IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
DIVERSIFIED MERCURY COMMUNICATIONS, LLC, *et al.*,[1]	)	Case No. 19-10757 (KBO)
	)	
	)	(Jointly Administered)
	)	
Debtors.	)	
	)	
	)	
GEORGE L. MILLER, solely in his capacity as chapter 7 trustee of Diversified Mercury Communications, LLC and DTR Advertising, Inc.,	)	
	)	
Plaintiff,	)	Adv. Proc. No. 21-50249 (KBO)
	)	
v.	)	
	)	
DIRECT RESULTS RADIO, INC.,	)	
	)	
Defendant.	)	
	)	

OPINION[2]

I. INTRODUCTION

In this proceeding, the chapter 7 trustee (the "Trustee") for the jointly administered estates of Diversified Mercury Communications, LLC ("DMC") and DTR Advertising, Inc. ("DTR" and together with DMC, the "Debtors") seeks to avoid and recover an alleged preferential transfer in the amount of $493,349.34 (the "Transfer") made to Direct Results Radio, Inc. ("Direct Results") by DMC. While the Trustee has adequately shown that the Transfer was preferential under section 547(b),[3] it cannot be avoided because of the ordinary course of business defense of section 547(c)(2)(A).

[1] The Debtors in these cases are: (i) Diversified Mercury Communications, LLC and (ii) DTR Advertising, Inc.

[2] This Opinion constitutes the Court's finding of facts and conclusions of law under FED. R. BANKR. P. 7052. This Court has jurisdiction over this matter, which is a core proceeding, pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(F).

[3] Unless otherwise indicated, all statutory references herein refer to title 11 of the United States Code (the "Bankruptcy Code").

II. FACTS

Prior to their bankruptcy filings, the Debtors were a full-service direct response media agency with various businesses, including short form, long form, and digital advertising media businesses, under the name "Mercury Media."[4] Direct Results is a direct marketing company that focuses on designing and implementing ad campaigns to help various advertisers acquire new customers. It specializes in audio advertising, which includes advertisements on platforms such as radio, podcasts, streaming, and satellite stations.

The Debtors and Direct Results began their business relationship in August 2015 by entering into a *Client Share Agreement*.[5] Pursuant to the agreement, Direct Results provided "Radio Buying Services"[6] on behalf of the Debtors for the Debtors' client, Financial Engines (formally known as the Mutual Fund Store). In return, the Debtors reimbursed Direct Results for agreed upon expenses and paid them fifty percent of the commission the Debtors earned from Financial Engines.[7] Throughout their relationship, the Debtors primarily acted as Financial Engines' "account manager," and Direct Results served as Financial Engines' "media manager."[8] In practice, this meant that the Debtors maintained the client relationship with Financial Engines, while Direct Results negotiated directly with broadcasters to book Financial Engines' advertisement spots.[9] Direct Results also invoiced and paid the broadcasters for their advertisement services.[10]

In order to coordinate the payment, Direct Results collected from the broadcasters all relevant invoices for services rendered during a broadcast month[11] and reconciled them. This process generally took forty-five days. Following its completion, Direct Results issued one invoice to the Debtors for the aggregate monthly amount owed to the broadcasters plus its commission. Each invoice included, among other things, an invoice date, invoice number, the due date, the relevant monthly service period, and the total amount due.[12] Direct Results sent its invoices to the Debtors monthly via email, and payment was due thirty days from that sent date. Once payment

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[4] Adv. D.I. 38 ¶ 6.

[5] Ex. J-1. While only DMC signed the agreement, the Trustee and Direct Results agree that both of the Debtors were parties to the transaction. Adv. D.I. 38 ¶ 8.

[6] The agreement does not define "Radio Buying Services." *See* Ex. J-1 § 4.

[7] Adv. D.I. 38 ¶¶ 9–10.

[8] Trial Tr. 69:1–3.

[9] *Id.* at 68:21-24 & 69:14-16.

[10] *Id.* at 69:4-11.

[11] A broadcast month is comprised of four Monday through Sunday periods that do not necessarily mirror a calendar month.

[12] The two invoices in evidence (the August Invoice and the September Invoice (both as defined herein)) indicate "Mercury Media" and DTR as the billing parties. *See* Exs. J-2 & P-18.

was received, Direct Results then paid the broadcasters.

