the present president of ATN and a stockholder of ATN who had been in the COCOT business in the past, testified that there is little value in COCOT phones. The owners of locations, although typically signing a three-year contract with a vendor, are easily able to break the contracts. Therefore, there is no long term value to the COCOTs. Since One to One did not own the telephones and did not control the vendors' or owners' right to shift to a new carrier at almost any time, the value of the COCOT business sold was zero. Mr. Courtney testified that the $20,014.95 was a "gift."

Mr. Courtney also testified that it would be ordinary course for a business which lost its network rights like One to One to sell its accounts. It had no ability to service them. However, Mr. Courtney also testified that it is uncommon to sell COCOT accounts in the telecommunications business for the reasons he gave as to their value.

Count XXII

One to One transferred $4,145,105.47 in funds listed in the Examiner's complaint to ATN from July 14, 1994 through July 13, 1995. The list is incorporated by reference.

As stated in the facts about Count XVIII, $2,509,759.53 was paid by One to One for payroll costs from April 1, 1994 through March 31, 1995. There was no actual breakdown of the sum by ATN and its relation to the $4,145,105.47 figure. As to sums which were not payroll amounts, the monies were repayments of operating advances. Ms. DeVito testified that the normal procedure that ATN and its subsidiaries followed was to first have advances to the subsidiaries made by ATN. If an emergency cash need situation arose (e.g., payroll or overdraft), a subsidiary would advance funds to a sister subsidiary.

Ms. DeVito identified some checks in Count XXII as equipment lease payments (five payments of $25,732.95). She identified a check to ATN for $2,500 for 1994 Utah first quarter rate differentials. There were two checks for "PR"—one of which was a replacement check. Other than the general information about intercompany advances and repayments, and the lump sum figure re payroll for a nonconcurrent period, there was no tracking of the amounts in question to specific needs, except the $2,500 amount and the $128,663.75 in lease payments.

Secured Status of ATN

On May 14, 1997, ATN filed a proof of claim in this case claiming a security interest in all of One to One's assets. The security interest arises from ATN's assumption of the position of First Community Financial Corporation's (FCFC) position as a revolving loan creditor of One to One.

On August 1, 1991, One to One and FCFC first entered into a lending agreement based upon a formula allowing loans against eligible accounts receivable. The agreement was amended in 1993. FCFC filed proper financing documents in 1991 to perfect its interest in virtually all assets of the debtor. On May 9, 1994, FCFC assigned its interests under the lending agreement with One to One to ATN. On May 13, 1994 an assignment of the secured position of FCFC was filed with the Arizona Secretary of State's office. The UCC filing was also made in the California Secretary of State's office on June 7, 1994, Utah Office on August 16, 1991, and Maricopa County Arizona County Recorder on August 12, 1991.

The payoff on the note on May 9, 1994 was $589,351.12. The money to pay the note was given to ATN by One to One on May 9, 1994. On May 9, 1994, there was no debt owed by One to One to ATN. In fact, ATN owed One to One $12,000. After the FCFC payoff with One to One funds, ATN owed One to One money. Even though One to One paid off the debt itself and

owed ATN nothing at the time of the assignment, ATN kept the assignment on the books. The secured status was not disclosed on the Debtor's bankruptcy schedules. ATN forgot about the security agreement until just prior to its filing of its proof of claim. No deadline for filing proofs of claim has been established.

Sanctions Request

Prior to trial, the Examiner generally objected to the Defendants' exhibits presented to him for the first time at trial on the basis that many of them had not been disclosed to him during discovery. As further exhibits were produced at trial, the objection was expanded to include the additional documents.

On June 10, 1996 and April 11, 1996, respectively, the Court signed orders setting Fed. R. Bankr. P. 2004 examinations of Nicholas Elliott and Debra DeVito. The orders contained language requiring production of documents. Mr. Elliott's order stated that he should produce "any and all documents or other recorded information . . . in possession of American Telecom Network or its subsidiaries and related companies, belonging to or in any way pertaining to One to One Communications and the matters [about which Mr. Elliott was to be examined]." The examination was to cover, in general, all aspects of the Debtor's property and business. Ms. DeVito was ordered to produce "any and all documents or other recorded information . . . belonging to One to One Communications and [matters pertaining to its assets and business]." No motions to limit or quash the production orders were ever made. At a hearing held during the trial, the Court took evidence as to the issue of whether violations of the orders had occurred and what appropriate sanctions might be.

Discovery was difficult in general. Mr. Nicholas Elliott asserted his Fifth Amendment rights and never did sit for a deposition. The Court ruled that One to One and ATN's documents

were not covered by his Fifth Amendment rights, yet no documents were ever produced by him pursuant to the court order. Ms. DeVito did sit for her Rule 2004 examination. She would not speak informally with the Examiner. Information from her as former Chief Financial Officer of One to One and present Chief Financial Officer of ATN and its other subsidiaries was crucial. ATN's counsel gave the Examiner two options. One, Ms. DeVito would speak informally to him about all matters, but, if she did, the Examiner could not request that she sit for a Rule 2004 examination; or, two, she would sit for a Rule 2004 examination but provide no further cooperation unless the Examiner consented to immunity from prosecution for her. The Examiner chose option two. Since he could not provide her with or influence any grant of immunity to her, the Examiner was able to conduct this formal examination only. Ms. DeVito produced some documents at her deposition and through counsel. The documents produced by her were in two boxes the Examiner produced at the sanctions hearing. These documents did not include most of Defendants' trial exhibits or the backup for them.

The Examiner specifically requested payroll information from Ms. DeVito and/or Mr. Stanard. It was not provided. Defendants' counsel testified that he would have given the Examiner anything he wanted, but the Examiner did not ask for specific items.

In October 1995, One to One's stock had been sold to the Praetorian Group. At that time, all of One to One's records should have been turned over to the new owner. Problems arose between ATN and One to One after that sale which culminated in commencement of an adversary case by One to One against ATN and Nicholas Elliott (Case No. 96-1057) in which One to One sought turnover of assets and records. As a result of that case, more than one thousand boxes of records were turned over. The files did not include the One to One records at issue.

