UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Air South Airlines, Debtor.	C/A No. 97-07229-W Adv. Pro. No. 99-80297-W
W. Ryan Hovis, Trustee Plaintiff, v. Summit Security Services, Inc., Defendant.	**JUDGMENT** Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Judgment for the Plaintiff shall be in the amount of $14,868.81.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 3, 2000.

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FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Air South Airlines, Inc. Debtor.	C/A No. 97-07229-W Adv. Pro. No. 99-80297-W
W. Ryan Hovis, Trustee Plaintiff, v. Summit Security Services, Inc., Defendant.	**ORDER** Chapter

THIS MATTER comes before the Court on the Complaint of W. Ryan Hovis (the "Trustee" or "Plaintiff") to recover preferential transfers pursuant to 11 U.S.C. §547(b)[1] and S.C. Code Ann. §27-25-10.[2] After reviewing the pleadings in this matter and considering the evidence presented and arguments of counsel at trial, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.[3]

FINDINGS OF FACT

1. Air South Airlines, Inc. ("Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on August 28, 1997. The case was subsequently converted to Chapter 7

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[1] Further references to the Bankruptcy Code shall be by section number only.

[2] Plaintiff did not address the anti-assignment statute in his proposed order; therefore, the Court deems it abandoned.

[3] The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such; and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

36

and Plaintiff was appointed to act as Trustee.

2. On August 18, 1999, Plaintiff commenced this adversary proceeding seeking the avoidance of transfers in the amount of $30,393.26 and requesting that the Court find the transfers in question to constitute assignments voidable under S.C. Code Ann. §27-25-10.

3. Summit Security Services, Inc. ("Summit") is a provider of security services. In April 1996, Summit began providing security services to Debtor at JFK International Airport in New York, New York. Summit provided the following services to Debtor: (1) guard service in the concourse; (2) screening of passengers and their luggage; and (3) wheel chair service. Summit billed Debtor for the wheel chair service on a weekly basis and charged a flat rate for each person that was serviced. The guard service in the concourse was billed weekly at an hourly rate for the guards' services. The screening of passengers and their luggage was billed monthly based on a per passenger charge.

4. The payment terms for the invoices that Summit sent Debtor were on a "upon receipt" basis.

5. Summit ceased doing business with Debtor on May 30, 1997 because Debtor moved to another terminal at JFK International Airport where Summit did not provide security services.

6. After May 30, 1997, Debtor paid Summit's invoices as follows[4]:

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[4] The Court relies on the stipulated summary presented at trial as Defendant's Exhibit A which reflects both the pre-preference and preference dates and numbers of the invoices, the dates the payments were received by creditor, the amounts of the invoices, and the amounts of the payments. However, the Court notes that there are discrepancies between the summary of invoices and the actual invoices, which are the subject of the preferential payments, introduced at trial as Plaintiff's Exhibit 1. Because the Court was not presented with the actual invoices for pre-preference payments, it cannot make a comparison between the invoices and the stipulated summary to correct any discrepancies; thus, it relies solely on the stipulated summary to calculate the percentages discussed within.

Date Payment Received[5]	Payment Amount	Invoice Date	Amount of Invoice	Days Between Inv. Date & Receipt
06/05/97	$10,000.00	03/24/97	$13,810.70	73
06/26/97	$10,116.94	03/10/97	$2,185.83	108
		03/24/97	$3,810.70*	94
		03/31/97	$738.27	87
		04/07/97	$684.68	80
		04/14/97	$2,113.99	73
		04/14/97	$583.47	73
07/30/97	$10,276.32	04/21/97	$2,201.22	100
		04/21/97	$434.62	100
		04/28/97	$2,088.34	93
		05/05/97	$2,201.22	86
		05/05/97	$523.93	86
		05/12/97	$666.82	79
		05/19/97	$2,160.17	72

* The payment of $3,810.70 was the balance due on the invoice dated 03/24/97 for the full amount of $13,810.70.

The preference period began ninety days prior to the filing of the voluntary Chapter 11 petition. Thus, the Trustee only seeks the recovery of the three payments which were made after may 19, 1999.

7. As indicated above, the June 5, 1997 payment was a partial payment on an invoice which was 73 days old. The June 26, 1997 payment was payment for a total of six invoices which had

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[5] In Hovis v. Aerospace Solutions, Inc. (In re Air South Airlines, Inc.), C/A No. 97-07229-W, Adv. Pro. No. 99-80256-W (Bankr. D.S.C. 1/14/00), this Court held that for purposes of the ordinary business course defense set forth in §547(c)(2), the date of "transfer" is not the date that the invoice is paid nor the date that the drawee bank honors the check, rather the relevant date is the date that the check was received by the creditor.

aged between 73 days to 108 days, with an average of 85.83 days. The final payment on July 30, 1997 was for seven invoices which had aged between 74 to 100 days, with an average of 88 days.

8. Debtor never paid its obligations to Summit upon receipt or even within 30 days. During Summit and Debtor's relationship; the period between the invoice date and date the payment was received by Summit varied from a low of 38 days to a high of 141 days, with an average of 77.43 days.

9. During the pre-preference period, Debtor's delinquency resulted in friction between Debtor and Summit. On December 12, 1996, Debtor wrote Summit's Operations Manager regarding the delinquency. Debtor's letter stated:

> According to our records, Air South has paid Summit in excess of $54,000.00 since September, and currently owes $33,293.85 of which $15,176.46 has aged beyond 60 days. To resolve this issue, we will pay $15,176.46 on Friday, December 13, 1996 (I will be glad to personally deliver this check to you on the arrival of our flight 836 on Friday at 15:00). The remaining balance of $18,117.39 will be paid on December 30, 1996. Further, we will continue to make weekly payments to you going forward with the intent of keeping our aging payables to you at or under 30 days.

Summits' records indicate that a payment of $16,546.92 was made on December 16, 1996. Debtor did not make the December 30, 1996 payment as promised; and, on January 2, 1997, Summit's director of accounts receivable wrote a letter to Debtor demanding payment. Summit's records indicate that it received a payment of $16,546.93 on January 3, 1997.

10. Debtor did not make the weekly payments as promised. On April 17, 1997, Debtor sent a letter via facsimile to Summit's director of accounts receivable which stated:

> Confirming today's conversation, our next payment to your for $10,000.00 will be made tomorrow for express delivery Monday, April 21, 1997.

> Weekly $10,000 payments will follow on successive Mondays until we are at our 30 day aging target with you.

Summit's records indicate that on April 21, 1997 it received a payment in the amount of $9,858.51. Debtor made a $10,000.00 payment on April 29, 1997; approximately one week after the April 21, 1997 letter. However, Debtor thereafter failed to make weekly payments.

11. During March through July of 1997, Summit represented approximately 40 to 60 airlines other than Debtor. Evidence presented to the Court at trial indicates that between 45% to 50% of customers paid Summit's invoices within 31 to 60 days of the invoice date; between 20% to 23% of customers paid Summit's invoices between 61 to 90 days; and approximately 27 to 28% of customers waited over 91 days to pay Summit's invoices. Debtor usually fell within the second category and, during the pre-preference period, allowed its invoices to age an average of 77.43 days.

12. The Trustee's expert testified that the Robert Morris Associates Annual Statement Studies for 1997 indicated that the median number of days between invoicing and payment in the security industry was 42 days.

13. Gary L. Cerra, who is employed by Summit as the Security Manager of terminal 1 at JFK Airport, testified on behalf of Summit that, from his experience working for airline security service providers, the usual aging of invoices by other airline security service providers was between 30 to 60 days.

CONCLUSIONS OF LAW

Section 547(b) provides the trustee with the authority to avoid any pre-petition transfer which meets the requirements set forth in the section. More particularly, it provides as follows:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made--
> (A) on or within 90 days before the date of the filing of the petition; 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.

The trustee's avoidance power which is set forth in §547(b) promotes the "equality of distribution among creditors" by ensuring that all creditors get paid a share of the bankruptcy estate while discouraging creditors from "outmaneuver[ing] each other in an effort to carve up a financially unstable debtor." Advo-System, Inc. v. Maxway Corp., 37 F.3d 1044, 1047 (4th Cir. 1994). Prior to trial, the parties stipulated that the requirements of §547(b) are met in this case. The transfers in question were payments by the Debtor for the benefit of Summit, a creditor. Second, the payments were on account of antecedent debts incurred when Summit provided security services to Debtor. Third, pursuant to §547(f), "the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition." Fourth, Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on August 28, 1997; thus, the transfers at issue in this case were all made within 90 days prior to the date of the filing, as required by §547(b)(4)(A). Lastly, the transfers enable Summit to receive more than it would receive in a Chapter 7 proceeding. Summit was an unsecured creditor and,

because in this case unsecured creditors will receive less than 100% distribution, Summit's position was improved by virtue of receiving the payments.

While §547(b) provides the trustee with a strong power to avoid certain transfers that meet its requirements, the Bankruptcy Code also provides creditors with various defenses to preferential transfer recovery. Summit, in the case now before the Court, has raised the "ordinary course of business" defense which is set forth in §547(c)(2). The section provides:

> (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.

Section 547(g) sets forth which party bears the burden of proof in a preference action. It provides that the trustee bears the burden of proving that the requirements of subsection (b) have been met in order to avoid the transfer as preferential; however, "the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section." Thus, in order to prevail under the ordinary course of business defense in this case, Summit bears the burden of proving that the debts, as represented by the invoices, were incurred in the ordinary course of the business affairs of Debtor and Summit; the payments were made in the ordinary course of the business of Debtor and Summit; and the transfers were in harmony with the range of terms prevailing in the relevant industry's norms. See, e.g. Campbell v. NationsBank of South Carolina (In re Rodwell Pontiac Cadillac GMC Truck, Inc.), C/A No. 93-71381-W, Adv. Pro. 95-8003-W (Bankr. D.S.C. 03/25/1996). At trial, Plaintiff and Summit stipulated that the requirement of subsection A had

been met. Therefore, the issues that remain before this Court and on which Summit bears the burden of proof by a preponderance of the evidence are whether subsection B and C have been met so that the subject preferential transfers may be excepted from Plaintiff's avoidance pursuant to the ordinary course of business defense.

A. Section 547(c)(2) - The Ordinary Course of Business Defense

The leading authority in this District on the ordinary course of business defense is the Fourth Circuit decision of Advo-System, Inc. v. Maxway Corp., 37 F.3d 1044 (4th Cir. 1994). The Court in Advo-System recognized that subsections B and C of §547(c)(2) provide a subjective and objective test respectively which require a separate analysis. In the past, many courts have struggled with the issue of what analysis the Court must undergo to determine whether preferential transfers were made in the ordinary course of business or financial affairs of the debtor and creditor and whether said transfers were made according to ordinary business terms. Some courts were leaning toward applying a subjective test to both subsections B and C; however, as the Fourth Circuit has held, "[b]ecause subsections B and C are written in the conjunctive, the use of subsection B's subjective approach under subsection C would render subsection C superfluous." Advo-System, 37 F.3d at 1048. Thus, the Fourth Circuit has concluded that, whereas subsection B is the subjective component of the three-part test of §547(c)(2) which requires an analysis of "'the business practices which were unique to the particular parties under consideration,'" Huffman v. New Jersey Steel corp. (In re Valley Steel Corp.), 182 B.R. 728, 736 (Bankr. W.D. Va. 1995) (quoting Gosch v. Burns (In re Finn), 909 F.2d 903, 907 (6th Cir. 1990)), subsection C requires an objective analysis of "the norm in the creditor's industry." Advo-System, 37 F.3d at 1048. However, the Bankruptcy Code provides no help in defining the phrases "incurred in the ordinary course of business" or "according to

ordinary business terms." See In re Rodwell Point Cadillac GMC Truck, Inc., C/A No. 93-71381-W, Adv. Pro. No. 95-8003-W. Courts testing the validity of the ordinary course of business defense under §547(c)(2) have thus usually made "particularly factual" inquiries. See Yurika Foods Corp v. UPS (In re Yurika Food Corp.), 888 F.2d 42, 45 (6th Cir. 1989).

B. Subjective Test - Section 547(c)(2)(B)

Subsection B is the subjective component of the three-pronged test of §547(c)(2). When analyzing subsection B, "[t]he relevant question is not whether the transactions were ordinary with respect to some objective standard in the industry, but whether they were 'consistent with the course of dealings between the particular parties.'" Huffman, 182 B.R. at 736 (Yurika Foods Corp. v. UPS (In re Yurika Foods Corp.), 888 F.2d 42, 35 (6th Cir. 1989). Factors that courts have considered when making a determination under subsection B are the prior course of dealing between the parties; the amount, manner and timing of the payments; and the circumstances surrounding the transactions. See, e.g. Levy v. Gatlin (In re Gardner Matthews Plantation Co.), 118 B.R. 384, 385 (Bankr. D.S.C. 1989). Late payments are not *per se* out of the ordinary terms of the parties' conduct; rather, "late payment[s] will be considered 'ordinary' only upon a showing that late payments were the normal course of business between the parties." See Logan v. Basic Dist. Corp (In re Fred Haws Org., Inc.), 957 F.2d 239, 244 (6th Cir. 1992). In the case now before the Court, payments prior to the preference period were made an average of 77.43 days after the date of the invoice. During the preference period, payments were made on an average of 86 days after the date of the invoice. Even though the transfers in question were paid, on average, ten days later than the pre-preference payments, courts have held that such a slight difference does not defeat the ordinariness required in subsection B. In In re Valley Steel, the payments prior to the preference period were made, on average, 54.38 days after the date of the

invoice. However, the preferential transfers at issue in the case were made an average of 67.18 days after the date of the invoice. The court concluded:

> If timeliness of payments is determined solely on the basis of comparison of average days before and during the preference period, the difference in this case is not so significant as to defeat the ordinariness of all the payments. The evidence in this case reflects a time range consistent with other case law that indicates that a narrow band of difference is acceptable.

In re Valley Steel, 182 B.R. at 737.

The Court finds that the three payments in question in this case meet the ordinary course of business requirement of subsection B.[6] When considering the timing, the amount and manner the transactions were paid, and the overall circumstances under which the transfers were made; the Court finds that the difference in the timeliness and manner of payments during the preference period was not so significant from prior course of dealings between the parties as to defeat the ordinariness of the payments. Another factor that the Court must consider is the existence of any unusual debt collection practices. "Any payment that was made in response to unusual creditor pressure is made out of the ordinary course." Id. at 737. In this case, Summit had corresponded with Debtor by letters dated January 2, 1997 and one dated post-petition, August 15, 1997; informing Debtor of the late payments and requesting that payment be remitted. Furthermore, Debtor had corresponded with Summit by letters dated December 12, 1996 and April 17, 1997 and had agreed to make weekly payments until Debtor caught up to the thirty day aging target with Summit's invoices. The Court finds that the majority of

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[6] A comparison between the average aging of pre-preference payments and aging of the payments of each of the fourteen invoices that are the subject of this case, rather than a sole comparison of averages, would likewise provide that invoices dated 03/24/97 (in the amount of $10,000), 04/14/97, 04/14/97, 05/12/97, and 05/18/97, which have been found to meet the requirements of subsection C, would also meet the requirements of subsection B.

correspondence related to transfers that took place during the pre-preference period. Furthermore, the preferential transfers in question were not a result of any particular coercion by Summit. In fact, between the letter by Debtor of April 17, 1997 and the letter by Summit dated August 15, 1997, there is no evidence that further conversations or correspondence took place between Debtor and Summit requesting the payment of the overdue invoices. The Court thus finds that the transfers at issue were not a result of unusual collection activities; therefore, the payments all meet the "ordinary course of business" test set forth in subsection B.

C. Objective Test- Section 547(c)(2)(C)

Subsection C provides that in order to meet §547(c)(2)(C), the defendant must show that the subject transfers were "made according to ordinary business terms" Courts have viewed this subsection as the objective analysis of the three-pronged test, and have held that "the benchmark for ordinariness is the norm in the creditor's industry." See Advo-System, Inc. v. Maxway Corp., 37 F.3d 1044, 1047 (4th cir. 1994). In Fiber Lite Corp v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.), 18 F.3d 217 (3d Cir. 1994), the Court defined "ordinary business terms" as "the range of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C." Id. at 224 (quoting Jones v. United Sav & Loan Ass'n (In re U.S.A. Inns of Eureka Springs, Ark.), 9 F.3d 680, 685 (8th Cir. 1993)).

> [S]ubsection C . . . establish[es] a requirement that a creditor prove that the debtor made its pre-petition preferential transfers in harmony with the range of terms prevailing as some relevant industry's norms. That is, subsection C allows the creditor considerable latitude in defining what the relevant industry is, and even departures from that relevant industry's norms which are not so flagrant as to be "unusual" remain within subsection C's

protection.

Id. at 226; see also Advo-System, Inc., 37 F.3d at 1050. The Court finds that the relevant industry in this case is the airline security service providers industry. The evidence presented by Summit's witness shows that other airline security providers aged invoices usually between 30 to 60 days, even though some invoices aged even longer than that period. Mr. Cerra's testimony is further supported by Summit's own practices that it would contact Debtor regarding the payment of invoices which were more than 30 days old; and, in the case the account because more than 60 days old, Summit's accounting department would contact its operation manager at JFK to assist in the collection of the invoices.

The industry norm is to be viewed under a sliding-scale approach which allows for a variance from the established industry norm depending on the length of time of the relationship between the parties.

> In summary, we hold that subsection C requires an objective analysis and we adopt the Seventh Circuit's Tolona Pizza rule modified and embellished as follows by the Third Circuit in Molded Acoustical.
>
> > [W]e read subsection C as establishing the requirement that a creditor prove that the debtor made its pre-petition preferential transfers in harmony with the range of terms prevailing as some relevant industry's norms. That is, subsection C allows the creditor considerable latitude in defining what the relevant industry is, and even departures from that relevant industry's norms which are not so flagrant as to be "unusual" remain within subsection C's protection. In addition, when the parties have had an enduring, steady relationship, one whose terms have not significantly changed during the pre-petition insolvency period, the creditor will be able to depart substantially from the range of terms established under the objective industry standard inquiry and still find a haven in subsection C.

Id. at 1050; see also (In re Molded Acoustical Products, Inc.), 18 F.3d at 226-27. In In re Molded Acoustical Products, Inc., the Court held that the creditor and debtor's relationship,

which had begun approximately eighteen months prior the debtor's insolvency, "was not extremely lengthy, but was of a sufficiently long duration that the relationship [was] entitled to some leeway, meaning we might approve a not insubstantial departure from the established 45-day industry norm." Id. at 227. In this case, Summit began providing security services to Debtor in April of 1996 and the relationship continued until May 30, 1997. Debtor's first payment to Summit was received on September 10, 1996 and the last one, which is one of the transfers at issue in the present case, was received on July 30, 1997. While Debtor and Summit did not have a long-standing prior course of dealing, the Court finds that, when taking into account the totality of the circumstances, some leeway in determining whether the transactions in question meet the requirement of subsection C is appropriate. The Court finds that any payments, presently at issue in this case, which were aged 75 or more days do not meet the requirements of subsection C. Thus, the preferential payments which meet the requirements of §547(c)(2)(C) and are thus unavoidable are for the payments of invoice dated 03/24/97 in the amount of $10,000.00, invoice dated 04/14/97 in the amount of $2,113.99, invoice dated 04/14/97 in the amount of $583.47, invoice dated 05/12/97 in the amount of $666.82, and invoice dated 05/18/97 in the amount of $2,160.17, all of which total $15,524.25. The remaining payments for invoices which total $14,868.81 are deemed avoidable by Plaintiff pursuant to §547(b). It is therefore,

ORDERED that judgment for Plaintiff shall be in the amount of $14,868.81.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 3, 2000.