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OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	SC-05-1238-MoTB
)		
COMMERCIAL MONEY CENTER, INC.)	Bk. No.	02-09721-H7
)		
Debtor.)	Adv. No.	03-90331-H7
)		
_____)		
NETBANK, FSB,)		
)		
Appellant,)		
)		
v.)	A M E N D E D	
)	<u>O P I N I O N</u>	
RICHARD M. KIPPERMAN,)		
Chapter 7 Trustee,)		
)		
Appellee.)		
_____)		

Argued on March 23, 2006
at Pasadena, California
and Submitted on May 4, 2006

Filed - August 2, 2006
Amended - August 25, 2006¹

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

Honorable John J. Hargrove, Bankruptcy Judge, Presiding.

Before: MONTALI, TCHAIKOVSKY,² and BRANDT, Bankruptcy Judges.

¹ After our initial opinion was filed on August 2, 2006, Appellee filed a timely motion for limited rehearing. Appellant filed a response, Appellee filed a reply, and we issue this amended opinion to clarify the points raised by the parties. In all other respects we have denied the motion for limited rehearing by a separate order.

² Hon. Leslie J. Tchaikovsky, Bankruptcy Judge for the Northern District of California, sitting by designation.

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1 MONTALI, Bankruptcy Judge:

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4 The principal issue in this case appears to be one of first
5 impression for us or any court of appeals. We are told that the
6 multi-billion dollar securitization industry depends on being able
7 to fractionalize financial assets, and specifically on stripping
8 payment streams from underlying transactions such as the equipment
9 leases in this case. The issue is whether those payment streams
10 are chattel paper or payment intangibles. On cross-motions for
11 partial summary judgment the bankruptcy court held that the
12 payment streams are chattel paper. We disagree. The underlying
13 equipment leases are chattel paper but the payment streams
14 stripped from the leases are payment intangibles.

15 This means that the assignment of the payment streams could
16 be automatically perfected under Revised Uniform Commercial Code
17 ("UCC") Article 9, Section 9-309(3), but only if the assignment is
18 a sale. We agree with the bankruptcy court that the transactions
19 in this case are loans, not sales, so there is no automatic
20 perfection. However, there are unresolved factual and legal
21 issues as to whether perfection was accomplished by taking
22 possession of the underlying leases through a third party agent.

23 Accordingly, we AFFIRM IN PART, REVERSE IN PART, AND REMAND.

24

I. FACTS

25 Commercial Money Center, Inc. ("Debtor") leased equipment to
26 lessees with sub-prime credit. It packaged groups of leases
27 together and assigned its contractual rights to future lease

28

1 payments to entities such as Net.B@nk, Inc., FSB ("NetBank").³ To
2 enhance the marketability of these payment streams Debtor obtained
3 surety bonds guaranteeing the payments and it assigned its rights
4 under the surety bonds to NetBank. As security for NetBank's
5 receipt of the lease payments and any surety bond payments, Debtor
6 granted NetBank a security interest in the underlying leases and
7 other property. In other words, Debtor assigned NetBank both an
8 interest in the payment streams and an interest in the underlying
9 leases, but it separated the two interests.

10 A. Transaction terms

11 In 1999 and 2000 NetBank transferred over \$47 million to
12 Debtor in transactions involving 17 pools of leases. Seven lease
13 pools remain at issue. Each transaction involved (1) a Sale and
14 Servicing Agreement ("SSA") among NetBank, Debtor, and a surety
15 company ("Surety"), (2) surety bonds issued by Surety to Debtor,
16 which Debtor assigned to NetBank under the SSA and was supposed to
17 deliver to NetBank, and (3) an indemnity agreement between Surety
18 and Debtor. A typical lease involved 62 payments of which two had
19 been paid at the inception, leaving 60 payments assigned by Debtor
20 to NetBank. Debtor paid Surety a premium equal to approximately
21 two percent of the total of all payments due under each lease.

22 A representative SSA in the excerpts of record states in one
23 part (§ 2.1(c)) that Debtor and NetBank intend a sale, not a loan:

24 (c) The execution and delivery of this Agreement
25 shall constitute an acknowledgment by each of [Debtor
26 as] Seller and [NetBank as] Purchaser that they
intend that each assignment and transfer herein
contemplated constitute a sale and assignment

27
28 ³ Appellant is identified as Net.B@nk in some transaction documents and as NetBank in the pleadings and briefs.

1 outright, and not for security, of the [Transferred
2 Assets, defined in Section 2.1(a) to include the
3 payment streams due or on deposit, the surety bonds,
4 and proceeds of those things], conveying good title
5 thereto free and clear of any Liens, from [Debtor] to
6 [NetBank], and that all such property shall not be
7 part of the estate of [Debtor] in the event of
8 bankruptcy In the event that such conveyance
9 is determined to be made as security for a loan made
10 by [NetBank] to [Debtor], [Debtor] hereby grants to
11 [NetBank] a first priority security interest in all
12 of [Debtor's] right, title and interest in and to the
13 [Transferred Assets] [Emphasis added.]

14 On the other hand, Section 2.10 of the SSA characterizes the
15 transaction as a loan, not a sale, for tax purposes:

16 SECTION 2.10 Income Tax Characterization. This
17 Agreement has been structured with the intention that
18 the [amounts payable to NetBank] will qualify under
19 applicable federal, state, local and foreign tax law
20 as indebtedness of [Debtor] secured by the Leases and
21 other assets described in Section 2.1. The parties
22 hereto agree to treat and to take no action
23 inconsistent with the treatment of [such amounts] as
24 such indebtedness for purposes of federal, state,
25 local and foreign income or franchise taxes and any
26 other tax imposed on or measured by income.
27 [Emphasis added.]

28 Other provisions of the SSA also use both sale and loan
29 terminology. The sample SSA provides for NetBank to wire an
30 "Original Principal Amount" of \$11,610,558.80 to Debtor "[a]s the
31 purchase price," "being the Present Value of the payment stream
32 discounted to effect Interest Rate yield" applying an "Interest
33 Rate" of 12% per annum (later amended to 11.2287% per annum). SSA
34 §§ 1.1, 2.7(d), Amendment I. In exchange Debtor assigns the
35 Transferred Assets to NetBank "without recourse" and Debtor "shall
36 have no interest in [the] Lease Assets which it may be permitted
37 to sell, pledge, assign or transfer to any Person." SSA
38 §§ 2.1(a), 6.4(c).

1 Debtor was required to perfect its own security interests in
2 the leased equipment. SSA § 2.1(b). It was also supposed to list
3 NetBank in financing statements and lease documents as the
4 "assignee" of those security interests (SSA § 10.2(a)), stamp the
5 original lease documents with an "appropriate legend . . .
6 indicating [NetBank's] ownership interest and security interest in
7 the Lease and Transferred Assets" (SSA § 10.2(e)), and deliver to
8 NetBank (A) evidence of the filing of financing statements, (B) a
9 letter from Surety "acknowledging the valid issuance and delivery
10 of the Surety Bonds," and (C) "the original of each executed
11 Surety Bond with Power of Attorney and Notary attached"
12 SSA § 2.7(g). Debtor's Chapter 7 trustee, Richard M. Kipperman
13 ("Trustee"), alleges that in fact Debtor did not fulfill all of
14 these obligations and NetBank's interests were never perfected.

15 The SSA appoints Surety as "Servicer" of the leases and
16 Debtor as "Sub-Servicer" to assume all responsibilities and
17 perform all duties of the Servicer. SSA §§ 3.7, 7.4, Art. VIII.
18 Despite the extensive financial and other obligations of the
19 Servicer and Sub-Servicer, further described below, NetBank has
20 "no obligation to pay any Servicing Fee." SSA Art. V.⁴

21 Duties of the Servicer/Sub-Servicer include paying all taxes
22 and insurance on the leased equipment (SSA § 3.4), collecting the
23 payment streams from the lessees (SSA § 3.2), and holding the

24
25 ⁴ Under the SSA, Debtor theoretically could have been
26 replaced as Sub-Servicer, if a new Sub-Servicer were willing to
27 take on its obligations and if NetBank consented. Unless and
28 until that event, however, NetBank agrees to deal "directly" with
Debtor as Sub-Servicer rather than dealing with Surety as
Servicer. SSA § 3.7. Although Debtor eventually resigned as Sub-
Servicer, there is no evidence in the excerpts of record that a
replacement was selected and served in that capacity.

1 leases and associated files on NetBank's behalf. SSA § 2.7(a) (at
2 closing Debtor must deliver the original "Lease Files" to Surety
3 as Servicer "which shall then deliver the original Lease Files
4 [back to Debtor] as Sub-Servicer"). Surety/Debtor have the option
5 to commence legal proceedings to enforce the leases "at [their]
6 own expense" (SSA § 3.1), but regardless of the amounts collected
7 they must pay a fixed "Monthly Base Distribution Amount," which is
8 \$258,270.47 in the sample SSA, plus other sums including an
9 initial payment of "Interest" and a final payment of any remaining
10 "Principal Balance" and "Interest." SSA §§ 1.1, 3.7, 4.7(a).
11 They are permitted to grant some extensions to lessees but "in no
12 event shall such extension change the Monthly Base Distribution
13 Amount [\$258,270.47] to be received by [NetBank]." SSA § 1.1,
14 3.2(c)(iii). If a lessee falls behind then Surety/Debtor shall
15 "as [their] first recourse . . . realize upon and collect the
16 proceeds in respect of the Surety Bond" (SSA §§ 3.1, 3.3), but if
17 Surety/Debtor wish to avoid whatever costs and consequences would
18 flow from that choice, they can elect to make a "Servicer Advance"
19 to NetBank to cover the shortfall. SSA § 4.6. When all
20 "Principal" and "Interest" payments have been made Section 2.8 of
21 the SSA provides for any residual Transferred Assets to be
22 transferred back to Debtor:

23 Termination of this Agreement. This agreement shall
24 terminate upon the receipt by [NetBank] of the
25 Original Principal Amount plus all Interest
26 Distributable Amounts [i.e., any remaining unpaid
27 monthly "interest" payments, equal to one-twelfth of
28 the product of the Interest Rate and the Principal
 Balance of all outstanding Leases] and, if the
 Monthly Total Distribution Amount is not paid in full
 on the Stated Maturity Date, interest accrued at the
 Interest Rate on such unpaid portion from and after
 the Stated Maturity Date. Upon such termination,

1 [Surety/Debtor] shall be entitled to any amounts
2 payable to it as provided herein. Any remaining
3 Transferred Assets shall thence be conveyed to
4 [Debtor] without recourse. [Emphasis added.]

5 A sample indemnity agreement between Debtor and Surety,
6 included in the excerpts of record, obligates Debtor and its
7 principals to indemnify Surety and hold it harmless "against all
8 demands, claims, loss, costs, damages, expenses and attorneys'
9 fees whatever, and any and all liability therefore, sustained or
10 incurred by the Surety" under any surety bonds. NetBank is not a
11 party to the indemnity agreement or the bonds.

12 Section 10.3 of the SSA provides: "Governing law. This
13 agreement shall be governed by and construed in accordance with
14 the laws of the state of Nevada without regard to the principles
15 of conflicts of laws thereof and the obligations, rights and
16 remedies of the parties under this agreement shall be determined
17 in accordance with such laws." (Original entirely in capital
18 letters.)

19 B. Procedural background

20 The initial Surety, Amwest Surety Insurance Company
21 ("Amwest"), was replaced by Royal Indemnity Company ("Royal"). In
22 early 2002 Royal commenced an action in federal district court to
23 remove Debtor as Sub-Servicer under the SSA (Royal Insurance Co.
24 v. Commercial Money Ctr., Inc., 02-CV-0199-BTM (AJB, S.D. Cal.),
25 transferred for pretrial purposes to Ohio, 02-CV-16002-KMO (N.D.
26 Ohio)).

27 As stated above, SSA § 2.7(a) contemplated that at closing
28 Debtor would retain the leases as Sub-Servicer. Pursuant to a
stipulated order Debtor resigned as Sub-Servicer and Royal was

1 authorized to take possession of the leases in March of 2002 (the
2 "Royal Possession Order"). According to NetBank, it is not clear
3 whether the leases were removed from Debtor's possession at an
4 earlier date, perhaps pursuant to a temporary restraining order
5 entered on February 1, 2002 (the "Royal TRO").

6 On May 30, 2002 (the "Petition Date") Debtor filed its
7 voluntary Chapter 11 petition (Case No. 02-24068-BKC-RBR, Bankr.
8 S.D. Fla., transferred Oct. 3, 2002, Case No. 02-09721-H7, Bankr.
9 S.D. Cal.). After Debtor's case was converted to Chapter 7,
10 Trustee was appointed and filed an adversary proceeding against
11 NetBank (Adv. No. 03-90331-H7). Trustee initially negotiated a
12 settlement with NetBank but Royal objected to the settlement and
13 as an alternative offered its own settlement with Trustee which
14 was ultimately approved by the bankruptcy court.

15 Trustee's Complaint seeks declaratory relief and avoidance of
16 NetBank's interests under a combination of the UCC and the
17 Bankruptcy Code. Trustee claims that NetBank has not satisfied
18 the requirements for perfection of its interests in the payment
19 streams and therefore its interests are avoidable using his
20 strongarm powers. See 11 U.S.C. §§ 544(a), 550 and 551. The
21 Complaint also seeks a judgment avoiding as a preference any
22 perfection of NetBank's interests in the Transferred Assets that
23 might have occurred within 90 days of the Petition Date. See 11
24 U.S.C. § 547 (as enacted prior to any amendments by The Bankruptcy
25 Abuse Prevention and Consumer Protection Act of 2005, Pub. L.
26 109-8, 119 Stat. 23, because this case was filed before its
27 effective date). This preference claim anticipates NetBank's
28 assertion that it obtained actual or constructive possession of

1 the leases through the Royal Possession Order, which was issued
2 within the 90 day preference period. See 11 U.S.C.
3 § 547(b) (4) (A).

4 NetBank's Answer alleges (1) "that Royal had actual and
5 constructive possession before and after the [Royal Possession
6 Order]" which "led to [NetBank] being perfected with respect to
7 [the Transferred Assets]," (2) more generally, that "agents and/or
8 bailees always had possession of the items in which [NetBank] is
9 secured," (3) that "while [NetBank] did not file a UCC-1
10 [financing statement] . . . to the extent required, [Debtor and/or
11 Surety] were legally responsible for such filings," and (4) that
12 any transfers that might otherwise be avoidable as preferences
13 were protected by the ordinary course of business defense of 11
14 U.S.C. § 547(c) (2). The Answer asserts numerous other affirmative
15 defenses including equitable estoppel because Debtor and/or Surety
16 "were responsible for, among other things, transferring the sold
17 assets, and perfecting and protecting [NetBank's] secured rights
18 and interests under the [SSAs] and under the surety bonds."

19 NetBank and Trustee filed cross-motions for partial summary
20 judgment. After a hearing on December 20, 2004, the bankruptcy
21 court issued a memorandum decision that Trustee is entitled to
22 judgment on each of the claims described above. In re Commercial
23 Money Center, Inc., 2005 WL 1365055, 56 UCC Rep.Serv.2d 54 (Bankr.
24 S.D. Cal. 2005). It ruled that the payment streams constitute
25 "chattel paper" and therefore NetBank was required to perfect its
26 interests under the rules applicable to chattel paper. In the
27 alternative, the bankruptcy court ruled that, even if the payment
28 streams are not chattel paper, NetBank cannot benefit from the

1 automatic perfection rule applicable to sales of payment
2 intangibles (Rev. UCC § 9-309(3)) because the transactions at
3 issue were loans rather than sales. The bankruptcy court's
4 decision states, "It is undisputed" that NetBank did not perfect
5 its interests in the payment streams either by filing financing
6 statements or by taking possession of the underlying leases.

7 Pursuant to the parties' stipulation the bankruptcy court
8 entered an amended partial judgment for Trustee (the "Judgment")
9 under Fed. R. Civ. P. 54(b) (incorporated by Fed. R. Bankr. P.
10 7054). NetBank filed a timely notice of appeal.⁵ In response to
11 questions from the panel at oral argument and in accordance with
12 our orders, the parties have submitted supplemental post-argument
13 letter briefs, and the submission of this appeal was deferred
14 until the last of those letter briefs was received.

15 II. ISSUES

16 A. Are the payment streams "chattel paper" within the meaning
17 of Revised UCC Article 9?

18 B. Alternatively, were the transactions at issue loans,
19 rather than sales?

20 C. If the answer to either question is affirmative, is there
21 a genuine issue of material fact whether NetBank perfected its

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23 ⁵ In considering whether we have jurisdiction we have
24 retrieved from the bankruptcy court's online docket an order
25 entered on April 26, 2005. We are persuaded that this order and
26 the Judgment together satisfy the strict requirements of Fed. R.
27 Civ. P. 54(b). See generally In re Belli, 268 B.R. 851, 855 (9th
28 Cir. BAP 2001) (emphasizing that Fed. R. Civ. P. 54(b)
certification requires "express" determination that there is no
just reason for delay and "express" direction for the entry of
judgment on fewer than all claims). Alternatively, on October 5,
2005, a BAP motions panel issued an order that to the extent this
appeal is interlocutory "leave to appeal is GRANTED under 28
U.S.C. § 158(a)(3)."

1 interests in the payment streams, or regarding NetBank's alleged
2 equitable defenses?

3 III. STANDARDS OF REVIEW

4 We review the bankruptcy court's conclusions of law de novo.
5 In re Woodson Co., 813 F.2d 266, 270 (9th Cir. 1986). If findings
6 of fact were properly made in this summary judgment context, we
7 review them for clear error. Id.

8 As a general matter, "[f]indings of fact should be eschewed
9 in determining whether summary judgment should be granted."
10 Taybron v. City & County of San Francisco, 341 F.3d 957, 959 n. 2
11 (9th Cir. 2003). Nevertheless, there is an exception for
12 determining "ultimate facts" in non-jury cases when there is no
13 genuine dispute as to the basic facts. In those circumstances the
14 appellate court can treat the appeal as arising from a bench trial
15 with factual findings reviewed for clear error. Wolfe v. United
16 States, 798 F.2d 1241, 1243-44 n. 2, amended by 806 F.2d 1410 (9th
17 Cir. 1986); TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.,
18 913 F.2d 676, 684 (9th Cir. 1990). See generally William W.
19 Schwarzer et al., Cal. Practice Guide: Fed. Civ. Proc. Before
20 Trial, ¶¶ 14:224-239 at pp. 14-61 through 14-64 (The Rutter Group
21 2005). The Ninth Circuit appears to have applied this exception
22 in Woodson, because it reviewed findings of fact for clear error
23 on an appeal from a summary judgment regarding the distinction
24 between loans and sales. Woodson, 813 F.2d at 270, 272. As
25 described below, some basic facts are disputed in this case and
26 others are not.

27 Therefore, when the basic facts are undisputed we review the
28 ultimate findings of fact for clear error. On the other hand,

1 when the basic facts are disputed we cannot treat the ultimate
2 facts as having been decided by a bench trial, and on these cross-
3 motions for partial summary judgment we must reverse and remand if
4 the disputed facts are material and the disputes are genuine. See
5 generally Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

6 We review de novo the bankruptcy court's exclusion of
7 declarations reflecting the parties' subjective intent on the loan
8 versus sale issue under the parol evidence rule. That rule is "an
9 issue of state law" reviewed de novo and not actually a rule of
10 evidence. Jinro Am., Inc. v. Secure Invs., Inc., 266 F.3d 993,
11 998-99 (9th Cir. 2001).

12 The parties disagree on the standard of review applicable to
13 the bankruptcy court's decision on the loan versus sale issue
14 itself. That is a factual determination that we review for clear
15 error, not a mixed question of law and fact as NetBank argues.
16 See Woodson, 813 F.2d at 270, 272; In re Golden Plan of Cal.,
17 Inc., 829 F.2d 705, 709 (9th Cir. 1987); In re Lendvest Mortg.,
18 Inc., 119 B.R. 199, 200 (9th Cir. BAP 1990).

19 Alternatively, our decision on the loan versus sale issue
20 would be the same even if that is a mixed question of law and fact
21 in the circumstances of this case, meaning that the less
22 deferential de novo standard of review applied. For the reasons
23 discussed below, we agree with the bankruptcy court's finding that
24 the transactions at issue were loans rather than sales.

25 **IV. DISCUSSION**

26 Trustee's strongarm powers generally enable him to avoid a
27 pre-petition unperfected transfer by Debtor of an interest in its
28 property. 11 U.S.C. § 544. See In re Jenson, 980 F.2d 1254,

1 1258-59 and 1261 (9th Cir. 1992) (majority and concurring opinions
2 discussing avoidance of unperfected security interest under Nevada
3 law and 11 U.S.C. §§ 544 and 547). Trustee argues that NetBank's
4 interests were not perfected.

5 The parties agree that Nevada's version of Revised UCC
6 Article 9 states the applicable law of perfection. There are no
7 material differences between the Nevada version and the uniform
8 versions of the relevant provisions.⁶

9 Like other courts we recognize the usefulness of the Official
10 Comments in interpreting the UCC. See, e.g., In re Filtercorp.,
11 Inc., 163 F.3d 570, 580 (9th Cir. 1988). We also recognize that
12 some of the decisions cited below predate Revised UCC Article 9,
13 but they are still useful on the issues discussed.

14 The perfection rules of Revised UCC Article 9 apply not just
15 to security interests for loans but also to sales of chattel paper
16 and payment intangibles. Nev. Rev. Stat. § 104.9109(1)(c) (with
17 inapplicable exceptions, "this article applies to . . . (c) a sale
18 of accounts, chattel paper, payment intangibles, or promissory
19 notes") (emphasis added). Somewhat confusingly, the UCC uses

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21 ⁶ Trustee's memorandum of points and authorities, filed with
22 the bankruptcy court on June 18, 2004, notes that under Revised
23 UCC § 9-301(2) when perfection is by possession the law that
24 generally governs is the law of the place where the collateral is
25 located. Allegedly that location is California. Nevertheless,
26 Trustee concedes that he does not believe there are any material
27 differences between California and Nevada law on this issue. We
28 express no opinion whether the choice of law provisions of the
SSAs would require application of Nevada law if there were any
material differences on this issue.

26 Nevada's version of the UCC is numbered differently from the
27 uniform version. Nevada's amendments last year made more
numbering changes but are otherwise immaterial, and in any event
28 they "do not apply to a right of action that has accrued before
October 1, 2005." 2005 Nevada Laws Ch. 233 ("S.B. 201").

1 lending terminology in provisions that are applicable to sales.
2 See Nev. Rev. Stat. § 104.1201(2)(ii) (“‘Security interest’ means
3 an interest in personal property or fixtures which secures payment
4 or performance of an obligation. ‘Security interest’ includes any
5 interest of a consignor and a buyer of accounts, chattel paper, a
6 payment intangible or a promissory note in a transaction that is
7 subject to Article 9.”) (emphasis added). See also Rev. UCC § 9-
8 109, Official Comment 5 (“Use of terminology such as ‘security
9 interest,’ ‘debtor,’ and ‘collateral’ is merely a drafting
10 convention adopted to reach [the] end [of applying ‘this Article’s
11 perfection and priority rules’ to sales transactions], and its use
12 has no relevance to distinguishing sales from other transactions.
13 See PEB [Permanent Editorial Board] Commentary No. 14.”).

14 Most perfection is not automatic. One exception is a sale of
15 payment intangibles (referred to as a security interest), which is
16 perfected automatically: “The following security interests are
17 perfected when they attach: . . . 3. a sale of a payment
18 intangible[.]” Nev. Rev. Stat. § 104.9309(3) (emphasis added).

19 NetBank claims that its transactions with Debtor come within
20 this exception and are automatically perfected. NetBank argues in
21 the alternative that its interests were perfected by possession of
22 the chattel paper or perhaps by filed financing statements. See
23 Nev. Rev. Stat. §§ 104.9310(1) (filed financing statement
24 generally required for perfection), 104.9312(1) (chattel paper,
25 perfection by filing), 104.9313(1) (tangible chattel paper,
26 perfection by possession).

27

28

1 A. The payment streams are payment intangibles, not chattel
2 paper

3 NetBank claims that the payment streams are payment
4 intangibles, which is one of the requirements for automatic
5 perfection under Nev. Rev. Stat. § 104.9309(3) -- the other
6 principal requirement is that the transactions be sales, which we
7 address in the next section of this discussion. The bankruptcy
8 court held that the payment streams are chattel paper.

9 The UCC distinguishes between the monetary obligation
10 evidenced by chattel paper and the chattel paper itself:

11 1. In this article:

12 * * *

13 (k) "Chattel paper" means a record or records that
14 evidence both a monetary obligation and a security
15 interest in or a lease of specific goods As
16 used in this paragraph, "monetary obligation" means a
monetary obligation secured by the goods or owed
under a lease of the goods [Emphasis added.]

17 Nev. Rev. Stat. § 104.9102(1)(k) (emphasis added).

18 This language on its face defines chattel paper to mean the
19 "records" that "evidence" certain things, including monetary
20 obligations. Payment streams stripped from the underlying leases
21 are not records that evidence monetary obligations -- they are
22 monetary obligations. Therefore, we agree with NetBank that the
23 payment streams are not chattel paper.

24 If they are not chattel paper, what are they? Most monetary
25 obligations are "accounts" but the definition of account excludes
26 "rights to payment evidenced by chattel paper." Therefore the
27 monetary obligations in this case fall within the payment
28 intangible subset of the catch-all definition of general

1 intangibles. See Nev. Rev. Stat. §§ 104.9102(1)(b) (“Account”
2 means “a right to payment of a monetary obligation . . . for
3 property that has been or is to be . . . leased . . . [but the
4 term] does not include rights to payment evidenced by chattel
5 paper . . .”); 104.9102(1)(pp) (“General intangible” means any
6 personal property other than accounts, chattel paper, and various
7 other specified types of property, and specifically “includes
8 payment intangibles”);⁷ 104.9102(1)(iii) (redesignated as (hhh) by
9 S.B. 201) (“Payment intangible” means “a general intangible under
10 which the account debtor’s principal obligation is a monetary
11 obligation”). See generally In re Wiersma, 324 B.R. 92, 106-07
12 (9th Cir. BAP 2005) (discussing why definition of payment
13 intangible includes assignment of payment right under settlement
14 agreement).

15 As stated by one publication, the “carved-out payment streams
16 seem to fit the definition of ‘payment intangible’ like a glove.”
17 Barkley Clark and Barbara Clark, The Law of Secured Transactions
18 Under the UCC, ¶ 10.08[8][D]. That publication specifically
19 disagrees with the bankruptcy court’s decision in this case that
20 the payment streams are chattel paper. See id. (criticizing
21 Commercial Money Center, 2005 WL 1365055, 56 UCC Rep.Serv.2d 54).

22 Our analysis might stop here. As the bankruptcy court noted,
23 the plain language of the statute is usually conclusive. See
24 Roger Falcke and Herbig Props. Ltd. v. County of Douglas, 116 Nev.
25 583, 588; 3 P.3d 661, 664 (2000) (“Where the language of a statute

26
27 ⁷ We recognize that the definition of general intangibles
28 excludes chattel paper, but because the monetary obligations are
not chattel paper they are not excluded from the definition of
general intangibles.

1 is plain and unambiguous . . . there is no room for construction,
2 and the courts are not permitted to search for its meaning beyond
3 the statute itself" and "words in a statute should be given their
4 plain meaning unless this violates the spirit of the act")
5 (citations omitted). See also United States v. Ron Pair Enters.,
6 Inc., 489 U.S. 235, 240-42 (1989) (plain meaning legislation
7 should be conclusive, "except in the 'rare cases [in which] the
8 literal application of a statute will produce a result
9 demonstrably at odds with the intentions of its drafters.'"")
10 (citation omitted). Cf. In re Kane, 336 B.R. 477, 487-88 and
11 n. 19 (Bankr. D. Nev. 2006) (discussing plain meaning rule, while
12 also noting that "the Supreme Court has not given unambiguous
13 instructions on how to detect or treat legislative ambiguity").

14 Nevertheless, the bankruptcy court interpreted the plain
15 words of the statute in a manner with which we do not agree:

16 The definition [of chattel paper] states three
17 requirements before collateral is characterized as
18 chattel paper: 1) a record; 2) that evidences both
19 a monetary obligation; and 3) a security in or a
20 lease of specific goods. A monetary obligation is
21 defined as a monetary obligation secured by the goods
22 or owed under a lease of the goods. The parties do
23 not dispute that all three elements for chattel paper
24 are met with respect to the underlying equipment
25 leases, but NetBank seeks to characterize the
26 "monetary obligation" owed under the lease as a
27 "payment intangible." This proposition does not
28 follow from the plain language of the statutory
29 definition of chattel paper and such a reading would
30 essentially delete the monetary obligation
31 requirement from the definition. See Singer,
32 Sutherland Statutes and Statutory Construction,
33 § 47.79 (6th ed. 2000) (A canon of statutory
34 construction is that a definition which declares what
35 a term "means" excludes any meaning that is not
36 stated). The court finds that the monetary
37 obligation (i.e., the payment streams) constitute
38 chattel paper. [Emphasis added.]

1 We do not understand how NetBank's reading "would essentially
2 delete the monetary obligation requirement from the definition" of
3 chattel paper. That requirement simply describes the type of
4 records involved -- they must be records that "evidence" a
5 monetary obligation, among other characteristics. Nev. Rev. Stat.
6 § 104.9102(1)(k). The leases do that, so they are chattel paper,
7 but the payment streams do not. As stated above, they are not
8 "records" that "evidence" monetary obligations, they are the
9 monetary obligations.

10 The bankruptcy court's memorandum decision also comments, in
11 a footnote, that "The Court views NetBank's argument that [Debtor]
12 transferred only the payment streams, and not the underlying
13 leases, immaterial to the legal issue involved." We disagree, for
14 the reasons just stated.

15 As an alternative basis for its ruling, the bankruptcy court
16 considered the policies behind the statute. We agree with the
17 bankruptcy court that the UCC aims to provide certainty in
18 financial transactions and some means for third parties to
19 discover competing interests in property, at least when that
20 property is collateral or some types of purchased property. We
21 are not persuaded that the plain meaning of the statute conflicts
22 with such policies, or alternatively that it is our role to
23 rewrite the statute if there is any such conflict.

24 The principal decision cited by the bankruptcy court involved
25 an assignee ("Jefferson") that had been assigned only the payment
26 streams and not the underlying equipment leases. In re Commercial
27 Management Svc., Inc., 127 B.R. 296 (Bankr. D. Mass. 1991). A
28 critical difference is that Jefferson had also taken possession of

1 the leases. Id. at 299. Here the possession of the leases is a
2 disputed issue.

3 The Chapter 7 trustee in that case argued that the payment
4 streams were general intangibles and that Jefferson had not
5 perfected its interest in those payment streams because it had not
6 filed any financing statements. The Commercial Management court
7 rejected this argument, holding that "Jefferson perfected its
8 security interest [in the payment streams] by possession" of the
9 leases. Id. at 305. The Commercial Management court acknowledged
10 that the UCC does not "specifically provide" for this result:

11 The [UCC] does not specifically provide that the
12 transfer of chattel paper transfers the obligation it
13 represents; nor does it specifically provide that
14 perfection of a security interest in the written
15 paper, for example, by possession, perfects a
security interest in those obligations. It merely
provides in Section 9-305 that "[a] security interest
in chattel paper may be perfected by the secured
party's taking possession of the collateral."

16 Commercial Management, 127 B.R. at 302 (quoting Boss, "Lease
17 Chattel Paper: Unitary Treatment of a 'Special Kind of Commercial
18 Specialty,'" 1983 Duke L.J. 69, 92 (1983) (footnotes omitted)).

19 Nevertheless,

20 [t]aking possession of the collateral, the chattel
21 paper itself, would be meaningless unless the paper
22 represented the underlying rights which were
23 transferred by a transfer of the paper. Therefore,
the necessary implication of [former UCC] Section
9-305 [permitting perfection by possession] is that
24 delivery of chattel paper operates to transfer the
claim that the paper represents

25 Commercial Management, 127 B.R. at 302 (quoting Boss, 1983 Duke
26 L.J. at 92-93 (footnotes omitted)).

27

28

1 Commercial Management is not binding precedent but we assume
2 for purposes of this discussion that it is correct.⁸
3 Nevertheless, it is distinguishable. As NetBank's attorney argued
4 before the bankruptcy court:

5 Certainly if you sell a piece of chattel paper, it
6 does come with all the rights that are thereunder.
7 But the flip side of that is not true. If you buy
8 some of the pieces under the chattel paper [i.e. the
9 payment streams], it doesn't mean that you're getting
10 the chattel paper as well.

11 Transcript Dec. 20, 2004, p. 50:13-17.

12 In other words, delivery of the chattel paper may "operate[]
13 to transfer" a perfected interest in the associated payment
14 streams, as Commercial Management holds, but that does not mean
15 that payment streams are chattel paper. When stripped from the
16 chattel paper they are payment intangibles.

17 Trustee argues that the automatic perfection of payment
18 intangibles in Revised UCC § 9-309(3) was only intended to address
19 loan participations, not the payment streams in this case. We are
20 not persuaded. Nothing in the statute limits its application to
21 loan participations. See Nev. Rev. Stat. § 104.9309(3) (stating
22 simply, "The following security interests are perfected when they
23 attach: . . . (3) a sale of a payment intangible," without

24 ⁸ See generally Rev. UCC § 9-109 Official Comment 5 (stating
25 that a "'sale' of chattel paper" includes "a sale of a right in
26 the receivable"); Rev. UCC § 9-313 Official Comment 2 (implying
27 that delivery of a writing, such as tangible chattel paper,
28 "operates to transfer the right to payment"); Commercial
Management, 127 B.R. at 303-304 (quoting authority that the
advantages of chattel paper would be lost if possession of the
records does not perfect an interest in the payment streams, and
such perfection prevents a dishonest pledgor from "misleading a
potential subsequent lender into believing that [the pledgor] is
free to pledge that same property again . . .") (citations and
footnotes omitted).

