

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR DISTRICT OF DELAWARE**

IN RE:	(
	(
Fulcrum Direct, Inc.	( Bankruptcy No. 98-1767
Fulcrum West, LLC, and	( Bankruptcy No. 98-1768
Equipment Bond Purchaser,	( Bankruptcy No. 98-1769
Inc.	( (Jointly Administered)
	(
Debtor(s)	( Chapter 11
	(
Fulcrum Direct, Inc. and	(
Fulcrum West, LLC	(
	(
Plaintiff(s)	(
	(
v.	( Adversary No. 99-251
	(
Associated Footwear, Inc.	(
	(
Defendant(s)	(
	(

Appearances:

Richard H. Cross, Jr., Esquire, for Debtors

Thomas M. Blumenthal, Esquire, for Defendant

**MEMORANDUM OPINION<sup>1</sup>**

The matter before the court is the motion for summary judgment by Debtors Fulcrum Direct, Inc., and Fulcrum West, LLC (hereafter “Fulcrum”).

I ruled from the bench concerning one of the three issues (set off) and provided time for the parties to try to resolve the matter. They were unable to do so. This opinion sets forth

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<sup>1</sup>The court’s jurisdiction was not at issue. This Memorandum Opinion constitutes our findings of fact and conclusions of law.

my findings of fact and conclusions of law. The material facts are not in dispute. Prepetition, Fulcrum was a leading catalogue retailer of apparel, shoes, and accessories for children, teenagers, and young women. Prepetition, Defendant Associated Footwear, Inc. (hereafter “Associated Footwear”) ordered merchandise from Fulcrum for resale to third parties. Associated Footwear also manufactured merchandise for Fulcrum.

### *The Complaint*

In its complaint, Fulcrum alleges as follows. On July 30, 1998, the date Fulcrum filed its chapter 11, Associated Footwear was in possession of certain merchandise owned by Fulcrum with a fair market value of approximately \$75,900. Fulcrum requested return of the merchandise so that it could resell it but was advised by Associated Footwear that the merchandise had already been sold. Although the complaint does not specify, this request for return of merchandise was apparently made postpetition and after the bankruptcy court entered an order approving an asset purchase agreement on November 18, 1998, which barred Associated Footwear from asserting liens, claims, encumbrances, or interests against merchandise owned by Fulcrum. The complaint alleged that Associated Footwear has failed to return the merchandise or pay Fulcrum the value of the merchandise.

The complaint further alleges that Fulcrum's records indicate that Associated Footwear owes it \$262,084.50 for prepetition invoices dated between May 29, 1998, and July 20, 1998. Thus, Count I of the complaint seeks turnover of \$337,984.50<sup>2</sup> representing the total of \$75,900 (the fair market value of the merchandise Associated Footwear ordered from

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<sup>2</sup>This amount changed after the Complaint was filed by agreement of the parties. They now agree that the total amount owed by Associated Footwear to Fulcrum on this Count is \$136,101.15. *See* III. Setoff, *infra*.

Fulcrum prepetition) and \$262,084.50 (the amount of outstanding invoices dated between May 29, 1998, and July 20, 1998, for goods Fulcrum sold to Associated Footwear).

Count II of the complaint alleges that in the 90 days prepetition, Fulcrum made transfers to Associated Footwear in the amount of \$60,000 which constituted preferential transfers. It seeks to avoid as preferential transfers the \$60,000 in payments. In all, Fulcrum requested entry of judgment against Associated Footwear in the amount of \$397,984.50 plus interest, costs and attorneys' fees. However, as noted throughout, the demand has changed since the Complaint was filed.

*Answer and Counterclaim*

Associated Footwear filed an answer raising certain affirmative defenses and filed a counterclaim. In its answer, Associated Footwear denies doing business with plaintiff Fulcrum West, LLC. Associated Footwear admitted that prepetition Fulcrum Direct sent it 14,883 pairs of shoes but denies ordering the shoes and asserts that it gave special instructions to Fulcrum not to ship the shoes.<sup>3</sup> Associated Footwear further states that it advised Fulcrum that it would store them for a fee. Associated Footwear also asserts that it requested instructions for shipping the shoes back to Fulcrum but never received instructions, only a request to put them in a warehouse which Associated Footwear asserts constituted abandonment of the property.

