Dated: September 30 2006

.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 004-3394 to 00-43402
	)	Jointly Administered
Pittsburgh-Canfield Corporation, et. al,	)	
	)	Chapter 11
Debtors.	)	Hon. Kay Woods
	)	
Wheeling-Pittsburgh Steel Corporation,	)	Adv. Pro. No. 06-3168
	)	
Plaintiff,	)	Hon. Mary Ann Whipple
v.	)	
	)	
Industrial Waste Control, Inc.,	)	
	)	
Defendants.	)	
	)	
	)	

MEMORANDUM OF DECISION
ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff's Complaint for Avoidance of Transfers, Recovery of Avoided Transfers and Other Relief ("Complaint") [Doc #1] challenges as preferential transfers two pre-petition payments Plaintiff made to Defendant in the total amount of $56,465.26. Plaintiff has filed a Motion for Partial Summary Judgment [Doc

#28] with respect to one of the payments in the amount of $36,162.38. This court has jurisdiction over Plaintiff's underlying Chapter 11 case and this adversary proceeding pursuant to 28 U.S.C. § 1334(a) and (b) respectively. This adversary proceeding has been referred to this court for decision under the general order of reference entered in this district. *See* 28 U.S.C. § 157(a)(1). Proceedings to determine, avoid, or recover preferences are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2)(F). For reasons discussed below, Plaintiff's motion for partial summary judgment will be granted.

FACTUAL BACKGROUND

On November 16, 2000, Plaintiff Wheeling-Pittsburgh Steel Corporation ("Plaintiff" or "Wheeling-Pitt") filed for relief under chapter 11 of the Bankruptcy Code in underlying Case No. 00-43396. On August 18, 2000, during the ninety days prior to Plaintiff's bankruptcy filing, a transfer by check No. 826009 was made to Defendant, Industrial Waste Control, Inc. ("Defendant" or "IWC") for $36,162.38. [Pl. Ex. A-1]. Defendant was a creditor of Wheeling-Pitt when the transfer was made, and the check covered payments on a number of outstanding invoices. The check was dated August 18, 2000, which date was from 140-171 days after the invoice dates. [Pl. Ex. A and A-1]. The check was received by IWC on August 21, 2000 [Pl. Exs. A-1, A-2], and cashed on August 23, 2000. [Plf. Ex. A]. In his affidavit, IWC Controller, Mike Pacifico, stated that Wheeling-Pitt paid its invoices between 62 to 260 days of invoice date in 1998, 32-71 days of invoice date in 1999, and 67-150 days of invoice date in 2000, but did not cite specific examples. [Pacifico Aff. ¶ 8-10]. Other customers of IWC also had a history of late payments, such as Duferco Steel (paying 62-116 days late) and Youngstown Thermal (paying 65-127 days late). [Pacifico Aff. ¶ 12,13].

LAW AND ANALYSIS

Under Fed. R. Civ. P. 56, applicable to this proceeding through 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). A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying the parts of the record that it believes demonstrate an absence of a genuine issue of material fact. *Id.*, 477 U.S. at 323. Movant has the burden of showing that there exists no genuine issue of material fact on each element of the cause of action subject to the motion. *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 order for a payment to be avoided as a preferential transfer under 11 U.S.C. § 547, " five elements must be satisfied; the transfer must "(1) benefit a creditor; (2) be on account of an antecedent debt; (3) be made while the debtor was insolvent; (4) be made within 90 days before bankruptcy; and (5) enable the creditor to receive a larger share of the estate than if the transfer had not been made." *Luper v. Columbia Gas of Ohio, Inc. (In re Carled, Inc.)*, 91 F. 3d 811, 813 (6th Cir. 1996) (citing *Union Bank v. Wolas*, 502 U.S. 151, 155 (1991)). Plaintiff has the burden of proving the elements and avoidability of the transfer under § 547(b). 11 U.S.C. § 547(g).

Plaintiff's motion and attached exhibits A through D provide properly supported evidence meeting each of the elements of avoidability of the payment in issue under § 547(b). IWC's memorandum and affidavit in opposition do not raise any issues of fact as to these elements and IWC does not contest that the payment is avoidable under § 547(b). With all of the elements for avoiding a preferential transfer

met, Plaintiff has met its burden of proof under § 547(b).

Instead, IWC argues that the payment is excepted from avoidance under the ordinary course of business affirmative defense of § 547(c)(2). IWC has the burden of proof on this exception to avoidance. 11 U.S.C. § 547(g). Through its motion and supporting materials Wheeling-Pitt has met its obligation under Rule 56 of identifying the parts of the record that show there is either an absence of evidence on an element upon which IWC has the burden of proof, or that there is no genuine issue of material fact pertinent to this affirmative defense. In order to prevail on Wheeling-Pitt's motion, IWC must either show that there is a genuine issue of material fact or that it is otherwise entitled to prevail as a matter of law on the undisputed facts.

The first issue that Defendant raises is what law applies to Plaintiff's claims. Section 547(c)(2) was significantly amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), effective October 17, 2005. Under pre-BAPCPA § 547(c)(2), the ordinary business course exception reads as follows:

> (c) The Trustee may not avoid under this section a transfer...
> (2) to the extent that such 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 of financial affairs of the debtor and the transferee; and
> (C) made according to ordinary business terms.

11 U.S.C. § 547(c)(2). The application of § 547(c)(2) has generated much nuanced legal debate and several significant and, obviously, controlling cases from the Sixth Circuit. The requirements for proving the exception for transfers occurring in the ordinary course of business under pre-BAPCPA § 547(c)(2) were set out in *Logan v. Basic Distribution Corp. (In re Fred Hawes Organization, Inc.)*, 957 F.2d 239 (6th Cir. 1992). In *Fred Hawes*, the Sixth Circuit clarified that a transferee such as IWC may not use the same

standard to prove all of the elements of § 547(c)(2). Specifically, the Sixth Circuit held that the conjunctive wording of § 547(c)(2) necessitated different and separate inquiries under subparts (B) and (C), with subpart (B) being characterized as the "subjective" prong focusing on the business dealings between the that debtor and that transferee and subpart (C) characterized as the "objective" prong of the test requiring proof "that the payment is ordinary in relation to the standards prevailing in the relevant industry." [1]

In BAPCPA Congress amended § 547(c)(2) by changing the "and" between the two subparts to "or." Thus, under the amended subsection (c)(2), conjunctive subparts (B) and (C) became disjunctive subparts (A) and (B). This change has materially lessened the transferee's burden of proof of the affirmative defense and effectively overruled the Sixth Circuit decision in *Fred Hawes* to the extent that it required both the subjective and objective elements elements to be established in order for a transferee to prevail. Now, under the amended statute, either the subjective standard of ordinary course between the parties or the objective standard of ordinary business terms in the industry must be established, but not both.

IWC argues in opposition to Wheeling-Pitt's motion for summary judgment that the BAPCPA amendment to § 547(c)(2) applies and that it must satisfy only one of the subparts and not both of them. The court disagrees. The applicable law is the law in effect when the original bankruptcy case was filed. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title XV, sec. 1501(b)(1)(stating that, unless otherwise provided, the amendments do not apply to cases commenced under Title 11 before the effective date of the Act). The underlying chapter 11 was filed in 2000, long before October 17, 2005. Therefore, the court must apply the pre-BAPCPA version of § 547(c)(2) as interpreted before the amendment, and all references to the Bankruptcy Code in this opinion are thus to the pre-BAPCPA version of the Code. Instead, to avoid partial summary judgment as to this transfer, Defendant

[1]Subsection (A) is less frequently in dispute, and it is not here.

must prove both the objective and subjective components of the ordinary course of business exception by a preponderance of the evidence. *Luper*, 91 F.3d at 813. As explained below, Defendant can prove neither the objective nor the subjective components.

When analyzing the subjective component, that is the ordinary course of business between Plaintiff and Defendant, it must be found that "lateness [is] the norm as opposed to the exception." *Storey v. Dayton Power and Light Co. (In re Cook United, Inc.)*, 117 B.R. 884, 888 (Bankr. N.D. Ohio 1990). Case law dictates that a few late payments spread out over the course of a several year business relationship does not support late payments as part of the ordinary course of business. *Storey*, 117 B.R. at 889 (showing only six of thirty-six payments were late, therefore finding the payment in question to be a preferential transfer.); *Fred Hawes*, 957 F.2d at 244-245 (holding the payments to be outside the ordinary course of business exception due to a short, six month business relationship between the parties with only two late payments.); *Sprowl v. Miami Valley Broadcasting Corp. (In re Federated Marketing, Inc.)*, 123 B.R. 265, 270 (Bankr. S.D. Ohio 1991) (finding the payments in question to be an exception and not part of the ordinary course of business because only two prior late payments existed.) In *Storey*, the reasoning behind the ordinary course of business exception is explained as "directed primarily to ordinary trade credit transactions. These typically involve some extension of credit but are meant to be paid in full within a single billing cycle .... because the credit extended is meant to be extremely short term." 117 B.R. at 888. Even when the courts found there to be an applicable ordinary business transaction exception, the length of the late payment fell within a range that had been repeatedly considered acceptable by the parties. *Yurika Foods Corp. v. United Parcel Service (In re Yurika Foods Corp.)*, 888 F. 2d 42, 45 (6th Cir. 1989) (transfer was found to be part of the ordinary course of business because 87% of all payments made by the debtor were late and half of the late payments were at least twice the seven day period of time allotted for timely payment); *In re Tolona*