At trial, in cross examination of Richard Courtney, a witness for the Defendants, the Examiner's counsel sought to review the notes Courtney had with him during testimony. Plaintiff's Exhibits 80 and 81 are those notes. Exhibit 81 contains numerous documents of One to One which ATN still has and never produced for the Examiner or the new owner. Mr. Courtney found the documents so relevant to his testimony he had them at trial. The memorandum of Ms. DeVito on page 1 of the notes states:

> I think Mr. Elliott's position is that since the count is using "supposition and hearsay" that American Telecom Network (ATN) received this money, that we should merely state that ATN did not receive it. Let them find out who did. If they come back later, we will still be able to answer." (Emphasis added.)

The Examiner has expended the time and costs shown on Plaintiff's Exhibit 86 on this adversary case. The time totals $63,514.50. Most of it relates to reviewing records, attending depositions and trying to get records. The Examiner's counsel has expended over $56,000 on this litigation and asset investigation. As with the Examiner, a lot of the time has been searching for assets, and facts about assets and records.

In the interest of justice, the Court ruled that the Defendants could put into evidence the documents they wished (if permissible otherwise under the Federal Rules of Evidence), but allowed the Examiner the option to not rest his case until he had done further discovery if needed. The Examiner rested without seeking further discovery. The Court reserved the right to rule on the discovery sanction issues pursuant to Fed. R. Bankr. P. 7037 at the end of the trial.

LAW

As to the issues to be proven by One to One as to Sections 547, 548 or 549, the Examiner bears the burden of proof. *Southmark Corp. v. Schulte Roth & Zabel (Matter of Southmark Corp.)*, 88 F.3d 311, *reh'g en banc denied*, 95 F.3d 56 (5th Cir. 1996); *Alfa Mut. Fire Ins. Co. v.*

Memory (In re Martin), 184 B.R. 985 (M.D. Ala. 1995). As to the defenses to avoidability, the burden is on the Defendants. *Nordberg v. Arab Banking Corporation (In re Chase & Sanborn Corp.)*, 904 F.2d 588 (11th Cir. 1990). ATN must also prove the facts underlying its motion to file late claim and motion to reconsider order of March 26, 1997. As to all motions, the standard of proof is a preponderance of the evidence. *Pullman Constr. Indus. v. United States (In re Pullman Constr. Indus.)*, 190 B.R. 618 (Bankr. N.D. Ill. 1996).

The Court will first consider the matters that the Examiner had to prove on behalf of One to One. Then the Court will move to the Defendants' defenses. Lastly, the Court will consider the pending motions.

I.

A. The date of transfer of the Alabama switch asset as alleged in Count III—June 28, 1994 or February 28, 1995?

The Debtor alleged that the transfer of the Alabama switch occurred on February 28, 1995 because until approximately April 1995 all evidence in the books and records of One to One showed that the assets listed on the attachment to Plaintiff's Exhibit No. 40 were assets of One to One. These assets included "Equipment—AL." However, the evidence showed One to One never owned the Alabama switch. American Long Distance Services, Inc. owned the switch and transferred it to ATN in 1993.

Prior to determining upon what date a transfer of an asset occurred, a court must determine whether the asset was ever owned by the debtor. Whether a debtor has an interest in property is determined under state law. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 128 L. Ed. 2d 556, 114 S. Ct. 1757 (1994). In this case, the issue is "did One to One ever own the Alabama switch?" The answer is no.

The confusing entries in the Fixed Assets Ledger were explained. Debra DeVito testified that the books and records did not state that One to One owned the Alabama switch. The AL was a typographical error or represented some testing equipment from Telplex which One to One purchased as part of the settlement of a lawsuit. The Court concludes that there was no transfer of an Alabama switch on either June 28, 1994 or February 28, 1995. Therefore, the date of transfer issue is irrelevant.[4] Judgment for ATN is due to be granted.

B. Did the Defendants or any of them act with intent to hinder, delay or defraud One to One's creditors pursuant to 11 U.S.C. §§ 544 or 548(a)(1)?

One to One alleges that the manner in which ATN and the subsidiaries it controlled conducted business exhibited an intent to hinder, delay or defraud One to One's creditors. Whereas non-insider creditors were owed millions of dollars at the filing of One to One's case, all of One to One's insider creditors were paid in full by intercompany sales and transfers, either pre- or postpetition. By February 28, 1995, One to One had no fixed assets due to transfers to ATN of all fixed assets.[5] One to One was a shell into and out of which money was moved as necessary.

Some transfers were for actual expenses of One to One such as payroll; some transfers were loans to ATN or other subsidiaries. Some transfers were payments of loans to One to One. The cash flow was without pattern or regularity. This was true one year before One to One's bankruptcy, ninety days before it, and on the eve of bankruptcy. It continued after the filing as well. Debra DeVito summarized it well. She stated that she was instructed to get money when

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[4]The Court is not ruling on any of the issues raised by 11 U.S.C. § 548(d) or the case of *In re Martin*, 124 B.R. 69 (N.D. Ill. 1991) (transfer not "perfected" and therefore not valid until memorialized on books and records of corporation since One to One did not own the switch.)

[5]The Siemens switch was never in One to One's possession.

needed from whatever source she could. The ATN companies operated with a system of intercompany payables and receivables among them. The records of the transfers were faithfully kept.

Under Section 548(a)(1) a transfer by a debtor may be avoided if made "with actual intent to hinder, delay, or defraud" creditors. The debtor's conduct need not reach the level of being fraudulent; the plaintiff only needs to show that the conduct was intended to hinder or delay creditors when it was done. *Kapila v. Covino (In re Covino)*, 187 B.R. 773 (Bankr. S.D. Fla. 1995). Since Nicholas Elliott was Chairman of ATN and the decision maker for ATN and all of the subsidiaries as well, the intent of the transferee, ATN or the other subsidiaries, may be imputed to One to One as well. *Carmel v. River Bank Am. (In re FBN Food Servs.)*, 185 B.R. 265 (N.D. Ill. 1995).

One case has called the manner in which this corporation and ATN and its subsidiaries dealt with money as a "circle of cash." Money flowed circularly as needed from entity to entity. *Morse Operations, Inc. v . Goodway Graphics of Va., Inc. (In re Lease-A-Fleet, Inc.)*, 155 B.R. 666 (Bankr. E.D. Pa. 1993).[6] In *Lease-A-Fleet*, the circular flow alone was not found to be proof of an intent to hinder, delay or defraud creditors. More was required.

Is there more than a circle of cash in this case? Since actual intent is rarely directly proven, courts have considered certain indicia or badges of fraud to determine whether intent is present. *In re Warner*, 87 B.R. 199 (Bankr. M.D. Fla. 1988). The badges are (1) the relationship

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[6]In the *Lease-A-Fleet, Inc.* case, the bankruptcy judge concluded that the "circle of cash" required a finding that no "transfer" of the debtor's property occurred. The debtor, for tax reasons, transferred funds to an affiliate, which funds were immediately returned to the debtor. The transfers were clearly traceable. The sums matched exactly on both ends of the transfer. This defense is unavailable to ATN because the transfers, although loosely circular, were not exactly returned nor was there an immediate return. *Lease-A-Fleet, Inc.* at 155 B.R. 682.

between the transferor and transferee; (2) lack of consideration for the conveyance; (3) insolvency or indebtedness of the debtor; (4) transfer of debtor's entire estate; (5) reservation of benefits, control or dominion by the debtor; (6) secrecy or concealment of transaction; and (7) pendency or threat of litigation at time of transfer.

One to One paid its own debt to FCFC in full on May 9, 1994. The money flowed to ATN and then to FCFC, leaving One to One with a large intercompany receivable from ATN. Then on June 28, 1994 or February 28, 1995, One to One transferred switches to ATN which were One to One's most expensive assets. On February 28, 1995, all other fixed assets of One to One were transferred to ATN. By March 1, 1995, One to One had no assets except receivables, some cash (intermittently) and its good will. It freely loaned its available cash to ATN or sister subsidiaries and vice versa. Are these acts sufficient to show intent under 11 U.S.C. § 548(a)(1)?

One to One's actions left it with no "hard" assets, yet One to One continued to use the assets after transfer while paying lease payments for use. Debra DeVito testified that Harris Corporation required the ownership change in order to upgrade the switches. There was no business reason given for transfer of the assets which were not switches. In fact, the transfer is puzzling in light of ATN's claim to a security interest in all the assets which predated these transfers.

Many of the badges of fraud were present in One to One's situation, but after weighing the evidence and credibility of witnesses, solely as to the transfers in these counts, a preponderance of the evidence does not establish an intent to hinder, delay or defraud creditors. No evidence showed One to One's actions were hidden by it. There was no indication of any creditor requests for information about its assets. Although the Bill of Sale of February 28, 1995 was done after the fact, it was prepared before the bankruptcy within several months of the

transfer. The "circle of cash" money management system was constant from before July 14, 1994 to filing of One to One's bankruptcy and beyond it. Creditors were not misled.

C. Did the Defendants receive the property for less than "a reasonably equivalent value" pursuant to 11 U.S.C. § 548(a)(2)?

What constitutes "reasonably equivalent value" for fraudulent transfer purposes must be determined on a case by case basis. *Grant v. Davis (In re CJW Ltd., Inc.)*, 172 B.R. 675 (Bankr. M.D. Fla. 1994). ATN gave One to One an intercompany loan receivable of $131,555.28 in exchange for the transfer to it of all remaining furniture, fixtures and equipment held on February 28, 1995. The Court has already concluded that the Alabama switch was not part of the transfer. Therefore, the question is whether the credit given as an intercompany receivable from ATN to One to One was reasonably equivalent to the assets transferred which included computers, office equipment, telephone equipment, peripherals and testing equipment.

The Eleventh Circuit case has held that the transfer at issue must confer "an economic benefit" upon the debtor. *Gen'l Electric Credit Corp. of Tenn. v. Murphy (In re Rodriguez)*, 895 F.2d 725, 727 (11th Cir. 1990). In this case, the values used were the depreciated values of the assets. *Armstrong v. United Bank of Bismarck (In re Bob's Sea Ray Boats, Inc.)*, 144 B.R. 451 (Bankr. D.N.D. 1992) (financial statement value of assets was reasonably equivalent when using purchase price less depreciation and "blue sky.") These values are "reasonably equivalent" and conferred an economic benefit on One to One. There was no evidence to the contrary. One to One received credit against amounts owed to ATN for the transfer. *Brandt v. American Nat'l Bank and Trust Co. of Chicago (In re Foos)*, 188 B.R. 239 (Bankr. N.D. Ill. 1995) (transfers as payment on debt which reduces debt dollar for dollar are reasonably equivalent.)

II.

As to the defenses of the One to One affiliates, the burden of proof is on the affiliates. The defenses alleged were 11 U.S.C. § 547(c)(1), the contemporaneous exchange defense; 11 U.S.C. § 547(c)(2), the ordinary course of business defense; 11 U.S.C. § 547(c)(4) (the new value defense; and 11 U.S.C. § 549(a)(2)(B), the "authorized transfer" defense.[7] The defenses under Section 547 only apply to prepetition transfers. The defense under Section 549 only applies to postpetition transfers.

A. Were the transfers of funds or assets of One to One transferred to ATN and its other subsidiaries as transfers "made to be a contemporaneous exchange for new value given to the debtor" pursuant to 11 U.S.C. § 547(c)(1)?

Section 547(c)(1) provides that debtor transfers are not avoidable if the transfer was "intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor" and was "in fact a substantially contemporaneous exchange." This provision is intended to exclude from the reach of a trustee or debtor in possession situations where a debtor and creditor give substantially immediate new value to each other. *In re Davis*, 22 B.R. 644 (Bankr. M.D. Ga. 1982).

New value is defined at 11 U.S.C. § 547(a)(2) as

> money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation.

Repayments of prior advances are not contemporaneous exchanges. *In re Fulghum Const. Corp.*, 78 B.R. 146 (M.D. Tenn. 1987), *rev'd on other grounds*, 872 F.2d 739 (6th Cir. 1989).

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[7]The Court discusses the 11 U.S.C. § 547(c)(5) defense as well, although not pleaded, at p. 39-40.

Availability of credit is not new value unless it is actually used. *In re Roemig*, 123 B.R. 405 (Bankr. D.N.M. 1991).

