11 U.S.C. §105
11 U.S.C. §502(d)
11 U.S.C. §547

In re 14280 SW 72nd Ave., Inc., Case No. 393-36593-dds7

07/14/95 DDS

Unpublished

Most creditors received a 19% distribution on their claims in the 90 days prior to the petition through a prepetition workout. The trustee moved for permission to make an equalizing distribution to creditors who did not receive the 19% distribution rather than collect all of the workout payments through avoidance actions and redistribute after recovery of all preferences. The court denied the motion because notice had not been sent to all creditors and because one creditor had objected and the court had been presented no authority for an equalizing distribution beyond §105 equitable powers. On motion for reconsideration filed by seven creditors with large claims, the court authorized the trustee to make equalizing distributions based on the authority of Page v. Rogers, 211 U.S. 575 (1909) and §105, after notice to all creditors. The court held that the equalizing distribution in this case would serve the principle of equality of distribution to creditors which is behind §547 and §502(d).

P95-12(7)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	393-36593-dds7
14280 SW 72ND AVE., INC.,	)	
	)	MEMORANDUM GRANTING MOTION TO
Debtor.	)	RECONSIDER AND REQUIRING
	)	NOTICE TO CREDITORS OF INTENT
	)	TO MAKE EQUALIZING PAYMENTS

The trustee filed a motion to authorize him to make an equalizing payment to two creditors in this case. Most of the creditors of this estate received 19% of their claim against the debtor before the chapter 7 case was filed. Two creditors did not. The affidavit of Sanford Landress filed on April 14, 1995 explains that Lindenmeyr Paper received less than 19% due to an improper set off and Dynalectric Co. ("Grasle") received nothing on its present claim. Grasle garnished a fund containing the debtor's money prepetition and, but for the bankruptcy, would have been paid in full. Grasle agreed to release these funds to the trustee after the

bankruptcy filing, and then filed a proof of claim.

The motion asks that the trustee be allowed to make a payment to these two creditors so that they will also have received 19% of their claim. The motion was not noticed to creditors in general, but to seven creditors with large claims ("the Seven Creditors"), Grasle, and the U.S.Trustee. Grasle objected to the trustee's motion.

While it may seem unusual for a creditor to object to receiving money from a trustee, Grasle's goal is to obtain more than its pro rata distribution from this estate. Also pending before the court are the objections to the claims of the Seven Creditors. The objections were filed by Grasle early in the case. The objections seek to disallow the Seven Creditors' claims in full because the 19% payments were preferential transfers avoidable under 11 U.S.C. § 547. Grasle asks the court to disallow the claims under § 502(d). [1] There is sufficient money in this estate that if some of the creditors do not return their 19% payments and then file a claim, then Grasle will be paid 100% of its claim.

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[1] Section 502(d) provides ". . . the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550 or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549 or 724(a) of this title, unless such entity or transferee has paid the amount, or has turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550 or 553 of this title.

The trustee's motion and Grasle's objections to the claims are interrelated because if the trustee is allowed to make the equalizing distribution, the trustee and the Seven Creditors argue that there will no longer be any preferential transfers avoidable under § 547 since all creditors will have received the same percentage of their claim. As a result, the goal of equality of distribution is reached without spending money and time filing complaints to recover preferences, collecting the judgments and objecting to the claims of those who do not respond to a judgment.

After a hearing on May 1, 1995, the court denied the trustee's motion to authorize a special distribution procedure. Although the procedure set forth by the trustee's motion was practical, effective and inexpensive, I denied his motion because notice had not been sent to all creditors and because I was faced with an objection and a lack of legal authority beyond § 105. At the conclusion of the hearing, I agreed to reconsider this matter if anyone attending the hearing supplied the court with the necessary arithmetic and authorities.

The memorandum filed by the Seven Creditors supplies adequate information to grant the motion to reconsider. After appropriate notice and absent other cause, I intend to allow the trustee's motion to make the equalizing payments,

overrule Grasle's objections to the claims of the Seven Creditors, and permit the trustee to review the claims and calculate dividends by taking into consideration the payments already received by the creditors of the estate to result in an equal distribution to all creditors owed more than $2,000[2].

