IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Welded Construction, L.P., *et al.,* Debtors.	Chapter 11 Case No. 18-12378 (CSS) (Jointly Administered)
Welded Construction, L.P., Plaintiff, vs. Industrial Fabrics, Inc., Defendant.	Adv. No. 20-50932 (CSS) Re: Adv. Docket Nos. 42, 43

MEMORANDUM OF LAW IN SUPPORT OF INDUSTRIAL FABRICS, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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11 U.S.C. §547(c)(2)

Pursuant to Federal Rule of Civil Procedure 56(a), made applicable herein pursuant to Federal Rule of Bankruptcy Procedure 7056, Industrial Fabrics, Inc. (the "Defendant") submits this memorandum of law in opposition to Plaintiff's Motion Summary Judgment (Adv. D.I. 42) (the "Plaintiff's Motion").

SUMMARY OF ARGUMENTS

In Plaintiff's Motion, the Plaintiff contends that it has established a prima facie case against the Defendant. The Plaintiff argues that it has proven each and every element of 11 U.S.C. § 547(b) and its motion it limited to that argument. The Plaintiff's motion does not argue against the Defendant's affirmative defenses. Nevertheless, the Plaintiff is not entitled to summary judgment because the Plaintiff has not proven that the Defendant received more than it would have received under 11 U.S.C. § 547(b)(5).

On the assumption that the Plaintiff has established all of preferential transfer elements under 11 U.S.C. § 547(b), the Defendant incorporates by reference the arguments and evidence in its own Motion for Summary Judgment [Adv. D.I. 39] (the "Defendant's Motion"). The Defendant, unlike the Plaintiff, has met its burden of proof with respect to its affirmative defenses.

COUNTER-STATEMENT OF UNDISPUTED MATERIAL FACTS

The Defendant incorporates fully as if set forth herein the Statement of Facts appearing in Defendant's Memorandum of Law in Support of Motion of Summary Judgment [Adv. D.I. 40].

ARGUMENTS IN OPPOSITION

In an action to avoid a transfer under section 547(b) of the Bankruptcy Code, the burden of proof is on the trustee to prove by a preponderance of the evidence each of the five elements contained therein. *Giuliano v. RPG Mgmt. (In re NWL Holdings, Inc.),* Case No. 08-12847

(MFW), Adv. No. 10-53535 (MFW), 2013 Bankr. LEXIS 2360 at *7- 8 (Bankr. D. Del. June 4, 2013); *see also* 11 U.S.C. § 547(g). Specifically, to avoid a transfer under section 547(b), a trustee must prove that the transfer was made (1) to or for the benefit of a creditor, (2) for or on account of an antecedent debt, (3) while the debtor is insolvent, (4) within 90 days of filing the bankruptcy petition, or, if the transferee is an insider, within one year of the petition date, and (5) in such a way that it enables the creditor to receive more than if the transfer had not been made. 11 U.S.C. §§ 547(b)(1)- (5).

I. THE PLAINTIFF CANNOT MEET HIS BURDEN OF PROOF UNDER 11 U.S.C. §547(b)

The Plaintiff cannot meet its burden of proof in general

To support the arguments in the Plaintiff's Motion, the Plaintiff relies heavily on the Declaration of Jacklyn Krzysztofik (the "Krzysztofik Decl."), the former Human Resources Manager and post-Effective Date consultant of the Debtors.

In the Krzysztofik Decl., Ms. Krzysztofik simply states that she became "generally familiar with the Debtors' books and records, operations and vendor relationships" in the course of her duties.[1] However, neither the position Human Resources Manager nor the position of consultant would require Ms. Krzysztofik to regularly access or control the Debtors' financial books and records. In fact, aside from the sweeping and self-serving declaration quoted above, Ms. Krzysztofik does not sufficiently explain *how* she became familiar enough with the Debtor's financial books and records to make claims and representations about the parties' relationship and payment practices.

For example, Ms. Krzysztofik claims that there "do not appear to be enough assets to pay general unsecured claims in full." However, this claim was based merely on "the schedules filed

[1] *See* ¶2, Krzysztofik Decl.

in this bankruptcy proceeding," not Ms. Krzysztofik's personal knowledge.

Ms. Krzysztofik further claims that "93% of invoices were paid between 26 and 69 days past invoice date" during the Historical Period[2] and that the "Transfers paid invoices between 54 and 88 days past invoice date".[3] However, Ms. Krzysztofik has proffered no explanation as to *how* she learned about the actual payment dates.

To the extent that Ms. Krzysztofik based her claims on the Debtors' financial books and records, Ms. Krzysztofik has also failed to show any personal knowledge which could confirm the accuracy of the data entered in the books and records. Ms. Krzysztofik did not personally enter the data nor did her duties regularly allow her access to such data.

Stated differently, Ms. Krzysztofik has failed to show any personal knowledge about the parties' relationship and payment practices. Ms. Krzysztofik has not shown *how* her duties as a Human Resource Manager and post-Effective Data consultant granted her regular access or control over the Debtor's financial books and records – the only apparent basis for Ms. Krzysztofik's claims and representations. However, the accuracy of the Debtor's books and records has not been established since Ms. Krzysztofik apparently had no part in their control or maintenance.

The Plaintiff cannot meet its burden of proof under 11 U.S.C. §547(b)(5)

In order to avoid a payment as a preferential transfer, a trustee must show that the alleged transferee received more on account of the transfer than it would have had received in a hypothetical chapter 7 liquidation. 11 U.S.C. §547(b)(5); *AFA Inv. Inc. v. Trade Source, Inc. (In re AFA Inv. Inc.),* 538 B.R. 237, 243 (Bankr. D. Del. 2015).

Therefore, in order to meet its burden under 11 U.S.C. §547(b)(5), the Plaintiff must

[2] *See* ¶14, Krzysztofik Decl.
[3] *See* ¶10, Krzysztofik Decl.

show that the Defendant, by receiving $280,349.42 (the "Transfers") from Welded Construction, L.P. et al. (the "Debtors"), received **more** than it could have received in a hypothetical chapter 7 liquidation of the Debtors' estate. The Plaintiff, unfortunately, cannot meet that burden because the Defendant would have had a lien over the Debtors' estate if the Transfers were not paid.

A. Inchoate Liens are Security Interests

A lienor with a right to perfect an unperfected statutory lien holds an inchoate lien. *In re Vienna Park Properties*, 976 F.2d 106, 112 (2nd Cir. 1992). ("The failure of a secured party to perform enforcement procedures prior to bankruptcy merely renders an interest inchoate, not nullified."). The holder of an inchoate lien is a secured creditor. *In re SeSide Co*. 152, B.R. 878, 1993 U.S. Dist. LEXIS 4177 (E.D. Pa. 1993) citing *Vienna Park* at 113 ("An agreement that creates an inchoate lien on rents creates a "security interest" under the Bankruptcy Code). A "security interest" is defined in the Bankruptcy Code as simply a "lien created by an agreement." *Id*. § 101(51). "Lien," in turn, is broadly defined as a "charge against or interest in property to secure payment of a debt or performance of an obligation." *Id*. § 101(37). This definition includes inchoate liens. *See* S. Rep. 95-989, reprinted following 11 U.S.C. 101 ("The definition is new and is very broad. . . . It includes inchoate liens.") (emphasis added). *See also* *Ricotta v. Burns Coal & Building Supply Co.*, 264 F.2d 749 (2d Cir. 1959) (neither the filing nor the enforcement of [a mechanic's] lien would have constituted a preference" and that "had the liens been filed, payment merely discharging them . . . would likewise have been immune from attack.); and *In re Country Squire Assocs. of Carle Place, L.P.*, 1998 Bankr. LEXIS 1909 (Bankr. N.D.N.Y. Sep. 30, 1998) (The Second Circuit has decided that an agreement creating an inchoate lien on rents creates a security interest as defined by Code § 101(51) and qualifies as a security interest under section 552(b)).

B. Defendant held an Inchoate Materialman's Lien under W. Va. Code § 38-2-4

W. Va. Code § 38-2-4 states that, "Every person, firm or corporation, which shall furnish to any general contractor or to any subcontractor mentioned in sections one and two of this article, any materials, machinery or other equipment or supplies necessary to the completion of any building or other structure mentioned in this article, or improvement appurtenant thereto, for use in the erection, construction, repair or removal thereof, by virtue of a contract between such general contractor or subcontractor and the materialman or furnisher of machinery, or other supplies or equipment necessary to the completion of such general contract, shall have such a lien for his compensation as is mentioned in section one of this article."

Furthermore, W. Va. Code § 38-2-11 requires the lien holders described in the preceding article to serve a notice of lien to the contractor or subcontractor within 100 days after he or she has ceased to furnish materials in order to perfect and preserve their materialman's lien.

In this case, the Defendant supplied materials and supplies for the construction and improvement of the Debtors' project in West Virginia, and all invoices were paid by the Transfers prior to the lapse of the 100-day period for perfection. Clearly, the Defendant held an inchoate materialman's lien which remained unperfected precisely because of the payment of the Transfers.

C. Defendant held an Inchoate Mechanic's Lien under 49 Pa. Stat. Ann. § 1301

49 Pa. Stat. Ann. § 1301 states that, "Except as provided under subsection (b), every improvement and the estate or title of the owner in the property shall be subject to a lien, to be perfected as herein provided, for the payment of all debts due by the owner to the contractor or by the contractor to any of his subcontractors for labor or materials furnished in the erection or

construction, or the alteration or repair of the improvement, provided that the amount of the claim, other than amounts determined by apportionment under section 306(b) of this act, shall exceed five hundred dollars ($500)."

Furthermore, 49 Pa. Stat. Ann. § 1502 requires the lien holders described in the preceding article to file a claim within six (6) months from the completion of his work.

In this case, the Defendant supplied materials and supplies for the construction and improvement of the Debtors' project in Pennsylvania, and all invoices were paid by the Transfers prior to the lapse of the 6-month period for perfection. Clearly, the Defendant held an inchoate mechanic's lien which remained unperfected precisely because of the payment of the Transfers.

D. Defendant would have been a secured creditor if left unpaid

From the foregoing, the Defendant would have been a secured creditor of the Debtors for the entirety of the Transfers had the Defendant not been paid for its services. Thus, Plaintiff would not have been able to meet its burden under section 547(b)(5) of the Bankruptcy Code.

II. THE PAYMENTS WERE MADE IN EXCHANGE FOR WAIVER OF INCHOATE LIENS ARE MADE IN EXCHANGE FOR NEW VALUE AND CANNOT BE AVOIDED PURSUANT TO 11 U.S.C. 547(C)(1)

Given that the Defendant was an inchoate lien holder, the waiver of those inchoate liens bars the avoidance of the Transfers under 11 U.S.C. 547(c)(1).

Circuit courts that have addressed the issue have consistently found that the waiver of the right to perfect an inchoate lien in exchange for the receipt of an otherwise preferential transfer is a transfer of new value under 11 U.S.C. 547(c)(1). See e.g. *R.M. Taylor, Inc. v. H.M White, Inc. (In re RM Taylor, Inc.)*, 257 B.R. 289, 296 (Bankr. W.D. Mo. 2000) ("…the release of a lien, or the waiver of a lien right, is new value"); *In re Egert*, 887 F.2d 955, 959 (9 th Cir. 1989) ("…the release of the subcontractors' rights against the surety, which in turn could have exercised its lien rights, constituted "new value" being given in a substantially contemporaneous exchange."); *In re Rodman*, 792 F.2d 125 at 127-128 (10th Cir. 1986) (where the Court ruled that waiver of lien against third party owner was a contemporaneous exchange of new value); *In re Robinson Bros. Drilling*, 877 F.2d 32 at 34 (10th Cir. 1989) (affirmed district court ruling that release of inchoate liens were an exchange for new value to the extent of the value of the liens at the time of the transfers.); *In re Grand Chevrolet*, 25 F.3d 728 at 734 (9th Cir. 1994) (affirmed finding that release of inchoate security interest was transfer of new value and remanded to determine value of security interest.)

From the above, the Defendant contemporaneously waived its inchoate liens upon receipt of the Transfers. If the Debtors had not made the Transfers, the Defendant would have filed a lien over the Pipeline Projects pursuant to its standard business practices.[4] These liens would have been perfected and the Defendant would have sought payment through the Project Owners. The Project Owners would have paid the Defendant and sought indemnification from the Debtors, as the general contractors. However, at the time of the Transfers, the Project Owners owed sufficient sums of money to the Debtors to permit a setoff of their indemnification claims.[5] In this context, the Debtors received new value in exchange for the Transfers in the form of the Defendant's waiver of its inchoate liens. Hence, the Transfers may not be avoided by the Plaintiff pursuant to 11 U.S.C. § 547(c)(1).

<u>Non-ownership of the Pipeline Projects does not defeat the Defendant's affirmative defense</u>

The fact that the Plaintiff did not own the Pipeline Projects is not dispositive as courts have found value in the inchoate liens of subcontractors even though the debtor was merely a

[4] *<u>See</u>* ¶12, Appendix A of the Defendant's Motion
[5] *<u>See</u>* Appendices H and I of the Defendant's Motion

general contractor and did not own the properties on which the inchoate liens would have attached. See *JWJ v. Reuter*, 2003 U.S. APP. LEXIS 18413 (9th Cir. 2003) (where the Court of Appeals for the 9th Circuit affirmed the district court's decision that the debtor's payment to the subcontractors avoided the imposition of an equitable lien by a surety); *Taylor v. White*, 257 B.R. 289 (Bankr. W.D. Mo. 2000) (holding that in the event the subcontractor had not been paid by the debtor, the third-party owner would have paid the subcontractor/defendant and liened the debtor); *Gem Construction v. Guard Masonry*, 262 B.R. 638 (E.D. Va. 2000) (holding that the defendant, by forbearing to place a lien on the surety in exchange for the payments, did contribute new value since the surety would have placed a lien on the monies owed from the owner to the debtor).

Particularly instructive is *In re J.A. Jones*, 361 B.R. 94 (Bankr. W.D.N.C. 2007), wherein the debtor served as the general contractor and numerous subcontractors were sued to recover alleged preference transfers. Each defendant possessed inchoate lien rights which it released in exchange for the said transfers. The subcontractors moved for summary judgment on common issues. One of those issues was the "indirect transfer" theory.

The court recognized a division in case law on the issue but held that, "[T]he split in the case law on whether [the creditor's] release of inchoate lien rights against [a third party] constitutes 'new value' is not as wide as it initially appears. A close reading of the cases reveals that **the primary variant in these cases is whether, at the time of the preference payment, the [third party] still owed sufficient sums to the debtor on the project to permit a setoff . . . . If the [third party] still owes the debtor, then its indemnity claim can be setoff and is secured.** In this context, most courts consider the 'indirect transfer' to provide new value. If there is no debt to be setoff, however, then the owner's claim for indemnification is simply an unsecured debt and there is no 'new value.'"

In reaching this conclusion, the *J.A. Jones* court reasoned that, "Section 547 requires [the court] to hypothesize what the subcontractor would have received in bankruptcy had the allegedly preferential payment not been made. We cannot fairly assess how the subcontractor would have fared without projecting how it would have reacted to nonpayment. Since an individual subcontractor's reaction is unknowable, an objective approach should be employed, asking 'what would a reasonable materialman have done in response to that nonpayment.' It takes little commercial construction expertise to answer. A reasonable subcontractor would assert his legal rights, liening the project, perfecting those liens and forcing payment through the owner. We should also assume a reasonable behavior by the project owner. Again, this requires almost no imagination. With liens on this project, the owner would have no reasonable alternative but to pay the subcontractor and then seek indemnification from the general contractor. To make any other assumption would defy reality. It would also penalize the lien creditor for accepting payments. It would also defy commercial reality. A subcontractor would not long remain in business if it made a practice of refusing payments from its general contractor in favor of enforcing lien rights against the underlying project. No one would hire such a subcontractor."

The reasoning in *J.A. Jones* finds some support in this circuit in the case of *Instrumentation & Controls, Inc. v. Ne. Union, Inc. (In re Instrumentation & Controls, Inc.)*, 506 B.R. 677 (Bankr. E.D. Pa. 2014), wherein the court favorably cited *J.A. Jones* and agreed that the defendant therein could raise a defense under § 547(c)(1) based on the indirect transfer theory. However, since the case was still in the pleading stage, the court simply denied the plaintiff's motion for judgment on the pleadings and allowed the case to proceed to discovery.

In the present case, the Defendant contemporaneously waived its inchoate liens upon receipt of the Transfers. If the Debtors had not made the Transfers, the Defendant would have liened the Pipeline Projects pursuant to its standard business practices. These liens would have been perfected and the Defendant would have sought payment through the Project Owners. The Project Owners would have paid the Defendant and sought indemnification from the Debtors, as the general contractors.

There was no indemnification necessary in this particular circumstance because at the time of the Transfers, the Project Owners owed sufficient sums of money to the Debtors to permit a setoff of their indemnification claims.

The Debtors received an indirect transfer of new value in exchange for the Defendant's waiver of its inchoate liens because the Project Owners did not have to exercise their indemnification right and the Debtors' receivables against the Project Owners were preserved. Hence, the Transfers may not be avoided by the Plaintiff pursuant to 11 U.S.C. § 547(c)(1).

III. THE TRANSFERS ARE EXEMPT FROM AVOIDANCE PURSUANT TO SECTION 547(C)(2) OF THE BANKRUPTCY CODE

Once a bankruptcy trustee establishes the elements of a preferential transfer under 11 U.S.C. § 547(b), the burden shifts to the party from whom recovery is sought to establish one of the seven statutory defenses enumerated in § 547(c). See 11 U.S.C. §§ 547(c) and 547(g). One such defense is the ordinary course of business defense.

On the assumption that the Trustee has met his burden under 11 U.S.C. § 547(b), the Transfers cannot be avoided under 11 U.S.C. § 547(c)(2) of the Bankruptcy Code.

Section 547(c)(2) permits a "safe harbor" for preferential transfer payments if "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 of the debtor and transferee, or (B) made according to ordinary business terms." *Burtch v. Detroit Forming, Inc. (In re Archway Cookies)*, 435 B.R. 234 at 240 (Bankr. D. Del. 2010).

Here, the Debtors, as a mainline pipeline construction contractor, maintained business relationships with various business entities, through which the Debtors regularly purchased, sold, received, and/or delivered goods and services. ¶17 of Complaint.

On the other hand, the Defendant is a manufacturer and distributor of geotechnical products, including geotextile fabrics, geogrids, liner material, silt fence, erosion control, pipeline protection and paving products for the construction industry.

The Transfers were made pursuant to the parties' respective businesses. The Plaintiff has not disputed that the Transfers were both "debt incurred in the ordinary course of business of both the Debtor and the Defendant," thereby satisfying the first element of the ordinary course of business defense.

<u>The "subjective test" for the ordinary course of business defense</u>

The determination of whether a creditor has met its burden under section 547(c)(2)(A) is a subjective test, "calling for the Court to consider whether the transfer was ordinary as between the debtor and the creditor." *First Jersey Sec., Inc.*, 180 F.3d at 512 ("[T]he determination of what is 'in the ordinary course of business' is subjective, calling for the Court to consider whether the transfer was ordinary as between the debtor and the creditor.")

Courts have considered several factors in determining whether an ordinary course of business exception exists, including:

> (1) the length of time the parties engaged in the type of dealing at issue; (2) whether the subject transfers were in an amount more than usually paid; (3) whether the payments at

> issue were tendered in a manner different from previous payments; (4) whether there appears to have been an unusual action by the debtor or creditor to collect on or pay the debt; and (5) whether the creditor did anything to gain an advantage (such as additional security) in light of the debtor's deteriorating financial condition.

Stanziale v. Southern Steel & Supply, L.L.C. (In re Conex Holdings, LLC) 518 B.R. 269, 280 (Bankr. D. Del. 2014). "No one factor is determinative." *Id.*

A. Prior Course of Dealing Between the Parties

The circumstances reveal that the transactions between the parties during the Preference Period were ordinary compared with the Historical Period.

1. The parties have worked together for about 17 months prior to the Petition Date.
2. The Defendant's supply of goods to the Debtor was within the scope of the Defendant's normal business operations just as the Debtor’s acceptance of the goods was in the ordinary course of the Debtor’s business operations.
3. Throughout the course of their business dealings, the Defendant supplied the same type of goods to the Debtor.
4. The average payment amounts of both periods are relatively close.
5. In both periods, the Debtors always paid each invoice with a single check.
6. The Defendant did not exert unusual collection pressure on the Debtors and did nothing to gain an advantage of the Debtors' deteriorating financial condition.

<u>See</u> Appendix A of Defendant’s Motion.

B. The Average Lateness Method

Moreover, by using the well-recognized Average Lateness Method, the Debtors’ length of payments is **<u>51.64 days</u>** during the Historical Period and **<u>63 days</u>** during the Preference Period (a mere **<u>11.36-day</u> difference** in the averages). *<u>See</u> Appendices F and G* of Defendant’s Motion for Summary Judgment [D.I. 39].

An approximate **<u>11-day difference in the overall averages and 12-day difference in the weighted averages</u>** of the Historical Period and Preference Period falls well within what a number of courts have found as ordinary and immune from a trustee or debtor-in-possession's avoidance powers:

> a. *In re Bank of New England Corp.*, 161 B.R. 557 (Bankr. D. Mass. 1993) - Holding that a difference between 38.4 days pre-preference average number of days to payment, and 54.7 days preference average number of days to payment did not make the payments out of the ordinary course of business. Translating to a 16.3-day or 42.45% difference.
>
> b. *McCord v. Venus Foods (In re Lan Yik Foods Corp.)*, 185 B.R. 103, 112-113 (Bankr. E.D.N.Y. 1995) – Holding that a difference between approximately 89 days pre-preference average days to payment after invoicing, and approximately 110 days preference average days to payment after invoicing did not make the payments out of the ordinary course of business; Although the average payment in the preference period was made later than the average payment during the pre-preference period, a comparison of the pre-preference and preference payments shows that in both periods there were substantial and significant delays in payments.
>
> c. *Huffman v. New Jersey Steel Corp., (In re Valley Steel Corp),* 182 B.R. 728 (Bankr. W.D. Va. 1995) - Holding that a difference between approximately 54 days pre-preference average days to payment, and approximately 67 days preference average days to payment did not make the payments out of the ordinary course of business. Translating to a 13-day difference.

Thus, based on previous court decisions, an approximate **<u>11-day (18%) or 12-day (19%)</u>** difference between the averages and weighted averages of the Historical Period and Preference Period does not preclude the successful application of the ordinary course of business defense. Historically, only much larger shifts in the averages would be able to negate the ordinary course of business defense. <u>*See e.g.*</u> *Davis v. R.A. Brooks Trucking, Co. (In re Quebecor World (USA), Inc.)*, 491 B.R. 379 (Bankr. S.D.N.Y. 2013) (27.5 days increase from 50 days to 77 days or a 55% increase); *Official Plan Comm. v. Expeditors Int'l (in Re Gateway Pac. Corp.)*, 153 F.3d 915

(8th Cir. 1998) (19 days increase from 35 days to 54 days or a 54% increase); *In re CIS Corp.*, 214 B.R. 108 (Bankr. S.D.N.Y. 1997) (29 days increase from 51 days to 80 days or a 57% increase).

Based on the foregoing, the timeliness of payments between the parties during the Historical Period and the Preference Period remained ordinary.

C. The Range of Payments Method

Likewise, payments in the preference period made within the range of payments of the pre-preference period are deemed payments in the ordinary course of business. *Brothers Gourmet*

Coffees v. Armenia Coffee Corporation (In re Brothers Gourmet Coffees, Inc.), 271 B.R. 456 (Bankr. Ct. DE 2002). Even preference period payments slightly outside the historical range of payments are still ordinary. The bankruptcy court in *H. L. Hansen Lumber Co. v. G & H Custom Craft, Inc. (In re H.L. Hansen Lumber Co.)*, 270 B.R. 273 (Bankr. C.D. Ill. 2001), citing the case of *In re Tennessee Chemical Co.,* 112 F.3d 234, 237 (6th Cir. 1997), that transfers within 10% of the outer limit of the historical period range may still be considered as within the ordinary course of business. See also *In Miller v. Westfield Steel, Inc. (In re Elrod Holdings)*, 426 B.R. 106, 11 (Bankr. D. Del. 2010) (where Judge Gross found that the ordinary course of business exemption was applicable despite that the payments were made outside the range of payments from the pre-preference period).

During the Historical Period, the Debtors paid the Defendant's invoices between 27 days up to 71 days of the invoice date.[6] During the Preference Period, the Debtors paid the Defendant's invoices between 54 and 88 days of the invoice date.[7]

[6] See Appendix F of Defendant's Motion
[7] See Appendix G of Defendant's Motion

The first Transfer was made 54 days after the invoice date. Hence, it is clearly within the range of payments established during the Historical Period.

The second Transfer was made 75 days after the invoice date. Hence, it fell slightly outside of the range of payments established during the Historical Period. However, following the cases of *H. L. Hansen Lumber Co.* and *Miller v. Westfield Steel, Inc*, the second Transfer is also protected from recovery.

Hence, two out of three Transfers are protected by the Range Method and cannot be avoided pursuant to 11 U.S.C. 547(c)(2).

CONCLUSION

It is clear from the foregoing discussion that the Plaintiff's Motions should be denied considering that the Plaintiff has not discharged its burden under 11 U.S.C. § 547(b)(5) and Defendant has proven that there are no issues of material fact with regards to Defendant's defenses pursuant to 11 U.S.C. § 547(c)(1), 11 U.S.C. § 547(c)(2), and in consideration of providing reasonably equivalent value in exchange for the Transfers. The Defendant respectfully requests that this Court deny the Plaintiff's Motion in its entirety.

Dated: May 13, 2022

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