In order to avail itself of this defense, each of the defendants needed to establish that each transfer to them was coupled with new value being given to One to One. This proof was not given. Some of One to One's transfers to the defendants were loans to them. Loans to third parties do not result in new value to One to One. Advances to One to One which reduced antecedent debt of ATN or the other subsidiaries do not result in new value to One to One. Some of the transfers may have constituted contemporaneous exchanges. However, the Court cannot determine which ones.

The Court concludes as to each count to which the defense might be applicable:

Count IV - No proof was offered as to the status of ATN/One to One's intercompany payable and receivable accounts on February 28, 1995. It is unclear whether this transfer repaid an existing loan balance or was a new receivable for One to One. Also, this transaction cannot be viewed in isolation for the Section 547(c)(1) defense. The entire course of dealings and amounts of the balances owed by ATN and One to One at the time of each transfer between them would need to be proven.

Count VI - No proof of the overall dealings of the parties detailing the status as of each transfer was shown.

Count VIII - It is clear the loan and repayment were not contemporaneous.

Count IX - The schedule on page 10 of this opinion is the type of proof necessary for each affiliate to prove contemporaneous exchange or subsequent new value. In this case, the Court finds that the $38,000 in payments are not avoidable to 11 U.S.C. § 547(c)(4). Some of the transfers paid antecedent debts; some loaned funds to United. However, the transfers were not contemporaneous exchanges.

Count XIII - The transfers repaid antecedent debt of One to One owed to American One-2-One.

Count XXII - The transfers of One to One were not given in specific detail so that receivables and payable could be compared.

Proof was not offered with enough specificity to establish the defense for any count.

B. Were the transfers of funds and assets of One to One transferred to ATN and its other subsidiaries in the ordinary course of business as that defense is defined in 11 U.S.C. § 547(c)(2)?[8]

Section 547(c)(2) provides that a transfer, even if preferential, may not be avoided if the transfer meets three requirements:

1. The transfer was "in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee"; and

2. The transfer was "made in the ordinary course of business or financial affairs of the debtor and the transferee"; and

3 The transfer was "made according to ordinary business terms."

Florida Steel Corp. v. Stober (In re Industrial Supply Corp.), 127 B.R. 62, *aff'd*, *Florida Steel Corp. v. Stober*, 961 F.2d 1582 (11th Cir. 1991); *Anderson-Smith & Associates, Inc. v. Xyplex, Inc. (Matter of Anderson-Smith & Associates, Inc.)*, 188 B.R. 679 (Bankr. N.D. Ala. 1995).

The first prong of the test is whether the debt for which One to One was making payment prepetition was incurred in the ordinary course of One to One and its affiliate's business. Two debts clearly were not proven to be ordinary course for One to One and its affiliates:

1) Count IV - the transfer of One to One's assets to ATN on February 28, 1995 for $131,555.28; and

2) Count XXII - transfer of $4,145,105.47 to ATN (partial).

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[8]Mr. Richard Courtney, present President and Chief Operating Officer of ATN and shareholder of ATN, offered testimony about what is "ordinary course of business" in the telecommunications industry. To the extent his testimony dealt with how telecommunications companies generally operated and how and why sales of assets occurred in the industry, he was credible. To the extent he testified about how parent and affiliate companies in the telecommunications industry operated, other than ATN, he was not credible based upon his lack of experience in such parent/affiliate operations and their cash management procedures in particular.

The transfer in Count IV was a one of a kind, unusual transaction. One to One had never transferred all of its assets to another nor was there evidence that ATN had purchased other subsidiaries' assets before. No business reason was offered for this transfer of furniture, computers and other non-switch equipment, unlike the switch transaction. Case law does not require necessarily that a transaction be routine. *Graphic Productions Corp. v. WWF Paper Corp. (In re Graphic Productions Corp.)*, 176 B.R. 65 (Bankr. S.D. Fla. 1994). However, a transfer of all assets was not shown to be normal even for the industry as a whole. *Martino v. First Nat'l Bank in Harvey (In re Garofalo's Finer Foods, Inc.)*, 164 B.R. 955 (Bankr. N.D. Ill. 1994), *Aff'd in part, rev'd in part*, 186 B.R. 414 (N.D. Ill. 1995) (reasonable expectations test should be used to test ordinariness of transactions.)

Count XXII involved $4,145,105.47 in "circle of cash" payments to ATN. ATN alleged that all of the payments were payments of debts incurred in the ordinary course of the business or financial affairs to One to One and ATN and alleged that the "circle of cash" was ordinary course. It is clear that many of the payments may have been ordinary course. Payroll payments, lease payments, tax payments and other normal expenses were paid. However, ATN never provided a breakdown of the purpose of each transaction except five lease payments and one rate differential payment. The burden of making such a showing was on ATN. With the records the Court had, the allocation of funds could not be calculated.

ATN alternatively alleges that the purpose of each sum does not matter. The money management system was ordinary course in total. The transfers must meet the three enumerated tests. The focus of prong one of the test is on the basis of the debt. Stating it is an intercompany payable or receivable is not enough. In fact, that is precisely the issue. If the transfer was a loan

to ATN and not a repayment, it is clearly not "in payment of a debt incurred by the debtor." A breakdown is required and is lacking.

The next prong of the ordinary course test is that a transfer be made in the ordinary course of business of the debtor and transferee. *Braniff, Inc. v. Sundstrand Data Control, Inc. (In re Braniff, Inc.)*, 154 B.R. 773 (Bankr. M.D. Fla. 1993); *Grant v. Sun Bank/North Central Florida (In re Thurman Const. Co.)*, 189 B.R. 1004 (Bankr. M.D. Ma. 1995). The "circle of cash" method of funding ATN and its subsidiaries was the ordinary course of business for ATN and One to One. Debra DeVito testified that intercompany transfers between the two occurred frequently and the evidence indicated that it was true. Therefore, prong two of the test is met.

Prong three requires that the transfer was made according to ordinary business terms. The transfers were all at no interest. The transfers were made in various ways—check, wire, and cashier's check—but varied means were ordinary for One to One. Therefore, prong three is met as to transfers in Count XXII.