The Debtors[13] made twenty payments to Direct Results between March 17, 2017 and December 28, 2018 (the "Historical Period").[14] All payments were made by check except for one wire transfer.[15] Direct Results received the payments 28 to 74 days after the invoice was sent, averaging 45.81 days.[16] From invoice date, Direct Results received payment 64 to 96 days, averaging 80.76 days.[17] The Debtors' checks were honored and cleared their bank account 1 to 7 days after receipt.[18]

In the months preceding the fall of 2018, the Debtors were financially distressed and insolvent.[19] They began a formal winddown process by retaining professional advisors, legal counsel, and other consultants to effectuate a sale of the Debtors' assets outside of bankruptcy.[20] There is no evidence to suggest that Direct Results knew about the Debtors' declining financial condition. The parties' business relationship continued as normal. On October 15, Direct Results emailed the Debtors the invoice that relates to the Transfer.[21] Specifically, the invoice was for $493,349.34 on account of Financial Engines' advertisements that ran during the August broadcast month (the "August Invoice").[22] The August Invoice was dated August 26, 2018 and payment was due November 15.[23] On November 13, Direct Results emailed the Debtors an invoice for Financial Engines' advertisements that ran during the September broadcast month (the "September Invoice").[24] The total invoice amount was $664,980.17, with payment was due December 14.[25]

The Debtors did not timely pay the August Invoice. When payments were late, it was customary for Direct Results' bookkeeper, Kathryn Ewell, to email the responsible client about the payment status. Consistent with that practice, on November 16, Ms. Ewell, emailed Kelly Rollins, the Debtors' accounts payable representative, the following message: "I haven't seen

[13] Except for one payment, the record does not reflect which Debtor made payments to Direct Results during the Historical Period.

[14] Ex. P-6.

[15] *Id.*

[16] Ex. P-7.

[17] *Id.*

[18] *Id.*

[19] Trial Tr. 26:20-27:5.

[20] *Id.*

[21] Exs. P-8 at 9 (email dated Oct. 15, 2018 at 9:36 a.m.) & P-17.

[22] Ex. J-2.

[23] *Id.*

[24] Exs. P-6 & P-18.

[25] Ex. P-18.

payment arrive for the attached invoice. Do you have tracking information you can share?"[26] Ms. Rollins did not respond. On November 26, Ms. Ewell sent a second follow up email to Ms. Rollins stating, "I hope you had a good Thanksgiving! Do you have an update on the below?"[27] That same day, Ms. Ewell also sent an email to Dan Santa Lucia, an account manager of the Debtors, asking if Ms. Rollins was available since no response had been received to date.[28] Neither Ms. Rollins nor Mr. Santa Lucia responded to Ms. Ewell's November 26 emails.

On November 27, Alaina Bihler, an account director of Direct Results, sent an email to Jen Sullivan, a senior director of the Debtors, with the following message:

> Hi Jen – Hope you had a great Thanksgiving!
>
> I think Dan is no longer at Mercury – can you help us with August payment for Financial Engines? Kelly has not responded. Invoice due date was 11/15.[29]

Ms. Sullivan responded same day, copying Ms. Rollins and representing that she would look into the payment status the next day when she returned to the office.[30] Also that same day, Ms. Rollins responded, representing that she was not in the office but would get back to Ms. Sullivan.[31] The next day, November 28, Ms. Rollins confirmed that payment of the August Invoice was scheduled for November 30.[32] On November 29, Ms. Ewell sent a further email to Ms. Rollins and copied, among others, Jill Albert (the President of Direct Results) and Beth Vendice (a more senior account director of the Debtors).[33] The email stated, in pertinent part, that:

> We need to speed that up. We have stations to pay out by the end of the month once we receive funds.
>
> Please confirm that the payment on the September invoice will go out no later than 12/14, the normal mid-month schedule.[34]

Ms. Rollins responded that the check would be sent the following day (Friday) for Monday

[26] Ex. P-8 at 8-9 (email dated Nov. 16, 2018 at 8:30 a.m.).

[27] *Id.* at 8 (email dated Nov. 26, 2018 at 8:41 a.m.).

[28] *Id.* (email dated Nov. 26, 2018 at 12:01 p.m.).

[29] *Id.* at 7 (email dated Nov. 27, 2018 at 4:08 p.m.).

[30] *Id.* at 6 (email dated Nov. 27, 2018 at 4:16 p.m.).

[31] *Id.* (email dated Nov. 27, 2018 at 4:33 p.m.).

[32] *Id.* at 4 (email dated Nov. 28, 2018 at 8:07 a.m.).

[33] *Id.* (email dated Nov. 29, 2018 at 11:54 a.m.).