1 mentioning loan participations). The official comments imply that
2 a participation is just one type of interest that a party can
3 assign in the monetary obligation. See Rev. UCC § 9-109, Official
4 Comment 5 (a sale of chattel paper or certain other things, such
5 as an account, "includes a sale of a right in the receivable, such
6 as a sale of a participation interest") (emphasis added).

7 Trustee argues that our interpretation of the statute will
8 lead to endless debates over whether particular assignments are
9 actually sales or secured loans. Again, we are not persuaded.
10 Many transactions fall clearly on one side or the other of the
11 sale versus loan dichotomy. When the answer is not clear the UCC
12 contemplates that courts will need to decide the issue. See,
13 e.g., Rev. UCC § 9-109, Official Comment 5 ("[N]either this
14 Article nor the definition of 'security interest' in [Rev. UCC]
15 Section 1-201 provides rules for distinguishing sales transactions
16 from those that create a security interest"). If such
17 decisions are too burdensome on the commercial markets or on
18 litigants then the remedy is with the legislature and not the
19 courts. See generally Roger Falcke, 116 Nev. at 588; 3 P.3d at
20 664 ("Where the language of a statute is plain and unambiguous
21 . . . there is no room for construction, and the courts are not
22 permitted to search for its meaning beyond the statute itself")
23 (citation omitted).

24 Trustee also argues that if Revised UCC Article 9 permits
25 purchases of payment streams to be automatically perfected, as we
26 have held, then this permits secret interests and will wreak havoc
27 on the financing markets. According to Trustee, there is no way
28 for a hypothetical financier to protect itself against the

1 possibility that an entity such as Debtor will transfer interests
2 in the same payment streams more than once. NetBank responds that
3 payment stripping is a bedrock principle of the securitization
4 industry and that Trustee's concerns are misplaced.

5 NetBank argues persuasively that, if the hypothetical
6 financier is the first to perfect, then generally it will be first
7 in priority. See Nev. Rev. Stat. § 104.9322(1)(a).⁹ For these
8 purposes it does not matter if the transaction was a sale or a
9 secured loan because the UCC covers both, as we have discussed.
10 Nor does it matter if the financier's interest is in the payment
11 streams alone or in the underlying chattel paper leases, because a
12 perfected interest in chattel paper includes the associated
13 payment streams, at least if the reasoning in Commercial
14 Management applies. Commercial Management, 127 B.R. 296.

15 A more difficult example is if the financier purchased an
16 interest in the chattel paper leases after Debtor had already sold
17 the payment streams to someone else. The financier might have no
18 way to know of that prior "security interest."¹⁰ The holder of
19 that secret interest might not have filed any financing
20 statements, or taken possession of the leases, or given any other
21 notice because, under our holding, its interest would be
22 automatically perfected under Revised UCC § 9-309(3).

25 ⁹ "1. Except as otherwise provided in this section, . . .
26 (a) Conflicting perfected security interests and agricultural
27 liens rank according to priority in time of filing or perfection."
Nev. Rev. Stat. § 104.9322(1)(a).

28 ¹⁰ As noted at the start of this discussion, the term
"security interest" includes sales, not just collateral for loans.

1 NetBank argues that the financier could protect itself by
2 taking possession of the leases, which allegedly would give it
3 priority over the secret interest under the special rule of
4 Revised UCC § 9-330(b). That rule is codified in Nevada Revised
5 Statutes § 104.9330(2):

6 **104.9330. Priority of purchaser of chattel paper or**
7 **instrument.**

8 * * *

9 2. A purchaser [i.e., financier] has priority over a
10 security interest [i.e. the secret interest] in the chattel
11 paper which is claimed other than merely as proceeds of
12 inventory subject to a security interest if the purchaser
13 [financier] gives new value and takes possession of the
chattel paper under NRS 104.9105 in good faith, in the
ordinary course of [the financier's] business, and without
knowledge that the purchase violates the rights of the
secured party [i.e., the holder of the prior but secret
interest].

14 Nev. Rev. Stat. § 104.9330(2).¹¹

15 We note that this special priority rule only applies by its
16 terms to an interest "in the chattel paper." We have just held
17 that the payment streams stripped from the leases are not chattel
18 paper, so arguably this special priority rule is inapplicable,
19 although Trustee has not argued the point. On the other hand,
20 from the financier's point of view the assignment of an interest
21 in chattel paper includes the associated payment streams, under
22 the reasoning in Commercial Management. Therefore, for purposes

23
24 ¹¹ In the above hypothetical the chattel paper leases are
25 sold to the financier, rather than assigned as security for a
26 loan, but NetBank's argument is not limited to sales because the
27 term "purchaser" includes not only a buyer but also a secured
28 lender. See Nev. Rev. Stat. § 104.1201(2)(cc) ("Purchase" means
taking by sale, lease, discount, negotiation, mortgage, pledge,
lien, security interest, issue or reissue, gift or any other
voluntary transaction creating an interest in property.")
(emphasis added) and (dd) ("Purchaser" means a person that takes
by purchase.").

1 of competing priorities under Revised UCC Section 9-330(b), the
2 secret interest may be an interest in the financier's "chattel
3 paper." We explicitly decline to resolve this ambiguity in
4 Revised UCC Section 9-330(b), because neither that statute nor the
5 hypothetical situations posed by the parties are before us on this
6 appeal. It is sufficient for our purposes that the plain meaning
7 of the "chattel paper" definition in Nevada Revised Statutes
8 § 104.9102(1)(k) does not lead to a result that is demonstrably
9 counter to the legislative intent. Roger Falcke, 116 Nev. at 588;
10 3 P.3d at 664; Ron Pair Enters., 489 U.S. at 240-42. If it turns
11 out that the plain meaning of the "chattel paper" definition could
12 cause problems under statutory provisions that are not at issue on
13 this appeal, such as Revised UCC Section 9-330(b), then the answer
14 lies either in the courts' interpretation of those provisions to
15 harmonize the statute or in legislative amendment to the statute,
16 not in disregarding the plain meaning of unambiguous provisions.

17 For all of these reasons we must apply the plain meaning of
18 the statute: the payment streams separated from the underlying
19 leases do not fall within the definition of chattel paper. Nev.
20 Rev. Stat. § 104.9102(1)(k). Rather, these monetary obligations
21 fall within the payment intangible subset of the catch-all
22 definition of general intangibles. See Nev. Rev. Stat.
23 § 104.9102(1)(b) ("Account") (UCC § 9-102(a)(2));
24 § 104.9102(1)(pp) ("General intangible") (UCC § 9-102(a)(42)); and
25 § 104.9102(1)(iii) (redesignated as (hhh) by S.B. 201) ("Payment
26
27
28

1 intangible") (UCC § 9-102(a)(61)).¹²

2 Because the payment streams are payment intangibles,
3 NetBank's interest in them would be automatically perfected upon
4 attachment under Nev. Rev. Stat. § 104.9309(3) if its transactions
5 with Debtor were sales rather than loans. We now turn to that
6 issue.

7 B. Debtor's transactions with NetBank were loans, not sales

8 As noted above, the UCC leaves to the courts the decision
9 whether a transaction is a loan or a sale. See Rev. UCC § 9-109,
10 Official Comment 5. Although Nevada law governs, neither party
11 has argued that there is anything distinctive about Nevada's
12 approach to the issue and both parties treat decisions from other
13 states as relevant.

14 NetBank argues that Trustee bears the burden of proving that
15 the transactions were loans rather than sales, citing In re
16 Pillowtex, 349 F.3d 711 (3d Cir. 2003) (transaction was secured
17 financing rather than true lease). Pillowtex held that the party

18 _____
19 ¹² Both NetBank and Trustee submitted declarations of expert
20 witnesses, which the bankruptcy court excluded. The declarants --
21 Professor Steven L. Harris for Trustee and Professor Charles W.
22 Mooney, Jr. for NetBank -- were the two reporters for the
23 Permanent Editorial Board who worked on the revisions that became
24 Revised UCC Article 9. NetBank argues that the bankruptcy court
25 improperly struck this evidence "to the extent it constituted
26 factual testimony from a key participant in the drafting of
27 Revised Article 9" to clarify any ambiguity in the statute, citing
28 In re Boogie Enter., Inc., 866 F.2d 1172, 1174 (9th Cir. 1989)
(citing treatise by "Professor Gilmore, who helped draft Article 9
of the UCC"); Ritzau v. Warm Springs West, 589 F.2d 1370, 1376 n.4
(9th Cir. 1979) (citing article by "principal draftsman" of
uniform code). Trustee argues, among other things, that
"[m]aterial not available to the lawmakers is not considered, in
the normal course, to be legislative history." Gustafson v.
Alloyd Co., 513 U.S. 561, 579 (1995). We need not decide this
issue because if there was any error in excluding the Professors'
declarations it was harmless: we have reviewed the declarations
and they do not change our conclusions.

