UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC. Debtors	CASE NO. 96-61376 Chapter 11 Substantively Consolidated

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APPEARANCES:

SIMPSON, THACHER & BARTLETT Attorneys for § 1104 Trustee 425 Lexington Avenue New York, New York 10017	M.O. SIGAL, JR., ESQ. Of Counsel
WASSERMAN, JURISTA & STOLZ Attorneys for Official Unsecured Creditors Committee 225 Millburn Ave. Millburn, New Jersey 07041	DANIEL STOLZ, ESQ. Of Counsel
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER Attorneys for Official Early Investors Committee 425 Park Avenue New York, New York 10022	ARTHUR STEINBERG, ESQ. Of Counsel
HANCOCK & ESTABROOK Attorneys for Various Banks 1500 MONY Tower I Syracuse, New York 13202	STEPHEN DONATO, ESQ. Of Counsel
BOND, SCHOENECK & KING Attorneys for Various Banks One Lincoln Center Syracuse, New York 13202	JOSEPH ZAGRANICZNY, ESQ. Of Counsel
GREEN & SEIFTER Attorneys for Various Banks One Lincoln Center Syracuse, New York 13202	ROBERT WEILER, ESQ. Of Counsel
DORSEY & WHITNEY Attorneys for U.S. Bank National Association 220 South Sixth Street Minneapolis, Minnesota 55402	PAUL J. SCHEERER, ESQ. Of Counsel

WINTHROP, STIMSON, PUTNAM & ROBERTS
Attorneys for Various Banks
One Battery Park Plaza
New York, NY 10004-1490

DANIEL LOWENTHALL III, ESQ.
Of Counsel

HARTER, SECREST & EMERY
Attorneys for Various Banks
431 East Fayette Bank
Syracuse, New York 13202-1919

JOHN WEIDER, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court are the respective motions of Richard C. Breeden, as chapter 11 trustee (the "Trustee") of the substantively consolidated estates of The Bennett Funding Group, Inc. ("BFG"), Bennett Receivables Corporation ("BRC"), Bennett Receivables Corporation II ("BRC-II"), Bennett Management & Development Corporation ("BMDC"), The Processing Center, Inc. ("TPC"), Resort Service Company, Inc. ("RSC"), American Marine International, Ltd. ("AMI") and Aloha Capital Corporation ("Aloha") (the "Debtors"). The Trustee's first motion, filed December 19, 1997, pursuant to § 554(a) of the United States Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"), seeks to abandon all preference claims against what he has labeled as "Current Investors"[1] under Code § 547 ("Preference Abandonment

[1] The Trustee defines the "Current Investors" as those "who hold claims against the Consolidated Estate arising out of or in connection with lease financing." *See* Trustee's Preference Abandonment Motion at ¶ 10. The Trustee excludes certain individuals and entities that he has sued or in the future will be suing for actual fraudulent activities or other wrongdoing. *See id.*

Motion"). On February 12, 1998, the Trustee filed a second motion pursuant to Code § 554(a) seeking to abandon fraudulent transfer claims against the Current Investors pursuant to Code § 544, § 548 and the New York Debtor and Creditor Law ("Fraudulent Transfer Abandonment Motion").

The Preference Abandonment Motion was originally scheduled to be heard at the Court's motion term in Utica, New York, on January 30, 1998, but was consensually adjourned by the parties to February 12, 1998. Following oral argument on the Preference Abandonment Motion on February 12th, Trustee's counsel requested that it be adjourned to February 26, 1998, in order for the Court to consider it along with the Fraudulent Transfer Abandonment Motion which had been filed that day. Trustee's counsel indicated that a nexus existed between the two motions which made it appropriate that the two be addressed together.

Support for the Trustee's motions was filed by the Official Committee of Unsecured Creditors ("Unsecured Creditors Committee") and the Early Investor Committee[2] (the "Committees") on February 23, 1998, and February 26, 1998, respectively. Opposition to both

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[2] The Early Investor Committee was appointed by the U.S. Trustee in response to the Trustee's motion to reduce the claims of "early investors", as distinguished from "former investors" who did not hold claims against the estates at the time the cases were commenced, by the interest paid them during the six years prior to the commencement of the Debtors' cases ("Claims Adjustment Motion").

By the Claims Adjustment Motion, which is not the subject of the Decision herein, the Trustee seeks to reduce the aggregate claims of the Current Investors to approximately $550 million based on the theory that investors are entitled to a claim based on "restitution" rather than "investment expectations." *See* Fraudulent Transfer Abandonment Motion at ¶ 9. Under this theory, claims are computed by determining the total investment and then reducing that amount by the total payments received by the investor. The estimated allowable general unsecured claims, including those of the Current Investors as adjusted, total $579 million. *See* Joslyn Affidavit at 5.

of the Trustee's motions was filed on behalf of U.S. Bank National Association ("U.S. Bank")[3] and various other financial institutions (the "Banks"), some of which also moved to compel the Trustee to abandon his claims of alleged preferences against them.[4]

The Court heard further oral argument on both of the Trustee's motions and the Banks' motions, as well as that of U.S. Bank, on February 26, 1998, and reserved on its decision with respect to the relief sought by the movants.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of these contested matters pursuant to 28 U.S.C. §§ 1334,

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[3] U.S. Bank filed a motion on February 11, 1998, seeking abandonment by the Trustee of both preference claims and fraudulent transfer claims which he might wish to assert against it. U.S. Bank is alleged to have received a preference in the approximate amount of $7.9 million.

[4] The Banks have claimed a security interest in equipment leases, and in some instances, have also claimed an ownership interest in the leases and the equipment. Originally, over 200 banks asserted a security interest in the leases. The Trustee entered into settlements with a majority of the banks. It has been alleged that approximately fifty banks have refused to settle with the Trustee. The Banks appearing on the motions herein comprise a segment of those non-settled banks. The Trustee has asserted preference claims against the non-settled banks of $7.5 million. U.S. Bank is not one of the non-settled banks claiming a security interest in the leases.

Motions were filed by the law firm of Hancock & Estabrook on behalf of ESB Bank, F.S.B., Gloucester Bank & Trust Company, First United Security Bank, The Howard Bank, N.A., American State and Trust Company of Williston, Wilbur National Bank, Merchants Holding Company (f/k/a Merchants National Bank of Winona), Stoneham Savings Bank, First State Bank of Wabasha, First National Bank of Crockett, Union State Bank, Firstar Bank, F.S.B., Sprague National Bank, Marine Midland Bank, La Crescent State Bank, Oxford Bank & Trust, Heller Financial, Inc. and Heller Financial Leasing, Inc. on January 20, 1998, and by the law firm of Bond, Schoeneck & King on behalf of First National Bank of Carmi (and as Agents et al.), Minnesota Valley Bank, Norwest Bank of Red Wing, N.A. and First Community Bank, N.A. on February 9, 1998.

157(a), (b)(1) and (b)(2)(A), (F), (H) and (O).

FACTS

On March 29, 1996, BFG, BRC, BRC-II and BMDC filed voluntary petitions seeking relief under chapter 11 of the Bankruptcy Code . The Trustee was appointed trustee for each of them on April 18, 1996. On April 19, 1996, AMI and RSC filed petitions for relief under chapter 11, and on April 25, 1996, an involuntary chapter 11 case was filed against Aloha. TPC filed a voluntary chapter 11 petition on April 26, 1996, and on May 10, 1996, the Court entered an order for relief against Aloha. The Trustee's appointment for AMI, RSC, TPC and Aloha was approved by the Court on May 15, 1996. By Order dated July 25, 1997, the Court substantively consolidated the Debtors' estates.

Prior to filing, certain of the Debtors were involved in the originating, purchasing and selling of commercial leases of copy machines and other office equipment. For purposes of financing their operations, the Debtors compiled the leases into portfolios which were then assigned/transferred to potential lenders and investors. According to the Trustee, "the Debtor companies were operated as part of a pervasive Ponzi scheme through which amounts due to investors at any point in the relevant time period were paid for in substantial part by use of money raised from new investors. The scheme was effectuated by pledging to investors wholly fictitious leases and leases that had already been pledged to others, often multiple times." *See* Trustee's Fraudulent Transfer Abandonment Motion at ¶ 7. The Debtor companies also transferred interests in the leases to the Banks in connection with loans made to the Debtors. Allegedly,

between 1990 and 1996 the Debtors pledged approximately $2.5 billion in leases to banks and investors. It is further alleged that "the Debtors only originated a maximum of $960 million in leases" during that same time period. *See id.* at ¶ 8. The Trustee alleges that of the 9,273 Current Investors, all but 108 received payments within the 90 days prior to the cases being filed by the Debtors. Said payments total approximately $93 million, with the average payment being approximately $10,300. *See* Second Affidavit of Paul M. Joslyn ("Joslyn Affidavit"), filed February 20, 1998, at ¶¶ 3 and 4. "Approximately 7400 Current Investors received payments in an average amount less than or equal to $10,000. Approximately 1,600 Current Investors received payments in an average amount greater than $10,000." *See id.* at ¶ 4. The Trustee estimates that general unsecured claims total approximately $750 million, of which the liabilities to the Current Investors total approximately $722 million.

ARGUMENTS

Preference Abandonment Motion

With respect to the Preference Abandonment Motion, the Trustee contends that "the redistributive effects of pursuing such claims [against the Current Investors] would be minimal and, accordingly, of inconsequential value." *See* Preference Abandonment Motion at ¶ 8. The Trustee bases his argument on the fact that almost all of the Current Investors, who hold approximately 96% of the total unadjusted unsecured claims against the estate,[5] received

[5] Based on the information provided in the Joslyn Affidavit, the Court calculates that the Current Investors hold 95% of the proposed adjusted unsecured claims ($550 MM/$579 MM). For the sake of consistency, the Court will use the figure of 95% and will apply the amount of

preferential transfers and, therefore, he argues that most of the monies that might be recovered from them in pursuing the preferential claims would ultimately be distributed back to the same creditors. The Trustee points out that the costs of commencing, prosecuting and administering the claims, as well as the difficulty involved in collecting from approximately 9,000 individual investors, also were factored into his request for abandonment of the preference claims against the Current Investors. The Trustee asserts that he has not included the Banks since he has already initiated avoidance actions against them and the likelihood of collecting from them in the event he is successful is much greater than it would be against the large group of Current Investors.

The Banks take issue with the Trustee's request insofar as he has not included them in the class of Current Investors. They assert that like the individual investors who are the subject of the Trustee's Preference Abandonment Motion, the Banks also "hold claims against the Consolidated Estate arising out of or in connection with the lease financings" and, therefore, that the Trustee should abandon his claims against them as well. The Banks assert that the Trustee's Preference Abandonment Motion unfairly discriminates against them despite the fact that they are not insiders and have not been accused of actual fraud in their dealings with the Debtors. Furthermore, they contend that whether or not the Trustee is currently in litigation with a particular individual or entity should not serve as a basis for the disparate treatment proposed by the Trustee.

In response, the Trustee argues that the Banks lack standing and that their objections are premature since they assert that they are secured and as yet there has been no final determination

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adjusted claims in its discussion and calculations without making a finding on the appropriateness of the request sought by the Trustee in his Claims Adjustment Motion.

made whether they may be unsecured or undersecured. The Trustee takes issue with the Banks' assertion that he is trying to circumvent the Code's mandates pursuant to Sections 1122, 1124 and 1129, which require equality of treatment of similarly situated creditors for purposes of a chapter 11 plan. The Trustee points out that those particular sections of the Code prohibit disparate treatment of claims asserted against the estate. In this instance, the Trustee is requesting that he be permitted to treat similarly situated parties differently with respect to claims being asserted by the estate.

The Banks also assert that the Trustee has not provided the Court with any cost/benefit analysis to support his position that the claims are of inconsequential value to the estate. The Trustee has offered the affidavit of Paul M. Joslyn, in which he sets forth the following calculations:

Assumed Facts: $550 MM in Current Investor claims; $722 MM if not adjusted
$579 MM total general unsecured claims; $750 MM if not adjusted
$200 MM available for distribution
5% of recovery = costs of litigation and collection

	Adjusted	Not Adjusted
Projected recovery for unsecured class without preferences:	200/579 = 35%	200/750 = 27%
Projected recovery for unsecured class assuming 100% recovery of investor preferences (less 5% costs)	288/672 = 43%	288/843 = 34%
Projected recovery for unsecured class assuming 50% recovery of investor preferences (less 5% costs)	244/626 = 39%	244/797 = 31%

The argument is made on behalf of U.S. Bank that if the Trustee were successful in his

preference actions against the Banks and U.S. Bank, that the potential recovery for the unsecured class of creditors would be increased to 36% (200 + 15)/(579 + 15). U.S. Bank argues that if, as the Trustee apparently contends based on the only figures provided to the Court, a potential increase in recovery of 8% (35% vs. 43%) for the unsecured class is *de minimus* if $93 million in investor preferences is recovered, then a potential increase in recovery of only 1% is certainly *de minimus*. Therefore, U.S. Bank contends that the Trustee should also abandon the claims he has/will assert against the Banks and U.S. Bank.

Both Committees support the Trustee's Preference Abandonment Motion, arguing that the Current Investors should not be required to defend themselves against preference claims, particularly when most of money recovered would inure to their benefit upon distribution given that they hold between 95% and 96% of the total amount of claims against the estate. The Unsecured Creditors Committee also indicates that it is "prepared to live with" the Court granting the Banks' motions for abandonment of their preference claims as well, with the exception of U.S. Bank, which it asserts is differently situated from the "non-settled" banks. *See* Supplemental Statement of Unsecured Creditors Committee, filed February 23, 1998.

Fraudulent Transfer Abandonment Motion

The Trustee contends that he is seeking "the most equitable method of distributing assets of an estate involved in a 'Ponzi'-style fraud." *See* Fraudulent Transfer Abandonment Motion at ¶ 9. The Trustee points out that he could assert a claim against all investors for recovery of all payments made to each investor pursuant to Code § 548(a)(1), but such a claim he states would be subject to a defense under Code § 548(c) and equivalent state law. Similarly, the

Trustee notes that he may not be able to assert an action pursuant to Code § 548(a)(2) against an investor who received payments which totaled less than the amount he/she invested "because reasonably equivalent value for these payments to the investor is provided by the reduction, dollar for dollar, of the investor's restitution claim against the Estate." *See id.* at ¶ 11. The Trustee maintains that he is entitled to object to any claim of such investor to the extent that some of the payments received represented interest.[6]

Based on the above analysis, the Trustee asserts that rather than incur the expense to the estate of commencing adversary proceedings against all the investors, he wishes to abandon such claims, subject to certain exceptions:

1) The Trustee is not seeking to abandon any claims against "those individuals and entities engaged in litigation with the Trustee." *See id.* at 4 and Footnote 1 referenced therein. In addition, the Trustee also intends to pursue recovery of interest payments from the "former" investors who received returns on their investments but were not creditors of the Debtors at the time the cases were filed. *See id.*

2) The Trustee is not seeking to abandon claims against Current Investors whose claims against the Estate are less than the amount of interest they received on their investments.[7] [8]

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[6] The assertion is made on behalf of the Unsecured Creditors Committee in support of the motion that the "Trustee is, in essence, abandoning that which he does not have the grounds to pursue." *See* Unsecured Creditors Committee's Reply, filed February 25, 1998, at ¶ 10.

[7] According to the affidavit of Paul M. Joslyn ("Joslyn Affidavit II"), filed February 23, 1998, in connection with the Fraudulent Transfer Abandonment Motion, the Trustee intends to commence adversary proceedings to recover approximately $8 million. *See* Joslyn Affidavit II at ¶ 6. Joslyn asserts on behalf of the Trustee that there was an estimated $180 million in profit or interest paid to investors by the Debtors. *See id.* at ¶ 7.

[8] Opposition to the Fraudulent Transfer Abandonment Motion was filed by Leonard S. Goodman ("Goodman"), trustee of the Marvin L. Goodman Trust, on February 23, 1998.

3) The Trustee is not seeking to withdraw his Claims Adjustment Motion and the relief sought therein.

4) The Trustee is not seeking to abandon his right to offset against distributions pursuant to Code § 502(d) in the event that the relief sought in his Claims Adjustment Motion is denied. *See id.* at 4.[9]

It is the Trustee's position that he should be able to achieve "substantially the same effect" with the Claims Adjustment Motion as with "global affirmative fraudulent transfer actions against the Current Investors with less expense to the parties and considerably less hardship to the Current Investors." *See* Joslyn Affidavit II at ¶ 9. The Banks take issue with these arguments to the extent that they are being excluded from the relief sought by the Trustee. They assert that the Trustee has not articulated a basis for the disparate treatment the Banks would receive if they

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Goodman contends that the Trustee's motion fails to address a jurisdictional issue which Goodman asserts is common to the approximately 750 adversary proceedings that the Trustee intends to bring against Current Investors whose claims fall in this category. It is Goodman's position that seeking a general redistribution of the assets of the estate is beyond the scope of the New York Uniform Fraudulent Transfer Act. *See* Goodman Opposition at 6. The Court concludes this issue is more properly argued in the context of a particular adversary proceeding than in the context of the motion now before the Court which seeks to abandon fraudulent transfer actions.

Written opposition was also filed by Mrs. Marvin K. Hall objecting to the second exception set forth in the Trustee's motion. This too, in the opinion of the Court, is more properly raised in the context of an adversary proceeding.

[9] Limited objection to the Trustee's Fraudulent Transfer Abandonment Motion was filed on February 20, 1998, on behalf of Dr. Harry Helsel and Dr. Stanley Cohen and Joan Cohen as joint tenants with rights of survivorship and Dr. Stanley Cohen and Joan Cohen as Custodians for Shannon Cohen under the Gifts to Minors Act. The objection asserts that the Trustee is employing three vehicles to achieve claims reduction by including the third and fourth exceptions in his motion. The argument is made that if the Trustee's Fraudulent Transfer Abandonment Motion is granted, the Claims Adjustment Motion should be denied and he should also be precluded from defensive use of Code § 502(d). The Court deems such arguments as more appropriately made within the context of the Claims Adjustment Motion.

are excluded. They contend that the defense provided in Code § 548(c) has equal application to them and therefore any claims the Trustee might assert against them pursuant to Code § 548(a) are equally unsustainable.

DISCUSSION

"[A]bandonment [of property of the estate] is in the discretion of the trustee, bounded only by that of the court." *See In re Interpictures, Inc.*, 168 B.R. 526, 535 (Bankr. E.D.N.Y. 1994) (citation omitted). Pursuant to Code § 554, a trustee may abandon property that is either burdensome to the estate or that is of inconsequential value *and* inconsequential benefit to the estate. *See In re Beaudoin*, 160 B.R. 25, 31 (Bankr. N.D.N.Y. 1993), citing In *re K.C. Machine & Tool Co.*, 816 F.2d 238, 245 (6th Cir. 1987).[10] The Trustee has made no argument that the avoidance claims he seeks to abandon are in any way burdensome to the estate. Therefore, the Court must determine whether those claims are of inconsequential value and benefit to the estate as a whole.

According to the Trustee's figures, approximately 95% of the adjusted unsecured claims against the estate are held by the Current Investors. It is evident that recovery of preferential payments from the Current Investors would result in a corresponding increase in the Current Investor claims to be paid out of the estate. Thus, it is the Trustee's position that because the

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[10] Although both *Beaudoin* and *K.C. Machine* address the criteria to be considered by a court in ruling upon a request by a party in interest to compel a trustee to abandon property of the estate pursuant to Code § 554(b), the same criteria apply equally under Code § 554(a) since both provisions focus on whether the property sought to be abandoned is "burdensome to the estate or that is of inconsequential value and benefit to the estate."

Current Investors hold 95% of the unsecured claims and because he has a preference cause of action against almost all Current Investors, the net redistributive effect on the estate will be *de minimus*.

The Banks argue that the Trustee has arbitrarily drawn a line in an effort to bolster his argument concerning the net redistributive effect of abandoning the preference claims. They point out that moving that line to include them would in effect increase the percentage of claims against the estate held by the class from 95% to 96% and lend more support to the Trustee's position. The Court notes that this argument could be made by any unsecured creditor against whom the Trustee seeks to recover preferences who might wish to have its claim abandoned.

The Court is at a loss to understand the reason for the disparate treatment of the Banks. Indeed, the Trustee alleges that "the Debtors during the period of 1990-1996 pledged approximately $2.5 billion in purported leases to *banks and investors*." *See* Fraudulent Transfer Motion at ¶8. (emphasis added). This would seem to support the Banks' contention that in the event that they are determined to be unsecured or undersecured they are similarly situated to the Current Investors. Indeed, at oral argument Trustee's counsel, in disputing the application of Code §§ 1122, 1124 and 1129 to the Trustee's motion, acknowledged that the Trustee was requesting authority to treat "similarly situated parties" differently with respect to claims by the estate. Nevertheless, the Trustee is vehemently opposed to including the Banks in the class of Current Investors.[11] He argues that he has already filed counterclaims against the Banks or

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[11] The Trustee states in his affidavit, filed February 20, 1998, that "[i]f the Court were to rule that I would be required to abandon preference claims against the non-settled banks in order to abandon the preference claims against the Current Investors, I would reluctantly withdraw my request for authorization to abandon the preference claims against the Current Investors." *See* Trustee's Affidavit at ¶ 6.

commenced adversary proceedings against them. Therefore, the initial costs associated with litigation against the Banks have already been incurred by the estate. In addition, he asserts that the likelihood of collecting from the Banks is greater than that associated with collecting from 9,000 Current Investors.

These arguments do not establish to the satisfaction of the Court a reason to exclude the Banks from the class of Current Investors. The costs of litigation with the Banks is still likely to be substantial given the complexity of their transactions with the Debtors. The extent to which the Trustee may have difficulty collecting from the Current Investors is also a matter of supposition. Whether the class of Current Investors does or does not include the Banks, the Court finds that the Trustee has failed to establish that abandonment of the preference claims against them would be of inconsequential value and benefit to the estate. While the Trustee may be correct in this argument concerning the net redistributive effect with respect to the Current Investors, he ignores the effect of recovering the preferences on the remaining unsecured creditors. By seeking to abandon a potential recovery of $88 million ($93 million less 5% in litigation and collection costs), the resultant impact on the remainder of the unsecured creditors could be as much as $4.4 million (.05 x $88 million), which would otherwise not be available for distribution to them if the Trustee was granted the relief he seeks. This represents a potential 15% distribution on their claims ($4.4 MM/$29 MM) without taking into account any other monies that might be available in the estate. If the Banks are included in the class of Current Investors, the potential recovery sought to be abandoned amounts to $95.5 million ($100.5 million less 5% litigation and collection costs). This would result in approximately $4.82 million (.04 x $95.5 million) being available for distribution to the balance of the unsecured creditors.

This represents a potential distribution of 18% on their claims ($3.82 MM/$21.5 MM), again without taking into account any other monies available in the estate. The Trustee's own figures indicate that the projected distribution for the unsecured class of creditors, including the Current Investors, would increase 8%, assuming a 100% recovery of investor preferences and an increase in the amount of the unsecured claims from $579 million to $672 million.

As noted above, the Trustee opines that he may have difficulty collecting from in excess of 9,000 Current Investors. He estimates that if he recovers only 50% of the preference claims, there will only be an estimated 4% increase in distribution to the unsecured creditors. This amounts to $2.2 million ($44 million x .05) which would otherwise be available, or a potential increase of 7.5% distribution on the claims of the unsecured creditors, other than the Current Investors. The Court does not consider that inconsequential for the approximately 65 other unsecured creditors, exclusive of the Current Investors and the Banks.

If the potential amount to be recovered from the Current Investors was substantially less or if the entire unsecured creditor body had received preferential transfers which the Trustee proposed to abandon, the Court might find that the causes of action to recover such transfers were of inconsequential value and benefit to the estate. However, that is not the case here. Accordingly, the Court must deny the Trustee's motion to abandon Code § 547 claims against the Current Investors.

At the hearing, counsel for the Trustee asserted that in the event that the Court denied the Preference Abandonment Motion, the Court should also deny his Fraudulent Transfer Abandonment Motion. Counsel contends that in the event that the Trustee chooses to commence adversary proceedings against the Current Investors pursuant to Code § 547, expense to the

estate would be minimal if the Trustee also included a cause of action based on Code §§ 544 and 548 in the same complaints. Therefore, the Court will also deny the Trustee's motion to abandon claims against the Current Investors pursuant to Code §§ 544 and 548.

Since the Court has denied both motions of the Trustee, the motions of U.S. Bank and the Banks seeking to compel the Trustee to abandon preference actions[12] against them is rendered moot. Accordingly, the Court will deny the motions of U.S. Bank and the Banks.

Based on the foregoing, it is hereby

ORDERED that the Trustee's motion seeking to abandon all preference claims against the Current Investors pursuant to Code § 547 is denied; it is further

ORDERED that the Trustee's motion seeking to abandon certain fraudulent transfer claims against the Current Investors pursuant to Code § 544, § 548 and the New York Debtor and Creditor Law is denied; it is further

ORDERED that the motion of the Banks seeking to compel the Trustee to abandon all preference claims against them is denied; it is further

ORDERED that the motion of U.S. Bank seeking to compel the Trustee to abandon both preference claims and fraudulent transfer claims against it is denied, and it is further

ORDERED that in the event that the Trustee as a result of this Memorandum-Decision and Order seeks to commence adversary proceedings pursuant to Code §§ 547 and 548, the Trustee shall file simultaneously with any complaint(s) a disk utilizing the Electronic File Format for Submission of Adversary Data which Format is outlined on Attachment A affixed

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[12] U.S. Bank's motion to compel the Trustee to abandon any fraudulent transfer action against it is also rendered moot.

hereto.

Dated at Utica, New York

this 6th day of March 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge