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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No. NC-11-1173-DoDH
)	
7	JOSEPH J. VIOLA aka)	Bk. No. 10-30904
	GIUSEPPE VIOLA,)	
8)	Adv. No. 10-03103
	Debtor.)	
9	<hr/>		
)	
10	JANINA M. HOSKINS,)	
	Chapter 7 Trustee,)	
11)	
	Appellant,)	
12	v.)	O P I N I O N
)	
13	CITIGROUP, INC.; CITIGROUP)	
	GLOBAL MARKETS, INC.;)	
14	CITIBANK, N.A.,)	
)	
15	Appellees.)	
16	<hr/>		

Argued and Submitted on January 20, 2012
at San Francisco, California

Filed - April 6, 2012

Appeal from the United States Bankruptcy Court
for the Northern District of California

Hon. Dennis Montali, Bankruptcy Judge, Presiding.

Appearances: John H. MacConaghy of MacConaghy & Barnier argued
for the appellant. Stefan Perovich of Keesal,
Young & Logan argued for the appellees.

Before: DONOVAN,¹ DUNN, and HOLLOWELL, Bankruptcy Judges.

¹ Hon. Thomas B. Donovan, United States Bankruptcy Judge for
the Central District of California, sitting by designation.

1 DONOVAN, Bankruptcy Judge:

2
3 Janina M. Hoskins (Hoskins), chapter 7 trustee for the
4 estate of Joseph Viola (Viola), appeals an order of the
5 bankruptcy court dismissing with prejudice Hoskins' Second
6 Amended Complaint against Citigroup, Inc. (Citigroup), Citigroup
7 Global Markets, Inc. (CGMI), and Citibank, N.A. (Citibank),
8 (collectively Citi), for avoidance of fraudulent transfers and
9 damages for aiding and abetting intentionally fraudulent
10 transfers. We AFFIRM the dismissal.

11 **I. FACTS**

12 Viola, a convicted felon and fugitive from justice,
13 approached a San Francisco branch of Citibank managed by vice
14 president Rik B. Schrammel on or about April 14, 1999.²
15 Citibank was apparently Viola's bank of choice; his prior
16 conviction arose out of fraudulent activities in Arizona
17 involving Citibank accounts, and he was investigated by Citibank
18 internal fraud personnel in relation to those activities.
19 Despite this past investigation, Viola and Ralph Napolitano, a
20 retired auto mechanic, were permitted to open an account at
21 Citibank in the name of "The Ralph Napolitano Irrevocable Living
22 Trust DTD April 13, 1999." The Account Opening Form indicated
23 that Napolitano earned \$25,000 per year and had an entire net

24
25 ² All facts are drawn from allegations raised in Hoskins' Second
26 Amended Complaint, and are taken as true for the purposes of
27 reviewing the bankruptcy court's dismissal of Hoskins' complaint
for failure to state a claim. See Stoll v. Quintanar (In re
Stoll), 252 B.R. 492, 495 (9th Cir. BAP 2000).

1 worth of \$220,000. Under the terms of the trust, which was
2 executed and notarized in the presence of Schrammel, Viola had
3 full power of attorney for Napolitano, Viola and Napolitano were
4 co-trustees of Napolitano's affairs, and Schrammel was
5 designated as successor trustee. Viola and Napolitano also
6 opened an investment brokerage account in the name of the trust.

7 Napolitano died in 2000. However, the funds in the trust
8 accounts were not distributed to his chosen beneficiaries.
9 Instead, beginning around January 1, 2005, Viola began using the
10 trust accounts to operate a Ponzi scheme. In that year, the
11 balance in the trust accounts grew from approximately \$362,000
12 to \$771,000, with the increase due almost entirely to funds
13 obtained from Ponzi scheme victims. Viola successfully
14 represented to at least sixty investors that he was an
15 experienced securities and commodities trader and promised
16 generous investment returns. Based on these representations,
17 these investors entrusted him with roughly \$17 million.