1 seeking to re-characterize the transaction bears the burden of
2 proof (349 F.3d at 716-17 & n. 6) and in this case it is debatable
3 who that is, because contractual language supports both parties.
4 The SSAs state on the one hand that the parties intend the
5 transactions to be sales (§ 2.1(c)) and on the other hand that the
6 transactions are intended to be indebtedness for tax purposes
7 (§ 2.10). Nevertheless, we assume without deciding that Trustee
8 bears the burden of proof.

9 NetBank also argues that there is nothing impermissible about
10 intending different treatments for different purposes.

11 [F]or bankruptcy and financial purposes, the parties
12 will often structure the transaction as a sale.
13 However, for tax purposes, a lessor will often try to
14 structure a transaction as a secured loan to avoid
15 paying tax which would be incurred by the immediate
16 recognition of significant amounts of rental income
17 unless a lessor can achieve a specific tax benefit
18 from accelerating taxable income, such as utilizing
19 an expiring net operating loss.

20 Stuart M. Litwin and William A. Levy, "Securitization of Equipment
21 and Auto Leases," reprinted in New Developments in Securitization
22 2002, § 30:3.15 (Practicing Law Inst. #A0-00E0).

23 NetBank's concern is misplaced. We do not read the
24 bankruptcy court's decision as in any way criticizing the parties'
25 attempt to characterize the same transaction in different ways for
26 different purposes. Labels can make a difference, but in this
27 case the labels are conflicting so they carry little weight.
28 Labels also "cannot change the true nature of the underlying
transactions." Woodson, 813 F.2d at 272.

Whether a transaction is a sale or a loan is based on the
intentions of the parties as "determined from all the facts and
circumstances surrounding the transactions at issue." Golden

1 Plan, 829 F.2d at 709. NetBank argues that the bankruptcy court
2 erred by excluding the declarations of its own executives and
3 Debtor's former executives regarding their understanding of the
4 transactions. The bankruptcy court stated, in a tentative ruling
5 which it later reaffirmed:

6 I'm looking at the [SSA] and . . . it does appear
7 to the Court that [the] agreement is unambiguous. I
8 can't see the need for parol evidence. The bank has
9 provided [various] declarations And in
10 looking at . . . the appropriate case law . . . the
11 Ninth Circuit Woodson case and the Golden Plan case,
12 the most applicable to this matter, I just don't see
13 the need for any parol evidence. . . .

14 . . . [W]e're dealing with sophisticated parties.
15 If the parties and their attorneys can't memorialize
16 their understanding of the agreement, then I don't
17 know who can.

18 [NetBank] cites some cases in support of its
19 position; Golden Plan is one. There are a couple
20 more cases. . . . [T]hose cases basically dealt with
21 fraud issues, Ponzi schemes, hundreds if not
22 thousands of investors getting prospectuses, getting
23 told something by a sales person over the phone or in
24 writing, and that's why the court let that testimony
25 in, and that's completely different from what we have
26 in this case.

27 Transcript Dec. 20, 2004, pp. 5:4-6:13.

28 We have already noted that the SSAs contain contradictory
terminology, so we cannot agree with the bankruptcy court that the
documents are unambiguous. Nevertheless, the declarations were
properly excluded under the parol evidence rule.

We interpret Golden Plan to mean that testimony should be
admitted or excluded consistent with the ordinary rules regarding
parol evidence. Golden Plan, 829 F.2d 705. The SSAs include an
integration clause. SSA § 10.1. Therefore, parol evidence is
admissible to resolve ambiguities but not to "vary or contradict
the terms of a written agreement." Lowden Inv. Co. v. General

1 Elec. Credit Co., 103 Nev. 374, 379; 741 P.2d 806, 809 (1987).

2 We must read the executives' declarations in the light most
3 favorable to NetBank, as the non-moving party. In re Stern, 345
4 F.3d 1036, 1040 (9th Cir. 2003). Nevertheless, we conclude that
5 they either contradict the documents or add nothing to the
6 documents and the undisputed facts.

7 The declaration of NetBank's senior lending officer, for
8 example, states that if NetBank had viewed the transactions as
9 loans then it would have insisted on promissory notes, extensive
10 foreclosure rights, and personal guarantees from Debtor's
11 principals. First, there is no dispute about what protections
12 NetBank did or did not obtain. No declarations are needed on that
13 issue. Second, from the face of the documents the parties
14 obviously were aware that payment streams might later be
15 "determined to be made as security for a loan by [NetBank] to
16 [Debtor]." SSA § 2.1(c). The parties even granted NetBank a
17 "first priority security interest" in contemplation of that
18 possibility. SSA §§ 2.1(c), 10.8. Therefore, the declaration was
19 properly excluded. See generally Daly v. Del E. Webb Corp., 609
20 P.2d 319, 320 (Nev. 1980) (excluding evidence that contradicted
21 contract).

22 Turning to the documents, NetBank points out that in Golden
23 Plan the Ninth Circuit reversed a finding that the transactions at
24 issue were loans rather than sales, and did so despite the fact
25 that the debtor or its agent retained physical possession of the
26 property being sold and had a similar servicer "advance"
27 provision. Golden Plan, 829 F.2d at 709-711. NetBank also notes
28 that the courts do not give controlling weight to any one factor

1 and not all factors need to point in the same direction. See,
2 e.g., Major's Furniture Mart, Inc. v. Castle Credit Corp., 602
3 F.2d 538, 544 (3d Cir. 1979) (existence of recourse was not
4 determinative).

5 NetBank cites numerous alleged characteristics of sales in
6 the documents:

7 * sale terminology in the SSAs and other documents and the
8 lack of "typical loan provisions" (presumably meaning
9 guarantees, extensive foreclosure rights, and similar
10 provisions);

11 * Debtor's assignment of the payment streams to NetBank
12 "without recourse" (SSA § 2.1);

13 * the fact that Debtor was permitted but not required to make
14 Servicer Advances (SSA § 4.6);

15 * NetBank's ability to assign its rights in certain
16 circumstances (SSA § 2.9) which it characterizes as treating
17 the payment streams as its own property;¹³

18 * Debtor's lack of such rights (SSA § 6.4(c));

19 * NetBank's purported inability to accelerate payments under
20 the SSAs, and Debtor's purported lack of rights to repurchase
21

22 ¹³ The SSA provides that NetBank "may assign or transfer the
23 Transferred Assets and related security interests . . . in whole
24 but not in part to another financial institution," and if NetBank
25 assigns a part interest then the conveyance "shall be exclusively
26 between the [NetBank] and such assignees or transferees, and other
parties [to the SSA] shall not in any respect be obligated to, nor
shall they be required to deal or communicate with, such assignees
or transferees." SSA § 2.9.

27 In our view this provision is entirely consistent with
28 NetBank's role as a lender. It can sell participations in the
loan, but unless it sells the entire loan the borrower (Debtor)
and Sureties are entitled to deal solely with NetBank.

1 or receive a reconveyance of the payment streams (SSA
2 § 2.6);¹⁴

3 * the fact that the interest rate is fixed, which NetBank
4 characterizes as evidence that the "Interest Rate" is simply
5 a mechanism to compute the present discounted value of the
6 Transferred Property (SSA § 1.1); and

7 * that Debtor allegedly "retained no residual interest in the
8 payment streams upon their sale to NetBank."

9 On this last point NetBank argues that the reconveyance of
10 the Transferred Assets at the end of the SSAs' 60-month Collection
11 Period (SSA § 2.8) would not actually convey any payment streams
12 because those payment streams will be exhausted when NetBank is
13 paid the full "Original Principal Amount" plus all "Interest"
14 amounts. Trustee acknowledges that typically there were 62
15 payments under each lease and the lessee made two payments to
16 Debtor upon signing the lease so there were 60 remaining payments.
17 The exception, NetBank concedes, is that if Debtor made an
18 "optional" Servicer Advance because a lessee failed to make a
19 lease payment (SSA § 4.6) then Debtor would retain any lease
20 payments that it received after termination of the SSAs along with
21 any late fees. According to NetBank, these latter circumstances
22 do not evidence that Debtor retained any interest in the payment
23 streams. Trustee posits a situation in which the last 10 of 60
24 lease payments were not paid by the lessee and were advanced by
25 Debtor to illustrate that Debtor could receive a substantial
26 residual interest upon termination of the SSA.

27
28 ¹⁴ In fact, as NetBank concedes, upon a breach of warranty
Debtor is obligated to repurchase the payment streams. See SSA
§ 2.6.

1 Despite NetBank's arguments, the transactions bear far more
2 hallmarks of a loan than a sale. Each month Debtor as Sub-
3 Servicer is required to pay NetBank a minimum fixed amount
4 (\$258,270.47 in the sample SSA) plus any additional "interest" and
5 "principal" amounts owing to NetBank, regardless of what is or is
6 not paid by the lessees. See SSA §§ 1.1, 3.7, 4.7(a). Debtor's
7 assignment of the Transferred Assets to NetBank is non-recourse
8 but just like many non-recourse loans it is secured by Debtor's
9 property, including the underlying leases and equipment. See SSA
10 § 2.1(b). Debtor as Sub-Servicer bears all costs of collection
11 from lessees (SSA § 3.1), NetBank pays no fees for this expense or
12 any other costs of servicing the leases (SSA § 5.1), and if there
13 is a shortfall at the end of the 60-month Collection Period then
14 Debtor as Sub-Servicer is required to make up the shortfall and
15 pay ongoing "interest" until all "principal" is repaid in full
16 (SSA § 2.8). At that point any residual value in the Transferred
17 Assets is returned to Debtor with no possibility of NetBank
18 receiving more than repayment of the "principal" and "interest"
19 (id.) whereas Debtor can retain any subsequent payments and late
20 fees paid by the lessees. SSA § 4.6. In other words, NetBank
21 (1) has none of the potential benefits of ownership and (2) is
22 contractually allocated none of the risk of loss.

23 These are strong indicia of a loan rather than a sale. The
24 absence of risk "seems to result in a finding of a debtor-creditor
25 relationship in most cases." Woodson, 813 F.2d at 271. See also
26 Lendvest, 119 B.R. at 200 (transaction was loan where documents
27 placed "risk of loss" on debtor and not investors); In re S.O.A.W.
28 Enterprises, Inc., 32 B.R. 279, 282 (Bankr. W.D. Tex. 1983)

1 (transactions were disguised loans rather than sales where
2 investor "ran no real risk"), cited with approval in Golden Plan,
3 829 F.2d at 709-10; In re Evergreen Valley Resort, Inc., 23 B.R.
4 659, 661 (Bankr. D. Me. 1982) ("a security interest is indicated
5 if the assignee must account to the assignor for any surplus
6 received from the assignment over the amount of the debt" rather
7 than retaining such surplus as one of the benefits of ownership)
8 (citation omitted). Compare Golden Plan, 829 F.2d at 709
9 ("assumption of risk [by investors] strongly suggests that [they]
10 were not in a creditor-debtor relationship with [the debtor]").

11 NetBank argues that it now has a "real risk" of loss, as
12 evidenced by the bankruptcy court's Judgment. NetBank misstates
13 the issue. In determining whether parties intended a sale or a
14 loan the issue is how risks are contractually allocated when the
15 transactions were entered into. In this case the risk was
16 allocated to Debtor. The fact that Debtor later became insolvent
17 is irrelevant. In Woodson the debtor had not paid its investors
18 and was in bankruptcy but the contractual risk was allocated to
19 the debtor. Primarily for that reason the transaction was
20 determined to be a loan rather than a sale. Woodson, 813 F.2d at
21 270-72.

22 NetBank argues that the issue on this appeal is "not whether
23 [Debtor] was relieved of the risks of owning the Leases" but
24 "whether [Debtor] continued at risk with regard to NetBank."
25 (Emphasis added.) This is too narrow a reading of the
26 transactions and of Woodson and the other cases cited above. For
27 purposes of determining whether a transaction is a sale or a loan,
28 one useful factor is who is economically at risk. Under the

1 transaction terms described above, it is Debtor, not NetBank,
2 which is contractually allocated the risk of loss if, for example,
3 a larger number of lessees default than expected.

4 NetBank notes that the debtor in Woodson guaranteed a rate of
5 return and monthly payments and purchased an insurance policy
6 insuring those guarantees. Woodson, 813 F.2d 266. NetBank argues
7 that these elements are not present in this case because
8 (a) Debtor transferred the payment streams to NetBank without
9 recourse or guarantees; (b) Surety guarantees performance by the
10 lessees, not by Debtor; and (c) NetBank is not a party to any
11 "private arrangements" between Debtor and Surety for indemnity and
12 allegedly there is no evidence that NetBank was aware of the
13 indemnity agreements when the SSAs were signed.

14 Trustee objects that NetBank has raised this last issue for
15 the first time on this appeal and that it is therefore
16 procedurally improper. We agree. NetBank has not pointed us to
17 any portion of the excerpts of record in which it raised this
18 issue. In re E.R. Fegert, Inc., 887 F.2d 955, 957 (9th Cir. 1989)
19 ("appellate courts will not consider arguments that are not
20 'properly raise[d]' in the trial courts" meaning that "the
21 argument must be raised sufficiently for the trial court to rule
22 on it") (citations omitted).¹⁵

23 Alternatively, we reject NetBank's argument because it
24 reverses the burden of proof. As a matter of law a surety would
25 normally have a right of indemnity from one such as Debtor. See

27 ¹⁵ Trustee also argues that NetBank is factually wrong
28 because an internal NetBank memorandum shows that it knew that the
risk of loss remained with Debtor. NetBank disagrees. This is a
factual issue that cannot be resolved on appeal.

1 generally Black & Decker (U.S.), Inc. v. Essex Group, Inc., 105
2 Nev. 344, 345; 775 P.2d 698, 699 (1989) ("When one party is subject
3 to liability, which, as between that party and another, the other
4 should bear, the first party is entitled to full indemnity")
5 (citation omitted). Therefore, absent evidence to the contrary,
6 the transaction between NetBank and Debtor placed the ultimate
7 risk of loss on Debtor. We asked NetBank's counsel about this at
8 oral argument and he pointed us to no contrary evidence or special
9 rule of law applicable to this case.

10 Alternatively, even if NetBank could show that it was
11 ignorant of Debtor's specific contractual and legal obligations to
12 indemnify Surety, the other transaction terms leave no doubt who
13 has the ultimate risk of loss. Under the SSAs Debtor as Sub-
14 Servicer "assumes all responsibility, as agent for and on behalf
15 of the Servicer, to perform the duties of the Servicer hereunder."
16 SSA § 3.7. As set forth above, those duties include paying
17 NetBank all "principal" and "interest" regardless of what is or is
18 not paid by the lessees, or for that matter what is or is not paid
19 by Surety under its surety bonds. Debtor must continue to do
20 these things as long as it remains the Sub-Servicer while
21 absorbing all costs and receiving no compensation. NetBank offers
22 no reason why Debtor would agree to these terms unless Debtor was
23 the ultimate obligor rather than Surety. Nor has NetBank
24 explained why the SSAs would include the option of Servicer
25 Advances -- which presumably are useless to Surety because it
26 would have to advance the same funds under its surety bonds --
27 unless Debtor was ultimately responsible for all payments.
28 Debtor's assets, including the underlying leases, are pledged to

1 NetBank to secure the obligations under the SSAs. Therefore, even
2 if NetBank was unaware of Debtor's obligation to indemnify Surety,
3 the SSAs leave no doubt that the ultimate risk was on Debtor.

4 We agree with the bankruptcy court that the transactions were
5 loans, not sales. Therefore, NetBank does not satisfy one of the
6 criteria under Nev. Rev. Stat. § 104.9309 (3) ("The following
7 security interests are perfected when they attach: . . . (3) a
8 sale of a payment intangible[.]") (emphasis added). NetBank's
9 interest was not automatically perfected.

10 C. Existence of a genuine issue of material fact

11 NetBank alleges that there are genuine issues of material
12 fact that preclude summary judgment for Trustee. NetBank argues
13 that under the Royal Settlement Trustee is essentially acting for
14 the benefit of Royal, not for Debtor's estate, and that it would
15 be inequitable to deprive NetBank of millions of dollars of
16 recovery in exchange for which the estate has received only a
17 fraction of that amount from Royal. The Royal Settlement is not
18 at issue on this appeal, NetBank cannot collaterally attack it,
19 and as Trustee points out NetBank actually supported the
20 settlement before the bankruptcy court.

21 NetBank complains about the alleged inequity of permitting
22 Trustee to gain from Debtor's misdeeds, but its opening brief on
23 this appeal concedes that it cannot assert equitable defenses to a
24 bankruptcy trustee's avoidance actions. It argues instead that
25 Debtor failed to carry out its duties to perfect NetBank's
26 security interest and that this should be considered in connection
27 with Trustee's argument that the transactions at issue are loans
28 rather than sales. This is a red herring. NetBank is a

1 sophisticated commercial entity and nothing prevented it from
2 verifying that financing statements had been filed, or from taking
3 possession of the leases. If anything, the equities favor third
4 party creditors who had no notice of NetBank's unperfected
5 interests. The cases cited by NetBank bear no resemblance to the
6 circumstances of this case. See Glus v. Brooklyn E. Dist.
7 Terminal, 359 U.S. 231, 232 (1959) (party invoking statute of
8 limitations allegedly induced delay); Grassmueck v. Am. Shorthorn
9 Ass'n, 402 F.3d 833 (8th Cir. 2005) (trustee brought negligence
10 action, not avoidance action, and standing in debtor's shoes was
11 barred by in pari delicto principle -- that plaintiff who has
12 participated in wrongdoing may not recover damages resulting from
13 the wrongdoing); In re Gaudette, 241 B.R. 491, 497 (Bankr. D.N.H.
14 1999) (distinguishing between actions brought by the trustee
15 pursuant to avoiding powers and those brought by trustee as
16 successor to debtor, as to which trustee stands debtor's shoes and
17 is subject to same defenses).

18 NetBank argues that Trustee has the initial burden of proving
19 a lack of perfection. We agree. See In re Davidson, 738 F.2d
20 931, 936 (8th Cir. 1984).

21 On the issue of financing statements, Trustee has met his
22 burden. Trustee's Complaint alleges that the requisite financing
23 statements were not filed. NetBank's Answer admits that it did
24 not file them. NetBank cannot create a genuine issue of material
25 fact by suggesting the possibility, unsupported by any evidence,
26 that somebody else might have filed them. See Maldonado-Denis v.
27 Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994) ("motions for
28 summary judgment must be decided on the record as it stands, not

1 on litigants' visions of what the facts might someday reveal.").
2 NetBank's opening brief on this appeal concedes that "if the
3 transaction is characterized as a loan by NetBank to [Debtor]
4 secured by chattel paper or payment intangibles [then] NetBank's
5 security interest would be perfected only if NetBank can establish
6 that it took possession of the Leases." (Emphasis added.)

7 NetBank's Answer suggests that it had actual or constructive
8 possession. Its reply brief on this appeal concedes that "NetBank
9 itself never took possession of the Leases" but NetBank argues
10 that it had possession of the leases either through a third party
11 agent or through Debtor as Sub-Servicer.

12 Debtor cannot be NetBank's agent. As a matter of law, an
13 assignee cannot leave the debtor in possession of the collateral
14 and then claim to have possession through the debtor as its agent.
15 See Nev. Rev. Stat. § 104.9313(3) and (8) (referring to possession
16 by person "other than debtor") and Rev. UCC § 9-313, Official
17 Comment 3 ("The debtor cannot qualify as an agent for the secured
18 party for purposes of the secured party's taking possession.").
19 NetBank argues that we should disregard this limitation in the
20 statute because Debtor was acting as Surety's agent not NetBank's
21 agent. The only decision it cites involved creditors who had
22 taken possession of the promissory notes at issue shortly after
23 the transaction closed, and later commenced foreclosure
24 proceedings by transferring those notes to the party they knew as
25 their "trustee and fiduciary" who turned out to be the debtor's
26 subsidiary, not the debtor. In re Bruce Farley Corp., 26 B.R. 164
27 (S.D. Cal. 1981). The collateral was not left in the control of
28 the debtor. Id. at 165. The Farley court held that "[t]he

1 debtor's lack of possession coupled with actual possession by the
2 creditor, the creditor's agent or the bailee serves 'to provide
3 notice to prospective third party creditors that the debtor no
4 longer has unfettered use of his collateral.'" Id. (quoting
5 Heinicke Instruments Co. v. Republic Corp., 543 F.2d 700, 702 (9th
6 Cir. 1976)) (emphasis altered). NetBank does not explain how
7 possession by Debtor in this case would provide similar notice to
8 third party creditors, assuming without deciding that Farley was
9 correctly decided. But cf. Heinicke, 543 F.2d at 702 ("The notice
10 function of U.C.C. § 9-305 would be defeated if the debtor, or a
11 person under the debtor's control, were left in possession of the
12 collateral") (emphasis added).

13 The remaining issues are whether NetBank had possession of
14 the leases through a third party agent and whether NetBank thereby
15 perfected its interest in the payment streams. See Commercial
16 Management, 127 B.R. 296. NetBank claims that Debtor's books and
17 records are unclear about who had possession prior to the Petition
18 Date (Transcript, Dec. 20, 2004, p. 56:3-17) and that Royal or
19 Amwest may have held the leases as its agent.

20 Trustee responds that the issue of possession was not
21 disputed before the bankruptcy court. The bankruptcy court
22 agreed, stating "[i]t is undisputed that NetBank did not perfect
23 by either method [filing or taking possession]." (Emphasis
24 added.) Based on the excerpts of record before us, we disagree.

25 One way in which NetBank disputed the issue of possession was
26 by moving to strike Trustee's stated "understanding" that Debtor
27 had physical possession of the leases as contemplated by SSA
28 § 2.2(b). The bankruptcy court granted NetBank's motion to strike

1 this statement, both orally at the hearing on December 20, 2004,
2 and in a written order on February 25, 2005. See Transcript, Dec.
3 20, 2004, pp. 7:1-17, 53:21-57:6. The parties also argued before
4 the bankruptcy court regarding the effect of the Royal Possession
5 Order and the Royal TRO.

6 Trustee points to the Royal Possession Order as evidence that
7 Royal first obtained possession on or after the date of that
8 order, but as NetBank points out that order deals with documents
9 and records "not previously made available to the Sureties." That
10 phrase supports NetBank's assertion that the Sureties may have had
11 possession before the date of that order.

12 NetBank also points out that, prior to the Royal Possession
13 Order, the Royal TRO ordered Debtor to "make available to Royal
14 all books, records, and accounts related to the Royal bonded
15 leases" within two days of receipt of that order. The Royal TRO
16 is dated February 1, 2002, several weeks outside of the 90-day
17 preference period asserted in Trustee's Complaint. See 11 U.S.C.
18 § 547(b)(4)(A).

19 Trustee claims that the Royal TRO only directed Debtor to
20 give Royal access to the leases, and that Debtor was not ordered
21 to turn over the leases until the Royal Possession Order was
22 issued. Trustee also claims that even if Royal had possession of
23 the leases Royal never executed SSAs with NetBank and Royal only
24 took over Amwest's role as Surety and not as Servicer. Based on
25 these alleged facts, Trustee concludes that Royal could not have
26 been NetBank's agent and therefore NetBank could not have had
27 possession of the leases through Royal. See Transcript, Dec. 20,
28 2004, p. 85:8-17.

1 Trustee's arguments only further establish that there are
2 genuine issues of material fact as to who had possession, when,
3 and in what capacity. This precludes summary judgment. See
4 TransWorld Airlines, 913 F.2d at 684-85 (summary judgment improper
5 "unless it is clear that more complete factual development could
6 not possibly alter the outcome and that the credibility of the
7 witnesses' statements or testimony is not at issue").

8 **V. CONCLUSION**

9 NetBank entered into transactions with Debtor that were
10 intentionally structured to have characteristics of both a loan
11 and a sale. It relied on Debtor and others to file UCC-1
12 financing statements, or otherwise assure that its interests in
13 the payment streams from Debtor's leases were perfected, if they
14 were not automatically perfected.

15 We hold, contrary to the bankruptcy court, that the payment
16 streams are payment intangibles under Revised UCC Article 9 and
17 therefore could have been automatically perfected if the payment
18 streams had been sold to NetBank. We agree with the bankruptcy
19 court, however, that the transactions between NetBank and Debtor
20 are not sales but are secured, non-recourse loans instead.
21 Therefore, NetBank's interests were not automatically perfected.
22 There remain genuine issues of fact and law as to whether
23 NetBank's interests were perfected by possession through an agent
24 such as Royal or Amwest. Trustee did not meet his burden on the
25 factual issue by submitting uncontested evidence regarding who
26 held the leases at the relevant times, nor did Trustee establish
27 entitlement to a judgment as a matter of law by establishing that,
28 contrary to Commercial Management, possession of the leases could

1 not perfect an interest in the payment streams. These unresolved
2 issues preclude summary judgment for Trustee.

3 Accordingly, we AFFIRM IN PART, REVERSE IN PART, AND REMAND.
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