If ATN had tracked the transfers made by One to One with specificity and satisfied prong one of the ordinary course test, much of Count XXII might qualify as ordinary course. However, without specificity, the Court cannot determine what amounts qualify for the ordinary course defense and which do not. The burden was on ATN. Proof was offered as to $131,163.75.

The complaint contained other counts dealing with transfers from One to One to subsidiaries. The same three tests apply to these transfers.

Debra DeVito indicated that it was not normal course for subsidiaries to lend to other subsidiaries. Such loans were made only in emergency situations. The evidence showed that this was true. Millions of dollars were traded between ATN and One to One. Transactions

between One to One and the subsidiaries were infrequent. The transfers claimed to be preferential between One to One and subsidiaries were:

1. Count VI involves transfers to ATN Towers, Inc. of $155,150. Although some of these transfers may be rent payments, the evidence only showed that $71,000 was for rent and the remainder was not. Therefore, $84,150 are not transfers in the ordinary course. If they were loans, and no proof of the purpose was provided, they were not transfers in payment of a debt.

2. Count VIII involves a transfer to American Paytel, Inc. for $120.70 for monthly insurance costs and $100,468.84 to repay American Paytel for covering an overdraft in One to One's account on an emergency basis. The loan and its repayment were not ordinary business of One to One or American Paytel. The auto insurance payments were for the reasons stated above.

3. Count IX involved the transfer of $38,000 to Unitel Corporation. The sum was paid in five transactions of differing amounts. Three transactions were by One to One checks; one transfer was by cashiers check; and one transfer was by wire. No evidence indicated any specific purpose for these transfers. Ms. DeVito's general testimony was that sums from other subsidiaries were for emergencies. Therefore, the transfers were not in the ordinary course of Unitel and One to One's business.

4. Count XIII involved payments by One to One to American One-2-One of $110,800. Ms. DeVito testified that the sums may have been advances on commissions owed to American One-2-One, but she had no verification of that. She had earlier testified that the funds were repayments of advances to One to One for emergency needs. With the lack of certainty on Ms. DeVito's part, the Defendants' burden was not carried and the Court cannot find that the funds covered ordinary business transactions.

Therefore, as stated above, some of the transfers which were made within the preference period of Section 547 do not fit within the ordinary course defense.

C Were the transfers of funds and assets of One to One transferred to ATN and its other subsidiaries new value as that term is used in 11 U.S.C. § 547(c)(4)?

Section 547(c)(4) provides that a creditor obtains credit for subsequent new value given and only has to disgorge the difference between the repayment and the new value. *Charisma*

Investment Co., N.V. v. Air Florida System, Inc. (In re Jet Florida System, Inc.), 841 F.2d 1082 (11th Cir. 1986). Section 547(c)(4) states that the trustee may not avoid 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.

To prove that transfers are within this exception, the Defendants must show that each transfer to One to One was followed by new advances which partially or fully cover the transfer amount. This comparison needs to be made as to each and every transfer. An aggregation is not proper. *Clark v. Frank B. Hall & Co., Inc. (In re Sharoff Food Serv.)*, 179 B.R. 669 (Bankr. D. Colo. 1995).

The new value advanced by the creditor (ATN or the subsidiaries) must have remained unpaid until the filing of the case. *Sun Bank/North Central Florida v. Thurman (In re Thurman Const., Inc.*, 189 B.R. 1004 (Bankr. M.D. Fla. 1995). The proof in this case shows that ATN at least was fully paid at the filing of the case and, in fact, owed One to One over $80,000.

In its defense as to Count I, Unitel Corporation offered Exhibit 9 which did provide the necessary facts. It listed all prepetition transactions in question. It tracked all advances and repayments. Unitel owed $15,000 to One to One on January 20, 1995. By filing, Unitel was owed $10,322.33 by One to One. It did not improve its position. It gave One to One more value than it received by filing. Therefore, the $38,000 in transfers are covered by the 11 U.S.C. § 547(c)(4) exception.

ATN and the subsidiaries offered no evidence which allowed the Court to trace transfers and repayments adequately to determine the applicability of the defense except in Count IX. Therefore, the defense was not proven. In most cases, the defendant's positions improved by the date of filing, i.e., One to One had paid their debts and no new value was given.

D. Were the postpetition transfers "authorized under this title or by this Court" pursuant to 11 U.S.C. § 549?

Many of the counts in the Examiner's complaint deal with transactions that One to One had with its affiliates postpetition. Postpetition transfers are avoidable if they are "not authorized under [title 11] or by the court." U.S.C. § 549(a)(2)(B). Transactions may be authorized by court order; transactions may be authorized even without a court order, if they are "in the ordinary course of business." 11 U.S.C. § 363(b). Ordinary course has been defined in many cases. This Court concludes that the test set forth in *Martino v. First Nat'l Bank in Harvey (In re Garofalo's Finer Foods, Incorporated)*, 186 B.R. 414 (N.D. Ill. 1995) is the proper one. Ordinary course means that they are transfers routinely made by the debtor prior to Chapter 11 and creditors should expect the same after Chapter 11 is filed.[9] If the transactions are one of a kind or the result of an emergency situation, they usually are not ordinary course transactions. The following counts involve postpetition transfers:

1. Count XIV involved $132,000 of $259,000 transferred to American One-2-One for ANIs. The purchase of an entirely new line of business is not ordinary course. When One to One purchased the ANIs, One to One became a switchless reseller. One to One had never purchased ANIs before and has not since according to the evidence. Clearly such a purchase should have received court approval. None was sought and none was given. Therefore, $132,000 must be repaid.

[9]It is clear that ATN and its affiliates knew what was expected of them postpetition. Debtor's counsel sent letters to Mr. Elliott and Ms. DeVito outlining One to One's duties and responsibilities vis à vis its affiliates. See Examiner Exhibits 54 and 55.

2. Count XV involved transfer of $65,838.43 to ATN postpetition. As stated in the facts above, $28,428.60 paid by ATN for One to One were ordinary course payments. No evidence showed the purpose of the remaining sums paid to ATN. They were not shown to be ordinary, nor were they court approved. Even if paying down One to One's intercompany payable might be ordinary course if the payments were for postpetition expenses, this is not applicable here. One, ATN owed One to One $88,680.06 at filing, so no payments should have been necessary to pay the items indicated. Two, if there were other normal postpetition payables included in the repayment, there was no evidence offered to prove it. Therefore, $37,409.83 must be repaid.

3. Count XVI involved the transfer of $67,237.71 to ATN for equipment lease payments. The payments were $25,732.95 per month. The number corresponds with the stated equipment rental payments. The $15,771.81 represents payment for part of the month of October 1995. These payments occurred pre-and post bankruptcy. The payments constitute ordinary course payments. Therefore, judgment for ATN is warranted.

4. Count XVII involved the transfer of $12,000 to ATN. The sum was for rent for the 1509 Government Street premises. However, the checks were made payable to the wrong payee. Payment to ATN for ATN Towers' rent is not an ordinary course payment and must be repaid.

5. Count XVIII involved the transfer of $189,677.40 to ATN for the items listed in the facts stated earlier. The sum of $97,276.81 was paid postpetition on postpetition payroll. The Court concludes that, in general, such a payment is ordinary course. The payroll sums were paid in varying amounts—some in advance and some in arrears. However, these differing payment methods were "ordinary" for One to One. The sum of $92,400.59 was paid postpetition on prepetition payroll and Utah rate differentials. This payment is not ordinary. It prefers some creditors over others and pays them sooner than others. No prepetition expenses can be paid postpetition without a court order. $92,400.59 must be repaid.

6. Count XIX involved a transfer of $259,000 to American One-2-One postpetition. The transfer occurred due to a one-time purchase of ANIs by One to One from American One-2-One. This is not an ordinary course transaction. It required court approval. Therefore, under Count XIX, $132,000 must be repaid.

7. Count XX involved a transfer of $17,880.93 from ATN postpetition. Ms. DeVito testified that the sums were used by ATN to pay One to One's network charges. However, no evidence of this was provided. Furthermore, the funds were wire transferred to ATN by Zero Plus Dialing, Inc. on One to One's behalf. This transaction was unique. It did not happen again and is not ordinary course. Therefore, $17,880.93 must be repaid.

8. Count XXI involved a transfer of COCOTs for $20,014.95 postpetition to ATN Communications, Inc. This was a one-time transaction which all who testified about it labeled unusual. It was not ordinary course. The transfer is avoidable. Therefore, $20,014.95 must be repaid.

III.

A. Was ATN a secured creditor of One to One, and if so, should the Court allow the filing of the claim at the commencement of the trial? — Motion to File Last Claim and Motion to Reconsider Court's Order of March 26, 1997

ATN had FCFC's position assigned to it on May 9, 1994. On April 28, 1995, One to One owed ATN $0.00 according to Defendants' Exhibit 13. (This is the closest date to 90 days before the bankruptcy filing the Court could find.) The Court was given no evidence of the debt owed by One to One to ATN, if any, on July 13, 1994, but One to One loaned $589,351.12 to ATN to pay off the debt on its behalf on May 9, 1994. On July 13, 1995, One to One owed ATN no money and was owed $85,680.08 by ATN.

ATN's security interest was an assignment of First Community Financial Corporation's accounts receivable security agreement interest in all of One to One's "presently existing and hereafter arising accounts, instruments, contract rights, documents, chattel paper, . . . [and] general intangibles." Paragraph 1.1 of Agreement, Defendants' Exhibit 58. The agreement, as amended, allowed One to One to obtain loans for up to 50% of the value of "Eligible Accounts" to a maximum of $600,000. According to the UCC filings, security for the loan was, in general terms, all accounts receivable, but also included all inventory, all furniture, fixtures and equipment, and all insurance policies. The collateral included proceeds and after acquired property. The security interest was perfected by FCFC and by ATN.

ATN claims that the existence of this perfected security interest at the filing of the bankruptcy case moots any issue about its dealings with the debtor. ATN claims it was a fully

secured creditor in virtually all of One to One's assets so there can be no preferences, fraudulent transfers or improper postpetition transfers. However, ATN's perfected security interest affords it no protection.

At filing, ATN was owed nothing by One to One and, in fact, owed One to One over $85,000. For a security interest to attach to postpetition assets (i.e., accounts receivable generated after July 13, 1995), One to One needed to comply with Section 552 of the Bankruptcy Code. It did not. In order to have any postpetition loans to One to One termed secured loans, ATN needed to comply with Section 364 of the Bankruptcy Code. It did not. Therefore, as to any of the claims relating to postpetition transfers, the security interest is without effect. Any loan ATN made to One to One was unsecured.

If ATN claims that the prepetition transfers of ATN are covered by the security agreement and the transfers are not avoidable or returnable, ATN has failed to make the necessary proof. ATN would have to prove that 11 U.S.C. § 547(c)(5) applied to all the claims except Count IV in this trial. *Matter of Clark Pipe and Supply Co., Inc.*, 893 F.2d 693, *reh'g denied*, *Smith v. Associates Commercial Corp.*, 899 F.2d 11 (5th Cir. 1990); *Krafsur v. Scurlock Permian Corp. (In re El Paso Refinery, L.P.)*, 178 B.R. 426 (Bankr. W.D. Tex. 1995). There was no proof of the value of the secured claim of ATN on July 13, 1994. It was needed. Due to the $589,000 receivable of One to One from ATN created May 9, 1994, it was likely zero. In fact, ATN likely owed One to One. On July 13, 1995, One to One owed ATN zero. Therefore, any sum ATN transferred out of One to One during the one-year period before bankruptcy improved ATN's position by reducing its payable to One to One. Under the "improvement of position" test of 11 U.S.C. § 547(c)(5), the transfers are avoidable.

ATN seeks to file its claim as a late filed claim. In a Chapter 11 case, there is no statutory or rule mandated date by which claims must be filed. Fed. R. Bankr. P. 3003(c)(3). The Court did not set a deadline for filing claims in One to One except administrative expense claims. A deadline of January 12, 1997 for all administrative expense claims incurred on or before November 1, 1996 was set. Therefore, if the secured claim had merit, it is timely. The motion to file the claim is allowed. The clerk is directed to enter the claim, as attached to the motion, in the claim register. However, although filed, it does not negate the avoidability of the transfers.

