**The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.**

Mary Ann Whipple
United States Bankruptcy Judge

**Dated: October 31 2005**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| In Re: | ) | Case No.: 02-35491 |
| RN Building Materials, | ) | Chapter 7 |
| Debtor. | ) | Adv. Pro. No. 04-3343 |
| Bruce C. French, Trustee, | ) | Hon. Mary Ann Whipple |
| Plaintiff, | ) | |
| v. | ) | |
| Haas Cabinet Co., Inc., | ) | |
| Defendant. | ) | |

**MEMORANDUM OF DECISION**
**REGARDING MOTIONS FOR SUMMARY JUDGMENT**

This adversary proceeding is before the court on the parties' cross motions for summary judgment [Doc. ## 24 and 25], their responses [Doc. ## 26 and 27]and Defendant's reply [Doc. # 28]. In this proceeding, Plaintiff, the Chapter 7 Trustee in underlying bankruptcy case number 02-35491, seeks to recover, as preferential transfers, three payments made to Defendant Haas Cabinet Co., Inc., by Debtor within ninety days before filing its bankruptcy petition. The court has jurisdiction over this adversary

proceeding pursuant to 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to recover preferences are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(F). For the reasons that follow, Defendant's motion will be granted and Plaintiff's motion will be denied.

**SUMMARY OF FACTS**

The following facts are undisputed. An involuntary petition for relief under Chapter 7 of the Bankruptcy Code was filed against Debtor, RN Building Materials ("Debtor"), on August 20, 2002, and an order for relief was entered on September 15, 2002. Defendant is in the business of manufacturing and selling kitchen and bath cabinetry, an industry that is small and very competitive. [Doc. # 28, Ex A, ¶ 11]. Defendant regularly sells its products on credit, as is common within the industry, and sold cabinets to Debtor from 1992 until on or about August 20, 2002. Debtor was one of Defendant's largest customers.

The affidavit of Tom Coats, Controller for Debtor, explains the credit relationship between Debtor and Defendant. The stated credit terms during Defendant's relationship with Debtor was 5%/10 net 30, meaning that payment was due within 30 days of the invoice date and that Debtor received a 5% discount on orders paid within ten days of the invoice date. In November 2001, Defendant's invoices to Debtor contained the additional term "C.I.A." or "cash in advance," meaning that Defendant would release new orders as past invoices were paid. [Doc. # 25, Ex. A, ¶ 6]. Nevertheless, according to Coats, it was Defendant's practice to offer accommodations to its largest customers in order to maintain continued business relations and allow them to receive product and remain in business. [*Id.* at ¶ 12]. Thus, notwithstanding the stated credit terms, Defendant accepted orders from and shipped new product to Debtor as long as Debtor made consistent payments on past orders. [*Id.* at ¶ 11].

Debtor's history of payments during the period approximately twelve months before the preference period in this case indicate that Debtor's payments routinely included payment for multiple invoices, often with varying degrees of lateness, and were received, on average, 61 days from the invoice date, or 31 days after the net 30 day stated credit term.[1] [*See id.* at ¶ 10 and Ex. B]. Although Debtor's payment history

[1] Although Coat's affidavit states that payments were received, on average, 67 days from the invoice date, Plaintiff correctly argued that his calculation included payments and credit memos that skewed the true average. Thus, the court's calculation excludes all entries in Defendant's Exhibit B that represent credits and all entries that represent payments earlier than 30 days or later than 100 days, as such payments were the exception rather than the rule. To the extent that Plaintiff also argues that the average calculation does not reflect seasonal influences, there is no evidence in the record indicating that the cabinet industry is affected by any particular season of the year.

shows payments made as early as 7 days and as late as 764 days after the invoice date, such payments were the exception rather than the rule. The vast majority of invoices (over 370 of 554 invoices) were paid between 30 and 69 days after the invoice date. Of those, over 50 were paid between 30 and 40 days after the invoice date and 295 were paid between 50 and 70 days after the invoice date. A "snap-shot" review of Defendant's accounts receivable in August 2002, which accurately reflects its usual business practice, showed that 80 (or approximately 21%) of its 371 credit customers had outstanding account balances whose past due payment time would be equal to or greater than Debtor's past due payment average. [*Id.* at ¶¶ 14, 16]. The amounts owed on those accounts constituted nearly 30% of all amounts owed to Defendant by all of its credit customers. Based on credit information received by Coats from various cabinet companies in the United States that includes information regarding the payment terms and history of a credit applicant, at least some such companies are also willing to extend credit to customers despite the fact that the customer is a slow payer. [Doc. # 28, Ex. A, Coats Aff., ¶¶ 8-10]. A credit reference letter from at least one other cabinet company with similar stated terms of net due in 30 days indicates that it accepts payments from its customer that are 10 to 15 days late, or 40 to 55 days after the invoice date.[2] [*Id.*, Ex. B].

At issue in this case are the following three payments that Debtor made to Defendant during the ninety-day period immediately preceding the filing of the bankruptcy petition:[3]

| Date Paid | Amount |
|---|---|
| 5/30/2002 | $ 7,389.27 |
| 7/12/2002 | $26,222.89 |
| 7/16/2002 | $ 5,064.76 |
| Total | $38,676.92 |

[Pl. Ex. 1, French Aff.] Each payment was made in payment of multiple invoices for goods previously shipped to Debtor. [*Id.;* Def. Ex. C]. All of Debtor's payments to Defendant during the ninety-day preference period were received between 33 and 69 days from the date the goods were shipped and invoiced to Debtor, with the majority of those invoices being paid between 50 and 70 days. On average, the payments during the preference period were received 56 days from the shipping and invoice date.

[2] Although two additional credit reference letters are included in exhibit B, it is not apparent that the company that submitted the letter is a cabinet company.

[3] The court has applied the rule, applicable under § 547(b), that a transfer made by check is deemed to occur on the date the check is honored in setting forth the date the payment was made. *See Barnhill v. Johnson*, 503 U.S. 393, 394-95 (1992).

Defendant employed no additional collection tactics or pressure to encourage any payment at issue in this case. Notwithstanding the payments made, Debtor has an outstanding balance owed to Defendant in the amount of $32,703.13, due in large part to shipment of product after the alleged preferential payments.

Finally, it is undisputed that payments made to Defendant during the 90 days before Debtor's bankruptcy enabled it to receive more than it would have if the transfer had not been made and it received payment to the extent provided under Chapter 7. The funds currently held by the Trustee total approximately $14,400. [Doc. # 24, Ex. 1, ¶ 6]. Having reviewed the assets available for distribution to creditors, anticipated future recoveries and the anticipated allowable claims, the Trustee estimates that a dividend of less than 5% will be paid to holders of allowed unsecured claims. [*Id.* at ¶ 8].

## LAW AND ANALYSIS

### I. Summary Judgment Standard

Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, a party will prevail on a motion for summary judgment when "[t]he 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 judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed.R.Civ.P. 56(c). In order to prevail, movant must prove all elements of the cause of action or defense. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). Once that burden is met, however, the opposing party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *60 Ivy St. Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir. 1987). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986).

In cases such as this, where the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that both parties simultaneously argue that there are no genuine factual issues does not in itself establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Fed.R.Civ.P. 56 does not

automatically entitle the opposing party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

**II. Preferential Transfers Under § 547(b)**

The Trustee seeks to avoid prepetition transfers to Defendant as preferences under 11 U.S.C. § 547(b), which provides as follows:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property–
>
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made–
> (A) on or within 90 days before the date of the filing of the petition; . . .
> (5) that enables such creditor to receive more than such creditor would receive if–
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

While § 547(b) authorizes a trustee to avoid certain prepetition transfers, the Bankruptcy Code excepts from avoidance the types of transfers described in § 547(c), including transfers made in the ordinary course of business or transfers to the extent that the creditor subsequently advanced new value to the debtor. 11 U.S.C. § 547(c)(2) and (4). The Trustee has the burden of proving all five of the elements making a transfer avoidable under § 547(b); however, the party against whom recovery or avoidance is sought has the burden of proving that a transfer is not avoidable under one of the affirmative defenses of § 547(c). 11 U.S.C. § 547(g).

The evidence clearly indicates, and Defendant does not dispute, that it is a creditor of Debtor, that the three transfers in issue were made within 90 days before the bankruptcy petition was filed, and that each transfer was on account of an antecedent debt. Although Plaintiff must also prove that Debtor made the transfers in issue while it was insolvent, there is a statutory presumption of insolvency during the ninety days immediately preceding the filing of bankruptcy. 11 U.S.C. § 547(f). Defendant offers no evidence to rebut that statutory presumption. *See In re Oakes*, 7 F.3d 234 (Table), 1993 WL 339725, *2 (6th Cir. Sept. 3, 1993) (citing *In re Sierra Steel, Inc.,* 96 B.R. 275, 277 (B.A.P. 9th Cir. 1989)) (presumption vanishes only

after transferee comes forward with substantial evidence of solvency). Thus, there is no dispute that all transfers made to Defendant during the ninety days prior to the filing of the bankruptcy petition were made while Debtor was insolvent. Finally, Defendant does not dispute that it received more than it would have received had the transfers not been made and it received its pro rata share of the property of the estate under Chapter 7. As such, there is no factual dispute regarding any element of Plaintiff's preference claim under § 547(b). However, Defendant has raised two of the affirmative defenses set forth in § 547(c) - the "ordinary course of business defense" under § 547(c)(2) and, alternatively, the "subsequent new value" defense under § 547(c)(4). Plaintiff is entitled to judgment only to the extent that there is no genuine issue for trial and Defendant has failed to meet its burden of proof with respect to these affirmative defenses.

**II. Ordinary Course of Business Defense**

Defendant argues that the three transfers at issue made by Debtor are excepted from avoidance under the ordinary course of business defense set forth in § 547(c)(2). Under § 547(c)(2),[4] a trustee may not avoid a transfer to the extent that the transfer was

> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> (C) made according to ordinary business terms.

The Bankruptcy Code does not define "ordinary course of business or financial affairs" or "ordinary business terms." However, the Sixth Circuit explained that "'the ordinary course of business exception to the preference rule is formulated to induce creditors to continue dealing with a distressed debtor so as to kindle its chances of survival without a costly detour through, or a humbling ending in, the sticky web of bankruptcy.'" *Luper v. Columbia Gas of Ohio (In re Carled, Inc.)*, 91 F.3d 811,815 (6th Cir. 1996) (quoting *Fiber-Lite Corp. V. Molded Acoustical Prods., Inc. (In re Molded Acoustical Prods., Inc.*) 18 F.3d 217, 219-20 (3d Cir. 1994). To accomplish this purpose, § 547(c)(2) "protect[s] recurring, customary credit transactions which are incurred and paid in the ordinary course of business of the debtor and the transferee" and "to leave undisturbed normal financial relations, because it does not detract from the general policy of

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[4] The underlying Chapter 7 case and this adversary proceeding were filed before October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 1501(a), 119 Stat. 23 (2005). Thus, the amended version of § 547(c)(2) does not apply to this adversary proceeding.

the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." *Waldschmidt v. Ranier & Assocs. (In re Fulghum Constr. Corp.),* 872 F.2d 739, 743 (6th Cir. 1989).

Subsections (A) and (B) are subjective elements of the § 547(c)(2) defense. Subsection (A) requires proof that the debt was incurred in the ordinary course of business or financial affairs of that debtor and that creditor, and subsection (B) requires that the defendant prove that the debt and its payment are ordinary in relation to other business or financial dealings between that creditor and that debtor. *See Logan v. Basic Distribution Corp. (In re Fred Hawes Org., Inc.)*, 957 F.2d 239, 244 (6th Cir. 1992). In applying subsection (B), courts consider several factors, "'including timing, the amount and manner a transaction was paid and the circumstances under which the transfer was made.'" *Id.* (quoting *Yurika Foods Corp. v. United Parcel Serv. (In re Yurika Foods Corp.*), 888 F.2d 42, 45 (6th Cir. 1989)). Subsection (C) is the objective prong of the defense and requires proof "that the transaction was not so unusual as to render it an aberration in the relevant industry." *Luper v. Columbia Gas of Ohio, Inc. (In re Carled, Inc.)*, 91 F.3d 811, 818 (6th Cir. 1996).

In this case, there is no dispute that Defendant has satisfied subsection (A), that is, that the debt paid during the ninety days before the bankruptcy petition was filed was incurred in the ordinary course of business of Debtor and Defendant. But Plaintiff contends that Defendant has not met its burden of proof under subsections (B) and (C). The court disagrees.

With respect to subsection (B), Defendant has demonstrated that the payments at issue were made in the ordinary course of business between Defendant and Debtor. The evidence before the court indicates that Debtor regularly paid invoices well beyond the stated terms of 30 days from the date of invoice and that, on average, payments were received and accepted by Defendant 61 days from the invoice date. Of the 554 invoices paid by Debtor during the year before the preference period, 373 were paid between 33 and 69 days after the invoice date. By comparison, Debtor's payments during the preference period, as set forth in Defendant's Exhibit C, were received by Defendant an average of 56 days after the invoice date and all were received between 33 and 69 days after the invoice date. While it is true that during the year before the preference period some invoices were paid earlier than 33 days and some were paid later than 69 days, Debtor nevertheless regularly made payments within the same range of time that it made payments during the 90-day preference period. Plaintiff sets forth no facts showing there is a genuine issue for trial as to whether Debtor's payments during the preference period were made in the ordinary course of business

between Defendant and Debtor.

The court rejects Plaintiff's argument that because Exhibit C reflects the date Debtor's check was received by Defendant rather than the date the check was honored by the bank, it should be disregarded. Plaintiff cites *Barnhill v. Johnson*, 503 U.S. 393(1992), in support of this argument. In *Barnhill*, the court decided when a "transfer" by check takes place for purposes of § 547(b), which requires the transfer to have occurred within a specified time before the filing of the bankruptcy petition. *Id.* Although § 547(c)(2) previously required that a payment had to have been made within 45 days of when the underlying debt was incurred to qualify as a payment in the ordinary course of business, the Court noted that the requirement has been eliminated and "courts now need only focus on whether the transfer was made in the ordinary course of business." *Id.* at 402 n. 9. As such, the court finds that the comparison of when payments were *received* from Debtor during the preference period with when payments were *received* during the year before the preference period permits an apples to apples comparison such that the court can determine the ordinary course of business between Debtor and Defendant. *See Brown v. Shell Canada Ltd. (Tennessee Chemical Co.)*, 112 F.3d 234, 237-38 (6th Cir. 1997) (finding that the date of receipt rule furthers the policy considerations that underlie § 547(c)).

The court also rejects Plaintiff's suggestion that Debtor's payments were not in the ordinary course of business due to the fact that payment on July 12, 2002, (received by Defendant on July 11) did not include payment of freight charges on some of the invoices and payment on July 16, 2002, (received by Defendant on July 15) included payment of those freight charges. Plaintiff argues that nothing in Debtor's payment history indicates that "freight only" or "freight not paid" payments were usual and customary. While it is not clear why the freight charges on 14 of the 24 invoices paid on July 12 were not paid until July 16, the charges ranged from between $ .03 to $85.74, for a total of only $324.19. Given the relatively small amount involved, the court does not find Debtor's method of payment of these charges so unusual that the July 12 and 16 payments fall outside the ordinary course of business. Moreover, it appears that a number of invoices during the year before the preference period were paid in a similar manner. [*See, e.g.,* Def. Ex. B, unnumbered p. 4 (invoice # 732130), p. 5 (invoice # 743320), p. 6 (invoice ## 780860, 794890 & 805050)].

The court next addresses the objective prong of the ordinary course of business defense under subsection (C). In *Carled*, the Sixth Circuit reviewed other circuit opinions addressing the "ordinary business terms" requirements of § 547(c)(2)(C) and, "[f]ollowing the clear consensus among the courts of

appeals," the court held that '"ordinary business terms' means that the transaction was not so unusual as to render it an aberration in the relevant industry." *Carled,* 91 F.3d at 815-18. In determining what evidence will satisfy this "industry standard" prong, the court considered the Seventh Circuit's discussion of the purposes of § 547(c)(2)(C):

> First, subsection (C) has an evidentiary purpose such that "[i]f the debtor and creditor dealt on terms that the creditor testifies were normal for them but that are wholly unknown in the industry, this casts some doubt on his (self-serving) testimony." (citation omitted). Second, section 547(c)(2)(C) "allay[s] the concerns of creditors that one or more of their number may have worked out a special deal with the debtor, before the preference period, designed to put that creditor ahead of the others in the event of bankruptcy."

*Id.* at 816 (citing *In re Tolona Pizza Prod. Corp.*, 3 F.3d 1029, 1032 (7th Cir. 1993). It also considered the fact that the Seventh Circuit based its finding that the payments at issue were made in accordance with ordinary business terms on the testimony of the executive vice-president of the creditor/transferee that payment within thirty days "is within the outer limits of normal industry practices" even though it was longer than the terms stated in the invoice. *Id.; see also Jones v. United Sav. and Loan Ass'n (In re U.S.A. Inns of Eureka Springs, Ark., Inc.)*, 9 F.3d 680, 685-86 (8th Cir. 1993) (finding transferee had carried its burden of proof under § 547(c)(2)(C) based on the testimony of its President and CEO that "it is regular practice in the savings and loan industry to work with delinquent customers as long as some type of payment is forthcoming"). It cited with approval the Third Circuit's reasoning that "the Seventh Circuit's analysis 'affords meaning to subsection (C) and yet does not render it so exacting that a creditor is forced–both when soliciting new customers and when embroiled in a preference proceeding–to depend upon information about its competitor's trade practices, information that the competitors oft will be reluctant to yield and that frequently the creditor will find difficult to obtain.'" *Id.* (citing *Fiber-Lite Corp. v. Molded Acoustical Prods., Inc. (In re Molded Acoustical Prods., Inc.)*, 18 F.3d 217, 224 (3d Cir. 1994)).

In *Carled,* the Sixth Circuit rejected any requirement that the transactions at issue resemble the *majority* of the industry's transactions. *Id.* at 818. It explained that "while it would not suffice for a transferee to state generally that a certain percentage of its customers paid their bills 'late,' it would be sufficient to prove that a certain percentage of customers pay within a certain number of days after the due date. The court recognized "the difficulty of obtaining more precise information from competitors in light of antitrust and proprietary concerns, especially where, as here, the relevant industry is comprised of a small number of competitors." *Id.* at 819. It found that the transferee's evidence relating to the percentage of

customers (10% and 24%) who paid in a manner similar to the debtor satisfied § 547(c)(2)(C). *Id.*

In this case, the affidavit of Coats, Defendant's Controller, indicates that 21% of its 371 credit customers paid as late or later than Debtor's average time for payment. In addition, based on credit information received by him from various other cabinet companies that includes information regarding the payment terms and history of a credit applicant, Coats indicates that other such companies are also willing to extend credit to customers that are slow payers. Although information regarding competitor's payment terms and payment histories of their customers are not readily accessible given the fact that the cabinet manufacturing industry is small and very competitive, a credit reference letter from at least one other cabinet company with similar stated terms of net due in 30 days indicates that it accepts payments from its customer that are 10 to 15 days late, or 40 to 55 days after the invoice date. The court finds this evidence satisfies Defendant's burden of showing that the payments at issue in this case are not so unusual as to render them an aberration in the cabinet manufacturing industry.

To the extent that Plaintiff argues that the industry standard regarding the timing of payments is reflected not by when 21% of Defendant's customers pay but instead by when the majority of its customers pay, a similar argument, as discussed above, was squarely rejected by the Sixth Circuit in *Carled*. *Id.* at 818. At issue is not whether the majority of customers pay in the same manner as Debtor but whether Debtor's payments are an aberration in the industry such that doubt is cast on Defendant's evidence of its ordinary course of business with Debtor or that suggests that Defendant has created a course of dealing designed to put it ahead of other creditors in the event of bankruptcy. *See Tolona Pizza Prod. Corp.*, 3 F.3d at 1032.

This court also rejects Plaintiff's argument that the Affidavit of Defendant's Controller is insufficient as a matter of law to meet Defendant's burden under § 547(c)(2). Plaintiff cites *Logan v. Basic Distribution Corp. (In re Fred Hawes Organization, Inc.)*, 957 F.2d 239 (6th Cir. 1992), in support of his argument. However, in that case, the court merely affirmed the bankruptcy court's finding that the testimony of the transferee's president lacked credibility and reliability as the appellant presented no evidence to suggest that the finding was clearly erroneous. It does not stand for the proposition asserted by Plaintiff. Where, as here, Defendant's agent sets forth a valid basis for his statement regarding industry practices, such evidence may be, and in this case is, sufficient to meet Defendant's burden under § 547(c)(2). *See Tolona Pizza Prod. Corp.*, 3 F.3d at 1032; *U.S.A. Inns of Eureka Springs, Ark., Inc.*, 9 F.3d at 685-86.

The court finds that the facts in this case paint a picture of precisely the type of situation that the

"ordinary course of business" exception was intended to address, "allowing suppliers . . . to receive payment within the course that has developed in the commercial relationship between the parties unless substantial deviations from established practices occur." *Tennessee Chemical Co.*, 112 F.3d at 238. In light of the foregoing, and because Plaintiff has failed to show that a factual dispute exists as to any element of Defendant's ordinary course of business defense, Defendant has met its burden of proving the affirmative defense under § 547(c)(2) and is entitled to summary judgment. As such, the court need not address Defendant's alternative "subsequent new value" defense under § 547(c)(4).

## CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment will be denied and Defendant's motion for summary judgment will be granted. A separate order and a separate final judgment in accordance with this Memorandum of Decision will be entered.