Pizza Products Corp., 3 F.3d 1029, 1032 (7th Cir. 1993) (creditor consistently gave debtor special permission to make late payments throughout the course of their 15 year business relationship with average payment times between 26 and 46 days late.); *Decor Noel Corp. v. Alexander & Co., Inc. (In re The Decor Noel Corp.)*, 134 B.R. 883, 890 (W.D. Tenn. 1991) (payments in question were found to be part of the ordinary course of business because of the 12 years the parties had a seasonal business relationship, payments had been 43-61 days late for three other years, totaling roughly 1/3 of all payments as late.); *Newton v. Andrews Distributing Co. (In re White)*, 64 B.R. 843, 849 (Bankr. E.D. Tenn. 1986) (the court found that 13 of 22 payments prior to the preference period were late, some up to 30 days late, and held that the payments in question fell under the ordinary course of business exception).

In the present case, Defendant does not specifically state how long the parties have been engaged in a business relationship, but references a relationship "since the early nineties." [Mem. in Opposition 4]. The parties, therefore, had a 5 to 10 year business relationship. In addition, information on late payments during the years 1998, 1999, and 2000 has been provided, but only ranges of lateness are provided, not a specific number of payments and how late each was. [Pacifico Aff. ¶ 8-10]. The defendant has not provided information specific enough to support its claim of the applicability of the ordinary course of business defense. Without numbers of payments, the court only knows that one payment was made corresponding to the lowest number of the range, and one payment was made corresponding to the highest number in the range. It is those numbers that will be used for this analysis. [2] The payments in question range from 140 to 171 days after invoice date. [Pl. Ex. A]. According to Pacifico, the Controller for IWC, only in 1998 did late payments extend as far out from invoice date, when a payment was made 260 days late. [Pacifico Aff. ¶ 8]. When considering the length of time the parties have conducted a business relationship,

[2] The court notes that even if numbers of payments would have been provided, the Defendant still has not met its burden for the objective component, and would not have been able to overcome partial summary judgement.

only one payment at least as late as the payment in question does not set the foundation for the ordinary course of business between the parties. It is apparent that while Wheeling-Pitt and IWC may have had an ordinary business relationship that consisted of commonly made late payments, IWC has not established a genuine issue of material fact that lateness to the extent on this record was tolerated. Rather, lateness to this extent and the payment of the invoices in issue has shown to be extraordinarily late compared to their past dealings. Therefore, in regard to the subjective element of the ordinary course of business exception, Defendant has not created any genuine issue of material fact showing that the lateness exhibited on the record as to this payment was within the parties' ordinary course of business. Since Defendant must prove both the subjective and objective elements in order to prevail, this alone permits the court to grant partial summary judgment for Plaintiff. However, as explained below, Defendant also fails to create a genuine issue of fact as to the objective component of the affirmative defense.

The Sixth Circuit focused directly on the objective prong of subpart (C) in *Luper*. Establishing that the payment in question was within the ordinary course of business customary to the industry (the objective element) does not mean that Defendant must solidify "the existence of some single, uniform set of business terms." *Luper*, 91 F. 3d at 816. It does, however, require the showing of industry practices in order to prevent the creditor from testifying to terms as "normal for them but that are wholly unknown in the industry... cast[ing] some doubt on [their] (self serving) testimony." *Id.* (citing *Tolona Pizza*, 3 F.3d at 1032.) In *Luper*, the court decided that it was sufficient to provide evidence that a "certain percentage of customers pay within a certain number of days after the due date." *Id*, at 819; *See also Yurika Foods Corp*, 888 F.2d at 45 (holding that the objective component within the industry was met because proof was offered that 82% of other carriers had followed similar credit practices.); *In re Tolona Pizza Products, Inc.*, 3 F.3d at 1033 (stating that the industry standard was between 21 and 30 days late and the

payment in question was in the normal range for this standard at 22 days late).

In *Luper*, all of the debtor's payments to utility Columbia Gas during the preference period were "late" payments made after the due date on the invoice, but before the end of the billing cycle when gas service could be terminated. The bankruptcy court and the district court held that the evidence presented by Columbia Gas as to utility industry standards was insufficient and awarded judgment in favor of the trustee. The Sixth Circuit reversed the bankruptcy court and the district court judgments, finding that both courts had erred and applied an incorrect standard under subpart (C). Examining the nuanced case law developed by other circuits, with the Seventh Circuit's decision in *Tolona Pizza Products* of particular influence, the Sixth Circuit held that "ordinary business terms" means "that the transaction was not so unusual as to render it an aberration in the relevant industry." *Luper*, 91 F.3d at 818. The transfers need not be consistent with a majority or even a significant percentage of the industry's transactions. *Id.* Although case law is divided, the Sixth Circuit looked to the creditor's industry as the controlling industry under § 547(c)(2)(C). *See id.*, at 814-818.

Plaintiff asserts through the Boling Affidavit [Pl. Ex A] that Wheeling-Pitt's practice was to pay invoices within 30-60 days of invoice date, and that this practice comported with the payment practices of the steel industry, therefore concluding that the payment in issue that occurred 140 to 171 days after the invoice dates "were outside the steel industry standard." Defendant must therefore show that there is a genuine issue of material fact on this point.

Defendant stated in response to Plaintiff's Interrogatory No. 5 that "Steel Industry customers generally pay 45-75 days from the date of invoice." [Pl. Ex. D, Def. Answers to Pl. Interrogs. #5]. In addition, the affidavit of Mike Pacifico states IWC had customers similarly situated to Wheeling-Pitt that consistently paid beyond 60 days, specifically, Duferco Steel paid between 62 and 116 days, and

Youngstown Thermal paid between 65 and 127 days. [Pacifico Aff. ¶ 12, 13]. The court concludes that Defendant has provided no evidence from which a fact finder could conclude that the industry standard was more than 45-75 days. And even if the two examples of customers similarly situated to Wheeling-Pitt are taken to be the industry standard of 62-127 days after invoice date, which the court does not believe meets the test of *Luper*, a payment that dates from 140 to 171 days beyond invoice is still well outside that range. So whether the industry standard is 30-60 days as contended by Plaintiff, or either 45-75 days or 62-127 days as contended by Defendant, the payment in question that ranges between 140 and 171 days after invoice dates is beyond the limits of any industry standard in the record. Defendant has thus failed to create a genuine issue of material fact as to application of the objective component of § 547(c)(2) to the transfer in issue. A reasonable fact finder could not conclude that the payment in question was within the ordinary course of business of the steel industry. Defendant did not prove by a preponderance of the evidence the objective element of the ordinary course of business exception.

CONCLUSION

Plaintiff is entitled to partial summary judgment in the amount of $36,162.38 on the complaint. Plaintiff met its burden of proving that there is no genuine issue of material fact to be determined and that it is entitled to prevail as a matter of law on the avoidability of the transfer. The burden then shifted to Defendant to prove both the subjective and objective components of the defense of an ordinary course of business exception under pre-BAPCPA § 547(c)(2). Defendant failed to show that there is a genuine issue of a material fact to be decided as to the ordinary course of business exception to avoidability or that it is entitled to prevail as a matter of law on the affirmative defense based on the record of undisputed facts before the court.

Plaintiff requests that the court direct entry of judgment on this claim upon a finding of no

just reason for delay pursuant to Fed. R. Civ. P. 54(b) as applicable in this adversary proceeding under Fed. R. Bankr. P. 7054. The court disagrees that Plaintiff has demonstrated an entitlement to entry of a final appealable judgment in its favor on this claim before issues as to the remaining transfer are resolved. While the other claim involves a separate check, the court does not know and Plaintiff has not identified what the factual issues are that will be tried as to that transfer. The law in issue and the court's view of the law will be the same. Particularly where one party is a bankruptcy or former bankruptcy debtor, the prospect of two separate appeals and essentially two separate proceedings where the the same parties and the same business relationship and the same exact time frame are involved is inefficient and uneconomical. So while the court will grant Plaintiff's motion for partial summary judgment, it declines to enter judgment at this time upon a finding of no just reason for delay. Instead a further pretrial conference will be set by separate order of the court.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Plaintiff's Motion for Partial Summary Judgment [Doc #28] be, and hereby is, **GRANTED**.