[34] *Id.*

delivery.[35] As promised, DMC issued a check on November 30 (the "Check")[36] in the amount of $493,349.34 payable to Direct Results in satisfaction of the August Invoice.[37] Direct Results received the Check on Monday, December 3,[38] forty-nine days after the August Invoice was sent. It then proceeded to pay relevant broadcasters.[39]

On December 7, Ms. Ewell emailed Ms. Rollins the following message:

> We received the August payment on Monday, thank you!
>
> Do you have an update on September? Please confirm it will be arriving no later than 12/17, since 12/15 lies on the weekend.[40]

Ms. Rollins responded that she did not yet have an update on the September payment.[41] Ms. Albert also emailed Ms. Rollins that same day with the following message:

> Will you please let me know when payment will be processed. I appreciate you saying you will let us know when you find out but I don't want to repeat the late payment of last month. I believe all discrepancies are cleared. We need money in house next Friday, 12.14 to make station payments on time and avoid the calls from stations to client… as occurred last month.[42]

Ms. Albert followed up with another email to Ms. Rollins on December 11:

> Would you please send another update on payment status.
>
> We want to avoid a repeat of last month in which stations called the client for payment because we had not received money per the contract.

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[35] *Id.* at 3 (email dated Nov. 29, 2018 at 9:29 a.m.).

[36] Ex. J-3.

[37] Adv. D.I. 38 ¶ 11.

[38] *Id.* ¶ 12.

[39] *See* Ex. D-5. Approximately 85% of the radio stations were paid on December 3, 2018. The remaining 15% were paid on August 20, November 26, December 4, December 5, and December 6, 2018.

[40] Ex. P-8 at 3 (email dated Dec. 7, 2018 at 12:05 p.m.).

[41] *Id.* at 2 (email dated Dec. 7, 2018 at 9:17 a.m.)

[42] *Id.* (email dated Dec. 7, 2018 at 3:15 p.m.).

REMINDER – payment is due this FRIDAY, 12.14.[43]

While untimely, DMC issued a wire transfer in the amount of $664,980.17 on December 28 to Direct Results for payment of the September Invoice.[44]

On January 2, 2019, Direct Results deposited the Check issued on account of the August Invoice.[45] Direct Results waited to cash the Check until after the new year for "financial management and tax purposes."[46] The Check cleared DMC's bank account on January 3,[47] thirty-one days after Direct Results received the Check and ninety days prior to DMC's Petition Date (as defined below).

III. PROCEDURAL HISTORY

The Debtors continued their winddown process into 2019. In January, they consummated two sales through which they sold substantially all of their assets and paid off their secured lender.[48] On April 3, 2019 (the "Petition Date"), an involuntary chapter 7 petition was filed with the Court against DMC.[49] Thereafter, the *Order for Relief in an Involuntary Case* was entered.[50] On May 23, 2019, DTR filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code.[51] The Debtors' chapter 7 cases have been jointly administered, with George L. Miller as the appointed chapter 7 trustee. The claims reconciliation process is complete, and the Debtors' assets are nearly liquidated. This adversary proceeding is the last remaining.

The Complaint was filed on March 18, 2021.[52] It asserts four counts by which the Trustee seeks to avoid and recover the Transfer as preferential and/or fraudulent pursuant to sections 547 (Count 1), 548 (Count 2), and 550(a) (Count 3) and to disallow any claims Direct Results has against the Debtors' estates under section 502(d) until such time as Direct Results pays the Trustee the Transfer amount (Count 4). On July 12, 2021, Direct Results filed an Answer, asserting several

[43] *Id.* at 1 (email dated Dec. 11, 2018 at 11:51 p.m.).

[44] Ex. P-6.

[45] Adv. D.I. 38 ¶ 13.

[46] Ex. P-3 at 5 (Interrogatory No. 8 of *Defendant Direct Results Radio, Inc.'s Response to Plaintiffs First Set of Interrogatories*). Direct Results submits that it was common for them to hold checks received in December and cash them after the new year. *See, e.g.*, Ex. D-6 (list of checks received from various Direct Results' clients dating back to December 2016 with corresponding deposit dates).

[47] Adv. D.I. 38 ¶ 14; Ex. P-5 (DMC's bank account summary for Jan. 2019).

[48] Trial Tr. 28:8-12.

[49] Adv. D.I. 38 ¶ 1.

[50] *Id.* ¶ 2

[51] *Id.* ¶ 3.

[52] Adv. D.I. 1.

affirmative defenses.[53] The parties then engaged in discovery, which ultimately narrowed the issues for trial. Specifically, the Trustee abandoned his fraudulent transfer claim in Count 2, and Direct Results abandoned several of its affirmative defenses, leaving only those raised under sections 547(c)(2) and 105(a).

At the Court's direction, the parties submitted a *Joint Statement of Undisputed Facts and Disputed Facts*[54] and pretrial briefing.[55] The trial was conducted on November 9, 2022.[56] During such time, the Court heard testimony from three credible and knowledgeable witnesses and admitted over two dozen exhibits. The matter is ripe for adjudication.

IV. DISCUSSION

A. Avoidance of the Transfer Pursuant to Section 547(b) (Count 1)

In Count One of the Complaint, the Trustee seeks to avoid the Transfer as preferential pursuant to section 547(b). To succeed, he is required to prove by a preponderance of the evidence five statutory elements – generally, that the transfer (1) was made to or for the benefit of a creditor; (2) for or on account of an antecedent debt; (3) made while the debtor was insolvent; (4) made within ninety days of the filing or within one year of the filing if the transfer was to an insider; and (5) enabled the creditor to receive more that it would have received if the case were one under chapter 7 and the transfer had not been made.[57] Direct Results has stipulated that the first four elements are satisfied, leaving only the last.

"Section 547(b)(5) requires that a creditor receive more than it would have in a chapter 7 liquidation before a transfer is deemed avoidable."[58] Because Direct Results received 100% of what it was owed for the August Invoice as a result of the Transfer, the relevant inquiry is whether Direct Results would have received less than a 100% distribution in a hypothetical chapter 7

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[53] Adv. D.I. 12.

[54] Adv. D.I. 38.

[55] Adv. D.I. 39, 40, 41 & 42.

[56] Prior to trial, the Trustee filed two motions – a *Motion to Strike Defendant's Untimely Documents and For Reasonable Attorney's Fees* (the "Motion to Strike") and a *Motion in Limine to Exclude Defendant's Historical Payment Charts* (the "Motion in Limine"). Adv. D.I. 45 & 46. The Court heard oral arguments on these motions at a pre-trial hearing held on October 26, 2022, and subsequently issued an order granting, in part, and denying, in part, the Trustee's Motion to Strike. Adv. D.I. 51 & 52. As a result, Direct Results was prohibited from offering or referring to certain documents not timely produced during discovery. The Court deferred ruling on the Motion in Limine until trial, at which time it was rendered moot. Trial Tr. 7:15-8:4.

[57] 11 U.S.C. §§ 547(b) & (g).

[58] *AFA Inv. Inc. v. Dale T. Smith & Sons Meat Packing Co. (In re AFA Inv. Inc.)*, No. 14-50134, 2016 WL 908212, at *2 (Bankr. D. Del. Mar. 9, 2016).

liquidation.[59] If the answer is yes, then section 547(b)(5) is satisfied.[60] In making this determination, bankruptcy courts are permitted to take judicial notice of the documents in a case and the Debtors' bankruptcy case as a whole.[61]

The record reflects that general unsecured creditors of DMC will not be paid in full. The Official Claims Register indicates that general unsecured creditors hold approximately $15.3 million in claims against DMC's estate.[62] The Trustee is currently holding on behalf of the estate a little more than $5 million of cash[63] and expects to receive, at most, an additional $2.5 million. The estate is insolvent. Best-case, claimants may receive a fifty percent distribution on account of their claims. Direct Results has offered nothing to counter this projected distribution. Accordingly, the Trustee has satisfied his burden under section 547(b)(5).[64]

All five conditions to qualify the Transfer as a preference have been met by the Trustee. The burden now shifts to Direct Results to establish, by a preponderance of the evidence, a defense to bar avoidance.[65] Direct Results asserts that the Transfer was made within the ordinary course of business pursuant to section 547(c)(2) and that the Court should use its equitable power under section 105(a) to prevent the avoidance of the Transfer.

1. Ordinary Course of Business Exceptions

Direct Results asserts that the Transfer was made within the ordinary course of business pursuant to section 547(c)(2). Section 547(c)(2) provides that the trustee may not avoid a preferential transfer:

> 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

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[59] *Id.*; *Burtch v. Masiz (In re Vaso Active Pharm., Inc.)*, 500 B.R. 384, 394 (Bankr. D. Del. 2013).

[60] *Vaso*, 500 B.R. at 394 (citing *AFD Fund v. Transmed Foods, Inc. (In re AmeriServe Foods Distrib., Inc.)*, 315 B.R. 24, 32 (Bankr. D. Del. 2004)).

[61] *Id.*

[62] Ex. P-19.

[63] Ex. P-20.

[64] *See Vaso*, 500 B.R. at 395 ("As a matter of general arithmetic, any transfer to a general unsecured creditor ordinarily satisfies this test unless the debtor's estate turns out to be solvent in Chapter 7.").

[65] 11 U.S.C. § 547(g); *Miller v. Westfield Steel, Inc. (In re Elrod Holdings Corp.)*, 426 B.R. 106, 110 (Bankr. D. Del. 2010); *AFA Inv.*, 2016 WL 908212, at *3.

(B) made according to ordinary business terms . . . .[66]

The ordinary course of business defense under section 547(c)(2) is disjunctive, thus allowing the creditor to prove the application of either section 547(c)(2)(A) (the "subjective test") or section 547(c)(2)(B) (the "objective test").[67]

The parties do not dispute that the Transfer was made to satisfy a debt incurred by DMC in the ordinary course of business of DMC and Direct Results. The dispute is whether section 547(c)(2)(A)'s subjective test or section 547(c)(2)(B)'s objective test applies. While Direct Results has argued both apply, it has failed to satisfy its burden with respect to the objective test because it neither offered an expert report nor other satisfactory evidence to establish a relevant industry standard of ordinary business terms against which to compare the Transfer.[68] Notwithstanding, it has satisfied its burden with respect to the subjective test.

Deciding whether a transfer was made within the ordinary course of business between a debtor and creditor under section 547(c)(2)(A) is a subjective, inherently fact-intensive inquiry, aimed at determining whether the transfer at issue conformed with the "normal payment practice between the parties."[69] To decide whether payments were made in the ordinary course of business, courts look at the following factors:

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

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[66] 11 U.S.C. § 547(c)(2)(A)-(B).

[67] *FBI Wind Down, Inc. v. Careers USA, Inc. (In re FBI Wind Down, Inc.)*, 614 B.R. 460, 487 (Bankr. D. Del. 2020).

[68] Section 547(c)(2)(B) is an objective inquiry, comparing the terms of a preferential transfer to the "ordinary business terms" of the relevant industry standards. *Sass v. Vector Consulting, Inc. (In re Am. Home Mortg. Holdings, Inc.)*, 476 B.R. 124, 140 (Bankr. D. Del. 2012). "Ordinary business terms" includes a broad range of practices that are "in harmony with the range of terms prevailing as some relevant industry norms." *Stanziale v. S. Steel & Supply LLC (In re Conex Holdings, LLC*), 518 B.R. 269, 285 (Bankr. D. Del. 2014) (quoting *Am. Home Mortg.*, 476 B.R. at 140-41). Only transfers that are "so idiosyncratic as to fall outside that broad range" of practices customary in the creditor's industry should be avoided. *Fiber Lite Corp. v. Molded Acoustical Prods., Inc. (In re Molded Acoustical Prods., Inc.)*, 18 F.3d 217, 224 (3d Cir. 1994). "While expert testimony is not necessarily required, a defendant must provide admissible, non-hearsay testimony related to industry credit, payment, and general business terms in order to support its position." *Conex Holdings*, 518 B.R. at 285.

[69] *Am. Home Mortg.*, 476 B.R. at 135; *Stanziale v. Superior Tech. Res., Inc. (In re Powerwave Techs., Inc.)*, No. 15-50085, 2017 WL 1373252, at *4 (Bankr. D. Del. Apr. 13, 2017).

an advantage (such as additional security) in light of the debtor's deteriorating condition.[70]

a. Length of Time

The first step in the Court's analysis is to determine whether there was a sufficient length of time to establish an ordinary course of dealing between the parties before the Transfer.[71] Here, there was. The parties transacted regularly, with twenty transactions during the two-year Historical Period.[72] A majority of those transfers were made when the Debtors were financially healthy.[73]

b. Similarity of Transactions

With an established baseline of prior dealings, the Court can examine the Transfer and determine whether it is "sufficiently similar" to qualify as ordinary.[74] It will be if it is similar in amount and made in a similar manner within a similar period of time.[75] The Trustee does not argue that the amount of the Transfer was inconsistent with prior dealings. Moreover, there is no argument that the manner of payment changed – the Transfer was made by check like past dealings between the parties. The crux of the dispute is timing.

Timing of payment is particularly important in analyzing the ordinary course of business between the debtor and creditor.[76] While small deviations in payment timing between a challenged preferential transfer and those in the historical period may be insignificant,[77] greater deviations between the two may defeat a finding of ordinariness.[78] Late payments do not necessarily preclude

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[70] *FBI Wind Down*, 614 B.R. at 487 (citing *Am. Home Mortg.*, 476 B.R. at 135-36); *accord Hechinger Inv. Co. v. Universal Forest Prods., Inc. (In re Hechinger Inv. Co.)*, 489 F.3d 568, 578 (3d Cir. 2007).

[71] *FBI Wind Down*, 614 B.R. at 487; *see also Elrod*, 426 B.R. at 111 ("[W]here the parties have a founded tradition of prior dealings, the focus is on those dealings . . . .").

[72] While the Debtors and Direct Results entered into their agreement in August 2015, the evidence admitted at trial only established a Historical Period two years prior to the Petition Date. *See* Ex. P-6.

[73] *Powerwave*, 2017 WL 1373252, at *4 (noting that a historical period should encompass the time period when the debtor was financially healthy).

[74] *FBI Wind Down,* 614 B.R. at 488; *see also Powerwave*, No. 15-50085, 2017 WL 1373252, at *4 ("A creditor must establish a baseline of dealings between it and the debtor that can be compared to their dealings during the preference period.").

[75] *FBI Wind Down,* 614 B.R. at 488.

[76] *Forman v. Moran Towing Corp. (In re AES Thames, LLC)*, 547 B.R. 99, 104 (Bankr. D. Del. 2016) (citing *Burtch v. Detroit Forming, Inc. (In re Archway Cookies)*, 435 B.R. 234, 243 (Bankr. D. Del. 2010)).

[77] *Id. See, e.g.*, *Archway Cookies*, 435 B.R. at 244 (finding that a difference of 4.9 days was not material); *Elrod*, 426 B.R. at 112 (finding that a small deviation (35-73 days versus 30-74 days) was insufficient to defeat the ordinary course of business defense).

[78] *AES Thames*, 547 B.R. at 104. *See e.g., Forklift Liquidating Trust v. Clark-Hurth (In re Forklift LP Corp.)*, No. 00-1730-LHK, 2006 WL 2042979, at *8 (D. Del. July 20, 2006) (denying ordinary course of

a finding that a payment was made in the ordinary course of business because a pattern of late payments can establish an ordinary course between the parties.[79]

During the Historical Period, Direct Results received payments from the Debtors 28 to 74 days after an invoice was sent, averaging 45.81 days. With respect to the Transfer, Direct Results received the Check 49 days after the August Invoice was sent, squarely within the historical range and the parties' previous payment practices. While the Check was received about three days later than the average, this difference is not material and insufficient to overcome the ordinariness of the Transfer.

The Trustee argues that the Court should examine the length of time between the date of the August Invoice and the date the Check was honored, which is 130 days and materially beyond the ranges and averages of the Historical Period. However, the Court concludes that reliance on this timeframe would be inappropriate. To start, the Trustee has not produced any evidence of the significance or meaning of the invoice date. Testimony from Direct Results' founder and President indicates that it may be the last day of the relevant broadcast month for which services were rendered.[80] However, nothing concrete explains the relevance of the date. Moreover, the parties historically determined the timeliness of the Debtors' payments from each invoice's sent date. As such, this is the critical starting point for the Court's ordinariness analysis.[81] Similarly, the date that the Check was honored is not a relevant ending point. For purposes of analyzing payment timing for the ordinary course of business defense, the date the creditor receives the check – not the clear date – is the relevant date.[82]

Finally, the Trustee argues that Direct Results' delay in depositing the Check was

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business defense when the historical number of payment days increased 58.4% during the preference period); *Radnor Holdings, Corp. v. PPT Consulting, LLC (In re Radnor Holdings Corp.)*, No. 08-51184, 2009 WL 2004226, at *6 (Bankr. D. Del. July 9, 2009) (denying the defense when the average number of payment days nearly doubled between the historical period and preference period).

[79] *Am. Homes Mortg.*, 476 B.R. at 173 (citing *Elrod*, 426 B.R. at 111).

[80] Trial Tr. 95:6–97:4.

[81] *AES Thames*, 547 B.R. at 104 ("Measuring the time from load date to payment, or from invoice date to payment, does not reflect whether the payments were timely or whether there was a consistency . . . .").

[82] *See, e.g.*, *Montgomery Ward, LLC v. OTC Int'l, Ltd. (In re Montgomery Ward, LLC)*, 348 B.R. 662, 676 n.6 (Bankr. D. Del. 2006); *Am. Home Mortg.*, 479 B.R. at 137-38; *FBI Wind Down*, 614 B.R. at 488. The Trustee cites several cases that support using the date a check was cashed, rather than the receipt date, in circumstances where transferees waited over thirty days from receipt to deposit the checks. *See O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35 (1st Cir. 1984); *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986); *Kupetz v. Elaine Monroe Assoc., Inc. (In re Wolf & Vine)*, 825 F.2d 197 (9th Cir. 1987); *Durham v. Smith Metal & Iron Co. (In re Cont'l Commodities, Inc.)*, 841 F.2d 527 (4th Cir. 1988); *Braniff Airways, Inc. v. Midwest Corp.*, 873 F.2d 805 (5th Cir. 1989); *Duvoisin, v. Anderson (In re Southern Indus. Banking Corp.)*, 92 B.R. 297 (Bankr. E.D. Tenn. 1988). Those cases rely on an old provision of section 547(c)(2) that focused on when a transfer occurred relevant to when the debt was incurred (rather than whether payment was made in the ordinary course of business) and no longer applies.

inconsistent with the parties' prior dealings. Once again, the Court must disagree as to this fact's relevance to its ordinary course analysis. As explained by the United States Court of Appeals for the Third Circuit in *Fiber Lite Corp. v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.)*, "[t]he preference provisions are designed not to disturb normal debtor-creditor relationships, but to derail unusual ones which threaten to heighten the likelihood of the debtor filing for bankruptcy at all and, should that contingency materialize, to then disrupt the paramount bankruptcy policy of the equitable treatment of creditors."[83] Here, Direct Results received payment from the Debtors consistent with its ordinary practice. The timing of deposit was then left to its discretion as it had always been. The fact that it decided to hold off cashing the Check until after the new year actually benefitted the Debtors by providing them with additional liquidity. On the other hand, it harmed Direct Results by exposing it to a risk that funds would be unavailable to satisfy the Check and, ultimately, by subjecting it to this preference suit.

The Trustee points out that some courts have determined that deposit delays affect the ordinariness of a payment. Those holdings are factually distinguishable because they involved either a coordinated effort among a debtor and creditor to delay the deposit or, in one instance, a debtor's lone effort to do so.[84] These types of situations lend themselves to conclusions of payment "favoritism and/or exploitation"[85] and are not present here. Rather, in the present circumstance, the timing of check cashing has no bearing on the payment relationship between Debtors and Direct Results.[86]

c. Unusual Debt Collection and Advantages in Light of Debtors' Financial Condition

The Trustee argues that Direct Results pressured the Debtors and took advantage of their financial condition in order to obtain the Transfer. In particular, he argues that DMC made the

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[83] 18 F.3d at 224.

[84] *Off. Unsecured Creditor Comm. v. Heilman (In re Diamond Insulation, Inc.)*, No. 17-09015, 2017 WL 3888292, at *2 (Bankr. N.D. Iowa Sept. 1, 2017) (finding that creditor agreed to delay the check deposit until the debtor could collect its accounts receivable and ultimately determining the transfer was avoidable due to insufficient evidence of the parties' ordinary course of business); *Liquidating Supervisor for Riverside Healthcare, Inc. v. Sysco Food Servs. San Antonio, LP (In re Riverside Healthcare, Inc.)*, 393 B.R. 422, 427-28 (Bankr. M.D. La. 2008) (determining with no analysis that the defendant's one-time five-day hold was outside the parties' ordinary course of business but implying that defendant may have agreed to hold the check); *Lichtenstein v. Aspect Comput. (In re Comput. Personalities Sys. Inc.)*, No. 02-0684, 2004 WL 1607005, at *8 (Bankr. E.D. Pa. July 2, 2004) (finding that the debtor's issuance of post-dated checks during the preference period was one of many relevant facts that made the transfers not ordinary).

[85] *Molded Acoustical*, 18 F.3d at 225.

[86] Equally misplaced is the Trustee's argument that Direct Results engaged in tax evasion by depositing the Check in 2019 and that this wrongdoing destroyed the Transfer's ordinariness. The Court, of course, does not condone tax evasion. However, it need not delve into this issue. The analysis the Court must undertake to determine the ordinary course of business defense focuses on the parties' payment relationship; not Direct Results' treatment of the funds for its tax purposes.

Transfer because of Direct Results' unusual collection activity and points the Court to the emails Direct Results sent to the Debtors after the August Invoice was not timely paid. He characterizes them as "pressure tactics" enabling Direct Results to receive preferred treatment over other creditors. The Court disagrees.

Unusual collection efforts during the preference period may bring payment efforts outside the ordinary course of business "when a differing payment interval alone is not enough to do so."[87] Unusual collection efforts generally include changes to credit terms or the method and timing of payment, and/or the threat or initiation of legal action.[88] Telephone calls and other forms of communications may be unusual if they resemble "a calculated response to a deteriorating creditor-debtor relationship."[89]

Nothing of the sort occurred here. The emails from Direct Results were polite inquiries regarding the status of payment,[90] and follow up emails were consistent with Direct Results' past practice when confronted with late client payments.[91] The evidence suggests that the need for timely payment was motivated by the desire to timely pay broadcasters and maintain healthy relationships with them; not from a fear that DMC would be unable to pay. There is no evidence that Direct Results knew about the Debtors' deteriorating financial condition. The opposite is true – it received the Check but then waited to cash it.

As the Trustee highlights, DMC may have expedited the Check to Direct Results following the emails. Nonetheless, there is no evidence as to whether this was unusual for late payments.[92] As a final matter the Trustee also points to the emails regarding payment of the September Invoice

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[87] *Forklift Liquidating Tr. v. Custom Tool & Mfg. Co. (In re Forklift LP)*, 340 B.R. 735, 739 (D. Del. 2006).

[88] *Burtch v. Prudential Real Estate & Relocation Servs., Inc. (In re AE Liquidation, Inc.)*, No. 10-55543, 2013 WL 3778141, at *7 (Bankr. D. Del. July 17, 2013); *Off. Comm. of Unsecured Creditors v. Curtis Int'l Ltd. (In re Hhgregg, Inc.)*, 636 B.R. 545, 551 (Bankr. S.D. Ind. 2022).

[89] *AE Liquidation*, 2013 WL 3778141, at *7 (quoting *Am. Home Mortg.*, 476 B.R. at 139) (explaining that a creditor's awareness of the debtor's financial condition can indicate that it is attempting to collect a debt ahead of other creditors); *see also Hhgregg*, 636 B.R. at 551 (finding that more frequent emails with an insistent tone from senior management during the preference period was not extraordinary).

[90] *Cf. Menotte v. Oxyde Chem. Inc. (In re JSL Chem. Corp.)*, 424 B.R. 573, 582 (Bankr. S.D. Fla. 2010) (finding that an email sent by defendant's chief financial officer stating that the debtor was placed on credit hold constituted "unusual debt collection activity"); *Lightfoot v. Amelia Maritime Servs., Inc. (In re Sea Bridge Marine, Inc.)*, 412 B.R. 868, 873-74 (Bankr. E.D. La. 2008) (finding that numerous emails threatening to send the debtor to collections or to initiate legal action were unusual collection activity).

[91] *See, e.g.*, *Elrod*, 426 B.R. at 112 (determining that a threat to withhold future shipments did not destroy the ordinariness of the challenged transfer when the creditor often made such threats in the past); *Archway Cookies*, 435 B.R. at 244-45 (applying a similar analysis); *Am. Home Mortg.*, 476 B.R. at 139-40 (finding that defendant's challenged collection practices extended to all of its clients and were reasonable under the circumstance).

[92] Even if the Check was not expedited, Direct Results would have likely received it well within the historical range for payment.

and the December 28 wire transfer, arguing that these evince Direct Results' successful pressures. However, that payment and the related emails are separate from the Transfer, the decision to issue a wire was made voluntarily by DMC, and the Trustee has not sought avoidance of the wire transfer because it was made outside the preference period.

In conclusion, based on the record, the Court finds that the Transfer was made in the ordinary course of business between it and the Debtors, and cannot be avoided. Accordingly, the Court will enter judgment in favor of Direct Results on Count 1.[93]

B. Counts 2 Through 4

Count 2 of the Complaint is the Trustee's section 548 fraudulent transfer count. Count 3 is the Trustee's request for recovery of the Transfer pursuant to section 550(a). Count 4 is the Trustee's request for disallowance of Direct Results' claims under section 502(d). In light of the Trustee's abandonment of Count 2 and the Court's judgment in favor of Direct Results on Count 1, it will enter judgment in favor of Direct Results on Counts 2 through 4.

V. CONCLUSION

For the foregoing reasons, the Court will enter judgment in favor of Direct Results on all Counts. An appropriate order will follow.

Dated: December 1, 2022
Wilmington, Delaware

Karen B. Owens
United States Bankruptcy Judge

[93] In light of its conclusion that the Transfer was made in the ordinary course of business, it is unnecessary for the Court to address Direct Results' remaining defense under section 105(a).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 7
DIVERSIFIED MERCURY COMMUNICATIONS, LLC, *et al.*,[1]	Case No. 19-10757 (KBO)
Debtors.	(Jointly Administered)
GEORGE L. MILLER, solely in his capacity as chapter 7 trustee of Diversified Mercury Communications, LLC and DTR Advertising, Inc.,	Adv. Proc. No. 21-50249 (KBO)
Plaintiff,	**Related to Adv. D.I. 56**
v.	
DIRECT RESULTS RADIO, INC.,	
Defendant.	

ORDER

For the reasons set forth in the accompanying Opinion [Adv. D.I. #56], it is hereby **ORDERED** that judgment is entered in favor of Defendant Direct Results Radio, Inc. on all Counts of the Complaint.

Dated: December 1, 2022
Wilmington, Delaware

Karen B. Owens
United States Bankruptcy Judge

[1] The Debtors in these cases are: (i) Diversified Mercury Communications, LLC, and (ii) DTR Advertising, Inc.