491 B.R. 379
United States Bankruptcy Court,
S.D. New York.

In re **QUEBECOR** WORLD (USA), INC., et al., Debtors.
Eugene I. Davis, as Litigation Trustee for the **Quebecor** World Litigation Trust, Plaintiff,
v.
R.A. Brooks Trucking, Co., Inc., Defendant.

Bankruptcy No. 08–10152 (SHL). | Adversary No. 10–02212 (SHL). | April 23, 2013.

Synopsis
Background: Trustee of liquidation trust established under debtor's confirmed Chapter 11 plan brought adversary proceeding to avoid debtor's allegedly preferential payments to trucking company that provided it with transportation services. Parties cross-moved for summary judgment.

Holdings: The Bankruptcy Court, Sean H. Lane, J., held that:

[1] in assessing whether debtor's preference-period payments to trucking company were generally consistent with its payments during pre-preference period, court would use longer, two-year pre-preference period;

[2] court would not measure "ordinariness" of preference period payments based upon whether periods of time separating trucking company's invoices and debtor's payments thereon during preference period fell within the minimum and maximum payment delays established by parties' prior course of dealing; and

[3] debtor's preference period payments, to extent that they were made more than 45 days after invoice date, were not "ordinary."

Trustee's motion granted in part; debtor's motion denied.

West Headnotes (19)

[1] **Bankruptcy**
Recovery of preferences or fraudulent conveyances
Bankruptcy
Claims or proceedings against estate or debtor; relief from stay
Bankruptcy
Bankruptcy judges
Bankruptcy
Construction, execution, and performance

Bankruptcy court, even as non-Article-III court, had constitutional authority to finally adjudicate preference claims asserted by trustee of liquidation trust established under debtor's confirmed Chapter 11 plan against trucking company that had provided prepetition transportation services to debtor, and that had filed proof of claim for amounts still owing, given that court would have to determine that trucking company was not transferee on unrepaid, avoidable transfer as prerequisite to allowing its claim, and that preference claims would necessarily be resolved as part of claims allowance process. 11 U.S.C.A. §§ 502(d), 547(b).

Cases that cite this headnote

[2] **Bankruptcy**
Bankruptcy Jurisdiction
Bankruptcy
Claims or proceedings against estate or debtor; relief from stay
Bankruptcy
Consent to or Waiver of Objections to Jurisdiction or Venue

Bankruptcy court lacks final adjudicative authority over even a "core" claim, where (1) claim at issue does not fall within "public rights" exception; (2) claim would not necessarily be resolved in ruling on creditor's proof of claim; and (3) parties do not unanimously consent to final adjudication by non-Article-III tribunal.

Cases that cite this headnote

[3] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

"Ordinary course of business" exception to preference statute protects recurring, customary credit transactions that are incurred and paid in ordinary course of business of debtor and debtor's transferee. 11 U.S.C.A. § 547(c)(2).

Cases that cite this headnote

[4] **Bankruptcy**
Preferences
Bankruptcy
Preferences

Defendant asserting that alleged preference was made in "ordinary course" of debtor's business bears burden of proving this affirmative defense, and must do so by preponderance of evidence. 11 U.S.C.A. § 547(c)(2).

Cases that cite this headnote

[5] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

Determining whether alleged preferential transfer was "made in the ordinary course of business or financial affairs of the debtor and the transferee" requires subjective examination of whether transfer was ordinary between the parties to transaction. 11 U.S.C.A. § 547(c)(2)(A).

3 Cases that cite this headnote

[6] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement
Bankruptcy
Preferences

While late payment is presumptively nonordinary, preference defendant can rebut this presumption, and assert "ordinary course of business" defense even as to payments that were not timely made, if late payments were standard course of dealing between parties. 11 U.S.C.A. § 547(c)(2)(A).

Cases that cite this headnote

[7] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

Among factors considered by bankruptcy courts in assessing, for preference avoidance purposes, the "ordinariness" of challenged payment between parties are the following: (1) prior course of dealing between parties, (2) amount of payment, (3) timing of payment, (4) circumstances of payment, (5) presence of unusual debt collection practices, and (6) changes in means of payment. 11 U.S.C.A. § 547(c)(2)(A).

Cases that cite this headnote

[8] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

To demonstrate that allegedly preferential payment was "made in the ordinary course of business or financial affairs of the debtor and the transferee," creditor must establish a "baseline of dealings" between parties, in order to enable court to compare payment practices during preference period with parties' prior course of dealing. 11 U.S.C.A. § 547(c)(2)(A).

6 Cases that cite this headnote

[9] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

To demonstrate that allegedly preferential payment was "made in the ordinary course of business or financial affairs of the debtor and the transferee," creditor must demonstrate some consistency with other business transactions between debtor and creditor. 11 U.S.C.A. § 547(c)(2)(A).

3 Cases that cite this headnote

[10] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

Starting point, and often the ending point, in assessing "ordinariness" of challenged payments between parties, for purpose of deciding whether payments are avoidable as preferences, involves consideration of average time of payment after issuance of invoice during the pre-preference and post-preference periods, the so-called "average lateness" computation theory. 11 U.S.C.A. § 547(c)(2)(A).

4 Cases that cite this headnote

[11] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

To determine, for preference avoidance purposes, whether late payment may still be considered ordinary between parties, bankruptcy courts normally compare degree of lateness of each of the alleged preferences with pattern of payments prior to the preference period to see if alleged preferences fall within that pattern. 11 U.S.C.A. § 547(c)(2)(A).

2 Cases that cite this headnote

[12] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

Historical baseline utilized by court, in assessing whether debtor's preference-period payments to creditor are generally consistent with its payments during pre-preference period, for purposes of deciding whether creditor can successfully assert "ordinary course of business" defense in preference-avoidance proceeding, should be based on time frame when debtor was financially healthy. 11 U.S.C.A. § 547(c)(2)(A).

1 Cases that cite this headnote

[13] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

In assessing whether debtor's preference-period payments to trucking company were generally consistent with its payments during pre-preference period, for purposes of deciding whether trucking company could successfully assert "ordinary course of business" defense to preference-avoidance claims, bankruptcy court would use longer, two-year pre-preference period, as more accurately reflecting parties' ordinary course of dealings during period when debtor was in better financial health. 11 U.S.C.A. § 547(c)(2)(A).

1 Cases that cite this headnote

[14] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

In assessing whether debtor's preference-period payments to trucking company were generally consistent with its payments during

pre-preference period, for purposes of deciding whether trucking company could successfully assert "ordinary course of business" defense to preference-avoidance claims, bankruptcy court would not measure "ordinariness" of preference-period payments based upon whether periods of time separating trucking company's invoices and debtor's payments thereon during preference period fell within the minimum and maximum payment delays established by parties' prior course of dealing, as impermissibly capturing outlier payments that skewed analysis of what was "ordinary"; rather, court would instead use "average lateness" method, which looked to average time of payment after issuance of invoice during the pre-preference and preference periods and grouped payments into buckets based on their lateness. 11 U.S.C.A. § 547(c)(2)(A).

5 Cases that cite this headnote

[15] **Bankruptcy**
Normal payment; credit or business transactions; settlement or agreement

Chapter 11 debtor's preference period payments to trucking company that provided transportation services, to extent that they were made more than 45 days after invoice date, a delay substantially in excess of debtor's payments during pre-preference period, when average payment delay was only 27.56 days, and when 88% of all payments were made within 40 days of corresponding invoice, could not be considered "ordinary" between parties, such that trucking company could not successfully assert "ordinary course of business" defense to claims to avoid these more than 45-day-old payments as preferences. 11 U.S.C.A. § 547(c)(2)(A).

2 Cases that cite this headnote

[16] **Interest**
Particular cases and issues

Award of prejudgment interest is within bankruptcy court's discretion in preference-avoidance proceeding. 11 U.S.C.A. § 547(b).

Cases that cite this headnote

[17] **Bankruptcy**
Avoidance rights and limits thereon, in general

Policy of bankruptcy statute governing liability of transferees on avoided transfers is to restore to estate the full value of the asset transferred, thereby compensating estate for loss of "time value" of asset. 11 U.S.C.A. § 550.

Cases that cite this headnote

[18] **Interest**
Particular cases and issues

"Value" to which Chapter 11 estate was entitled to be restored upon avoidance of debtor's preferential payments to trucking company included time value of money paid, or prejudgment interest from date of preferential transfers. 11 U.S.C.A. § 550.

Cases that cite this headnote

[19] **Interest**
Prejudgment Interest in General

Prejudgment interest is not penalty, but is rather viewed as delayed damages to be awarded as component of compensation to prevailing party.

Cases that cite this headnote

Attorneys and Law Firms

***382** ASK Financial LLP, By: Joseph L. Steinfeld, Jr., Esq., John T. Siegler, Esq., Kara E. Casteel, Esq., St. Paul, MN, Edward E. Neiger, Esq., New York, NY, for Eugene I. Davis, as Litigation Trustee for the Quebecor World Litigation Trust.

Jones & Associates, By: Roland G. Jones, Esq., New York, NY, for R.A. Brooks Trucking, Inc.

MEMORANDUM OF DECISION

SEAN H. LANE, Bankruptcy Judge.

Before the Court is a motion for summary judgment filed by plaintiff Eugene I. Davis as Litigation Trustee for the Quebecor World Litigation Trust (the "Plaintiff" or "Trustee") in the above captioned adversary proceeding. Plaintiff seeks to avoid and recover ten alleged preferential transfers totaling $117,370.05 made by Quebecor World (USA), Inc. (the "Debtor") ***383** in the above-captioned Chapter 11 cases to R.A. Brooks Trucking Co., Inc. ("R.A. Brooks" or "Defendant") during the 90 day period before the Debtor filed its Chapter 11 case plus prejudgment interest of $15,191.09. Defendant opposed the motion and filed a cross motion for summary judgment. For the reasons set forth below, the Court grants Plaintiff's motion for summary judgment in large part and denying Defendant's motion for summary judgment.

BACKGROUND

On January 21, 2008, the Debtor filed the underlying bankruptcy case under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "Petition Date"). On May 18, 2009, the Debtor filed its Third Amended Joint Plan of Reorganization of Quebecor World (USA), Inc. and Certain Affiliated Debtors and Debtors–In–Possession (the "Plan"). On July 2, 2009, this Court entered the Findings of Fact, Conclusions of Law, and Order Confirming the Plan (the "Plan").

Pursuant to the Plan, a litigation trust administered by Plaintiff was created to pursue certain claims as defined under the terms of Plan. On January 14, 2010, the Plaintiff filed an adversary proceeding to avoid ten preferential transfers totaling $117,370.05 made by the Debtor to R.A. Brooks within 90 days of the commencement of the Debtor's Chapter 11 case. Specifically, the Plaintiff's complaint seeks to avoid the transfers pursuant to 11 U.S.C. Sections 547, 548, 549, and 502, and to recover the property transferred pursuant to 11 U.S.C. Section 550. In a subsequently filed stipulated order, the Plaintiff agreed to drop its claims under Sections 548 or 549 of the Bankruptcy Code. *See So Ordered Stipulation Dismissing Certain Claims* (ECF. No. 53). As a result, the Plaintiff only seeks remedies pursuant to Sections 502, 547, and 550 of the Bankruptcy Code to avoid certain transfers made during the Preference Period.

There are no material facts in dispute. The Debtor is a corporation engaged in industrial and commercial printing with its principal place of business located at 150 E. 42nd Street, New York, N.Y. 10017. Affidavit of Charles Brooks ¶ 3.[1] The Defendant is a company engaged in the business of supplying transportation services to its customers with its principal place of business located at 5500 Highway 161, North Little Rock, AR 72117. Affidavit of Charles Brooks ¶ 4. The relevant facts regarding the parties' relationship are undisputed. The Debtor and Defendant began their business relationship in 2002 and it continued until the date of petition. Affidavit of Charles Brooks ¶ 5. There was no written contract between Defendant and the Debtor but the Defendant's invoices stated that payment was due within ten days of receipt. Affidavit of Charles Brooks ¶ 6. The Debtor made payments by check that always matched the amounts on the invoices. The Debtor sent Defendant a remittance stub with its checks that indicated to which invoices the check payments applied. Affidavit of Charles Brooks ¶ 8. The parties agree that during the 90 days on or before the Petition Date (the "Preference Period") the Debtor made ten transfers to Defendant totaling $156,130.05, on account of an antecedent debt, from Debtor's corporate banking account. Davis Decl. ¶¶ 7–11. The parties also agree that the Defendant is an unsecured creditor that did not hold a perfected security interest in the assets of the ***384** Debtor with respect to the transfers, and that unsecured creditors will receive less than a 100% distribution under the Plan. *See* Davis Decl. ¶¶ 13–14. Prior to the bankruptcy filing, the Debtor owed $38,760 to the Defendant for services rendered to the Debtor in the 90 days prior to the filing. *See* Exhibit "F" to the Affidavit of Charles Brooks.

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(a) (made applicable to the adversary proceeding by Fed. R. Bankr.P. 7056). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact, and all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Ames Dep't Stores, Inc. v. Wertheim Schroder & Co., Inc.*, 161 B.R. 87, 89 (Bankr.S.D.N.Y.1993). Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence to demonstrate that there is a genuine issue of fact for trial. *See Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. If the non-moving party fails to make such a showing, then the moving party is "entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548; Fed.R.Civ.P. 56(e).

A. Stern v. Marshall

[1] [2] Because this Court is adjudicating a motion for summary judgment, it must consider whether it has the constitutional authority to issue a final decision consistent with *Stern v. Marshall*, —— U.S. ——, 131 S.Ct. 2594, 2609, 180 L.Ed.2d 475 (2011). In *Stern*, the Supreme Court held that a bankruptcy court "lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." *Id.* at 2620. The decision in *Stern* is understood in this district to mean that a bankruptcy court lacks final adjudicative authority over a core claim where all of the following three conditions are met: "1) the claim at issue did not fall within the public rights exception; 2) the claim would not necessarily be resolved in ruling on a creditor's proof of claim; and 3) the parties did not unanimously consent to final adjudication by a non-Article III tribunal. *Weisfelner v. Blavatnik (In re Lyondell Chem. Co.)*, 467 B.R. 712, 719–720 (S.D.N.Y.2012) (internal citations and quotations omitted).

In this case, the Defendant has filed a proof of claim. *See* Davis Decl., Ex. F. The Plaintiff's claims would necessarily be resolved in ruling on the Defendant's proof of claim as a result of Section 502(d) of the Bankruptcy Code, which provides that "the court shall disallow any claim of any entity ... 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 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." 11 U.S.C. § 502(d). Accordingly, the Court has the constitutional authority to issue a final judgment in this action. *See Katchen v. Landy*, 382 U.S. 323, 330–31, 335, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) (holding that bankruptcy courts have authority to decide preference actions where the defendant has filed a proof of ***385** claim); *Langenkamp v. Culp*, 498 U.S. 42, 45, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990) (holding that a defendant in a preference action that has filed a proof of claim is not entitled to a jury trial).

B. Preferential Transfers and the Ordinary Course of Business Defense

To be recoverable as a preferential transfer, a payment must satisfy all of the requirements of 11 U.S.C. Section 547(b). The Trustee bears the burden of proving the transfers were:

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such Transfers were made;
>
> (3) made while the debtor was insolvent;
>
> (4) on or within ninety (90) days before the date of filing of the petition; and
>
> (5) enable the benefited creditor to receive more than such creditor would have received had the case been a chapter 7 liquidation and the creditor not received the transfer.

11 U.S.C. § 547(b).

Here, it is undisputed that the Debtor's payments to Defendant meet the criteria of Section 547(b), and therefore are preferences as defined by the Code. Defendant argues that, although it received preferential payments, those payments fall under the so called "ordinary course of business" exception in 11 U.S.C. Section 547(c)(2) that makes them unrecoverable by the Trustee. Section 547(c)(2) of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), provides that:

> (c) The trustee may not avoid under this section a transfer—
>
> (2) to the extent that such 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 such transfer was—
>
> (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
>
> (B) made according to ordinary business terms.

11 U.S.C. § 547(c)(2).[2]

The BAPCPA Amendments made the test for an ordinary course of business defense disjunctive, allowing a defendant to prevail by proving either the so called "subjective" test under Section 547(c)(2)(A), or the so called "objective" test under Section 547(c)(2)(B). *See Jacobs v. Gramercy Jewelry Mfg. Corp. (In re Fabrikant & Sons, Inc.),* No. 06–12737, 2010 WL 4622449, at *2 (Bankr.S.D.N.Y. Nov. 4, 2010).

[3] The ordinary course of business exception to preference liability protects "recurring, customary credit transactions that are incurred and paid in the ordinary course of business of the debtor and the debtor's transferee." *Official Comm. Of Unsecured Creditors of Enron Corp. v. Martin (In re Enron Creditors Recovery Corp.),* 376 B.R. 442, 459 (Bankr.S.D.N.Y.2007) (quoting *Sender v. Heggland Family Trust (In re Hedged–Investments Assocs.),* 48 F.3d 470, 475 (10th Cir.1995)). The purpose of the exception is to "leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or [its] creditors during the debtor's slide into bankruptcy." *Lawson v. Ford Motor Co.* ***386** *(In re Roblin Indus., Inc.),* 78 F.3d 30, 41 (2d Cir.1996) (quoting H.R.Rep. No. 95–595 (1978) at 373, *Reprinted in* 1978 U.S.C.C.A.N. 5963, 6329).

[4] [5] [6] [7] A defendant bears the burden of proving its affirmative defense by a preponderance of the evidence. *Id.* at 39; 11 U.S.C. § 547(g). The Defendant here did not supply evidence of "ordinary business terms," a phrase in subsection (B) that refers to the relevant industry practices, but instead invokes subsection (A) that applies to transfers "made in the ordinary course of business or financial affairs of the debtor and the transferee." 11 U.S.C. § 547(c)(2)(A). This section "requires an examination of whether a transfer was ordinary between the parties to the transfer." *Daly v. Radulesco (In re Carrozzella & Richardson),* 247 B.R. 595, 603 (2d Cir. BAP 2000); *see also In re Enron Creditors Recovery Corp.,* 376 B.R. at 459 (stating that the subjective test focuses solely on the prior dealings of debtor and creditor). So while a late payment is usually nonordinary, the defendant can rebut this presumption if late payments were the standard course of dealing between the parties. *See Id.* (quoting 5 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 504.04[2][ii], at 547–55 (16th ed. 2010) ("COLLIER")). In determining whether a transfer satisfies the requirements of Section 547(c)(2)(A), courts examine several factors including "(i) the prior course of dealing between the parties, (ii) the amount of the payment, (iii) the timing of the payment, (iv) the circumstances of the payment, (v) the presence of unusual debt collection practices, and (vi) changes in the means of payment." *Buchwald Capital Advisors LLC v. Metl–Span I., Ltd. (In re Pameco Corp.),* 356 B.R. 327, 340 (Bankr.S.D.N.Y.2006); *Official Comm. of Unsecured Creditors of 360networks (USA) Inc. v. U.S. Relocation Servs. (In re 360networks (USA) Inc.),* 338 B.R. 194, 210 (Bankr.S.D.N.Y.2005); *see also Hassett v. Goetzmann (In re CIS Corp.),* 195 B.R. 251, 258 (Bankr.S.D.N.Y.1996) (stating that the court typically examines several factors including the prior course of dealing between the parties, the amount of the payment, the timing of the payment, and the circumstances surrounding the payment).

[8] [9] [10] [11] The creditor must establish a "baseline of dealings" between the parties in order to "enable the court to compare the payment practices during the preference period with the prior course of dealing." *In re Fabrikant & Sons, Inc.,* 2010 WL 4622449, at *3; *Cassirer v. Herskowitz (In re Schick),* 234 B.R. 337, 348 (Bankr.S.D.N.Y.1999). The creditor must "demonstrate some consistency with other business transactions between the debtor and the creditor." *In re Fabrikant & Sons, Inc.,* 2010 WL 4622449, at *3. "The starting point—and often ending point—involves consideration of the average time of payment after the issuance of the invoice during the pre-preference and post-preference periods, the so-called 'average lateness' computation theory." *Id.* "To determine whether a late payment may still be considered ordinary between the parties, a court will normally compare the degree of lateness of each of the alleged preferences with the pattern of payments before the preference period to see if the alleged preferences fall within that pattern." 5 COLLIER ¶ 504.04[2][ii], at 547–55. Generally, this involves a comparison of the average number of days between the invoice and payment dates during the pre-preference and preference periods. *See In re Fabrikant & Sons, Inc.,* 2010 WL 4622449, at *4; *Hassett v. Altai, Inc. (In re CIS Corp.),* 214 B.R. 108, 120 (Bankr.S.D.N.Y.1997).

***387 C. Defendant's Ordinary Course of Business**

Defense
The Court must first determine the appropriate pre-preference time period to use in establishing a baseline of dealings between the parties. Plaintiff's analysis uses historical data for two years reaching back to October 2005, while Defendant's analysis uses historical data for approximately one year reaching back to November 2006. The parties disagree as to the appropriate pre-preference data sufficient to establish a baseline of dealings between the parties.

[12] The Seventh Circuit in *In re Tolona Pizza Prods. Corp.* stated that the transfers at issue should "conform to the norm established by the debtor and creditor in the period before, preferably well before, the preference period." 3 F.3d 1029, 1032 (7th Cir.1993). Numerous decisions support the view that the historical baseline should be based on a time frame when the debtor was financially healthy. *See, e.g., In re Carled, Inc.*, 91 F.3d 811 (6th Cir.1996); *In re Molded Acoustical Products, Inc.*, 18 F.3d 217 (3rd Cir.1994); *In re Meridith Hoffman Partners*, 12 F.3d 1549 (10th Cir.1993); *Moltech Power Sys. v. Tooh Dineh Indus.*, 327 B.R. 675 (Bankr.N.D.Fla.2005) (noting that some courts have indicated that a pre-preference baseline should be established by focusing on a period well before the debtor experienced financial problems.); *Gonzales v. DPI Food Prod. Co. (In re Furrs Supermarkets, Inc.)*, 296 B.R. 33 (Bankr.D.N.M.2003) (determining the comparison of ordinariness should be preferably well before the preference period and before the debtor starting experiencing financial problems).

[13] Plaintiff used a weighted average analysis[3] that revealed a weighted average during the Preference Period of 57.16 days from invoice to payment, whereas the Defendant's analysis revealed a weighted average of 52 days during the Preference Period, a difference of five days. During the historical period, Plaintiff's analysis revealed a weighted average of 27.57 days from invoice to payment, while the Defendant's analysis revealed a weighted average of 35 days, a difference of seven days. Although the difference between looking back one or two years is not substantial, the Court adopts the longer period suggested by the Plaintiff because it more accurately reflects the parties' ordinary course of dealings during the period when the Debtor was in better financial health.

[14] The Court turns next to the method for determining how the payments during the Preference Period measure up against the payments made during the historical period. Defendant applied the total range method, which considers any Preference Period payment ordinary as long as it was paid within the minimum and maximum days to pay during the historical period. Such a theory, however, has previously been rejected as impermissibly expanding the ranges of ordinary transactions. *See In re M. Fabrikant & Sons, Inc.*, 2010 WL 4622449, *3 n. 2.; *In re CIS Corp.* 214 B.R. at 120 (Bankr.S.D.N.Y.1997). The Court rejects it here as well because that proposed methodology captures ***388** outlying payments that skew the analysis of what is ordinary. The Court turns instead to the more commonly used "average lateness" method, which looks to the average time of payment after the issuance of the invoice during the historical and Preference Periods. *In re M. Fabrikant & Sons, Inc.*, 2010 WL 4622449, at *3. In deciding what payments are ordinary, a court reviews the range of payments centered around the average and also groups the payments in buckets by age. *See In re Hechinger Inv. Co. of Delaware, Inc.*, 489 F.3d 568, 578 (3d Cir.2007); *Chapter 11 Estate Liquid. Trust v. Inserts East, Inc. (In re Philadelphia Newspapers, LLC)*, 468 B.R. 712, 716 (Bankr.E.D.Pa.2012).

[15] Both Plaintiff and Defendant provided an analysis of the historical and Preference Period payment history between the parties by using the average lateness method, grouping the payment by age, and providing a weighted average. The Plaintiff here is not seeking to recover any payments made within 11 to 35 days of the invoice date because more than 80 percent of the historical payments were made during that time frame. During the Preference Period, however, few payments were made during that period, with most payment instead coming in the range of 46 to 60 days after the invoice. Pl. Ex. G to Motion for Summary Judgment. Thus, there was a significant disparity between the average payment times during the historical period and the Preference Period. Plaintiff's analysis revealed that the average days to payment was 27.56 days during the historical period compared to 57.16 days during the Preference Period, or a difference of 29.60 days on average. *Id.* Furthermore, Plaintiff's bucketing analysis—examining payments by grouping—revealed that 88 percent of the amount paid during the historical period were paid between 11 and 40 days after receipt of invoice, whereas only 22 percent of the amount paid during the Preference Period were paid during the same range. Pl. Ex. H to Motion for Summary Judgment.

While courts generally permit some deviation from the historical average, a disparity of this magnitude cannot be considered ordinary. *See In re Fabrikant & Sons, Inc.*, 2010 WL 4622449, at *3 (citing *Off. Plan Comm. v. Expeditors Int'l of Wash, Inc. (In re Gateway Pac. Corp.)*, 153 F.3d 915, 918 (8th Cir.1998)) (payments not ordinary when there is a 19–day difference between the time to

payment during the historical period and preference period); *Official Comm. of Unsecured Creditors v. CRST, Inc. (In re CCG 1355, Inc.),* 276 B.R. 377, 383–84 (Bankr.D.N.J.2002) (not ordinary when payments made, on average, 89.50 days after the invoice date during the preference period compared to average of 66.47 days during the parties' four-year business relationship and 73.44 days during the last full year of the relationship [23 day and 16 day difference]; *In re CIS Corp.,* 214 B.R. at 120 (payments not ordinary where paid, on average 51 days after the due date during the pre-preference period and 80 days after the due date during the preference period). [29 day difference]).

Considering the average payment time of about 27 days during the historical period and the grouping of payments by buckets, the Court finds that payments up to 45 days should be considered ordinary under Section 547(c)(2)(A) and not subject to avoidance. *See In re Fabrikant & Sons, Inc.,* 2010 WL 4622449, at *4. These payments amount to approximately $38,760.00, leaving the remaining payments subject to avoidance because they were not made in the ordinary course of business under ***389** Section 547(c)(2)(A).[4]

D. Pre–Judgment Interest

[16] [17] [18] [19] Finally, the Court grants the Trustee's request for pre-judgment interest, which is within a court's discretion for actions brought under 11 U.S.C. Section 547. *In re Pameco Corporation,* 356 B.R. 327, 342 (Bankr.S.D.N.Y.2006); *In re Cyberrebate.com, Inc.,* 296 B.R. 639, 645 (Bankr.E.D.N.Y.2003). Pursuant to Section 550(a), a plaintiff can recover a preferential transfer or its value. 11 U.S.C. § 550(a). The policy of Section 550 is to restore to the estate the full value of the asset transferred to the preferred creditor, thereby compensating the estate for the loss of the time value of the asset. *In re L & T Steel Fabricators, Inc.,* 102 B.R. 511, 521 (Bankr.M.D.La.1989). Value includes pre-judgment interest from the date of the transfer. *Id.* The time value of money is an asset of the estate that should be recovered for the benefit of all creditors under the policy in the Bankruptcy Code, which favors equal treatment for all creditors of a bankruptcy estate. By awarding pre-judgment interest from the date of a preferential transfer, both the estate and the transferee are restored to the economic position each were in prior to the preferential transfers. Pre-judgment interest is not a penalty, but rather is viewed as delayed damages to be awarded as a component of compensation to the prevailing party. *General Motors Corp. v. Devex Corp.,* 461 U.S. 648, 654 n. 10, 103 S.Ct. 2058, 76 L.Ed.2d 211 (1983); *see also West Virginia v. United States,* 479 U.S. 305, 310 n. 2, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987).

CONCLUSION

For the reasons stated above, the Court grants the Plaintiff's motion for summary judgment in large part and denies the Defendant's motion. The Plaintiff shall settle a proposed order on three days' notice.

Footnotes

1 The two affidavits cited in this Decision were submitted by the parties in support of their respective motions. *See* Docket No. 44 (Declaration of Eugene I. Davis) and Docket No. 45 (Affidavit of Charles Brooks).

2 As the wording of the subparts was not changed by BAPCPA in 2005, the case law prior to BAPCPA's enactment as to the requirement of the section remains good law.

3 The weighted average method is a manner of calculating the average days to payments taking into account the sum of each payment by multiplying the amount of the invoice by the days it took to make payment then dividing that value by the total amount of the invoices in the data set. *Forklift LP Corp. v. Spicer Clark–Hurth (In re Forklift LP Corp.),* 2006 WL 2042979, 8–9, 2006 U.S. Dist. LEXIS 50264, 26–27 (D.Del. July 20, 2006). The weighted average takes into account the relative invoice amount and generates an average based on the days to payment and the amount of payments.

4 The adversary claimant sought recovery of $156,130.05 in transfers. But the parties subsequently agree that $38,760 is subject to the so called new value defense under Section 547(c)(4), which provides that a transfer is not avoidable where, generally speaking, a creditor gave "new value to or for the benefit of the debtor." Given the parties' agreement, there is no issue for the Court to resolve on the new value defense.

End of Document

2014 WL 5292981
United States Bankruptcy Court, S.D. New York.

In re: **Quebecor** World (USA), Inc., et al., Debtors.
Eugene I. Davis, as Litigation Trustee for the **Quebecor** World Litigation Trust, Plaintiff,
v.
Clarklift–West, Inc. dba Clarklift Team Power, Defendant.

Case No. 08–10152(JMP) (Jointly Administered) | Adv. Pro. No. 10–1568(SHL) | Signed October 14, 2014

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Chapter 11

MEMORANDUM OF DECISION GRANTING MOTION FOR SUMMARY JUDGMENT

SEAN H. LANE UNITED STATES BANKRUPTCY JUDGE

***1** Before the Court is a motion for summary judgment filed by Plaintiff Eugene I. Davis, Litigation Trustee for the **Quebecor** World Litigation Trust (the "Trustee"). The Trustee asserts that ten transfers totaling $69,207.60 by the debtors to the defendant Clarklift–West, Inc. ("Clarklift"), shortly before the filing of the bankruptcy case, are preferences under Section 547(b) of the Bankruptcy Code (the "Code"). After accounting for undisputed defenses, the Trustee seeks the return of $35,865.58 in preference payments to the estate. Clarklift does not dispute that these transfers are preferences but it asserts the "ordinary course of business" defense under Section 547(c)(2) to exempt these transfers from recovery by the Trustee. For the reasons set forth below, the Court rejects Clarklift's ordinary course of business defense and grants the Trustee's motion for summary judgment.[1]

BACKGROUND

There are no disputed material facts. On January 21, 2008 (the "Petition Date"), the Debtor filed for protection under Chapter 11 of the Code. On May 18, 2009, the Debtor filed its Third Amended Joint Plan of Reorganization of **Quebecor** World (USA), Inc. and Certain Affiliated Debtors and Debtors–In–Possession (the "Plan"). In June of 2009, the Plan was confirmed. Pursuant to the Plan, a litigation trust administered by the Trustee was created to pursue certain claims as defined under the terms of the Plan.

The Debtor and the Defendant have a history of business dealings reaching back to at least 2005. Davis Decl. ¶¶ 18–19; Ex. E [ECF No. 41]. The Defendant was in the business of heavy equipment sales, rental, and service. Davis Decl. ¶¶ 18–19; Ex. I. During the 90 days before the Petition Date (the "Preference Period"),[2] the Debtors made–and the Defendant received–ten (10) transfers totaling $69,207.60 (the "Transfers"). Davis Decl. ¶ 7; Ex. A, Ex. B, Ex. C. These Transfers were made by check from the Debtors' corporate bank account. *Id.* at ¶ 8, Ex. B. At the time the Transfers were made, the Defendant was a creditor of the Debtors and all payments were made on account of antecedent debts. Def.'s Resp. to Statement of Undisputed Facts ¶¶ 16–17. By receiving full payment for these debts, Clarklift acknowledges that it recovered more than it would have in a hypothetical Chapter 7 liquidation because the Plan calls for general unsecured creditors to receive less than 100 cents on the dollar. *Id.* at ¶¶ 19–20. Pursuant to Section 547(f), the Debtors are presumed to have been insolvent during the Preference Period.

***2** The Trustee concedes that $30,514.18 of these Transfers is not subject to avoidance under the "new value exception" of Section 547(c)(4) of the Code. *See* Hr'g Tr. 16:10–19, Feb. 20, 2014 [ECF No. 50]. The Trustee also concedes that another $3,372 qualifies under the ordinary course of business exception of Section 547(c)(2). *Id.* at 17:2–5. After accounting for these reductions, the Trustee seeks the return of $35,321.23 as preference payments, along with prejudgment interest. *Id.* at 22.

DISCUSSION

I. Summary Judgment Standard

It is appropriate for the Court to grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *see* Fed.R.Civ.P. 56(c) (made applicable to the adversary proceeding by Fed. R. Bankr.P. 7056). A genuine dispute of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 244 (1986).

The moving party bears the burden of demonstrating the absence of any genuine dispute of material fact, and all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255–57; *Ames Dep't Stores, Inc. v. Wertheim Schroder & Co., Inc. (In re Ames Dep't Stores, Inc.),* 161 B.R. 87, 89 (Bankr.S.D.N.Y.1993). Thus, the moving party bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine dispute of material fact. *See Celotex,* 477 U.S. at 323. Once the moving party meets this initial burden, the non-moving party must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file" to demonstrate a genuine issue of fact. *Id.* at 324. A court should grant the motion if "the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party." *Bundy Am. Corp. v. Blankfort (In re Blankfort),* 217 B.R. 138, 143 (Bankr.S.D.N.Y.1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986)).

II. Preferential Transfers and the Ordinary Course of Business Defense

To avoid a transfer as preferential under Section 547(b), the Trustee must establish five elements. The transfer must have been made:

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such Transfers were made;
>
> (3) made while the debtor was insolvent;
>
> (4) on or within ninety (90) days before the date of filing of the petition; and
>
> (5) enable the benefited creditor to receive more than such creditor would have received had the case been a chapter 7 liquidation and the creditor not received the transfer.

11 U.S.C. § 547(b).

Clarklift concedes that all five elements have been satisfied here and, therefore, the Transfers qualify as preferential. *See* Def.'s Resp. to Statement of Undisputed Material Facts ¶¶ 13–20 [ECF No. 5045]. Clarklift nonetheless asserts that the $35,321.23 sought by the Trustee is not avoidable because it is exempted under the ordinary course of business defense of Section 547(c)(2). That section provides that a transfer shall not be avoided:

> ***3** (2) to the extent that such 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 such transfer was –
>
> (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
>
> (B) made according to ordinary business terms.

11 U.S.C. § 547(c)(2).

The ordinary course of business defense generally protects "recurring, customary credit transactions that are incurred and paid in the ordinary course of business of the debtor and the debtor's transferee." *Official Comm. of Unsecured Creditors of Enron Corp. v. Martin (In re Enron Creditors Recovery Corp.),* 376 B.R. 442, 459 (Bankr.S.D.N.Y.2007) (quoting *Sender v. Heggland Family Trust (In re Hedged–Investments Assocs.),* 48 F.3d 470, 475 (10th Cir.1995)). The policy behind the defense is to "leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or [its] creditors during the debtor's slide into bankruptcy." *Lawson v. Ford Motor Co. (In re Roblin Indus., Inc.),* 78 F.3d 30, 41 (2d Cir.1996) (quoting H. Rep. No. 95–595 (1977), *reprinted* in 1978 U.S.C.C.A.N. 5963, 6329).

Prior to the 2005 BAPCPA Amendments, a defendant was required to prove both elements of Section 547(c)(2) to establish the ordinary course of business defense. Today, however, the test is a disjunctive one. Thus, a

defendant can prevail by demonstrating either the "subjective" test of Section 547(c)(2)(A) or the "objective" test of Section 547(c)(2)(B). *See Jacobs v. Gramercy Jewelry Mfg. Corp. (In re M. Fabrikant & Sons, Inc.),* Adv. No. 08–1690, 2010 WL 4622449, at *2 (Bankr.S.D.N.Y. Nov. 4, 2010). Clarklift here only invokes Subsection (A), which is the "subjective element that requires an examination of whether a transfer was ordinary between the parties to the transfer." *Daly v. Radulesco (In re Carrozzella & Richardson*), 247 B.R. 595, 603 (2d Cir. BAP2000) (citations omitted). A defendant bears the burden of proving this defense by a preponderance of the evidence. 11 U.S.C. § 547(g)(2).

To determine what is ordinary under Subsection (A), the first step is to establish an historic baseline period as a point of comparison. *See In re Fabrikant,* 2010 WL 4622449, at *3; *see also In re* ***Quebecor*** *World (USA), Inc. (Davis v. R.A. Brooks Trucking Co.),* 491 B.R. 379, 386 (Bankr.S.D.N.Y.2013); *In re Sparrer Sausage Co. Inc.,* BR No. 12 B 04289, 2014 WL 4258103 (citing *In re of Tolona Pizza Prod. (In re Tolona),* 3 F.3d 1029, 1033 (7th Cir.1993)). "The starting point–and often ending point–involves consideration of the average time of payment after the issuance of the invoice during the pre-preference and post-preference periods, the so-called 'average lateness' computation theory." *In re Fabrikant,* 2010 WL 4622449, at *3. Courts suggest examining a period of time "well before" the preference period to establish the baseline. *See Fiber Lite Corp. v. Molded Acoustical Prods. (In re Molded Acoustical Prods., Inc.),* 18 F.3d 217, 223 (3d Cir.1993) (citing *In re Tolona,* 3 F.3d at 1032). This is to reduce the likelihood that the debtor's financial difficulties had already taken hold during the historical period and thus distort otherwise "ordinary" practices under regular financial conditions. *See In re Sparrer Sausage Co. Inc.,* 2014 WL 4528103, at * 1.

4** "Once a baseline is established, the next step is to compare the average time it took the debtor to pay an invoice during the baseline period [with] the time it took the debtor to pay invoices in the preference period." *Id.* at *2. "Generally, this involves a comparison of the average number of days between the invoice and payment dates during the pre-preference and preference periods." *In re Fabrikant,* 2010 WL 4622449, at *4; *see also In re Sparrer Sausage Co. Inc.,* 2014 WL 4528103, at *2. Although a narrow band of difference is acceptable, payments delayed beyond a reasonable amount of time past the pre-preference period average generally do not fall within the ordinary course of business under Section 547(c)(2)(A). *See In re Fabrikant,* 2010 WL 4622449, at *3; *Davis v. All Points Packaging & Distrib., Inc. (In re* ***Quebecor *World (USA), Inc.),* 491 B.R. 363, 370 (Bankr.S.D.N.Y.2013), *aff'd, and adopted sub nom.*, 13 CIV. 3395 KBF, 2013 WL 6233905 (S.D.N.Y. Nov. 25, 2013). In *In re Fabrikant,* for example, the court rejected the argument that any payment is ordinary if it falls anywhere within the minimum and maximum number of days from invoice to payment during the historical period. *In re Fabrikant,* 2010 WL 4622449, at *4. Rather than using a total range as the measure of "ordinary," bankruptcy courts instead "compar[e] of the average number of days between the invoice and payment dates during the pre-preference and preference periods" when analyzing a creditor's ordinary course of business defense. *In re* ***Quebecor*** *World (USA), Inc,* 491 B.R. at 386; *In re Fabrikant,* 2010 WL 4622449, at *3; *Hassett v. Altai, Inc. (In re CIS Corp.),* 214 B.R. 108, 120 (Bankr.S.D.N.Y.1997). When a preference period payment falls beyond the pre-preference mean, therefore, courts typically find that the payment was made outside the ordinary course of business and thus not protected by Section 547(c)(2). *In re* ***Quebecor*** *World (USA), Inc,* 491 B.R. at 386; *In re Fabrikant,* 2010 WL 4622449, at *3; *In re CIS Corp.,* 214 B.R. at 120. Payments of this sort are presumptively non-ordinary unless the defendant can establish that such late payments were the standard course of dealing between the parties. *See In re Fabrikant,* 2010 WL 4622449, at *3*; see also In re Tolona,* 3 F.3d at 1032.

III. Clarklift's Ordinary Course of Business Defense

Applying the methodology above to analyze the parties' payment history, the Defendant's ordinary course of business defense comes up short. The Trustee has analyzed the parties' payment history, including approximately 5 3 3 transfers during the historical period–October 26, 2005, through October 17, 2007–and approximately 82 transfers during the 90–day Preference Period. Davis Decl., Ex. D; Ex. E. During the historical period of their business relationship, for example, 83% of payments to Clarklift were made between 45 and 65 days past the invoice date. Davis Decl., Ex. D; Ex. F. During the Preference Period, however, less than six percent of payments were made during this period. *Id.* By contrast, over 70% of payments during the Preference Period were made between 76 and 85 days. Not surprisingly then, the weighted average time to payment increased from 50.29 days in the historical period to 77.79 days during the Preference Period. This represents a shift of 27.5 days, or 55%. As 99.97% of Preference Period payments were made beyond 60 days, effectively none of these payments were transferred on or around the historical 50–day mean. *Id.*

Courts frequently have held that such a substantial shift in

weighted average time to payment negates a defendant's ordinary course of business defense. *See, e.g., Off. Plan Comm. v. Expeditors Int'l of Wash., Inc. (In re Gateway Pac. Corp.),* 153 F.3d 915, 918 (8th Cir.1998) (payments not ordinary when there is a 19–day difference between the time to payment during the historical period and preference period)*; Official Comm. of Unsecured Creditors v. CRST, Inc. (In re CGG 1355, Inc.),* 276 B.R. 377, 383–84 (Bankr.D.N.J.2002) (not ordinary when payments made, on average, 89.50 days after the invoice date during the preference period compared to an average of 66.47 days during the parties' four-year business relationship and 73.44 days during the last full year of the relationship) [23–day and 16–day difference])*; In re CIS Corp.,* 214 B.R. at 120 (payments not ordinary where paid, on average 51 days after the due date during the prepreference period and 80 days after the due date during the preference period) [29 day difference]).

***5** Clarklift does not dispute the accuracy of these figures nor does it contest the methodology used to derive them. Clarklift instead cites *In re Central Valley Processing, Inc.,* 360 B.R. 676 (Bankr.E.D.Cal.2007), for the proposition that "a 33% to 50% variance in the timeliness of the payment of invoices did not take said transaction(s) out of the 'ordinary course of business.' " Def.'s Opp'n 6:24–7:1. But *Central Valley* is distinguishable. Among other factors, the court in *Central Valley* expressly relied upon "the intervention of the Thanksgiving holiday just prior to the issuance" of the payments. *In re Central Valley,* 360 B.R. at 679. More specifically, the court took "judicial notice of the fact that in 2002 [the preference period year] Thanksgiving was on November 28. The check for payment was written on the following Monday, December 2, and the intervention of that holiday weekend may well have been a factor...." *Id.* at 679. Such a holiday would account for four or five days out of the ten-to-fifteen day delay in payment at issue in the case, a significant percentage. *See id.* (payments at issue were made 10–15 days later than 30 days specified in customer invoices). Given the lack of such unique facts here, the Court is not persuaded that *Central Valley* provides support for Clarklift's ordinary course of business defense. *See also id.* at 677–79 (identifying other problems regarding how the trustee measured the time of payment).

Clarklift also cites to the factors identified in *Buchwald Capital Advisors LLC v. Metl–Span I., Ltd. (In re Pameco Corp.),* 356 B.R. 327, 340 (Bankr.S.D.N.Y.2006), and argues that the majority of those factors support an ordinary course of business defense here. In *Pameco,* the court identified several factors to consider, including "(i) the prior course of dealing between the parties, (ii) the amount of the payment, (iii) the timing of the payment, (iv) the circumstances of the payment, (v) the presence of unusual debt collection practices, and (vi) changes in the means of payment. *Id.* at 340–41; *see also Official Comm. of Unsecured Creditors of 360networks (USA) Inc. v. U.S. Relocation Servs. (In re 360networks (USA) Inc.),* 338 B.R. 194, 210 (Bankr.S.D.N.Y.2005). Citing these factors, Clarklift argues that the parties' Preference Period conduct was consistent with their historical dealings, the amount of the payments did not vary substantially, the circumstances of the payments remained the same, there were no unusual debt collection practices, and that the means of payment remained the same during the Preference Period. Biegler Decl. ¶¶ 7–11.

But the Defendant's reliance on *Pameco* fails for several reasons. First, Clarklift's reading of *Pameco* is inconsistent with this Circuit's jurisprudence. No case in this Circuit has simply counted the number of factors identified in *Pameco* that favor each side as a dispositive formula to determine whether a payment was nonordinary. Instead, courts have articulated that late payments alone are "presumptively nonordinary" and that this presumption may be rebutted only though showing that such late payments "were the standard course of dealing between the parties." *In re Fabrikant,* 2010 WL 4622449, at *3 (quoting 5 Collier ¶ 504.04[2][ii], at 547–55; *In re Tolona,* 3 F.3d at 1032). The focus on the lateness of the payments was recognized by the *Pameco* court. *See In re Pameco Corp.,* 356 B.R. at 340 ("[a]dditionally, payments substantially delayed beyond the due date are not in the ordinary course of business"). So while courts have weighed multiple factors in determining whether the ordinary course of business defense protects a transfer, the existence of some favorable factors identified in *Pameco* does not necessarily compensate for a large shift in mean time to payment.

Second, Clarklift's application of the *Pameco* factors is flawed. While Clarklift cites the first four Pameco factors, it does nothing to establish how these factors favor Clarklift in this case. Def.'s Opp. to Pl.'s Mot. for Summ. J., 5:25–6:19 [ECF No. 42] (citing only to Trustee's exhibits). Indeed, the first four factors in *Pameco* relate in large part to the number and timing of payments. As such, these factors are captured in large measure by the Trustee's extensive analysis of the payment history between the parties. Davis Decl. Ex. E. For the reasons stated above, that payment history does not establish an ordinary course of business defense because it reveals a significant change in the average lateness for payments in the historical period when compared with the Preference Period.

***6** Clarklift fares little better as to the remaining two *Pameco* factors. Clarklift cites a lack of creditor pressure–*Pameco* factor five–but that factor does not necessarily negate a substantial shift in the mean time to payment. "Making payments in response to creditor pressure can often be indicative of transactions out of the ordinary course. But the absence of such creditor pressure, while of course failing to support an out of the ordinary course finding for that reason, does not otherwise establish the opposite." *Ames Merch. Corp. v. Cellmark Paper Inc. (In re Ames Dep't Stores, Inc.),* 450 B.R. 24, 33 (Bankr.S.D.N.Y.2011), *aff'd,* 470 B.R. 280 (S.D.N.Y.2012), *aff'd,* 506 Fed. App'x. 70 (2d Cir.2012). Similarly, consistency in the manner of payment –*Pameco* factor six– does not render a payment ordinary when it is accompanied by a noticeable change in payment timing. *In re Fabrikant,* 2010 WL 4622449, at *3–4. In short, the existence of two *Pameco* factors here simply does not overcome the significant increase in average payment time during the Preference Period.

Clarklift submits only one piece of evidence on its behalf: a letter from **Quebecor** to its suppliers. The letter notes, among other things, that **Quebecor** "look[s] forward to maintaining [its] business relationship with you." Def.'s Opp'n; Ex. 1, ¶ 5. This letter, however, appears to have been sent out to all of **Quebecor's** suppliers, not just the Defendant, and does not mention any specific details pertaining to **Quebecor's** business relationship with Clarklift. *See id.* The document is addressed generically to "**Quebecor** World Supplier" and does not reference Clarklift at any point in the letter. *Id.* For all these reasons, the letter does not support Clarklift's defense.

In sum, the Court rejects Clarklift's ordinary course of business defense, given the undisputed and significant difference in the timing of payments during the historical period and the Preference Period. Nothing in Clarklift's exhibits establishes that late payments of the magnitude described above constituted the "standard course of dealing between the parties." *See* Biegler Decl., Ex. 1 [ECF No. 44]; *see In re Fabrikant,* 2010 WL 4622449, at *3. As such, the Defendant has failed to come forward with evidence sufficient to raise a material issue of fact on the ordinary course of business defense.

IV. Pre–Judgment Interest

Under Section 547 of the Code, Courts have the discretion to grant prejudgment interest. *In re Pameco Corp.,* 356 B.R. at 342. Section 550(a) of the Code allows the Plaintiff to recover the value of property transferred under Section 547. Section 550 serves to restore the estate to the full value of the asset transferred to the creditor. *In re L & T Steel Fabricators, Inc.,* 102 B.R. 511, 521 (Bankr.M.D.La.1989). This value includes interest on the preference payments. *Id.* Prejudgment interest is not a penalty to the creditor. Rather, it compensates the estate for the time value of money it would have earned had the transfer not taken place. Therefore, the Court grants the Trustee's request for interest, which was $544.34 as of the date of filing the motion.

CONCLUSION

For the reasons above, the Court grants the Plaintiff's motion for summary judgment. The estate is entitled to recover $35,865.58, together with applicable interest. The Plaintiff shall submit an order on three days' notice.

IT IS SO ORDERED.

Parallel Citations

60 Bankr.Ct.Dec. 35

Footnotes

1 Because this Court is adjudicating a motion for summary judgment, it addresses whether it has the constitutional authority to issue a final decision in this case consistent with *Stern v. Marshall,* 131 S.Ct. 2594, 2620 (2011) (holding that a bankruptcy court "lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."). Clarklift filed proofs of claim. [Dkt.1999 at 17 (claim 9254 filed May 7, 2009, and claim 9255 filed May 7, 2009)]. The Trustee's preference claims would necessarily be resolved in ruling on the Defendant's proofs of claim as a result of Section 502(d) of the Bankruptcy Code, which provides that "the court shall disallow any claim of any entity ... 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 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." 11 U.S.C. § 502(d). Having subjected itself to this Court by filing proofs of claim, the Court has the constitutional authority to issue a final judgment in this action. *See In re Tronox Inc.,* 503 B.R. 239, 344–45 (Bankr.S.D.N.Y.2013) (citing *Katchen v. Landy,* 382 U.S. 323 (1966) and *Langenkamp v. Culp,* 498 U.S. 42 (1990)); *see also*

Davis v. R.A. Brooks Trucking Co. (In re Quebecor World (USA), Inc.), 491 B.R. 379, 384 (Bankr.S.D.N.Y.2013).

2 The parties agree that the Preference Period was from October 23, 2007, to January 21, 2008.