IT IS ORDERED as set forth below:

Date: March 27, 2008

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN RE:	:	Case Nos 04-40656 through 04-40658
Southwest Recreational Industries, Inc., et al.	:	Jointly Administered Under Case No. 04-40656
Debtor.	:	
Ronald L. Glass, as Chapter 7 Trustee of Southwest Recreational Industries, Inc., Plaintiff,	:	
vs.	:	Adv. No. 05-4066
Isotec International, Inc., Defendant.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Within the 90 days preceding the filing of its chapter 11 bankruptcy case on February 13, 2004, Southwest Recreational Industries, Inc. (the "Debtor") made three payments totaling

$96,215 to one of its suppliers, Isotec International, Inc. ("Isotec"). Ronald L. Glass, as the chapter 7 trustee for the Debtor following the conversion of the case to chapter 7 (the "Trustee"), filed this adversary proceeding to recover the payments as avoidable transfers under 11 U.S.C. § 547(b).[1]

The parties agree that all of the elements of a preference under § 547(b) are present but dispute whether Isotec is entitled to the ordinary course of business defense of § 547(c)(2). The Court granted partial summary judgment[2] to the Trustee that the three transfers were preferential transfers within the meaning of § 547(b) and conducted a trial on the ordinary course of business defense. The Court now enters its findings of fact and conclusions of law pursuant to FED. R. CIV. P. 52(a), *applicable under* FED. R. BANKR. P. 7052.

I. Findings of Fact

The Debtor made the three transfers at issue here by check. Two of the payments, one in the amount of $87,240 on December 15, 2003, and another in the amount of $1,659 on December 22, 2003, paid five invoices, two dated September 11, 2003, one dated September 12, and two dated September 16. The third payment in the amount of $7,316, made on January 30, 2004, paid a single invoice dated October 24, 2003. The parties agree that the first two payments

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[1]This Court has authority to hear and determine this proceeding under 28 U.S.C. § 157(b)(1) as a core proceeding under 28 U.S.C. § 157(b)(2)(F) within the District Court's jurisdiction under 28 U.S.C. § 1334(b) that the District Court has referred under 28 U.S.C. § 157(a) and L.R. 83.7, N.D.Ga. Because the Debtor's chapter 11 case was commenced prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the amendments made by that Act to 11 U.S.C. § 547 are not applicable. Accordingly, all references to § 547 are to the statute prior to the BAPCPA amendments.

[2]Order on Motions for Summary Judgment and on Defendant's Motion to Strike or, in the Alternative, Dismiss, June 27, 2007 [Docket No. 34].

occurred 94 days after the latest invoices they paid and 100 days after the earliest, and that the third payment occurred 102 days after the invoice date.[3] The invoices state that payment is due within 45 days.[4]

The first shipment of goods from Isotec to the Debtor occurred in November 2000. Through the time that the Debtor filed bankruptcy in February 2004, the Debtor made some 48 payments (including the three challenged as preferential) on some 151 invoices (including the six on which the challenged preferential payments were made).[5] Thus, 45 payments on 145 invoices were made before the 90 day preference period. Prior to the preference period, the average time between the date of an invoice and its payment was 54 days, and 88 percent of invoices were paid within a range of 30 to 70 days.[6] During this time, the median for payments was 51 days,[7] and only three invoices were paid later than 90 days.[8]

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[3]Plaintiff's Exhibit [hereinafter "PX"] 16, p. 4 (box at bottom of page); Defendant's Exhibit [hereinafter "DX"] C, p. 8. The data are the same in both exhibits.

[4]Although the invoices were not introduced into evidence, the parties agree that the invoices on their face called for payment within 45 days.

[5]PX-16; DX-C.

[6]PX-17.

[7]Testimony of Michael Fuqua. The Court has prepared its findings without a transcript of the trial.

[8]PX-17. Michael Fuqua, whose testimony is discussed later in the text, indicated that two of these payments might have been related to set-offs such that they should not properly be considered as payments. Disregarding them would reduce the number of payments greater than 90 days to one. Mr. Fuqua did not know whether the payments related to set-offs, and the Trustee introduced no further evidence on this issue. The Trustee presented PX-16 and PX-17 as Mr. Fuqua's analysis of payment history based on Isotec's data, and the Court accepts them as accurate, disregarding Mr. Fuqua's speculation about his own exhibits and the accuracy of the underlying data that no one challenged with evidence.