ATN also filed a motion asking the Court to reconsider its order of March 26, 1997, which granted summary judgment to the Examiner on the issues of solvency and preferential effect of transfers. ATN believed this order should be reconsidered in light of its position that it had a secured claim. Based upon the ruling that ATN's secured claim filing does not alter the avoidability of certain of the transfers in the Examiner's complaint, the motion is denied.

B. Should the Defendants, or any of them, or the attorney for the Defendants, be sanctioned pursuant to Fed. R. Bankr. P. 7037(a)(4) for failure to produce documents requested pursuant to Fed. R. Bankr. P. 7034(a)? — Examiner's Motion for Sanctions

There are several means bankruptcy courts may employ to ensure courteous, orderly litigation. Fed. R. Bankr. P. 9011, 7037 and 28 U.S.C. § 1927 are some of them. *In re Lincoln North Associates Ltd. Partnership*, 163 B.R. 403, 407 (Bankr. D. Mass. 1993).

Under Fed. R. Bankr. P. 7037, which incorporates Fed. R. Civ. P. 37 into the Bankruptcy Rules, the Court has discretion to sanction a party who fails to comply with discovery requests monetarily or substantively.

Rule 7034(b) provides that the proper remedy for a failure to produce documents without a court order is established in Rule 7037(a). Rule 7037(a)(4)(A) states that the proper relief is attorneys fees and expenses for a motion to compel. Rule 7037(b) provides the sanctions for failure to comply with court ordered discovery by "such orders in regard to the failure as are just . . ." including deeming facts admitted, striking defenses, striking pleadings or a contempt order. Rule 7037(d) requires payment of costs and attorneys fees by a party or the attorney advising that party or both if documents are not produced.

In this case, the Court ordered Debra DeVito and Nicholas Elliott to appear for examination under Fed. R. Bankr. P. 2004 and to produce documents. The orders were issued on April 11, 1996 and June 10, 1996, respectively. Certain disclosures of documents were made as testified to at the sanctions hearing held during the trial. However, at trial, when Defendants' exhibits were offered, it was clear that numerous relevant documents of One to One and ATN and its subsidiaries had never been disclosed to the Examiner.

Neither ATN, Nicholas Elliott nor Debra DeVito had sought any protective order. The information in the Defendants' exhibits was very pertinent to trial. The failure to disclose them put the Examiner and his counsel in the position of having to do more trial preparation than otherwise necessary and in the position of being unprepared for certain factual presentations. It also probably precluded meaningful settlement discussions.

Debtor's counsel, in defense of the Defendants' position, stated that any documents the Examiner wanted would have been provided to him. All he had to do was request them. The attorney also stated that any failure to disclose was his fault, not the Defendants' fault. What counsel fails to understand is that the Examiner did request the documents and the Court ordered

production. It is also difficult to know what to request when very little is provided and witnesses do not testify or testify only under conditions.

The failure to produce records was an ongoing issue in the case. ATN had a disagreement with the postpetition purchaser of One to One—The Praetorian Group—about turnover of records. It required a court hearing at that time to arrange an orderly turnover. The Court understood that all One to One documents were in One to One's hands after that. However, at trial, the Defendants offered exhibits including One to One and ATN documents not previously produced. When Richard Courtney's trial notes were produced, he had copies of One to One correspondence never turned over to The Praetorian Group or the Examiner. The statements of Nicholas Elliott about the inaccuracy of the Examiner's facts sums up the problem. The Examiner, due to the Defendants' laziness, inattention, or worse, was at a decided disadvantage in the lawsuit. He had incomplete records to examine and use.

The Defendants and their counsel tried to make the situation appear to be the Examiner's fault. "He just didn't ask specifically enough for the records he wanted." However, the burden was on the Defendants to show that production was inappropriate. No motions to quash or motions for protective orders were ever filed. The fault of nonproduction lies with the Defendants.

The Examiner and his counsel have spent thousands of dollars preparing for this trial and seeking information about assets. Defendants were less than forthright and forthcoming. Their actions have increased the litigation costs which the creditors must bear unless some of the cost is borne by the nonproducing parties.

As a sanction, the Court could have prevented use of the exhibits and thereby limited Defendants' defense arguments. The Court concluded a lesser sanction was appropriate. The

Examiner had an opportunity to delay any portion of the trial he wished to review the new documents and take additional discovery. He declined; but the creditors have been prejudiced by the fees of the Examiner and counsel incurred due to the lack of production. *In re Lincoln North Assoc., Ltd. Partnership*, 163 B.R. at 411. The fees are high; much of the cost would have been incurred anyway, but clearly a fee award of approximately 10% of the total fees expended on asset investigation and these suits is reasonable. The Court concludes that assessing a cost of Five Thousand Dollars against ATN and a separate cost of Five Thousand Dollars against Stanard & Mark is appropriate.

One half of the expenses are assessed against the Defendants because clearly they knew or should have known they had documents they had not turned over. It is a mystery to the Court why all of One to One's files were not in One to One's hands after the sale. Such a turnover would be the normal practice. At the least, as trial preparations resulted in the culling of documents for use at trial, they should have been produced. Ms. DeVito's memo sums up ATN's cavalier attitude. One half of the expenses are assessed against Stanard & Mark because Defendants' counsel knew or should have known the import of a discovery order. Counsel clearly should have produced documents his clients gave to him for trial exhibit purposes as soon as he got them and not on the morning of trial. As stated by the Eleventh Circuit:

> It is axiomatic that attorneys owe a duty of candor to the court. Moreover, attorneys also have a duty to deal honestly and fairly with opposing counsel . . . Our judicial machinery is dependent upon the full support of all members of the bench and bar. Advocacy does not include "game playing." Conduct such as that engaged in here must not, can not and will not be tolerated.

Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1522-23 (11th Cir. 1986).

ATN knew, through its officers, that it had numerous documents of One to One and did not turn them over to One to One at sale or for this suit until trial. Only when it served ATN's

purposes were the documents shared. But for Examiner's counsel seeking to review Richard Courtney's notes, some might never have been shared or have been known to be missing. Both ATN and counsel's behavior should not be condoned.