The Seven Creditors supplied arithmetic to support the common sense conclusion that creditors would receive a greater dividend if the trustee disbursed the funds on hand after performing a constructive recovery and offset of any preferential payments received by creditors in this case. They also cited cases to provide legal authority for such a procedure. In the case of Page v. Rogers, 211 U.S. 575 (1909), the Supreme Court enunciated the original view of this court in ruling:

> . . . it is entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he has received, and then to resort to the same court to obtain part of it back by way of dividend. The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, and the bankruptcy court then may settle the amount of the dividend coming to him,

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[2] Creditors that were owed less than $2,000 were paid in full prepetition when the larger creditors received their 19% distributions. At the hearing on May 1, 1995, all parties present agreed that the trustee could abandon the preference claims against those creditors because the expense would outweigh any benefit to the estate.

> and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend. Solely for the purpose of accomplishing this result, the final decree in the case is reversed and the case remanded to the District Court to take proceedings in conformity with this opinion.

Although the facts are somewhat different in this case, the procedure and result are the same. The Page decision provides a strong foundation for authorizing the trustee in this case to calculate the dividends to be paid to creditors by using a formula of a constructive recovery for the preferential payments and deducting the amounts already received by creditors as an offset from their dividend. At the hearing on July 14, 1995, counsel for the Seven Creditors agreed that Grasle could receive its 19% plus interest at 12% from the date of the bankruptcy petition so that Grasle's dividend was not eroded by the time value of money.

In addition, I may authorize the trustee to settle the dispute over whether the trustee should require the physical return of preferences as a condition of receiving a further dividend in the bankruptcy where the trustee's proposal to do a constructive return makes sense as a settlement under the principles of A & C Properties, 784 F.2d 138 (9th Cir. 1986). In line with the A & C Properties test, I find that the cost of recovery likely would exceed the benefits such as the claim slippage Grasle hopes will occur

as described in Exhibit A and related exhibits attached to the May 12, 1995 memorandum of West Coast Paper Co. While the likelihood of success in a preference suit is high, this likelihood is outweighed by the complexity of the litigation involved, the expense, inconvenience and delay in closing the case and, in my view, the paramount interest of all of the creditors upon consideration of their reasonable views. I see no reason to punish the estate or those creditors who participated in the prepetition private workout where such punishment would only enrich Grasle who garnished rather than participated.

The cases cited by Grasle are not persuasive in altering this conclusion. Neither is the argument that Grasle doesn't really want the trustee to have to go to the expense of suing the creditors to recover preferences, but the only result Grasle desires is that the creditors' claims be disallowed. The overriding principle stated by the courts in the cases cited by both sides is that the bankruptcy code is concerned chiefly with equality of distribution to creditors. See, In re KF Dairies,Inc., 143 B.R. 734, 737 (Bankr. 9th Cir 1992). Such equality is the intent of the §§ 547 and 502(d).

The effect of the Supreme Court's ruling in Page v. Rogers is that neither the bankruptcy court nor the trustee

is required to mindlessly apply §§ 547 or 502(d) when the result will potentially be a windfall and preference to one creditor, Grasle, at the expense of other creditors who elect not to return the preferences and then receive them back. Grasle's attempt to reject an equalizing payment and object to claims would result in inequality among creditors and unnecessary expense to the estate. Such manipulation should not be encouraged.

Based on the authority of Page v. Rogers, and § 105, I intend to authorize the trustee to make interim equalizing distributions to Grasle and Lindenmeyr Paper after notice to all creditors which explains the calculation he will use to effectuate an equal distribution to creditors. I anticipate the formula to include an equalizing payment to Grasle and Lindenmyer Paper, constructive recovery of preferences, audit and allowance of claims, a dividend calculation, and offset of payments received against the dividend. Such a calculation will not violate the normal prohibition against offsetting a claim against a preference. As demonstrated by the Creditors' memorandum, all creditors in this case will be treated the same after the equalizing payments are made by applying the constructive recovery and offset formula, while in a typical case, a creditor would receive more than its pro rata share if it were allowed to offset its claim against a

preference.

A separate order will be entered.

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DONAL D. SULLIVAN
Bankruptcy Judge

cc: Howard M. Levine
U. S. Trustee
James C. Waggoner
Donald H. Hartvig
John R. Rizzardi
Bruce H. Orr
Byron Dalis
Sanford R. Landress