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<sup>3</sup>The fair market value of the shoes was alleged to be between \$2.00 and \$2.25 per pair for a total between \$29,766.00 and \$33,486.75. However, as will be related later in the text, 10,800 pairs were sold for \$1.00 per pair. On November 19, 2002, Fulcrum conceded the value to be \$1.00 per pair or \$14,883, for purposes of this Motion for Summary Judgment.

In addition, Associated Footwear filed a proof of unsecured claim in the amount of \$39,498.65<sup>4</sup> for goods sold for the period January 1, 1998, to the date of the claim, October 21, 1998 (plus continuing warehousing fees).<sup>5</sup> Associated Footwear states that four invoices were issued prepetition but Fulcrum rejected them all. In September of 1998, postpetition, Associated Footwear invoiced Fulcrum for the stored shoes. Although the proof of claim attached to the Answer, Affirmative Defenses and Counterclaim is in the amount of "\$39,498.65 + warehousing fees", the total amount alleged to be owed to Associated Footwear is \$175,999.80. The \$175,999.80 is comprised of \$118,609.20 worth of goods that were never delivered to Fulcrum plus \$18,954 worth of goods as to which there was no proof of whether the goods were or were not shipped, plus \$38,036.60 that Fulcrum agrees it owes to Associated Footwear.

The answer further states that a \$60,000 payment was made in exchange for new goods and merchandise that Associated Footwear agreed to manufacture for Fulcrum's Fall "After the Stork" line. The "After the Stork" label was affixed to the shoe and cannot be removed without damaging the shoe. Associated Footwear states that it "would not have otherwise provided the manufacturing without advance payment except for this agreement". *See* Associated Footwear's Answer, Affirmative Defenses and Counterclaim, Docket No. 4, at

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<sup>4</sup>The arithmetic is out of balance by \$400. We will use the amount stated in the proof of claim (\$39,498.65) for purposes of this Memorandum Opinion. We note that the answer at paragraph 20 states that the amount stated in the proof of claim accounted for all of Fulcrum's claims and credits, applied offsets of mutual debts, including the alleged preferential payments, resulting in an unpaid balance due to Associated Footwear of \$39,498.65.

<sup>5</sup>Fulcrum has never filed an objection to Associated Footwear's claim.

24. Associated Footwear also avers that the payment was in the ordinary course of the parties' business and was made pursuant to ordinary business terms.

*Motion for Summary Judgment*

In January of 2001, Fulcrum filed a motion for summary judgment.<sup>6</sup>

The transactions at issue are divided by Fulcrum into 3 categories:

- (1) \$60,000 in payments by Fulcrum to Associated Footwear which Fulcrum claims are preferential; Fulcrum asserts entitlement to summary judgment on its claim to avoid preferential payments in the amount of \$60,000 inasmuch as the payments benefitted Associated Footwear and were made under a payment plan to reduce unsecured prepetition debt. *See* Motion for Summary Judgment at 16;
- (2) 14,883 pairs of shoes owned by Fulcrum but held by Associated Footwear which Associated Footwear considered to be abandoned; Fulcrum originally asserted that even under Associated Footwear's version of the facts (*i.e.*, that it sold 10,800 pairs for \$1.00 per pair) it is entitled to judgment, but contends the amount should be at least \$21,600, asserting that the value of the 10,800 pairs was actually \$2.00 per pair. However, by letter November 19, 2002, it amended its demand to be \$10,800;
- (3) invoices and adjustments thereto for goods Fulcrum sold to Associated Footwear and for goods Associated Footwear sold to Fulcrum. Fulcrum asserts entitlement to \$98,064.35<sup>7</sup> with respect to the unpaid invoices, allowing for offsets and accepting Associated Footwear's version of the facts.<sup>8</sup>

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<sup>6</sup>Fulcrum also filed a motion to amend its complaint to add a count for violation of the stay. The court denied the motion to amend the complaint and required that all portions of the motion for summary judgment that related to the amendment be stricken inasmuch as discovery was complete, dispositive motions had been filed, and the proposed amendment sought to introduce to the complaint entirely new transaction(s). Accordingly, only those portions of the motion for summary judgment relating to the original complaint will be addressed herein.

<sup>7</sup>Although the motion for summary judgment uses \$98,064.35, at the hearing the amount was stated to be \$98,054.50. The discussion herein is based on the amount stated in the motion.

<sup>8</sup>Fulcrum also asserted entitlement to summary judgment for willful violation of the  
(continued...)

### *I. Preference Payments of \$60,000*

Within the 90 day prepetition preference period Fulcrum issued three \$20,000 payments to Associated Footwear for a total of \$60,000, representing amounts owed to Associated Footwear on an antecedent debt for merchandise previously delivered to Fulcrum. Those payments occurred on May 19, 1998, June 8, 1998, and June 15, 1998, relating to invoices dated between October 22, 1997, and February 26, 1998. The invoices were net 30 days, with due dates between November 21, 1997, and March 28, 1998. Associated Footwear, however, avers that the payment was in the ordinary course of business and was made pursuant to ordinary business terms and thus falls under the exception to preference payment outlined in §547(c)(2).

For a payment to qualify under the exception of §547(c)(2), a creditor must prove by a preponderance of the evidence three statutory conjunctive elements: (1) the debtor incurred the underlying debt in the ordinary course of business of the debtor and the transferee; (2) the debtor made the transfer in the ordinary course of business or financial affairs of the debtor and the transferee; and (3) the payment was made according to ordinary business terms. At issue in this case is the third prong of this test. This prong involves an objective test regarding the billing practices generally within the relevant industry as opposed to the subjective test relating solely to the dealings between the parties set forth in the previous prong. *In re Sacred Heart Hospital of Norristown*, 200 B.R. 114, 116 (Bankr.E.D.Pa. 1996).

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<sup>8</sup>(...continued)

stay. However, the complaint only seeks turnover under §542 and avoidance of preferential transfers under §547. Fulcrum withdrew its claim for violation of the stay. *See* Reply Brief in Support of Plaintiff's Motion for Summary Judgment, Docket No. 41, at 1, ¶4.

The phrase “ordinary business terms” refers to “the range of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage.” *In re Molded Acoustical Products, Inc.*, 18 F.3d 217, 224 (3d Cir. 1994), quoting *Matter of Tolona Pizza Products Corp.*, 3 F.3d 1029, 1033 (7th Cir. 1993). “[O]nly dealings so [unusual] as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C.” *Molded Acoustical*, 18 F.3d at 224. Where the debtor's industry is different than the creditor's industry, the court in *Sacred Heart* held, after reviewing cases from other circuits, that the focus must be on the creditor's industry. *Sacred Heart*, 200 B.R. at 118-19.

At the hearing on May 17, 2002, Associated Footwear's counsel represented that Associated Footwear normally deals with the retail shoe industry, not the catalogue industry. Of Associated Footwear's 200 customers, only two, one of which is Fulcrum, are catalogue companies; the rest are retail stores. In his affidavit, Harold Hoffman, Senior Executive Vice President of Associated Footwear, stated that in his experience

while the payment arrangements with Fulcrum were not common to the way Associated Footwear did business with its other customers, such payment arrangements are common in the retail business for customers with seasonal cash flow problems such as catalog[ue] business.

Catalog[ue] business is not the same as regular retail business and cannot be compared. It is not unusual in the catalog[ue] business to have payment plans geared toward seasons as we did with Fulcrum, and to frequently adjust the arrangement, so this type of arrangement is well within the range of financing arrangements which exist in the industry given a customer like Fulcrum.

Affidavit of Harold Hoffman in Support of Defendant's Brief in Response to Plaintiffs' Motion for Summary Judgment, Dkt. #40 at ¶¶ 3, 4. At the May 17, 2001, hearing, counsel for Fulcrum took exception to use of the affidavit because it was not provided in discovery. I agree and will not consider it. However, whether the affidavit is used or not, the only evidence concerning the catalogue business is that Associated Footwear dealt with two catalogue companies. One was Fulcrum which Associated Footwear had on a payment plan throughout the parties' history and the other was a company that was not on a payment plan. The question here is what is the relevant industry: the entire shoe trade or the catalogue business. I find from the evidence that the industry is the retail shoe trade. Thus, although within that industry, Associated Footwear may employ payment terms applicable to the catalogue business differently from other purchasers, there is insufficient evidence of record to show what is typical within the entire retail shoe industry or even the catalogue business. The evidence informs only as to two catalogue purchasers, and then only as to Associated Footwear's dealings with those two entities. Associated Footwear did not deal uniformly even with the two catalogue customers it had. What is clear is that as between Fulcrum and Associated Footwear the entire course of dealing involved Associated Footwear requiring Fulcrum to adhere to a payment plan due to Fulcrum's poor payment history.

In his deposition, Mr. Jonas (no title given) acknowledged that Associated Footwear did not place any of its other 200 customers on a payment plan similar to that which Fulcrum was on and that Fulcrum's payment plan was "extremely unusual". Harold Hoffman and Stephen Jonas (Joint) Deposition at 168: 6-12. This testimony encompasses the other catalogue company with which Associated Footwear does business. Therefore, even

according to Associated Footwear, this payment plan was unusual in the creditor's industry - the retail shoe industry.<sup>9</sup>

However, it may not be so far outside the broad range as to be deemed extraordinary and outside the scope of §547(c). “[T]he more cemented (as measured by its duration) the pre-insolvency relationship between the debtor and the creditor, the more the creditor will be allowed to vary its credit terms from the industry norm yet remain within the safe harbor of §547(c)(2).” *Molded Acoustical*, 18 F.3d at 225. As this court previously stated, “the far more telling questions are how long the parties transacted business before the preference period and what variations in their relationships occurred during that period.” *In re Color Tile, Inc.*, 239 B.R. 872, 874 (Bankr.D.Del. 1999).

Specifically, if there is a longstanding relationship between the debtor and creditor, the objective test acknowledged by *Sacred Heart* is one where the relationship departs “so grossly from what has been established as the pertinent industry's norms that they cannot be

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<sup>9</sup>In his subsequent affidavit, Associated Footwear's Senior Executive Vice President Harold Hoffman states that "while the payment arrangements with Fulcrum were not common to the way Associated Footwear did business with its other customers, such payment arrangements are common in the retail business for customers with seasonal cash flow problems such as catalog[ue] business." Affidavit of Harold Hoffman in Support of Defendant's Brief in Response to Plaintiffs' Motion for Summary Judgment, Docket No. 40, at ¶3. He also explained that there cannot be a comparison between catalogue and retail businesses inasmuch as it is not unusual to have payment plans geared toward seasons in the catalogue business. *Id.* at 4. However, courts have held that where the court is “highly critical of efforts to patch up a party's deposition with his own subsequent affidavit” and “where deposition and affidavit are in conflict, the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken.” *Russell v. Acme-Evans Co.*, 51 F.3d 64, 67-68 (7th Cir. 1995). *See also Bird v. Kansas Dept. of Transp.*, 928 P.2d 915 (Kan. App. 1996). In this case, the statements were actually made by Mr. Jonas in their joint deposition and then clarified by Mr. Hoffman in an affidavit. Regardless, I accept as a fact that the Fulcrum payment plan was unusual in both the catalogue industry and in the retail shoe industry.

seriously considered usual and equitable with respect to other creditors.” *Sacred Heart*, 220 B.R. at 117. A three year relationship was determined to be longstanding in *Color Tile*. *Color Tile*, 239 B.R. at 875. In *Molded Acoustical*, 18 F.3d at 228, an eighteen-month prepetition relationship was notable. In *Sacred Heart*, 220 B.R. at 117, sixteen months was held not to be a longstanding term. In this case, the payment relationship in question between Associated Footwear and Fulcrum was also longstanding, having existed from 1996 to 1998 (Fulcrum filed for bankruptcy on June 30, 1998). Therefore, as long as the relationship does not depart so grossly from what is established as the creditor's industry's norms, the payment may fall within ordinary business terms.

In this case, Mr. Hoffman admits that the arrangement between Associated Footwear and Fulcrum required constant amendments to the payment plan due to the nature of Fulcrum's catalogue business and its inability to pay in a timely manner. Moreover, Associated Footwear would regularly personally pressure Fulcrum to pay. Deposition of Harold Hoffman and Stephen Jonas at 168:24 to 169:23.

The entire relationship between Associated Footwear and Fulcrum was based on a payment plan. The record establishes that there was no material variation in their relationship pre- and post-filing. In light of the testimony concerning the course of dealing between the parties pre- and postpetition, the payments at issue were according to ordinary business terms and qualify under §547(c)(2) as an exception to preference payments. Therefore, Fulcrum's motion for summary judgment is denied with respect to the \$60,000, and I find that the transfers are not avoidable.

## *II. Abandonment*

Fulcrum shipped 14,883 pairs of shoes to Associated Footwear prepetition, which Associated Footwear did not want, originally invoiced at \$2.25 per pair but later reduced to \$2.00 per pair. Associated Footwear asked Fulcrum for instructions to return them but also agreed to hold them, store them for a fee, and to try to sell them. Fulcrum never provided Associated Footwear with instructions regarding disposal of the shoes. Associated Footwear sold 10,800 pairs for \$1.00 per pair. Fulcrum originally demanded payment at the invoice rate of \$2.00 per pair. However, by letter dated November 19, 2002, Fulcrum agreed, for purposes of this motion, to a value of \$1.00 per pair. Thus, it seeks \$10,800. Associated Footwear claims that Fulcrum abandoned the shoes and is not entitled to payment.

I find that Fulcrum did not abandon the shoes. Silence is insufficient to demonstrate abandonment. *See Central Oregon Fabricators, Inc. v. Hudspeth*, 977 P.2d 416, 421 (Ore. App.) *review denied* 994 P.2d 119 (Ore. 1999) (TABLE), *clarification denied* 998 P.2d 740 (Ore. App. 2000); *Davis v. Suggs*, 460 N.E.2d 665, 668 (Ohio App., 12 Dist., 1983). In this case, Associated Footwear argues that Fulcrum was silent as to the 14,883 pairs of shoes. However, it also acknowledges that it agreed to store the goods for Fulcrum for a storage fee and that it agreed to try to sell the goods on behalf of Fulcrum. Deposition of Harold Hoffman and Stephen Jonas at 262:24 to 263:4. Moreover, Associated Footwear charged Fulcrum storage fees which further evidences the fact that it did not consider the goods abandoned by Fulcrum. Deposition of Harold Hoffman and Stephen Jonas at 257:23 to 258:19. Furthermore, Associated Footwear did not file a motion seeking to have the goods abandoned as required by §554.

Therefore, there is insufficient evidence to establish that the goods were abandoned and Associated Footwear must pay the value of the shoes back into the estate. According to the evidence submitted by the parties, within a reasonable time after gaining possession of the goods, Associated Footwear sold the 10,800 pairs of shoes to a third party for \$1.00 per pair. The sale is the best evidence of value. Accordingly, an order will be issued directing Associated Footwear to remit \$10,800 less storage charges of \$1,532.00 to the bankruptcy estate, for a total of \$9,268.00.

The remaining 4,083 pairs of shoes are still held by Associated Footwear. However, Associated Footwear is unable to sell them because Fulcrum sold the trademark to dELIA\*s which in turn sold it to Birthday Express. These shoes either have been abandoned by Fulcrum or have zero value inasmuch as Fulcrum sold the trademark and no longer can realize the value of the shoes.

Summary judgment will be entered in favor of Fulcrum in the amount of \$9,268.00.

### *III. Set-off*

The invoices are divided into "Fulcrum Invoices" and "Associated Footwear Invoices". The Fulcrum Invoices represent goods sold to Associated Footwear by Fulcrum and total \$262,084.50. After adjustments, the parties agree that balance owed to Fulcrum is \$136,101.15. The Associated Footwear Invoices for goods Associated Footwear sold to Fulcrum total \$175,599.80 of which \$118,609.20 worth of goods was not delivered and there is no documentation with respect to goods worth \$18,954.00 more. According to Fulcrum, Associated Footwear established that only \$38,036.60 of the \$175,599.80 in goods were actually delivered to Fulcrum. Fulcrum therefore has agreed that its claim of \$136,101.15

should be reduced by the \$38,036.60 it owes Associated Footwear, leaving a balance due to Fulcrum of \$98,064.55. Fulcrum seeks summary judgment for \$98,064.55.

Associated Footwear argues that it provided new value to Debtor through the sale of undelivered goods. However, Debtor never received the goods and no new value was provided. Associated Footwear is not entitled to the windfall it seeks and the new value defense is not available under these circumstances.

Associated Footwear also wants to set off against the \$98,064.55 certain amounts allegedly owed to it by Fulcrum for goods that Associated Footwear sold but never delivered to Fulcrum. Associated Footwear continues to hold these undelivered goods and contends that Fulcrum breached the contract. As I ruled on the record on May 17, 2001, if I were to permit a setoff against what Associated Footwear owes to Fulcrum (\$98,064.55) with an invoice (\$136,101.15) issued to Fulcrum for goods that were not delivered, I may be permitting Associated Footwear to “double-dip.” That is, it would have the goods worth \$136,101.15 and receive a credit for \$98,064.55 against the non-payment of those same goods. However, Associated has not yet proven its damages, if any, and I cannot rule. Inasmuch as Associated Footwear filed a proof of claim for \$39,498.65 and Debtor has not objected, that amount may be its allowed unsecured claim. However, I am not able to calculate the claim based on the evidence of record. Thus, I will set a status conference to discuss the issue.

*Issues Remaining Open*

The remaining issue is whether Associated Footwear's counterclaim for damages is pre- or postpetition inasmuch as the contract was entered into prepetition but the obligation to ship the shoes was postpetition. The date by which Fulcrum's duty to cancel or terminate took effect must also be addressed. Thus, Fulcrum's motion for summary judgment regarding setoff cannot be granted. Whether Associated Footwear will be entitled to any offset against the \$98,064.55 it owes to Fulcrum depends on the outcome of further proceedings.

An appropriate order will be entered.

DATE: April 14, 2003

\_\_\_\_\_  
/s/  
Judith K. Fitzgerald  
Chief Judge, U.S. Bankruptcy Court

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Fulcrum Direct, Inc. and	(
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	(
Plaintiff(s)	(
	(
v.	( Adversary No. 99-251
	(
Associated Footwear, Inc.	(
	(
Defendant(s)	(

**JUDGMENT ORDER**

**AND NOW**, to-wit, this 14th day of **April, 2003**, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED, ADJUDGED, and DECREED** that Debtor's Motion for Summary Judgment is granted in part and denied in part as follows:

(1) As to the prepetition payment of \$60,000, it is **ORDERED, ADJUDGED and DECREED** that the payment was not a preference and Fulcrum's motion for summary judgment is **DENIED**.

(2) As to the 14,883 pairs of warehoused shoes, it is **ORDERED, ADJUDGED and DECREED** that judgment is entered in favor of Fulcrum Direct, Inc., and against Associated Footwear, Inc., in the amount of \$9,268.

(3) As to the unpaid invoice issued by Fulcrum Direct, Inc., to Associated Footwear, Inc., with a balance due of \$98,064.55, it is **ORDERED, ADJUDGED and DECREED**, that the defense of new value is not available and Debtor has established that it is owed \$98,064.55 by Associated Footwear. However, whether Associated Footwear, Inc., is entitled to offset any of the \$98,064.55 against its alleged damages for Fulcrum's alleged breach of contract requires further evidence. Therefore, entry of a judgment on this issue is deferred pending further order.

(4) A status conference to discuss all remaining issues and to set trial on Associated Footwear's claim for damages based on the unshipped shoes (i.e., invoiced but not delivered to Debtor) will be held on **May 19, 2003**, at **11:30 a.m.**, in the Bankruptcy Court for the District of Delaware, 824 Market Street, Wilmington, Delaware.

It is **FURTHER ORDERED** that each party is to bear its own costs.

\_\_\_\_\_  
/s/  
Judith K. Fitzgerald  
Chief Judge, U.S. Bankruptcy Court

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