Before the Debtor and Isotec began doing business with one another in November 2000, Reed Seaton, then president of the Debtor, met with Charles Knight, the president of Isotec, to discuss the possibility of Isotec supplying the Debtor with materials the Debtor needed in connection with the sale and installation of outdoor running tracks. Mr. Seaton explained that the Debtor needed product processed to its somewhat unique specifications delivered to the project sites; that its relationships with its customers usually involved progress payments that resulted in a long payment process and that warranty issues, which could relate to Isotec product, might sometimes cause further delays in payment; and that the Debtor would need to collect from the customer for whose project the product would be ordered before the Debtor could pay Isotec. Consequently, Mr. Seaton requested a long payment cycle of 90 days, proposing that the Debtor would pay Isotec when the Debtor was paid and that the Debtor would try to pay within 90 days.[9] Mr. Knight agreed to this arrangement in view of the potential volume of sales, taking the payment arrangement into account as part of the pricing of the product.[10] Although Mr. Seaton and Mr. Knight agreed that they had established 90 day terms, neither could explain why the invoices provided for payment within 45 days.

Mr. Seaton testified that the payment arrangement with Isotec was not unusual in the sports construction industry, noting that he had had payment terms of 90 days with one supplier and 120 days with another.[11] Mr. Knight, similarly, testified that 90 day terms were not unusual

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[9]Testimony of Reed Seaton.

[10]Testimony of Charles Knight.

[11]Testimony of Reed Seaton.

and that longer terms might be granted.[12]

Michael McNeely is a certified public accountant who has provided accounting and consulting services to Isotec. He has extensive experience with clients in the chemical supply and chemical blend business. His accounting firm does work for companies in the same industry as Isotec or related industries, including companies that buy and companies that sell similar products. He testified that the payment arrangement between Isotec and the Debtor was within the industry practice and similar to arrangements with others in the industry for similar products. Mr. McNeely indicated that industry practice with regard to credit terms was about 90 days – sometimes less, sometimes more. He also testified that payments beyond 90 days, such as the ones challenged in this proceeding, are not uncommon in the industry.[13]

Mr. Michael Fuqua is a certified insolvency restructuring advisor who has also completed course work leading to a distressed business valuation certification. He has some 20 years of banking and financial experience. For the past five years, he has worked in the areas of forensic accounting and financial analysis for Glass Ratner, the Trustee's accounting firm, and in that capacity has analyzed at least 1,000 transactions in this and other bankruptcy cases on behalf of a trustee or similar estate representative to determine whether avoidable preferences had occurred.

Based on his review of market publications[14] and financial information filed by five

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[12]Testimony of Charles Knight.

[13]Testimony of Michael McNeely.

[14]The market publications themselves were not offered into evidence. Thus, their potential admissibility under FED. R. EVID. 803(17) is not at issue.

public companies with the Securities and Exchange Commission that Mr. Fuqua thought were engaged in businesses similar to those in question, but without talking to anyone engaged in such businesses,[15] Mr. Fuqua stated his opinion[16] that the ordinary payment term in the plastics and resin manufacturing businesses was approximately 45 days. Mr. Fuqua concluded that Isotec belonged in this business category because the category's SIC appeared to encompass the type of business in which he thought Isotec was engaged based on a review of its website.

As knowledgeable as Mr. Fuqua appears to be in certain matters, his testimony provides no credible evidence with regard to whether the payment terms between the Debtor and Isotec were ordinary or whether the payments that occurred were in the ordinary course of business beyond establishing the arithmetic facts relevant to the timing and distribution of payments made during the business relationship between the Debtor and Isotec. Mr. Fuqua has no personal knowledge of credit terms and payment practices in either the Debtor's or Isotec's industry, has not studied those issues beyond consulting market publications and public financial data for selected companies, and has not talked to anyone in either industry about these issues. Mr. Fuqua's admitted reliance solely on "raw numbers"(*i.e.,* the invoice and payment dates as shown in PX-16 and PX-17 and data in the market publications and public company financial

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[15]The only businessperson Mr. Fuqua spoke with at any time concerning practices in the Debtor's industry was Eric Arnold, who worked as an accountant or controller with the Debtor and was retained by the Trustee to help with postpetition accounting matters. Testimony of Michael Fuqua.

[16]At trial, the court permitted Mr. Fuqua to testify as an expert. Although the pre-trial order in this proceeding did not contemplate that Mr. Fuqua would testify as an expert concerning ordinary business terms and although it does not appear that the Trustee made the disclosures with regard to Mr. Fuqua's testimony as an expert required by FED. R. CIV. P. 26(a)(2), Isotec did not object to his expert testimony on these grounds.

statements he reviewed) as the basis for his opinions precludes the use of his testimony to establish anything beyond the undisputed calculations that the admitted exhibits themselves show.[17]

Although both Mr. Seaton and Mr. Knight in their testimony noted that a delay in receipt of payment by the Debtor from its customer would result in delay of payment by the Debtor to Isotec for product used in such a customer's installation, no evidence suggests that such a circumstance accounts for the length of time between invoices and the payments made on them during the preference period that are at issue here.[18]

Isotec did not engage in any unusual collection activity,[19] and there is no evidence that the Debtor gave unusual treatment to payment of Isotec's invoices. The Debtor made all payments during the preference period by check, the same method normally utilized.

At some point during the months preceding the Debtor's bankruptcy filing, the Debtor's secured lender began reviewing the Debtor's cash disbursements, and the secured lender and the Debtor's management jointly determined the payment of trade creditors,[20] but the evidence does

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[17]Although Mr. Fuqua as an expert could properly testify about the data in the market reports and SEC documents he reviewed and his analysis of them in order to explain the bases for his opinion, his testimony does not prove the data one way or another in the absence of admission of the market publications themselves.

[18]Mr. Seaton's testimony on cross-examination about possible reasons for the delay in payment is speculative and not based on knowledge about what actually happened.

[19]Counsel for the Trustee suggested, in cross-examination of Mr. Knight, that Isotec had at some point threatened to withhold further product shipments unless Isotec received payment. Mr. Knight had no knowledge of such an incident and no evidence regarding that contention was produced.

[20]Testimony of Reed Seaton.

not establish the extent, if any, that the lender controlled or directed the payment of invoices to Isotec or other suppliers, nor does the evidence establish any causal connection between any such activity by the lender and the timing of the payments. Further, the evidence does not establish when the lender's participation in the payment process began. Similarly, although Mr. Fuqua's testimony suggests the common sense proposition that a financially distressed business may delay payments to some or all of its suppliers and that the Debtor's payment of its trade debt during the preference period might have slowed, the evidence does not establish the extent to which such delays occurred or that the Debtor's financial distress accounted for any delay in the payment of the Isotec invoices at issue here. Nevertheless, Mr. Seaton's testimony indicates that the secured lender's participation resulted in some creditors being paid while others were not.

Based on the evidence presented and the Court's analysis of it as set forth above, the Court specifically makes the following factual findings:

1. The agreement between the Debtor and Isotec, established at the outset of their relationship in November 2000, was for 90 day payment terms with the understanding that the Debtor would generally pay for Isotec's product when the Debtor received payment from the customer for the project in which the product was used. The agreement contemplated that payment might occasionally occur more than 90 days after an invoice date based on delays in the Debtor's receipt of payments from its customer.

2. The payment arrangement was made in the ordinary course of business of both the Debtor and Isotec based on their specific business needs and objectives, taking into account the nature of the product, the expected volume of business that would occur, and the Debtor's needs in view of its relationships with its customers. The 45 day terms stated on the invoices did not

accurately reflect the agreement of the parties, neither of which thought they were controlling.

3. The payment arrangement was not unusual in the circumstances of the industries in which the Debtor and Isotec were engaged. The payment arrangement was within the range of payment arrangements made by buyers and sellers of product in similar or related businesses.

4. Notwithstanding the existence of the payment arrangement that permitted 90 day terms, the Debtor typically paid invoices well in advance of the permitted time. During the pre-preference period, the average time from invoice to payment was 54 days, the median time was 51 days, and payment occurred within 30 to 70 days 88 percent of the time.

5. The typical business practice established by the course of dealing between the Debtor and Isotec was for the Debtor to pay invoices within 30 to 70 days of the invoice date, but the parties on 18 occasions departed from this practice; one invoice was paid at an earlier time outside this range and 17 were paid at a later time. Three invoices were paid 90 days or more after the invoice date, of which two were paid after 130 days or more. The payment arrangement contemplated and permitted such deviations.

6. The Debtor made payments during the preference period outside the ordinarily permitted 90 day term by four to ten days. The Debtor made the challenged payments more than 30 days later than the latest time by which it made 88 percent of the payments in the pre-preference period. Neither the Trustee nor Isotec has shown any reason why the Debtor made the challenged payments later than it made substantially all of the payments during the pre-preference period.

7. Isotec did not engage in any unusual collection activities in connection with its receipt of the challenged payments.

8. The Debtor did not engage in any unusual practices or establish any special arrangements with regard to payment of Isotec during the preference period or otherwise at variance with the payment arrangement established at the outset of the relationship that would account for the subject payments being made. The payments during the preference period were made in the same manner as payments were made in the pre-preference period.

9. Beginning at an undetermined time prior to the bankruptcy filing, the Debtor's secured lender participated jointly with the Debtor's management with regard to determination of the payment of trade creditors. Due to the Debtor's distressed financial situation, some debts were paid and others were not. The evidence does not otherwise establish the extent, if any, to which the lender directed or controlled the payment of Isotec's invoices. There is no objective analysis of the extent to which the timing or amount of payments to creditors changed from the historical period to the preference period.

10. The Trustee sent a demand letter to Isotec on March 21, 2005, demanding payment of $96,215 within 20 days.[21] The Trustee commenced this adversary proceeding on October 11, 2005.

II. Discussion

The Court's summary judgment determined that the three payments at issue here are preferential transfers under § 547(b). The remaining issue for determination based on the facts found by the Court as set forth above is whether the ordinary course of business defense set forth in § 547(c)(2) precludes the Trustee from avoiding the transfers. Because the Debtor's case was filed prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection

[21] PX-25.

Act of 2005 ("BAPCPA"), its amendments to § 547(c)(2) are not applicable here.[22] Under § 547(g), Isotec bears the burden of establishing the defense. *E.g., Miller v. Florida Mining and Materials (In re A.W. & Associates, Inc.)*, 136 F.3d 1439, 1441 (11th Cir. 1998).

The ordinary course of business defense of § 547(c)(2), as applicable here, has three elements. The parties agree that the transfers meet the first requirement, set forth in § 547(c)(2)(A), that the transfer pay a debt "incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee."

The dispute is whether the other two requirements have been met. One is that the transfer must have occurred "in the ordinary course of business or financial affairs of the debtor and the transferee." § 547(c)(2)(B). The second is that the transfer must have been made "according to ordinary business terms." § 547(c)(2)(C).

If the Trustee is entitled to recover, a final issue is whether the Trustee is entitled to prejudgment interest.

A. § 547(c)(2)(B): Ordinary Course of Business or Financial Affairs

Under § 547(c)(2)(B), a payment must be "made in the ordinary course of business or

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[22]References herein to § 547 are to its provisions prior to the BAPCPA amendments. The text of § 547(c)(2), prior to the BAPCPA amendments, is 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 or financial affairs of the debtor and the transferee; and
>
> (C) made according to ordinary business terms.

financial affairs of the debtor and the transferee" in order to qualify for the ordinary course defense to the trustee's recovery of the transfer as a preference under § 547(b). This requirement is sometimes referred to as the "subjective" prong of the ordinary course defense.[23]

The Congressional purpose underlying the ordinary course of business defense in § 547(c)(2) is to protect "those payments which do not result from 'unusual' debt collection or payment practices."[24] In determining whether transfers occurred in the ordinary course of business of the debtor and the transferee within the meaning of § 547(c)(2)(B), "the issue is whether the transfers in question were made in a similar manner to transfers made prior to the preference period. The factor to focus upon is whether the payment(s) were made in response to unusual debt collection or payment practices."[25]

Factors relevant to the inquiry include "the prior course of dealing between the parties, the amount of the payment, the timing of the payment, and the circumstances surrounding the payment."[26] "Lateness is particularly relevant in determining whether payments should be

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[23]*E.g.,* Ellenberg v. Plaid Enterprises, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 790 (Bankr. N.D. Ga. 1993); Ellenberg v. Tulip Production Polymerics, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 782 (Bankr. N.D. Ga. 1993).

[24]Marathon Oil Co. v. Flatau (*In re* Craig Oil Co.), 785 F.2d 1563, 1566 (11th Cir. 1986).

[25]Scroggins v. BP Exploration & Oil, Inc. *(In re* Brown Transport Truckload, Inc.*)*, 161 B.R. 735, 739-40 (Bankr. N.D. Ga. 1993).

[26]Ellenberg v. Plaid Enterprises, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 790, 795 (Bankr. N.D. Ga. 1993); Ellenberg v. Tulip Production Polymerics, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 782, 787 (Bankr. N.D. Ga. 1993), both quoting Newton v. Ed's Supply Company, Inc. (*In re* White), 58 B.R. 266, 269 (Bankr. E.D. Tenn. 1986).

protected by the ordinary course of business exception."[27] This is because "the exception is directed primarily to ordinary trade credit transactions."[28] Accordingly, "the scope of its protection is necessarily limited to trade credit which is 'kept current' or other transactions which are paid in full within the initial billing cycle. Thus, untimely payments are more likely to be considered outside the ordinary course of business and avoidable as preferences."[29]

Nevertheless, late payments are considered ordinary if the transferee shows that late payments were the normal course of business between the parties.[30] In this regard, the transferee must establish a "'baseline of dealings' so that the court may compare the practice of late payments during the preference period with the prior course of dealing."[31] The "baseline of dealings" must be "fixed at least in part during a time in which [debtor's] day to day operations were 'ordinary' in the laymen's sense of the word. Preferably, the material period should extend

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[27]Marathon Oil Co. v. Flatau (*In re* Craig Oil Co.), 785 F.2d 1563, 1567 (11th Cir. 1986).

[28]*Id.*

[29]*Id.* at 1567-68.

[30]*E.g.,* Ellenberg v. Plaid Enterprises, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 790, 796 (Bankr. N.D. Ga. 1993); Ellenberg v. Tulip Production Polymerics, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 782, 788 (Bankr. N.D. Ga. 1993), both citing Logan v. Basic Distribution Corp. (*In re* Fred Hawes Organization, Inc.), 957 F.2d 239, 244 (6th Cir. 1992).

[31]Ellenberg v. Plaid Enterprises, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 790, 795-96 (Bankr. N.D. Ga. 1993); Ellenberg v. Tulip Production Polymerics, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 782, 788 (Bankr. N.D. Ga. 1993), both citing Iannacone v. Klement Sausage Co., Inc. (*In re* Hancock-Nelson Mercantile Co., Inc.), 122 B.R. 1006, 1013 (Bankr. D. Minn. 1991).

back into the time before the debtor became financially distressed."[32]

The Court has not found any authority that is directly controlling on this issue. *Ellenberg v. Tulip Production Polymerics, Inc. (In re T.B. Home Sewing Enterprises, Inc.),* 173 B.R. 782 (Bankr. N.D. Ga. 1993), is instructive but not definitive. Indeed, it supports both sides of the argument here. In that case, the debtor during the historical, pre-preference period had paid 86 percent of the defendant's invoices outside of their 60 day terms; the payment dates ranged from 27 to 176 days after invoice date during the historical period, and the average time from invoice to payment was 87.36 days. The preferential payments were made between 90 and 98 days after the invoice date, an average of 93.42 days. The court ruled that the payments during the preference period were within the range established during the pre-preference period.

The payments here occurred between 94 and 102 days after the invoice date, whereas a few payments during the historical period were made as long as 147 days after the invoice date. In this regard, this case resembles *Tulip Production,* which supports Isotec's view that the preferential payments were ordinary because their timing was within the range of late payments that occurred during the historical period. But in *Tulip Production,* the preferential payments were in the middle of the range of historical payments and were not, as here, within the range only because two or three payments occurred in the historical period that were otherwise well outside the typical range. The following chart comparing the historical patterns between this case and *Tulip Production* illustrates the point; the asterisks in each column indicate in which

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[32]Ellenberg v. Plaid Enterprises, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 790, 795-96 (Bankr. N.D. Ga. 1993); Ellenberg v. Tulip Production Polymerics, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 782, 788 (Bankr. N.D. Ga. 1993), both citing Iannacone v. Klement Sausage Co., Inc. (*In re* Hancock-Nelson Mercantile Co., Inc.), 122 B.R. 1006, 1013 (Bankr. D. Minn. 1991).

category the preferential payments fell:

Payment in days from Invoice Date	Tulip Production (173 B.R. at 788)	Isotec (PX-17)
within 60 days	14.0%	72%
61-80 days	37.4%	24%
81-100 days	*** 18.4%	** 4%
101-120 days	11.2%	* 0%
more than 120 days	19.0%	2%
	100%	102%[33]

The Court concludes that the fact that the payments in *Tulip Production* occurred in the middle of the range of payment dates is important to the result in that case. Bearing in mind the Eleventh Circuit's observation that the ordinary course of business exception "is directed primarily to ordinary trade credit transactions,"[34] the Court concludes that the legal principle governing this case is this: Preferential payments within the historical range that vary significantly from the typical payment pattern during the historical period are ordinary for purposes of § 547(c)(2)(B) only if the reasons for the variation in both the historical and preference periods are similar.

The historical payment pattern in this case is consistent with a payment arrangement for 90 day terms with the understanding that the Debtor was committed to pay when it was paid and that the Debtor could have longer to pay if the Debtor faced delays in payment. The existence

[33]Numbers do not add to 100% due to rounding.

[34]Marathon Oil Co. v. Flatau (*In re* Craig Oil Co.), 785 F.2d 1563, 1567 (11th Cir. 1986).

of such a flexible, somewhat loose payment arrangement explains why the Debtor in most instances paid well in advance of the 90 day terms that it had.

Under this view of the terms and operation of the payment agreement, a payment is ordinary if it occurs within 70 days (as 88 percent of them in the historical period were) or if the Debtor faced a payment delay on a project on account of which it needed to delay payment to Isotec. In order to conclude that the preferential payments here were in the ordinary course of business of the Debtor and Isotec, the Court would have to find that some project-related event accounted for the fact that the payments fell outside the usual time within which payments were typically made. Some other cause for a delay in payment unrelated to the Debtor's financial distress might also justify a conclusion that payment made at an unusual time is ordinary – an earlier oversight in paying an invoice, an error in the amount paid, or the like come to mind. Put another way, the payments here could be considered in the ordinary course of business if an ordinary course of business reason unrelated to the Debtor's financial distress explained their timing.

The evidence does not explain why the preferential payments were not paid within the time that payments typically occurred. Isotec has the burden of proof on the issue. Consequently, the Court must conclude that the payments were not made in the ordinary course of business within the meaning of § 547(c)(2)(B).

B. § 547(c)(2)(C): Ordinary Business Terms

In the interest of judicial economy and a complete record for appellate review, the Court next determines whether the payments were made according to ordinary business terms as § 547(c)(2)(C) requires.

Under § 547(c)(2)(C), a transfer must be "made according to ordinary business terms" to qualify for protection under the ordinary course defense. This requirement is sometimes referred to as the objective prong of the defense.[35] "'[O]rdinary business terms' refers to the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and . . . only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C."[36] Put another way, the terms to be ordinary must be "within the range of credit terms that one would consider to be normal."[37] Expert opinion evidence is not required to prove the ordinary business terms element.[38]

The payment arrangement here falls well within the range of terms that one would consider normal. The evidence is that 90 day terms are acceptable and expected in the industries in which the Debtor and Isotec were engaged and that deviations are sometimes permitted to take account of a customer's need to receive payment from its customer. There is nothing extraordinary about the payment terms or the payments themselves that would indicate, on an

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[35]*E.g.,* Ellenberg v. Plaid Enterprises, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 790, 798 (Bankr. N.D. Ga. 1993); Ellenberg v. Tulip Production Polymerics, Inc. (*In re* T.B. Home Sewing Enterprises, Inc.), 173 B.R. 782, 789 (Bankr. N.D. Ga. 1993).

[36]Miller v. Florida Mining and Materials (*In re* A.W. & Associates, Inc.), 136 F.3d 1439, 1443 (11th Cir. 1998) (quoting *In re* Tolona Pizza Prods. Corp., 3 F.3d 1029, 1033 (7th Cir.1993)) (emphasis in original).

[37]Barrett Dodge Chrysler Plymouth, Inc. v. Cranshaw (*In re* Issac Leaseco, Inc), 389 F.3d 1205 (11th Cir. 2004) (quoting Advo-System, Inc. v. Maxway Corp., 37 F.3d 1044 (4th Cir. 1994)).

[38]*See* Webster v. Fujitsu Consulting, Inc. (*In re* NETtel Corp.), 369 B.R. 50, 64 (Bankr. D.D.C. May 22, 2007).

objective basis, that they had an idiosyncratic character or that they were extraordinary. The Court concludes, therefore, that the payments were made according to ordinary business terms and as such meet the requirement of § 547(c)(2)(C).

The conclusion that the payments were made according to ordinary business terms under the objective test is not inconsistent with the conclusion that they were not made in the ordinary course of business between the parties under the subjective test. There is nothing striking or unusual, in the context of industry practices as shown by the evidence, about payments being made 90 days or even 102 days after an invoice date, particularly when it occurs only occasionally. The fact that the timing of a particular payment is not unusual in the industry (and thus is made in accordance with ordinary business terms) does not, however, establish that such a payment was ordinary in the relationship between the parties.

C. Prejudgment Interest

The Trustee seeks prejudgment interest on the preferential transfers from the date of his letter demanding their return from Isotec.

The general rule is that a trustee is entitled to recover prejudgment interest upon a recovery of a voidable preference from the date of demand for its return or, in the absence of a demand, from the date of commencement of the suit for recovery,[39] usually at the rate provided

[39]Palmer v. Radio Corp. of America, 453 F.2d 1133, 1141 (5th Cir. 1971) (citing Kaufman v. Tredway, 195 U.S. 271 (1904); *see , e.g.,* Gonzales v. Conagra Grocery Products Co. (*In re* Furr's Supermarkets, Inc.), 373 B.R. 691, 709 (B.A.P. 10th Cir. 2007); Kelley v. Chevy Chase Bank (*In re* Smith), 236 B.R. 91, 104 (Bankr. M.D. Ga. 1999); Friedman v. 1000 Brickell, Ltd. (*In re* Advertising Associates, Inc.), 95 B.R. 849, 851 (Bankr. S.D. Fla. 1989). *See generally* H.D. Warren, Annotation, *Interest on Preferential Payment Recovered by Trustee in Bankruptcy*, 4 A.L.R.2d 327 at ¶ 1[b] (Cumulative Supplement; Originally published in 1949). One court added three days to the date of demand to account for the creditor's receipt of it. Ellenberg v. Mercer (*In re* Home Co.), 108 B.R. 357, 361 (Bankr. N.D. Ga. 1989).

by 28 U.S.C. § 1961.[40] Courts have recognized, however, that the award of prejudgment interest is discretionary.[41] The court must exercise its discretion according to law, which means that prejudgment interest should be awarded unless a sound reason not to exists.[42] Courts have denied prejudgment interest when the value of the preferential transfer is unliquidated,[43] if there has been a delay in the prosecution of the trustee's avoidance action for which the creditor is not responsible,[44] or when the creditor has a credible defense such that the creditor could not have ascertained the amount of liability without a judicial determination.[45]

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[40]*See, e.g.,* Kelley v. Chevy Chase Bank (*In re* Smith), 236 B.R. 91, 104 (Bankr. M.D. Ga. 1999); Ellenberg v. Mercer (*In re* Home Co.), 108 B.R. 357, 360 (Bankr. N.D. Ga. 1989); Friedman v. 1000 Brickell, Ltd. (*In re* Advertising Associates, Inc.), 95 B.R. 849, 851 (Bankr. S.D. Fla. 1989).

[41]Jones v. Aristech Chemical Corp. (*In re* Golco Industries, Inc.), 157 B.R. 720, 723 (N.D. Ga. 1993). *See, e.g.,* Hechinger Investment Co. of Delaware, Inc. v. Universal Forest Products, Inc. (*In re* Hechinger Investment Co. of Delaware, Inc.), 489 F.3d 568, 579-80 (3d Cir. 2007); *In re* Milwaukee Cheese Wisconsin, Inc., 112 F.3d 845, 849 (7th Cir. 1997).

[42] *See, e.g.,* Hechinger Investment Co. of Delaware, Inc. v. Universal Forest Products, Inc. (*In re* Hechinger Investment Co. of Delaware, Inc.), 489 F.3d 568, 579-80 (3d Cir. 2007); *In re* Milwaukee Cheese Wisconsin, Inc., 112 F.3d 845, 849 (7th Cir. 1997).

[43]First Software Corp. v. Computer Associates International, Inc. (*In re* First Software Corp.), 107 B.R. 417, 425-26 (D. Mass. 1989).

[44]Peltz v. Worldnet Corp. (*In re* USN Communications, Inc.), 280 B.R. 573, 602-03 (Bankr. D. Del. 2002). *Contra, e.g., In re* Milwaukee Cheese Wisconsin, Inc., 112 F.3d 845, 849 (7th Cir. 1997).

[45]*E.g.,* Bergquist v. Anderson-Greenwood Aviation Corp. (*In re* Bellanca Aircraft Corp.), 850 F.2d 1275, 1281 (8th Cir. 1988); Meeks v. Harrah's Tunica Corp. (*In re* Armstrong), 260 B.R. 454, 460 (E.D. Ark. 2001), *aff'd on other issues,* 291 F.3d 517 (8th Cir. 2002); Sacred Heart Hospital of Norristown v. E.B. O'Reilly Servicing Corp. (*In re* Sacred Heart Hospital of Norristown), 200 B.R. 114, 119 (Bankr. E.D. Pa. 1996). *Contra, e.g.,* Gonzales v. Conagra Grocery Products Co. (*In re* Furr's Supermarkets, Inc.), 373 B.R. 691, 709 & N. 83 (B.A.P. 10th Cir. 2007).

In *Palmer v. Radio Corp. of America*, 453 F.2d 1133, 1141 (5th Cir. 1971), the Fifth Circuit, recognizing the general rule, stated, "It is well settled that interest upon a voidable preference recovered by a trustee in bankruptcy should be computed from the date of demand for its return or in the absence of a demand, from the date of the commencement of the suit for recovery." Because *Radio Corp. of America* was decided prior to October 1, 1981, it is binding precedent under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).[46]

District Judge Murphy addressed the prejudgment interest issue in *Jones v. Aristech Chemical Corp. (In re Golco Industries, Inc.)*, 157 B.R. 72 (N.D. Ga. 1993). Judge Murphy concluded that the award of prejudgment interest on the recovery of a preferential transfer is not mandatory "but is left to the discretion of the bankruptcy court" and that "a good faith dispute as to the amount of preferential transfers is a valid basis on which not to award prejudgment interest." *Id.* at 723.[47]

In *Aristech Chemical*, the merits of the dispute between the trustee and the creditor turned

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[46]*See* Ellenberg v. Mercer (*In re* Home Co.), 108 B.R. 357, 360 n. 1 (Bankr. N.D. Ga. 1989).

[47]*Accord, e.g.*, Bergquist v. Anderson-Greenwood Aviation Corp. (*In re* Bellanca Aircraft Corp.), 850 F.2d 1275, 1281 (8th Cir. 1988); Meeks v. Harrah's Tunica Corp. (*In re* Armstrong), 260 B.R. 454, 460 (E.D. Ark. 2001), *aff'd on other issues,* 291 F.3d 517 (8th Cir. 2002); Sacred Heart Hospital of Norristown v. E.B. O'Reilly Servicing Corp. (*In re* Sacred Heart Hospital of Norristown), 200 B.R. 114, 119 (Bankr. E.D. Pa. 1996); Rajala v. Holland Corp. (*In re* Chesapeake Associates, L.P.), 141 B.R. 737 ,748 (Bankr. D. Kan. 1992); *cf.* First Software Corp. v. Computer Associates International, Inc. (*In re* First Software Corp.), 107 B.R. 417, 425-26 (D. Mass. 1989) (No prejudgment interest where value of transferred property is in dispute). *Contra, e.g.,* Gonzales v. Conagra Grocery Products Co. (*In re* Furr's Supermarkets, Inc.), 373 B.R. 691, 709 & N. 83 (B.A.P. 10th Cir. 2007); Neponset River Paper Co. v. Travelers Insurance Co., 219 B.R. 918, 921 (Bankr. D. Mass. 1998), *aff'd* 231 B.R. 829 (B.A.P. 1st Cir. 1998); Feltman v. City National Bank of Florida (*In re* Sophisticated Communications, Inc.), 2007 WL 3216613 at *5 (Bankr. S.D. Fla. 2007).

on a pure legal issue, specifically, whether the debtor's payment by check for purposes of the affirmative defense of new value in § 547(c)(4) took place when the creditor received it or the bank honored it. The date was important because the creditor had shipped product for which it had not been paid after receipt of the check but before its payment by the bank. The court's ruling in favor of the creditor reduced the amount of the trustee's recovery. In view of this good faith dispute, the court ruled that the bankruptcy court's refusal to award prejudgment interest was not an abuse of discretion.

The circumstances here are strikingly similar to those in *Aristech Chemical.* Like the creditor in *Aristech Chemical,* Isotec did not dispute the amounts of the transfers but asserted a credible affirmative defense. Isotec's position required a trial and presented a very close question for resolution.

To be sure, the creditor in *Aristech Chemical* prevailed in its defense, unlike Isotec. But, notably, the prejudgment interest the court denied in *Aristech Chemical* related to the final amount the trustee recovered and that apparently was never in dispute. Thus, the existence of a dispute with regard to *other* aspects of the transfers justified the denial of prejudgment interest on amounts not in dispute. Here, Isotec's credible, good faith defense that goes directly to the transfers in question similarly justifies denial of prejudgment interest under *Aristech Chemical.*

The ruling in *Aristech Chemical* that a bankruptcy court may exercise its discretion to decline to award prejudgment interest on the basis of a good faith defense has been cited as an example of the minority view,[48] and *Radio Corp. of America* could be read as requiring the award

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[48]Gonzales v. Conagra Grocery Products Co. (*In re* Furr's Supermarkets, Inc.), 373 B.R. 691, 709 & N. 83 (B.A.P. 10th Cir. 2007).

of prejudgment interest if the amount of the challenged preferential transfer is liquidated. In view of the fact that *Radio Corp. of America* may also be read as not precluding the exercise of the bankruptcy court's discretion with regard to prejudgment interest,[49] the Court believes that *Aristech Chemical* is the proper precedent to apply in the Rome Division of the Northern District of Georgia. In accordance with *Aristech Chemical*, therefore, the Court will exercise its discretion to deny prejudgment interest based on Isotec's credible, good faith affirmative defense that, although not successful, nevertheless presented a close and difficult question for resolution.

III. Conclusions of Law

Based on the foregoing, the Court makes the following conclusions of law:

1. All elements of a preference under 11 U.S.C. § 547(b) have been established with regard to the subject payments in the amount of $96,215.[50]

2. The debts on account of which the subject payments were made were incurred in the ordinary course of business of the Debtor and Isotec within the meaning of 11 U.S.C. § 547(c)(2)(A).

3. The subject payments were not made in the ordinary course of business or financial affairs of the Debtor and Isotec within the meaning of 11 U.S.C. § 547(c)(2)(B).

4. The subject payments were made according to ordinary business terms within the meaning of 11 U.S.C. § 547(c)(2)(C).

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[49]Nordberg v. Arab Banking Corp. (*In re* Chase & Sanborn Corp.), 127 B.R. 903, 912 (Bankr. S.D. Fla. 1991).

[50]See Order on Motions for Summary Judgment and on Defendant's Motion to Strike or, in the Alternative, Dismiss, June 27, 2007 [Docket No. 34], determining that all elements of a preference had been established.

5. Isotec is not entitled to the protection of 11 U.S.C. § 547(c)(2) with regard to the subject payments. because the requirement of 11 U.S.C. § 547(c)(2)(B) is not met.

6. The Trustee is entitled to avoid the subject payments as preferential transfers under § 547(b) and to recover the amount of them, to wit, $96,215, under 11 U.S.C. § 550(a).

7. The Trustee is not entitled to prejudgment interest.

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This Order is not intended for publication.