18 Over the course of the scheme, Viola used the funds
19 invested: (a) to make distributions to investors, thereby giving
20 the false impression that he was generating returns, (b) to pay
21 his own living expenses, (c) to speculate in commodities trades,
22 in the process losing roughly \$4 million, (d) to invest
23 approximately \$1,200,000 in a retail bakery business, and (e) to
24 design and build custom sports cars. On February 21, 2008,
25 Viola also used \$1,007,600³ to purchase preferred stock of
26 Citigroup through an investment brokerage account managed by

27 ³ At one point the Second Amended Complaint references a
28 \$1,007,800 transfer. This appears to be a typographical error,
as Exhibit 5 to the Second Amended Complaint, referenced as
evidence for this transaction, indicates a value of \$1,007,600.

1 CGMI. Both Citibank and CGMI are subsidiaries of Citigroup, a
2 holding company.

3 Due to the increased account balances in early 2005, and
4 pursuant to the terms of the Patriot Act, Citi required updated
5 account information forms for the trust accounts, which Viola
6 fraudulently filled out on behalf of Napolitano, signing
7 Napolitano's name and giving his own address and phone number
8 for Napolitano's, who was dead. With this information, Viola
9 was permitted to continue operating the trust accounts and to
10 transfer millions of dollars through the accounts, which had a
11 high balance of \$9,452,583.34 on February 21, 2008. These
12 transfers included a \$4,810,553 transfer to a commodities
13 brokerage. When the commodities brokerage firm became concerned
14 over the size of Viola's losses, Citi provided two letters of
15 reference on his behalf in October of 2008, attesting to Viola
16 and Napolitano's wealth, sophistication, and integrity. Citi
17 also assured two of Viola's victims that Schrammel, the
18 successor trustee of the accounts, could act in the event that
19 Viola was not able.

20 Citi provided Viola with other assistance, including false
21 representations to victims that Viola was a practicing attorney
22 and a skilled investment advisor, and assuring Citi customers
23 that allocating portions of the victims' investment portfolios
24 to aggressive investment with Viola was a sound investment
25 strategy. Citi also permitted Viola to use its conference room
26 to meet with victims on at least one occasion. Citi referred
27 customers to Viola. For example, when Citi customer Morton
28 Kirsch sought to repatriate approximately \$8 million of his

1 offshore funds to his own account, Schrammel referred him to
2 Viola as one who was experienced in international money
3 transfers.

4 Citi eventually approached Viola to request additional
5 documentation after Citi's compliance department flagged the \$8
6 million foreign wire transfer from Kirsch and acknowledged that
7 the transactions in general were wholly inconsistent with a
8 personal trust account. Viola refused to cooperate, and Citi
9 closed the accounts after sixty days, during which time Viola
10 disbursed an additional \$912,240.22. Viola continued to operate
11 the Ponzi scheme for another six months, through other Citi
12 accounts that were opened with Schrammel's assistance, until
13 Viola's arrest and his involuntary chapter 7 petition filed on
14 March 16, 2010.

15 Following the involuntary filing, an order for relief was
16 entered and Hoskins was appointed chapter 7 Trustee. After
17 investigation, Hoskins filed an adversary complaint and then a
18 First Amended Complaint naming the Citi defendants and raising
19 two claims for avoidance of fraudulent transfers under 11 U.S.C.
20 §§ 548(a)(1)(A) and 544(b)⁴ and a third claim for damages for
21 aiding and abetting fraudulent transfers under § 544(a)(2). On
22 September 10, 2010, Citi brought a motion to dismiss the First
23 Amended Complaint. The bankruptcy court granted the motion with
24 leave to amend on the grounds that Viola, not Citi, controlled
25 the funds in the trust accounts; accordingly, Hoskins could not
26 bring an action against Citi as a non-transferee. Further, the

27 ⁴ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 court found that Hoskins lacked standing to assert a claim for
2 aiding and abetting a fraudulent transfer. Hoskins then filed
3 the Second Amended Complaint realleging the dismissed claims and
4 adding a fourth claim for avoidance of Viola's purchase of
5 Citigroup preferred stock. The court granted Citi's motion to
6 dismiss the Second Amended Complaint with prejudice for the
7 reasons stated in its previous Memorandum Decision, with the
8 added reason that § 546(e) precluded the fourth claim. Hoskins
9 appealed.

10 **II. ISSUES**

11 A. Are Citigroup, CGMI, and/or Citibank transferees
12 for the purposes of imposing fraudulent transfer liability?

13 B. Does a bankruptcy trustee have standing to bring
14 a claim for relief alleging the aiding and abetting of
fraudulent transfers under California law?

15 C. Do the provisions of § 546(e) apply to protect
16 Citigroup from liability in connection with a sale of its
own stock through its subsidiary, CGMI?

17 **III. JURISDICTION**

18 The bankruptcy court properly exercised jurisdiction under
19 28 U.S.C. § 157(b) (2) (E), and § 1334. We have jurisdiction
20 under 28 U.S.C. § 158.

21 **IV. STANDARD OF REVIEW**

22 The BAP reviews de novo a bankruptcy court's dismissal for
23 failure to state a claim under Federal Rule of Civil Procedure
24 12(b) (6). Busseto Foods, Inc. v. Laizure (In re Laizure), 548
25 F.3d 693, 696 (9th Cir. 2008). When reviewing a motion to
26 dismiss a complaint, the court must take as true all allegations
27 of material fact and construe them in a light most favorable to
28 the nonmoving party. Parks Sch. of Bus., Inc. v. Symington, 51

1 F.3d 1480, 1484 (9th Cir. 1995) (citation omitted). For a
2 complaint to survive a motion to dismiss, alleged facts must be
3 plausibly suggestive of a claim entitling the plaintiff to
4 relief. Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir.
5 2009). A plaintiff's complaint may be dismissed either for
6 failing to articulate a cognizable legal theory or for failing
7 to allege sufficient facts under a cognizable legal theory.
8 Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th
9 Cir. 1984).

10 V. DISCUSSION

11 A. The Citi Defendants Are Not Transferees Pursuant To The 12 Ninth Circuit's Dominion Test.

13 Hoskins' first and second claims for relief against Citi in
14 the Second Amended Complaint are for avoidance of intentionally
15 fraudulent transfers under §§ 548(a)(1)(A) and 544(b). These
16 sections permit the trustee to avoid a transfer of an interest
17 of the debtor in property made with the actual intent to hinder,
18 delay, or defraud a creditor within two years prior to the
19 bankruptcy filing, and to avoid any transfer of such an interest
20 that is voidable under applicable law by an unsecured creditor.
21 Pursuant to § 550(a), a trustee may recover a fraudulent
22 transfer from "the initial transferee of such transfer or the
23 entity for whose benefit such transfer was made; or any
24 immediate or mediate transferee of such initial transferee."
25 The term "transferee" is not defined in the Bankruptcy Code;
26 however, the Ninth Circuit has examined the question of who
27 constitutes a transferee at length.

28 As explained in In re Incomnet, Inc., 463 F.3d 1064, 1069

1 (9th Cir. 2006), there are two generally recognized tests to
2 determine if a party is a transferee: the "dominion test" and
3 the "control test." Perhaps because the words are usually
4 synonyms, the tests have frequently been conflated, but as
5 explained in Incomnet, the Ninth Circuit "ha[s] applied the
6 dominion test several times, but ha[s] declined to adopt the
7 control test." Id. The Ninth Circuit's dominion test defines a
8 transferee as one who "has dominion over the money or other
9 asset, the right to put the money to one's own purposes. . . .
10 The inquiry focuses on whether an entity had legal authority
11 over the money and the right to use the money however it
12 wished." Id. at 1070 (internal citations omitted).

13 The Ninth Circuit has identified Bonded Financial Services,
14 Inc. v. European American Bank, 838 F.2d 890 (7th Cir. 1988), as
15 the leading case in this area. Incomnet, at 1070. In Bonded
16 Financial, a bank was held not to be a transferee under
17 § 550(a), even though the debtor, a corporation, sent the bank a
18 check payable to the bank's order, because the check was
19 accompanied by a note directing the bank to deposit the check
20 into another account belonging to the debtor's principal. 838
21 F.2d at 891. The Seventh Circuit found that the bank received
22 no benefit from the transaction in which it served merely as a
23 financial intermediary; accordingly, the scenario failed the
24 dominion test, which stresses the ability of the recipient to
25 use the money as it chooses. Id. at 893.

26 The Ninth Circuit in Incomnet emphasized that the dominion
27 test is more restrictive than the "control test" used by other
28 circuits, referencing the explanation of the control test laid

1 out in Nordberg v. Societe Generale (In re Chase & Sanborn
2 Corp.), 848 F.2d 1196, 1199 (11th Cir. 1988). Incomnet, 463
3 F.3d at 1071. Under the control test, an examining court must
4 evaluate a transaction in its entirety and make a "logical and
5 equitable" determination as to whether "the banks actually
6 controlled the funds or merely served as conduits, holding money
7 that was in fact controlled by either the transferor or the real
8 transferee." Chase & Sanborn Corp., 848 F.2d at 1199-1200.
9 Therefore, while similar, "[t]he dominion test focuses on
10 whether the recipient of funds has legal title to them and the
11 ability to use them as he sees fit. The control test takes a
12 more gestalt view of the entire transaction to determine who, in
13 reality, controlled the funds in question." Incomnet, 463 F.3d
14 at 1071 (internal citations omitted).

15 Hoskins' Second Amended Complaint fails to demonstrate that
16 any of the Citi defendants had dominion over the funds
17 transferred to the trust accounts with Citibank and CGMI. To
18 the contrary, the complaint reflects that Viola had dominion
19 over the funds, or in other words, the legal title and ability
20 to do with them whatever he wished, much to the chagrin of his
21 duped investors. Hoskins has argued that, because a Citi
22 employee, Schrammel, was designated as successor trustee to the
23 trust accounts, Citi should be viewed as having exercised
24 dominion over the funds. In the alternative, Hoskins argues
25 that Citi should be deemed to have exercised dominion over the
26 funds in light of its continued violations of rules and
27 regulations in permitting the accounts to operate unlawfully.

28 Unfortunately for Hoskins, the Ninth Circuit has been clear

1 regarding its adoption of the dominion test and corresponding
2 rejection of the "more lenient" control test. Incomnet, 463
3 F.3d at 1071. Although it is a disturbing fact that Schrammel,
4 a Citi branch vice president, was designated as successor
5 trustee, the complaint does not allege that Schrammel served as
6 trustee at any time, nor that he had "sufficient authority over
7 the funds to direct their disbursement." Id. at 1074.

8 The allegations that Citibank ignored multiple red flags
9 and permitted glaring regulatory violations, thereby
10 facilitating the continuation of Viola's fraud, are also
11 disturbing. It is possible that the Citi defendants may be
12 subject to liability under state or federal law as a consequence
13 of these violations. However, the failure of Schrammel or any
14 of the Citi defendants to exercise dominion over the trust
15 accounts determines the issue of liability for fraudulent
16 transfer under the Bankruptcy Code and the Ninth Circuit
17 dominion test.

18 The bankruptcy court correctly determined that the Citi
19 defendants are not transferees under § 550(e) pursuant to
20 current binding precedent; accordingly, the dismissal of Hoskins
21 first and second claims for relief is affirmed.

22 B. The Trustee Does Not Have Standing To Bring A Claim For
23 Relief For Aiding And Abetting Fraudulent Transfers Because The
24 Trustee Is Not A Real Party In Interest.

25 Hoskins' third claim for relief attempts to invoke the
26 trustee's "strong arm" powers under § 544(a)(2), which gives the
27

1 trustee

2 . . .
3 the rights and powers of, or [the power to] avoid any
4 transfer of property of the debtor or any obligation
5 incurred by the debtor that is voidable by -- . . .
6 (2) a creditor that extends credit to the debtor at the
7 time of the commencement of the case, and obtains, at
8 such time and with respect to such credit, an execution
9 against the debtor that is returned unsatisfied at such
10 time, whether or not such a creditor exists

11 § 544(a)(2). Hoskins refers to the strong arm powers granted in
12 this section as those of the "hypothetical execution lien
13 creditor." These powers, as Hoskins correctly asserts, go beyond
14 mere avoidance powers. However, they do not establish Hoskins'
15 right to a claim for relief in this case under Ninth Circuit
16 precedent.⁵

17 Congress granted these "rights and powers" primarily to
18 facilitate a trustee's pursuit of leviable assets. Section
19 544(a)(2) was particularly intended to give a trustee, standing
20 in the shoes of a creditor that has already exhausted available

21 ⁵ For the purposes of analyzing Hoskins' argument, we assume
22 that § 544(a)(2) powers are available to Hoskins in this case. We
23 note, however, that there is some ambiguity in this Circuit's case
24 law as to whether a creditor must exist who had the legal right to
25 an execution at the time the bankruptcy case was filed, but simply
26 failed to obtain said execution. See Pac. Fin. Corp. v. Edwards,
27 304 F.2d 224, 228 (9th Cir. 1962); see also In re Skipwith, 9 B.R.
28 730, 737 (Bankr. S.D. Cal. 1981) (noting criticism of the Pacific
decision) (overruled on other grounds by Emmerich v. Lampi, 19
B.R. 666 (9th Cir. BAP 1982)); 124 Cong. Rec. 32400 (1978)
(suggesting that the Bankruptcy Code overrules Pacific Finance
Corp. insofar as it held that the trustee did not have the status
of a creditor who extended credit immediately prior to the
commencement of the case). It is not necessary for us to resolve
this ambiguity in light of our conclusion that these powers, if
granted, would still not allow Hoskins to pursue a claim against
the Citi defendants for aiding and abetting fraudulent transfers.

1 legal remedies, power to pursue equitable remedies in the context
2 of discovery. See S. Rep. No. 89-1159 (1965), reprinted in 1966
3 U.S.C.C.A.N. 2032, at 2466. Hoskins asks this Panel to
4 interpret § 544(a)(2) to give a trustee all the substantive
5 rights of the hypothetical execution lien creditor, which in
6 California include standing to bring a claim for relief for
7 aiding and abetting fraudulent transfers against a third party.
8 See Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101,
9 1118 (C.D. Cal. 2003). Other courts within the Ninth Circuit
10 have declined to grant a trustee standing to pursue such a claim,
11 albeit under a different subsection of the strong arm statute.
12 See Wyle v. Howard, Weil, Labouisse, Friedrichs Inc. (In re
13 Hamilton Taft & Co.), 176 B.R. 895, 902 (Bankr. N.D. Cal. 1995)
14 (holding that the trustee did not have power to pursue an aiding
15 and abetting claim for relief under § 544(b)); Ciolino v. Ryan
16 (In re Ryan), 2008 Bankr. LEXIS 2968 at *10 n.5 (Bankr. N.D. Cal.
17 Oct. 29, 2008) (same).

18 Hoskins attempts to distance her claim from these rulings by
19 emphasizing the differences between § 544(a), the basis for her
20 claim, and § 544(b), the basis for the claims in In re Hamilton
21 Taft & Co. and Ryan. This attempt is futile in light of the
22 factual similarities between her claim and that raised in
23 Williams v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988).
24 In addition to having a nearly identical factual scenario, the
25 reasoning of the Ninth Circuit's interpretation of Supreme Court
26 precedent is as applicable to this case as it was to Williams.

27 In Williams, the Ninth Circuit considered a bank's motion to
28 dismiss the trustee's action against the bank for violation of

1 the federal securities laws on behalf of creditors who had been
2 bilked in a Ponzi scheme. Id. at 665. In response to the bank's
3 assertion that the trustee did not have standing to bring such a
4 suit, the trustee obtained an assignment of the claim from some
5 of the investors. Id. Nonetheless, the Ninth Circuit concluded
6 that under the Supreme Court's decision in Caplin v. Marine
7 Midland Grace Trust Co., 406 U.S. 416, 428-30 (1972), the trustee
8 did not have standing to pursue the claim against the bank and
9 the case should be dismissed.

10 The Ninth Circuit gave three specific reasons for
11 dismissal. First, the trustee did not have power to collect
12 money not owed to the estate: the court reasoned that the
13 assignment of their claims notwithstanding, the investors
14 remained the real parties in interest. Williams, 859 F.2d at
15 666-67. Second, the debtor had no independent claim against the
16 bank. Id. at 667. Third, allowing the trustee to bring a suit
17 raised the potential for inconsistent actions between the trustee
18 and those investors who had not assigned their claims,
19 potentially creating a conflict of interest and the proliferation
20 of litigation. Id. The court further noted that Congress had
21 the opportunity in 1978 to overturn Caplin, which had first
22 raised these three points in denying a trustee the authority to
23 recover damages, and decided not to do so. Accordingly,
24 "'Congress' message is clear -- no trustee, whether a
25 reorganization trustee as in Caplin or a liquidation trustee [,]
26 has power under . . . the Code to assert general causes of action
27 . . . on behalf of the bankrupt estate's creditors.'" Id. at 667
28 (quoting In re Ozark Rest. Equip. Co., 816 F.2d 1222, 1228 (8th

1 Cir. 1987)).

2 The reasoning of Williams applies to this case. First, any
3 recovery of funds from the Citi defendants will go straight to
4 the investors, apart from administrative costs that Hoskins may
5 recoup as the cost for bringing the suit. Second, Viola's estate
6 has no independent claim against the Citi defendants. Hoskins
7 cannot bring a claim on behalf of the estate against the bank for
8 the bank's alleged complicity with Viola's fraudulent activities.
9 Finally, allowing Hoskins to go forward with her suit against the
10 Citi defendants raises the risk of inconsistent actions brought
11 outside of bankruptcy by the investors themselves.

12 In the Ninth Circuit, "it is well settled that a bankruptcy
13 trustee has no standing generally to sue third parties on behalf
14 of the estate's creditors, but may only assert claims held by the
15 [debtor] itself." Smith v. Arthur Andersen LLP, 421 F.3d 989,
16 1002 (9th Cir. 2005) (internal citations omitted); see also In re
17 Hamilton Taft & Co., 176 B.R. at 902 ("A debtor's bankruptcy
18 trustee . . . is not authorized to pursue every action that
19 creditors of the debtor might pursue."). Hoskins' claim against
20 the Citi defendants for aiding and abetting fraudulent transfers
21 is entirely derived from the creditor investors, and would not
22 exist but for their existence and involvement in the bankruptcy.
23 For the reasons laid out in Caplin and adopted by the Ninth
24 Circuit in Williams, we must conclude that Hoskins does not have
25 standing to pursue this claim, and therefore we affirm the
26 dismissal of Hoskins' third claim for relief.

27 C. The Trustee Cannot Avoid The Transfer Of \$1,007,600 For
28 Citigroup Stock Because The Transfer Was Made Through CGMI, A

1 Protected Entity Under § 546(e).

2 Hoskins' fourth and final claim for relief against the Citi
3 defendants seeks to avoid Viola's 2008 transfer of \$1,007,600 for
4 the purchase of Citigroup's preferred stock.⁶ This transfer
5 falls outside of the statutory period in § 548(a)(1)(A), having
6 occurred more than two years before the petition was filed.
7 Accordingly, Hoskins seeks to avoid the transfer under § 544(b).

8 Section 546(e) limits the trustee's power to avoid
9 transfers made by, to, or for the benefit of, certain entities,
10 including stockbrokers and financial institutions. Specifically,
11 the section states:

12 Notwithstanding section[] 544 . . . , the trustee may
13 not avoid a transfer that is . . . a settlement payment
14 . . . , made by or to (or for the benefit of) a commodity
15 broker, forward contract merchant, stockbroker,
16 financial institution, financial participant, or
17 securities clearing agency, or that is a transfer made
18 by or to (or for the benefit of) a commodity broker,
19 forward contract merchant, stockbroker, financial
institution, financial participant, or securities
clearing agency, in connection with a securities
contract, as defined in section 741(7), commodity
contract, as defined in section 761(4), or forward
contract, that is made before the commencement of the
case.

20 § 546(e). Hoskins has conceded that CGMI is an entity covered
21 under the safe harbor of § 546(e). However, she does not concede
22 that Citigroup, the parent holding company of CGMI and Citibank,
23 is so protected.

24 Instead, Hoskins argues that CGMI should be treated as a
25 "mere conduit," consistent with the bankruptcy court's prior

26 _____
27 ⁶ This transfer is treated differently from those raised under
28 Hoskins' first and second claims for relief, because in this case
the Citi defendants are transferees under § 550(a), having
received the cash in exchange for stock, and accordingly obtained
legal right to do as they wished with the cash.

1 determination regarding the dismissal of her first and second
2 claims for relief, which this court has affirmed. Hoskins argues
3 under this reasoning that Citigroup, the seller of the preferred
4 stock, is the true transferee. She further argues that Citigroup
5 is not protected under § 546(e), and so the claim for relief
6 should move forward.

7 Hoskins' "mere conduit" argument fails for two reasons.
8 First, there is nothing in the Bankruptcy Code or subsequent case
9 law to suggest that the Ninth Circuit's test to determine a
10 transferee under § 550(a) should be applied as a limitation to
11 the safe harbor provisions of § 546(e). The two sections do not
12 cross-reference, and they explain different subjects: § 546(e)
13 deals with transfers, while § 550(a) deals with transferees.
14 Second, even under the Ninth Circuit's dominion test, CGMI would
15 be considered a transferee for the \$1,007,600 transaction. CGMI
16 received the investor money from the Citi trust accounts in
17 payment for the Citigroup stock, and then had legal authority to
18 do what it wished with that money. This is unlike CGMI or
19 Citibank's mere holding of trust account funds, which Viola
20 controlled and transferred as he wished.

21 As was noted in oral argument, Hoskins unfortunately has
22 been caught between two statutory provisions--the safe harbor
23 clause of § 546(e), and the statutory limits of § 548(a)(1)(A).
24 Her argument that "Section 546(e) should not be used as a free
25 pass to avoid liability in a scheme to defraud" is appealing.
26 However, the drafters of the Bankruptcy Code have already
27 provided a limitation on § 546(e) to that effect. Any avoidance
28 action arising under § 548(a)(1)(A) that concerns transfers made

1 "with actual intent to hinder, delay, or defraud," is exempt from
2 § 546(e) protections. However, § 548(a)(1)(A) is limited to
3 transactions made within two years before the bankruptcy filing
4 date. In this case, the filing date was March 16, 2010. The
5 transaction that Hoskins seeks to avoid took place on February
6 21, 2008, more than two years prior to the bankruptcy filing, and
7 is accordingly outside of the § 548(a)(1)(A) statutory period.

8 It is not the place of this Panel to read in an expansion of
9 clear statutory limits in response to this factual scenario. See
10 In re Hamilton Taft & Co., 176 B.R. at 901 (finding that the
11 ethical nature of a transaction outside the statutory period of
12 exemption under § 546(e) is irrelevant to the court's
13 determination). Accordingly, the bankruptcy court's dismissal of
14 this claim for relief is affirmed.

15 VI. CONCLUSION

16 For the foregoing reasons, the bankruptcy court's dismissal
17 with prejudice of Hoskins' case for failure to state a claim is
18 AFFIRMED.

19
20 HOLLOWELL, Bankruptcy Judge, concurring:

21
22 I agree with the majority that Hoskins cannot assert an
23 aiding and abetting claim under § 544(a)(2) because the estate
24 has no claim against the Appellees. The rights of a
25 hypothetical lien creditor are dependent on the rights of its
26 debtor. Smith v. Arthur Andersen LLP, 421 F.3d 989, 1002 (9th
27 Cir. 2005) citing Shearson Lehman Hutton, Inc. v. Wagoner,
28 944 F.2d 114, 118 (2d Cir. 1991). Here, because the deposits at

1 issue were not made by Viola, the Citi defendants did not become
2 the obligors of Viola.¹ Certified Grocers, 150 Cal.App.3d at
3 286 ("When a bank receives deposits, it becomes the debtor of
4 the depositor and its implied contract with him is to discharge
5 that indebtedness by honoring such checks as he may draw upon
6 it; the bank is not entitled to debit his account with payments
7 not made by his order or direction."). Even if Viola had been
8 the depositor, the facts do not indicate that Viola had a claim
9 against the Appellees. Accordingly, the equitable remedies made
10 available to a judgment creditor whose execution is returned
11 unsatisfied, such as the right to bring a creditor's bill, or
12 seek a receivership, or bring an action for aiding and abetting,
13 could not be exercised by Hoskins against the Appellees.

14 If, however, Viola had a valid claim against the Appellees,
15 then the holding in Williams v. Cal. 1st Bank, 859 F.2d 664 (9th
16 Cir. 1988), and its progeny, barring claims against third
17 parties by a trustee would not apply. Smith, 421 F.3d at 1002
18 ("If the debtor suffered an injury, the trustee has standing to
19 pursue a claim seeking to rectify such injury."). For example,
20 in such a case, defendants would not necessarily be able to
21 assert an in pari delicto defense if state law bars such a
22 defense against receivers. See Mosier v. Stonefield Josephson,
23 Inc., 2011 WL 5075551 *4 (C.D. Cal. Oct. 25, 2011). Nor, if the

24 ¹ The deposits were either in the name of the Napolitano Trust or
25 a Delaware "shell" corporation. While Viola had signing authority
26 for the accounts, the Appellees were authorized "to honor
27 withdrawals from an account on the signatures authorized by the
28 signature card, which serves as a contract between the depositor
for the handling of the account." Certified Grocers of Cal., Ltd.
v. San Gabriel Valley Bank, 150 Cal.App.3d 281, 287 (Cal. Ct. App.
1983).

1 debtor had a claim, independent of the claims of its creditors,
2 would a trustee be prohibited from pursuing the claim just
3 because the creditors might have similar claims. In Smith, the
4 court recognized that while acts of mismanagement by an
5 insolvent corporation indirectly injured creditors, the trustee
6 for the debtor corporation still had standing to bring an action
7 for breach of duty or misconduct to the debtor. 421 F.3d at
8 1004.

9 There are other important rights a trustee may assert under
10 § 544(a) which would be unavailable under § 544(b), such as
11 defenses to a claim that the statute of limitations has expired.
12 Collins v. Kholberg & Co. (In re Sw. Supermarkets, LLC.),
13 325 B.R. 417, 427 (Bankr. D. Ariz. 2005)

14 I note the differences between § 544(a) and (b) not because
15 the majority's analysis is incorrect. On the facts of this
16 case, no other result is possible. Nevertheless, the difference
17 between a trustee's § 544(a) and (b) powers is worth noting
18 because, depending on the facts of a particular case, that
19 difference may significantly impact a trustee's ability to
20 recover assets.