IT IS SO ORDERED.

Dated: March 29, 2024

John E. Hoffman, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	Case No. 18-52736
ASPC Corp.,	:	Chapter 11
Debtor.	:	Judge Hoffman
John B. Pidcock, not individually but as Trustee of the ASPC Creditor Trust,	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 20-2077
Sturm Ruger & Company, Inc.	:	
Defendant.	:	

MEMORANDUM OPINION ON
MOTION FOR SUMMARY JUDGMENT (DOC. 18)

I. Introduction

The issue in this adversary proceeding is whether certain alleged preferential transfers were made according to ordinary business terms within the meaning of § 547(c)(2)(B) of the Bankruptcy Code. The plaintiff, John B. Pidcock, is the trustee of the creditor trust formed under the Chapter

11 plan of ASPC Corp., which at the time of the alleged preferential transfers was known as AcuSport Corporation ("AcuSport"). The defendant, Sturm Ruger & Company, Inc. ("Ruger"), is a small firearms manufacturer. Before its liquidation, AcuSport was a wholesaler and distributor of Ruger's firearms.

AcuSport made prepetition wire transfers exceeding $3 million to Ruger as payment for Ruger's firearms. Pidcock seeks to avoid those transfers as preferential under § 547(b) of the Bankruptcy Code. Ruger moves for summary judgment on the ground that AcuSport made the transfers according to ordinary business terms, meaning § 547(c)(2)'s ordinary course of business defense bars Pidcock from avoiding the transfers. Whether Ruger is entitled to summary judgment turns on two sets of questions:

First, in arguing that the transfers in question were made according to ordinary business terms, Ruger presented evidence of payments from both retailers and wholesalers like AcuSport to manufacturers in Ruger's own small firearms industry. Was it proper for Ruger to only present evidence on payments made to manufacturers in its own industry? Or, as Pidcock argues, should Ruger have presented evidence of payments made by companies in AcuSport's durable goods wholesalers industry as well?

Second, Ruger asserts that the Court should determine whether the transfers at issue were made according to ordinary business terms based on the number of days AcuSport's invoices were outstanding compared to a range of days that invoices are typically outstanding in the relevant industry. Is this an appropriate metric for determining ordinariness? Or, as Pidcock argues, should the Court focus on other evidence, including how other firearms manufacturers adjust credit limits—as compared to how Ruger adjusted AcuSport's credit limit during the preference period?

For the reasons explained below, the Court answers both sets of questions in favor of Ruger. First, the Court concludes that Ruger relied on the appropriate industry by producing evidence of the timing of payments from both wholesalers and retailers to manufacturers in the small firearms industry. Second, the Court also finds that by comparing the number of days AcuSport's invoices were outstanding to the average number of days in which receivables are collected by other small firearms manufacturers, Ruger used an appropriate benchmark for measuring whether the payments it received from AcuSport were made according to ordinary business terms. And Pidcock has done nothing to establish that Ruger's reduction of AcuSport's credit limits was extraordinary in the industry. Thus, because Ruger's evidence makes clear that AcuSport's payments to it were made according to ordinary business terms, and because Pidcock has failed to show any genuine issue of material fact exists, Ruger is entitled to summary judgment.

II. Jurisdiction and Constitutional Authority

The Court has jurisdiction to hear and determine this matter under 28 U.S.C. § 1334(b) and the general order of reference entered in this judicial district in accordance with 28 U.S.C. § 157(a). This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(F).

The Court also has the constitutional authority to enter a final order in this adversary proceeding for two reasons. First, Ruger filed a proof of claim, and bankruptcy courts have the constitutional authority to finally adjudicate preference actions against parties that have filed proofs of claim. *In re Quebecor World (USA), Inc.*, 518 B.R. 757, 760 n.1 (Bankr. S.D.N.Y. 2014). Second, parties may consent to bankruptcy courts' entry of final orders adjudicating matters, *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 699 (2015), and the parties have consented to the Court's entry of a final order here, *see* Joint Am. Prelim. Pretrial Statement at 2.

III. Procedural History

AcuSport filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on May 1, 2018 ("Petition Date"). Less than a year later, the Court confirmed AcuSport's liquidating Chapter 11 plan, approving the formation of a creditor trust and appointing Pidcock as the trustee of that trust. As trustee, Pidcock was tasked with pursuing claims held by AcuSport's bankruptcy estate, including preferential transfer claims like the one he brought against Ruger.

After Ruger filed a proof of claim in an amount exceeding $1 million, Pidcock brought this adversary proceeding against Ruger by filing a complaint (Doc. 1) ("Complaint"), which contained six counts and requested the following relief:

> (I) avoidance of transfers as preferential under § 547(b) of the Bankruptcy Code;
>
> (II) recovery of the transfers from Ruger under § 550(a);
>
> (III) disallowance of Ruger's proof of claim under § 502(d);
>
> (IV) a judgment declaring "that the 'Aggregate Free Goods Claim,' and the property constituting the same," is property of the estate of AcuSport under § 541;
>
> (V) a declaratory judgment that any previously effectuated setoff of the Aggregate Free Goods Claim against Ruger's pre-Petition Date claim is null and void, and that Ruger does not have a right of setoff; and
>
> (VI) an order requiring Ruger to turn over cash or property having an economic value equal to the Aggregate Free Goods Claim.

Compl. at 9–14.

Ruger answered the Complaint (Doc. 5) ("Answer"), then filed its motion for summary judgment (Doc. 18) ("Summary Judgment Motion"). Pidcock responded to the Summary Judgment Motion (Doc. 20) ("Response"), and Ruger replied (Doc. 23) ("Reply"). As stated, Ruger moves for summary judgment on Count I of the Complaint—seeking avoidance of alleged

preferential transfers—based on § 547(c)(2)'s ordinary course of business defense. Ruger also seeks summary judgment on Counts II and III of the Complaint, on the ground that those claims for relief are tied to the preference claim asserted in Count I. And if that preference claim fails, Ruger argues, then so too must the claims asserted in Counts II and III. Summ. J. Mot. at 10.

In his Response, Pidcock "concede[d] Counts IV-VI and consent[ed] to the prior setoff of the free goods balance against [Ruger's] general unsecured claim." Resp. at 2. Ruger is therefore entitled to summary judgment on Counts IV-VI. Pidcock further concedes that Ruger relies on facts sufficient to allege a new value defense under § 547(c)(4)[1] in the amount of $12,629.46, Resp. at 15, and Ruger only asserts a new value defense in the amount of $3,498.49. Summ. J. Mot. at 5. So all that remains for the Court to decide is whether the avoidance and recovery of AcuSport's alleged preferential transfers is barred by the ordinary course of business defense.

Although the Court heard oral argument on the Summary Judgment Motion, no transcript of the argument has been prepared. The recording of the oral argument will be cited as "Oral Arg. at [timestamp]."

IV. Background

Ruger is a small firearms manufacturer, and before its liquidation, AcuSport was an authorized distributor of Ruger's firearms. Summ. J. Mot. at 2. During the 90-day period before the Petition Date ("Preference Period"), AcuSport made several wire transfers to Ruger ("Transfers") on account of firearms Ruger shipped to it under their distribution agreements.

[1] Section 547(c)(4) provides that the trustee may not avoid transfers:

> to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—
>
> (A) not secured by an otherwise unavoidable security interest; and
> (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor[.]

Although the Complaint identified the amount of the Transfers as "not less than $3,033,264.49," Compl. at 6, Ruger stated that the actual amount should be $3,028,994.88, Summ. J. Mot. at 3 n.1, and Pidcock agreed that this is the correct amount, Resp. at 2 n.1.

The Bankruptcy Code enables preference defendants to avoid liability for preferential transfers through several affirmative defenses. *See* 11 U.S.C. § 547(c). "The preference defenses in § 547(c) were enacted to encourage creditors to continue doing business with [] debtors under usual practices." *Auriga Polymers Inc. v. PMCM2, LLC as Tr. for Beaulieu Liquidating Tr.*, 40 F.4th 1273, 1288 (11th Cir. 2022) (citing *In re BFW Liquidation, LLC*, 899 F.3d 1178, 1193 (11th Cir. 2018)); *see also In re Beaulieu Grp., LLC*, 616 B.R. 857, 875 (Bankr. N.D. Ga. 2020) (same). In other words, "preference defenses are designed 'to encourage creditors to continue to sell on credit to a buyer slipping into bankruptcy and perhaps prevent the bankruptcy altogether.'" *Steege v. Canon U.S.A., Inc. (In re Calumet Photographic, Inc.)*, 594 B.R. 879, 883 (Bankr. N.D. Ill. 2019) (quoting Deborah L. Thorne, *Inequality Among Preference Defendants: How Is That Fair?*, Am. Bankr. Inst. J., Nov. 2014, at 24). *Cf. Harrah's Tunica Corp. v. Meeks (In re Armstrong)*, 291 F.3d 517, 525 (8th Cir. 2002) ("The purpose of the § 547(c) exceptions at issue is to encourage creditors to continue doing business with troubled debtors who may then be able to avoid bankruptcy altogether.") (cleaned up).

One preference defense found in § 547(c)(2) is the ordinary course of business defense, which absolves a defendant of preference liability if the transfer at issue satisfies either the subjective or objective test set forth in the statute. The subjective test asks whether the transfer at issue was made in "the ordinary course of business or financial affairs of the debtor and the transferee." 11 U.S.C. § 547(c)(2)(A). The objective test, by contrast, looks to "ordinary business terms," 11 U.S.C. § 547(c)(2)(B), comparing the payment between the parties to ordinary business

terms in the industry. Although Ruger asserted that the Transfers satisfy both the subjective and objective tests, Answer at 7, in seeking summary judgment it relies solely on the objective test, Summ. J. Mot. at 10.

In support of its argument that the Transfers satisfy the objective test, Ruger relies on "independent industry data from reliable sources regarding ordinary business terms in the industry," *id.* at 4, as described in the expert report of Edward T. Gavin ("Gavin"). Gavin's expert report ("Gavin Report") is appended in redacted form as an exhibit to the Declaration of Edward T. Gavin, which is Exhibit 2 to the Summary Judgment Motion. Gavin is the Managing Director and Founding Partner of Gavin/Solmonese LLC, a firm which "provides restructuring, turnaround, litigation, asset sale and structured liquidation advisory services to debtors and creditors." Summ. J. Mot. at 5–6. He "has extensive experience serving as a liquidating trustee, fiduciary, financial adviser to debtors and creditors' committees, and as an expert witness, including analyzing and testifying regarding the avoidability of pre-petition transfers on behalf of plaintiffs and defendants." *Id.* at 6.

In his report, Gavin first concluded that in assessing the ordinariness of the Transfers, Ruger's industry was the appropriate industry to consider. Industries are classified under the North American Industry Classification System ("NAICS") code designations. Gavin determined that the NAICS Code that best describes Ruger's business is 332994, "Small Arms, Ordnance, and Ordnance Accessories Manufacturing," a U.S. industry that "*comprises establishments primarily engaged in manufacturing small firearms that are carried and fired by the individual*." Gavin Report at 12.

Gavin next reviewed data from two Risk Management Association ("RMA") reports—one for firearm manufacturers with annual sales over $25 million, and the other for firearms

manufacturers with annual sales over $50 million. Ruger's annual sales exceed $50 million. Summ. J. Mot. at 5. For both reports, Gavin "identified the range of the average number of days in which receivables are collected, and concluded that the middle quartile range, encompassing the middle 50% of the data points, establishes a baseline for what can be considered ordinary in the industry." *Id.* at 5. "The two reports produced an ordinary range of 33 to 66 days, and 39 to 67 days, respectively." *Id.* Gavin then determined whether AcuSport paid Ruger's invoices within the ordinary payment ranges of 33 to 66 days and 39 to 67 days after invoice. *Id.* With one exception, AcuSport paid Ruger's invoices within 42 to 56 days after their issuance—well within both ordinary payment ranges. *Id.* Only one payment—a payment on a $3,498.49 invoice made 74 days after invoice ("Outlier Payment")—fell outside the ordinary payment ranges. *Id.*

Rather than submitting his own expert report, Pidcock critiques the Gavin Report in two ways. First, he contends that the Gavin Report does not establish that the Transfers were made according to ordinary business terms because Gavin evaluated the wrong industry. The relevant industry, Pidcock argues, is AcuSport's—and AcuSport "operated under NAICS Code 4239 (Miscellaneous Durable Goods Merchant Wholesalers.)." Resp. at 6. That industry includes the wholesale sellers of a "broad range of durable goods, including sporting, recreational, toy, hobby, and jewelry goods and supplies." Reply at 5.

Second, Pidcock argues that even if Gavin had evaluated the relevant industry, the Gavin Report still would not establish that the Transfers were made according to ordinary business terms. Pidcock asserts that Ruger reduced AcuSport's credit limits within the Preference Period, and says this reduction should have been compared to how other companies in the small firearms industry adjust credit limits in response to their customers' financial distress. Resp. at 9–12. Pidcock, however, presents no evidence to enable such a comparison. Instead, Pidcock relies on

(1) supposition about whether other companies impose strict credit limits and (2) emails regarding Ruger's adjustment of AcuSport's credit limits. Pidcock's evidence consists of the following:

> • The deposition testimony of Thomas Dineen, the Chief Financial Officer of Ruger, that Ruger does not have "hard and fast" credit limits, "which other companies I suppose do." Resp. at 9.
>
> • An email between Dineen and John Flanagan, the Chief Financial Officer of AcuSport, regarding a $5 million credit limit. *Id.* at 11.
>
> • "A December 28, 2017 communication from Flanagan questioning Dineen's demand for $900,000 in additional payments, despite [AcuSport] being current and under the $5 million credit limit." *Id.*
>
> • "A January 9, 2018 e-mail thread concerning Flanagan's efforts to obtain $1.5 million in shipments, based on an existing balance due at the time of $3.5 million; Dineen requests an additional $1 million in payments, suggesting a reduction in credit limit to $4 million." *Id.*
>
> • Flanagan's deposition testimony that "I believe we had a set dollar credit limit with [Ruger] . . . and in order to ship us product that was available, we needed to pay down that extra amount." *Id.*
>
> • A December 1, 2017 email from Flanagan to Mary Grim and Jim Broering (employees of AcuSport) stating that "[r]egardless, [Dineen] acknowledged that although our credit limit is technically $5M he is not willing to let the balance go that high (here we go again)." *Id.* at 12.
>
> • A January 30, 2018 email from Flanagan to Broering and Grim stating that "[Ruger] has a $1.3M letter of credit and $1.5M of credit insurance and he's no longer willing to go much above that. Not more than 'a few hundred thousand.' So we're essentially on a $3M credit limit now with Ruger." *Id.*

V. Legal Analysis

A. Summary Judgment Standard

Under Rule 56(a) of the Federal Rules of Civil Procedure, made applicable here by Rule 7056 of the Federal Rules of Bankruptcy Procedure, a court "shall grant summary judgment if the

movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact." *Johnson v. U.S. Postal Serv.*, 64 F.3d 233, 236 (6th Cir. 1995). "Once this burden is met, it shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.") (cleaned up).

"On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts." *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (cleaned up). A dispute is genuine only if it is "based on evidence upon which a reasonable [finder of fact] could return a [judgment] in favor of the non-moving party." *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 270 (6th Cir. 2009). And "[a] factual dispute concerns a 'material' fact only if its resolution might affect the outcome of the suit under the governing substantive law." *Id.*

B. Preference Law and the Ordinary Course of Business Defense

Section 547 of the Bankruptcy Code, entitled "Preferences," provides for the avoidance of "preferential transfers." Specifically, § 547(b) provides that the trustee may avoid a 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; or
> >
> > (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (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.

11 U.S.C. § 547(b).

Section 547 "fosters equality of distribution among creditors, which is one of the primary goals of the Bankruptcy Code." *Chase Manhattan Mortg. Corp. v. Shapiro (In re Lee)*, 530 F.3d 458, 463 (6th Cir. 2008). As the Supreme Court observed:

> "The purpose of [§ 547] is two-fold. First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor."

Union Bank v. Wolas, 502 U.S. 151, 161 (1991) (quoting H.R. Rep. No. 95–595, at 177–178 (1977), U.S.C.C.A.N. 6137, 6138). For purposes of summary judgment, Ruger assumes that Pidcock, who has the burden of proof on the elements of § 547(b), *see* 11 U.S.C. § 547(g), could establish each of those elements. Summ. J. Mot. at 10.

As noted above, § 547(c) sets forth a number of affirmative defenses "to counteract liability for an otherwise avoidable preference." *Prudential Real Est. & Relocation Servs., Inc. v. Burtch*

(In re AE Liquidation, Inc.), Civ. No. 13-1504-LPS, 2015 WL 5301553, at *3 (D. Del. Sept. 10, 2015). One of those defenses is the ordinary course of business defense, which applies

> (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—
>
> > (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; *or*
> >
> > (B) made according to ordinary business terms[.]

11 U.S.C. § 547(c)(2) (emphasis added).

Congress created the ordinary course of business defense "to leave undisturbed normal financing relations, because it does not detract from the general policy [of the] preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy.'" *See Logan v. Basic Distrib. Corp. (In re Fred Hawes Org., Inc.)*, 957 F.2d 239, 243 (6th Cir. 1992) (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 88)). The defendant has the burden of proof as to this and the other eight defenses set forth in § 547(c). 11 U.S.C. § 547(g).

For the ordinary course of business defense to apply to a transfer, the defendant must establish two things. First, the transfer must have been made in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the defendant. 11 U.S.C. § 547(c)(2). Neither party disputes that AcuSport made the Transfers in payment of debts it incurred in the ordinary course of business between it and Ruger.

Second, because § 547(c)(2) is written in the disjunctive, the transfer must *either* (1) be made in the ordinary course of business or financial affairs of the debtor and the transferee (satisfying the "subjective" ordinary course of business test) *or* (2) be made according to ordinary business terms (satisfying the "objective" ordinary course of business test). *Id.* Before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), § 547(c)(2)

used the conjunctive "and" between the objective and subjective tests, meaning a preference defendant needed to prove that transfers were made both (1) in the ordinary course of business or financial affairs of the debtor and the defendant and (2) according to ordinary business terms. *See Carrier Corp. v. Buckley (In re Globe Mfg. Corp.)*, 567 F.3d 1291, 1298 n.4 (11th Cir. 2009); *Pereira v. United Parcel Serv. of Am., Inc. (In re Waterford Wedgwood USA, Inc.)*, 508 B.R. 821, 827 (Bankr. S.D.N.Y. 2014); Lawrence Ponoroff, *Bankruptcy Preferences: Recalcitrant Passengers Aboard the Flight from Creditor Equality*, 90 Am. Bankr. L.J. 329, 357 (2016). Despite the change from the conjunctive to disjunctive, "the case law prior to BAPCPA's enactment as to the requirements of each subsection remains good law" because "the wording of the subsections was not changed by BAPCPA in 2005[.]" *Waterford*, 508 B.R. at 827; *see also Pirinate Consulting Grp. v. Maryland Dep't of the Env't (In re Newpage Corp.)*, 555 B.R. 444, 452 (Bankr. D. Del. 2016) (same); *In re Affinity Health Care Mgmt., Inc.*, 499 B.R. 246, 264 n.18 (Bankr. D. Conn. 2013) (same). In short, BAPCPA did not change the subjective or objective tests themselves, but made it so a preference defendant need only prove that a transfer satisfies either of the two tests—not both.

C. The Objective Test and the Relevant Industry

Again, for an alleged preferential transfer to satisfy the objective test of the ordinary course of business defense, that transfer must have been "made according to ordinary business terms[.]" 11 U.S.C. § 547(c)(2)(B). The Sixth Circuit has held that, for purposes of the objective test, "'ordinary business terms' means 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). Ruger argues that because each Transfer from AcuSport (other than the Outlier Payment) satisfies the objective test, those payments are not avoidable as a matter of

law. The Court must therefore determine whether the Transfers were "so unusual as to render [them] an aberration in the relevant industry." *Carled*, 91 F.3d at 818.

To determine whether the Transfers were made according to ordinary business terms (*i.e.*, whether they were so unusual as to render them an aberration in the relevant industry), the Court must answer this threshold question: What is the relevant industry? Pidcock and Ruger each define the "relevant industry" differently. Pidcock contends that the relevant industry is AcuSport's—Miscellaneous Durable Goods Merchant Wholesalers. Resp. at 6. Ruger says the relevant industry is its industry—Small Arms, Ordnance, and Ordnance Accessories Manufacturing. Gavin Report at 12.

Pidcock's definition is a non-starter. He maintains that "[t]he Sixth Circuit has held that an ordinary business terms analysis should be based on the debtor's industry, as opposed to the creditor's industry." Resp. at 6. For this proposition Pidcock cites two Sixth Circuit decisions: *Fred Hawes* and *First Fed. of Mich. v. Barrow*, 878 F.2d 912 (6th Cir. 1989). *Id.* But neither case supports using the debtor's industry to assess ordinariness. *Barrow* refers to the "parties' industry," as though the debtor and creditor shared an industry, which is not always the case. *Barrow*, 878 F.2d at 919 (quoting *In re Steel Improvement Co.*, 79 B.R. 681, 684 (Bankr. E.D. Mich. 1987)). And as explained below, *Fred Hawes* supports using the transferee's industry to determine whether payments were made according to ordinary business terms. True, one bankruptcy appellate panel decision supports using the debtor's industry. *See Shodeen v. Airline Software, Inc. (In re Access Air, Inc.)*, 314 B.R. 386, 394 (B.A.P. 8th Cir. 2004), *aff'd*, 163 F. App'x 445 (8th Cir. 2006) (holding that the phrase "ordinary business terms" requires a preference defendant to prove the debtor made the transfer according to the "ordinary business terms prevailing within the debtor's industry"). But that decision has not been followed on this point

even in the Eighth Circuit. *See US Bank Nat'l Ass'n (In re Interstate Bakeries Corp.)*, 499 B.R. 376, 388 n.7 (Bankr. W.D. Mo. 2013) (disagreeing with *Access Air*). This Court also declines to follow *Access Air* and rejects Pidcock's contention that AcuSport's is the relevant industry.

Creditors have "considerable latitude in defining what the relevant industry is." *Carled*, 91 F.3d at 817 (quoting *Advo–System, Inc. v. Maxway Corp.*, 37 F.3d 1044, 1050 (4th Cir. 1994)). And Ruger has not exceeded its latitude here. Indeed, Sixth Circuit law is consistent with selecting Ruger's (*i.e.*, the defendant's) industry as the relevant industry for assessing whether the Transfers satisfy the objective test for the ordinary course of business defense. In *Fred Hawes*, the Sixth Circuit noted that the debtor's "payment practices were in accordance with those of [the defendant's] overall customer base." 957 F.2d at 246. That is, the measure of ordinariness was the timing of payments from the defendant's customers to others in the defendant's industry. Here, that would be payments from the purchasers of small firearms to the manufacturers of small firearms. And in *Carled*, the Sixth Circuit held that the defendant showed the transactions were made according to ordinary business terms by introducing evidence as to the timing of payments made to it by its own customers, as well as evidence about the timing of payments made to another company in the same industry. *See Carled*, 91 F.3d at 814. In other words, the defendant satisfied the objective ordinary course of business test by introducing evidence regarding transactions between companies in the defendant's industry and their customers.

Every other circuit to address the issue has held that the phrase "ordinary business terms" refers to the practices in the creditor's/defendant's industry. *See In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1033 (7th Cir. 1993) ("'[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[.]"); *Miller v. Fla. Mining & Materials (In re A.W. & Assocs., Inc.)*, 136 F.3d 1439, 1443

(11th Cir. 1998) (same); *Fiber Lite Corp. v. Molded Acoustical Prods., Inc. (In re Molded Acoustical Prods., Inc.)*, 18 F.3d 217, 220 (3d Cir. 1994) (same); *Sigmon v. Butner (In re Johnson Bros. Truckers Inc.)*, 9 F. App'x 156, 162 (4th Cir. 2001) (same); *see also Waterford*, 508 B.R. at 828 ("It is well established that the creditor's industry is the measure for ordinariness under [§ 547(c)(2)(B)]"); *Stanziale v. S. Steel & Supply, L.L.C. (In re Conex Holdings, LLC)*, 518 B.R. 269, 285 (Bankr. D. Del. 2014) ("The phrase 'ordinary business terms' looks to general norms within the creditor's industry."). Thus, the relevant industry is the creditor's/defendant's industry—here, Ruger's small firearms industry.

Nor did Ruger exceed its "considerable latitude" by failing to present the best evidence of the Transfers' ordinariness. The payments at issue here were made from a Miscellaneous Durable Goods Merchant Wholesaler (AcuSport) to a Small Arms, Ordnance, and Ordnance Accessories Manufacturer (Ruger). So the evidence that would have best shown that the Transfers satisfied the objective test would have compared the timing of firearm wholesalers' payments to firearm manufacturers to the timing of AcuSport's payments to Ruger. *See Moglia v. ISP Techs., Inc. (In re DeMert & Dougherty, Inc.)*, 232 B.R. 103, 110 (N.D. Ill. 1999) ("'[A]ssuming the [creditor] is selling to a wholesaler, the range of terms to be considered are only the range of terms extended to other wholesalers.'") (quoting *Milwaukee Cheese Wis., Inc v. Straus (In re Milwaukee Cheese Wis. Inc.)*, 191 B.R. 397, 401 (E.D. Wis. 1995)). But the Gavin Report includes payments from not only wholesalers, but also retailers, to small firearms manufacturers. That means it is not the best evidence of the ordinariness of AcuSport's payments to Ruger.

Even so, Gavin's reliance on a report of payments to those in the defendant's industry makes sense given creditors' "considerable latitude in defining what the relevant industry is." *Carled*, 91 F.3d at 817. While an analysis of payments to small arms manufacturers from their

customers (wholesale or retail) is not on all fours with the business relationship between the parties here, it comes close enough. *See Dougherty*, 232 B.R. at 110. The Gavin Report includes payments to small arms manufacturers from both wholesalers and retailers, Oral Arg. at 3:43:33, because the reports on which the Gavin Report relied did not distinguish between the two, *id.* at 3:44:10–3:44:25. Where the best evidence is unavailable, case law supports using a measure within the "*range* of terms" typical for companies in the defendant's industry to assess ordinariness. *Tolona Pizza Prods.*, 3 F.3d at 1033; *A.W. & Assocs.*, 136 F.3d at 1443; *Molded Acoustical Prods.*, 18 F.3d at 220. And because the Gavin Report analyzes a report of customer payments to manufacturers in Ruger's industry, it uses a measure within the relevant range of ordinary business terms.

D. Days Sales Outstanding Versus Credit Limits

As discussed above, Gavin used RMA data to identify ranges of 33 to 66 days and 39 to 67 days for payment after invoice as the baseline for what is ordinary in the small firearms industry. And he determined that, with the sole exception of the Outlier Payment, AcuSport paid Ruger's invoices within 42 to 56 days after Ruger sent them, meaning the payments fall comfortably with both ordinary course ranges.

Importantly, Pidcock "does not question the actual data presented by . . . Gavin," Resp. at 7, and he acknowledges that Gavin's Days Sales Outstanding ("DSO") analysis, which looks at the number of days an invoice is pending before it gets paid, supports Ruger's contention that the Transfers were made according to ordinary business terms. *See id.* ("It is clear from a reading of the Gavin Report that *aside from his DSO analysis* . . . there is nothing else in his report that supports the Defendant's contention that the subject transactions were ordinary in the industry.") (emphasis added). Given those concessions from Pidcock, the Court must now answer this second

question: Is Gavin's DSO analysis, standing alone, sufficient to establish that no genuine issue of material fact exists as to whether the Transfers were made according to ordinary business terms?

For two reasons, the Court concludes that Gavin's analysis is sufficient. First, case law supports the sufficiency of the DSO approach. In *Carled*, the Sixth Circuit held that, for the purpose of establishing that payments were made according to ordinary business terms, "it would be sufficient to prove that a certain percentage of customers pay within a certain number of days after the due date" of approximately 14 days after invoice. *Carled*, 91 F.3d at 819. This means that the timing of payments was a sufficient basis to determine if payments were made according to ordinary business terms. *Id.*; *see also Forman v. P&M Brick LLC (In re AES Thames, L.L.C.)*, No. 11-10334 (KJC), 2016 WL 11595116, at *10 (Bankr. D. Del. Oct. 28, 2016) (holding that reliance by creditor's expert on RMA data on payment timing was "reasonable and appropriate" and based on this evidence, the transfers at issue were made according to ordinary business terms).

Second, the information regarding credit limits that Pidcock contends Gavin should have considered is not readily available. According to Pidcock, the ordinary business terms analysis should consider how other creditors modify their customers' credit limits. But how would Ruger obtain that information? At oral argument, Pidcock's counsel suggested that Ruger should have "picked up the phone" and surveyed other companies as to their practices regarding credit limits. Oral Arg. at 3:20:25–3:23:20. But that proposed solution is unworkable. It would saddle Ruger (and any other creditor defending a preference action) with the burden of producing "information that the competitors oft will be reluctant to yield and that frequently the creditor will find difficult to obtain." *In re Molded Acoustical Prod., Inc.*, 18 F.3d 217, 224 (3d Cir. 1994). What's more, the mere existence of "more precise information" that is difficult to obtain does not render other evidence of ordinary business terms insufficient. *Carled*, 91 F.3d at 819.

E. No Genuine Issue of Material Fact Remains

Because Ruger has established the absence of a genuine issue of material fact as to whether AcuSport's Transfers were made according to ordinary business terms, the issue becomes whether Pidcock has presented evidence showing that a genuine issue of fact remains regarding Ruger's ordinary course of business defense. For the reasons explained below, he has failed to do so.

Pidcock contends that the Transfers were not made according to ordinary business terms because Ruger's adjustments to AcuSport's credit limits were aberrational in the industry. But Pidcock has done nothing to establish that those adjustments were aberrational. The only evidence Pidcock produced—deposition testimony of Dineen and emails among AcuSport employees—primarily relates to changes that Ruger made to the credit limits Ruger imposed on AcuSport, which is relevant to the subjective test. Under the subjective test, the ordinary course of business defense applies to transfers made in "the ordinary course of business or financial affairs of the debtor and the transferee." 11 U.S.C. § 547(c)(2)(A). The subjective test "requires proof that the debt and its payment are ordinary in relation to other business dealings between that creditor and that debtor." *Nathan v. Am Med. Sec. (In re Advanced Sys. Int'l, Inc.)*, 234 F. App'x 398, 401 (6th Cir. 2007).

During oral argument, Pidcock's counsel turned to a discussion of how Ruger adjusted AcuSport's credit limits during the Preference Period compared to the pre-Preference Period. He stated that Ruger reduced AcuSport's credit limit by nearly 50% during the Preference Period compared to the pre-Preference Period. He then said that the question was whether other gun manufacturers would adjust credit limits in that way. Oral Arg. at 2:44:47–2:46:40. That may be a valid question, but Pidcock presents no evidence answering it. Again, the evidence in the record as to credit limits primarily relates to what Ruger did with respect to AcuSport's credit limit during the Preference Period compared to the pre-Preference Period. *See* Resp. at 10–11 (noting that

AcuSport's credit limit "was reduced by almost 50% at the precipice of the 90-day preference period."). A creditor's adjustment of credit limits as to a debtor speaks to the course of business between *those parties*—not what is objectively ordinary within the relevant industry.

The only bit of evidence that in any way goes to the objective test is Dineen's deposition testimony that Ruger does not have "hard and fast" credit limits, "which other companies I suppose do." Resp. at 9; Ex. A. From this Pidcock draws the following conclusion—which he bolds to emphasize the point—"**So off the bat . . . Dineen admits that with respect to credit limits, the Defendant does not conduct itself in a manner similar to other companies in the firearms industry**." *Id.* at 9–10. But nothing in Dineen's testimony establishes how other companies in the firearms industry treated AcuSport and other customers with respect to credit limits. Ruger's lack of hard and fast credit limits—which other manufacturers might have—hardly means that other manufacturers treated AcuSport and other customers differently than Ruger did. And whatever effect Ruger's reduction in credit limits had on AcuSport's payment practices, it did not (apart from the Outlier Payment) take the payments to Ruger outside the middle quartile of the range of payments in the small firearms industry. In sum, the evidence Pidcock presented regarding credit limits does nothing to refute the evidence supporting Ruger's argument that the Transfers satisfy the objective test.

Rather than producing relevant evidence, Pidcock poses questions that he believes should have been asked and answered regarding other companies in the small firearms industry:

- How are credit limits established?
- Under what circumstances do vendors typically reduce or eliminate credit limits?
- How are credit limits affected by third-party credit protections, such as credit insurance or standby letters of credit?

- Do vendors take adverse actions against customers that are otherwise paying timely but are not taking advantage of early-pay discounts?

Resp. at 8–9.

Pidcock says Gavin "does not even attempt to answer these questions," *id.* at 13—questions which in his mind "reveal that [Ruger] acted in a manner noticeably different from most of the other firearms and ammunition manufacturers with whom [AcuSport] did business," *id.* at 9.

Unfortunately for Pidcock, posing questions is not sufficient to raise a genuine issue of material fact. "[A]t the summary judgment stage, it is not enough . . . to raise questions. 'A party seeking to defeat a motion for summary judgment is required to wheel out all its artillery to defeat it.'" *Laborers' Pension Fund v. Prop. Recycling Servs. Corp.*, No. 15-CV-09170, 2021 WL 4844096, at *6 (N.D. Ill. Oct. 18, 2021) (quoting *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996)). "The [respondent to a motion for summary judgment] could have developed evidence . . . through depositions, expert analysis, or supplemental discovery. Having failed to do so, it cannot rely on rhetorical questions to establish a material issue of fact." *Id.*; *see also United Paperworkers Int'l Union, Loc. No. 35 Pension Plan v. Arlington Sample Book Co.*, No. CIV.A. 83-2828, 1984 WL 6625, at *4 (E.D. Pa. May 23, 1984) ("[T]he mere posing of questions and formulation of theories are insufficient to raise the genuine issue of fact needed to defeat a summary judgment motion.").

In short, Pidock's evidence mainly bears on the subjective test, not the objective test—and again, Ruger need only meet one of the tests, not both. This case illustrates the importance of BACPA's replacement of the conjunctive "and" with the disjunctive "or" between the subjective and objective tests for the ordinary course of business defense. Although the Court need not decide the issue, there appears to have been a change in the manner in which Ruger dealt with AcuSport before and during the Preference Period as to credit limits. Were § 547(c)(2) still written in the

conjunctive, Ruger would likely be unable able to satisfy the subjective test, and therefore may have been unable to establish that the Transfers were made in the ordinary course of business. But because preference defendants now need only satisfy *either* the subjective or objective test, Ruger can avail itself of the ordinary course of business defense by satisfying the objective test alone.

For all these reasons, Gavin's DSO analysis is sufficient to establish that the Transfers, with the single exception of the Outlier Payment, were made according to ordinary business terms, and the new value defense applies to the Outlier Payment. Ruger therefore is entitled to summary judgment on Counts I–III, and Pidcock concedes Counts IV–VI. Pidcock has failed to demonstrate a genuine dispute as to any material fact, and Ruger is entitled to judgment as a matter of law.

VI. Conclusion

For the reasons set forth above, the Summary Judgment Motion is **GRANTED**. A separate judgment entry in accordance with this Memorandum Opinion shall be entered.

IT IS SO ORDERED.

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