C. Should the Court enter a final judgment on fewer than all of the claims in this case pursuant to Fed. R. Bankr. P. 7054(b)? — Motion for Entry of Partial Final Judgment

Fed. R. Bankr. P. 7054(b) provides:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The Examiner seeks a final judgment on all counts tried or resolved to date which include all counts of the Complaint except 1, 2, 33 (to the extent related to Counts 1 and 2) and Count 32 which is the alter ego cause of action.

A Fed. R. Bankr. P. 7054(b) certification requires that the Court "support its conclusion by clearly and cogently expressing its reasoning and the factual and legal determinations supporting that reasoning." *Brandt v. Bassett (In re Southeast Banking Corporation)*, 69 F.3d 1539, 1546 (11th Cir. 1995). Under the rationale of the *Southeast Banking Corporation* case, a judgment may be certified only if "it possesses the requisite degree of finality. [T]he judgment must completely dispose of at least one substantive claim." *Southeast* at 69 F.3d 1547. For a final judgment to be proper, any claims which remain untried cannot be alternative forms of relief as to the same recovery sought. In this case the counts which were tried are separable.

Counts 1, 2, 33 (as related to Counts 1 and 2) and 32 are separate causes of action not relying upon any of the other counts. The facts about how ATN and its subsidiaries, including One to One, operate are important to all of the counts in the complaint. However, the results of

the untried counts when tried will not negate any of the other counts. The alter ego count could subsume the need for preference or fraudulent transfer avoidance since an alter ego conclusion would make all assets of ATN recoverable by One to One. However, this alone should not preclude entry of a final judgment on the less inclusive counts now.

The other part of the Rule 7054(b) test is whether there is "no just reason for delay." Counts 1 and 2 and the related parts of Count 33 have not been tried because Nicholas Elliott, the CEO of ATN, has asserted his Fifth Amendment rights and refused to testify to date due to a grand jury investigation. ATN's counsel asserts that Mr. Elliott is necessary to ATN's defense of those counts. The Court stayed the trial indefinitely. Count 32, in which the Examiner claims that ATN is One to One's alter ego and all of its assets should be subject to One to One's creditors, has been stayed by mutual consent. These delays are, in part, of the Defendants' own making. The other delay was to determine if trial of the alter ego action was necessary. That decision awaits this ruling.

The creditors in this case have been waiting two years already for a plan and disclosure statement. A final judgment as to most of the counts in this suit, the major piece of One to One's litigation, and the major asset of One to One, will give the Examiner the ability to formulate a plan. Second, the Court will not hold a final judgment because the CEO is not prepared to testify. If that were done, he could hold off collection from ATN and the other subsidiaries indefinitely. When the delay in concluding matters is at least partially the fault of the one objecting to a final judgment, there is "no just reason for delay."

CONCLUSION

For the reasons stated above, the Court concludes as follows:

Count I Trial stayed indefinitely by order of May 9, 1997

Count II	Trial stayed indefinitely by order of May 9, 1997
Count III	Judgment for ATN
Count IV	Judgment for Examiner for $131,555.28 pursuant to § 547(b) against ATN
Count V	Judgment for Examiner for $3,281,458.00 pursuant to § 550 against The Praetorian Group and Sean McCann
Count VI	Judgment for Examiner for $84,150.00 pursuant to § 547(b) against ATN Towers, Inc.
Count VII	Judgment for Examiner against ATN Towers, Inc. pursuant to § 549 for $60,000.00.
Count VIII	Judgment for Examiner for $100,468.84 pursuant to § 547(b) against American Paytel, Inc.
Count IX	Judgment for Unitel Corporation pursuant to § 547(c)(4).
Count X	Judgment for Examiner for $10,322.33 pursuant to § 547(b) against Unitel Corporation.
Count XI	Judgment for Examiner for $10,322.33 pursuant to § 550 against ATN.
Count XII	Dismissed.
Count XIII	Judgment for Examiner for $110,800.00 pursuant to § 547(b) against American One-2-One Communications, Inc.
Count XIV	Judgement for Examiner for $132,000.00 pursuant to § 549 against American One-2-One Communications, Inc.
Count XV	Judgment for Examiner for $37,409.83 pursuant to § 549 against ATN.
Count XVI	Judgment for ATN.
Count XVII	Judgment for Examiner for $12,000.00 pursuant to § 549 against ATN.
Count XVIII	Judgment for Examiner for $92,400.59 pursuant to § 549 against ATN.
Count XIX	Dismissed as to Integretal. Judgment for Examiner for $127,000.00 pursuant to § 549 against American One-2-One Communications, Inc.
Count XX	Judgment for Examiner for $17,880.93 pursuant to § 549 against ATN.

Count XXI	Judgment for Examiner for $20,014.95 pursuant to § 549 against ATN Communications, Inc.
Count XXII	Judgment for Examiner for $4,013,941.72 pursuant to § 547 against ATN.
Counts XXXIII - XXXI (first one)	Dismissed
Count XXXI or Count XXXII	Stayed indefinitely (alter ego claim)
Count XXXIII	As to all counts except Counts I and II and XXXIII, judgment for defendants.
Sanctions	Judgment for Examiner for $5,000.00 against ATN.
Sanctions	Judgment for Examiner for $5,000.00 against Stanard & Mark.

To the extent that Counts X and XI overlap, the Examiner on One to One's behalf, is only entitled to a single recovery. 11 U.S.C. § 550(c).

THEREFORE IT IS ORDERED AND ADJUDGED as follows based upon the above findings and conclusions:

1. Judgment in favor of the Plaintiff and against American Telecom Network, Inc. is awarded in the amount of $4,320,510.68.

2. Judgment in favor of the Plaintiff and against The Praetorian Group and Sean McCann is awarded in the amount of $4,281,458.00.

3. Judgment in favor of the Plaintiff and against ATN Towers, Inc. is awarded in the amount of $144,150.00.

4. Judgment in favor of the Plaintiff and against American Paytel, Inc. is awarded in the amount of $100,468.84.

5. Judgment in favor of the Plaintiff and against Unitel Corporation is awarded in the amount of $10,322.33.

6. Judgment is favor of the plaintiff and against American One-2-One Communications, Inc. is awarded in the amount of $369,800.00.

7. Judgment in favor of Plaintiff and against Stanard & Mark is awarded in the amount of $5,000.00.

Dated: July 21, 1997

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE