

OCT 16 2006

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

NOT FOR PUBLICATION

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

<p>In re:</p> <p>AFI HOLDING, INC.,</p> <p style="text-align: center;">Debtor.</p> <hr/> <p>ELITE PERSONNEL, INC.,</p> <p style="text-align: center;">Appellant/Cross-Appellee,</p> <p style="text-align: center;">v.</p> <p>CHRISTOPHER BARCLAY, Trustee,</p> <p style="text-align: center;">Appellee/Cross-Appellant.</p>	<p>BAP Nos. CC-05-1483-SnKMo CC-05-1499-SnKMo (cross-appeal)</p> <p>Bk. No. LA 01-41567-VZ</p> <p>Adv. No. LA 03-02508-VZ</p> <p style="text-align: center;">MEMORANDUM¹</p>
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Argued and Submitted on September 22, 2006
at Pasadena, California

Filed - October 16, 2006

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

Honorable Vincent P. Zurzolo, Bankruptcy Judge, Presiding

Before: SNYDER,² KLEIN and MONTALI, Bankruptcy Judges.

¹This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

²Hon. Paul B. Snyder, United States Bankruptcy Judge for the Western District of Washington, sitting by designation.

1 Elite Personnel, Inc. ("Elite") appeals the bankruptcy
2 court's determination on summary judgment that the transfer from
3 Advance Finance Partnership III ("AFPIII") to Elite in a "Ponzi"
4 scheme was a distribution on account of Elite's limited
5 partnership interest, rather than a release of its claims against
6 AFPIII for rescission and restitution, so that the transfer did
7 not constitute value as a defense to actual fraud. Christopher
8 R. Barclay, the Chapter 7 Trustee ("Trustee")³, cross-appeals the
9 bankruptcy court's denial of prejudgment interest. We AFFIRM as
10 to the appeal (05-1483) and REVERSE and REMAND as to the cross-
11 appeal (05-1499).

12 I

13 FACTS⁴

14 The following facts are uncontroverted. Advanced Finance
15 Holding, Inc. ("AFHI") was the general partner for Advanced Finance
16 Partnership IV ("AFPIV"). AFHI succeeded Advanced Finance, Inc.,
17 and became the general partner for three additional partnerships:
18 Advanced Finance Partnership I, II, and III (respectively "AFPI,"
19 "AFPII," and "AFPIII") (the two corporations and four partnerships
20 are referred to collectively as the "Debtor").
21

22 ³Carolyn A. Dye was initially appointed as the Chapter 7
23 Trustee. During the pendency of the summary judgment motion, she
24 was removed as the trustee and replaced by Christopher R. Barclay.
Both Ms. Dye and Mr. Barclay will be referred to as "Trustee."

25 ⁴Unless otherwise indicated, all "Code," chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, prior
27 to its amendment by the Bankruptcy Abuse Prevention and Consumer
28 Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, as the
case from which the adversary proceeding and these appeals arise
was filed before its effective date (generally October 17, 2005).
All "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 The Debtor was engaged in the business of factoring accounts
2 receivable. The "factoring" of accounts receivable involves
3 loaning money to customer businesses secured by the accounts
4 receivable of the customer businesses' clients at a high rate of
5 interest.

6 Gary Eisenberg ("Eisenberg") was the principal of the Debtor.
7 Eisenberg raised funds on behalf of the Debtor to make the loans to
8 its customers by selling limited partnership interests to
9 investors, promising interest rates from 9% to 18% per year.
10 Eisenberg knew he was operating a Ponzi scheme, in that he was
11 paying investors purported "interest" payments with funds raised
12 from other investors, rather than from the profits of the factoring
13 business as Eisenberg represented to investors.

14 On or about August 26, 1999, Elite transferred \$50,000 to
15 AFPIII to invest as a limited partner in that entity. On or about
16 May 23, 2000, AFPIII transferred \$54,545 to Elite on account of
17 Elite's limited partnership interest.

18 In approximately October, 2001, the United States Securities
19 and Exchange Commission ("SEC") began investigating the Debtor for
20 possible securities law violations.

21 This bankruptcy case was commenced on October 22, 2001, when
22 the six related entities comprising the Debtor filed voluntary
23 petitions under Chapter 11. On May 16, 2002, the bankruptcy court
24 ordered substantive consolidation of all six cases. On July 29,
25 2002, the bankruptcy court granted the Chapter 11 Trustee's motion
26 to convert the consolidated case to one under Chapter 7.

27 On December 12, 2002, Eisenberg was convicted of securities
28 and mail fraud pursuant to a judgment of the United States District

1 Court for the Central District of California, for his participation
2 in a Ponzi scheme relative to the Debtor's affairs prior to its
3 bankruptcy filing.

4 The Trustee sued Elite to avoid and recover the \$54,545
5 transferred on May 23, 2000, pursuant to California's Uniform
6 Fraudulent Transfer Act.

7 The Trustee moved for summary judgment, arguing that the
8 transfer was made with actual intent to defraud, and that based on
9 the holding in Hayes v. Palm Seedlings Partners-A (In re Agric.
10 Research and Tech. Group, Inc.), 916 F.2d 528 (9th Cir. 1990)
11 ("Agretech"), Elite could not establish as a defense that its
12 limited partnership distribution was for "reasonably equivalent
13 value." The bankruptcy court agreed, but declined to award the
14 Trustee prejudgment interest. The bankruptcy court subsequently
15 granted the Trustee's request to voluntarily dismiss the second and
16 only remaining claim for relief.

17 Elite filed an appeal of the bankruptcy court's Final Judgment
18 on First Claim for Relief, and the Trustee filed a cross-appeal
19 with respect to prejudgment interest.⁵

24
25 ⁵The excerpts of record provided to us did not include a copy
26 of the Cross-Appeal filed by the Trustee, nor of the Trustee's
27 Reply on its motion for summary judgment. We have obtained a copy
28 of the Cross-Appeal from PACER and take judicial notice of it. In
re Atwood, 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003). The
Trustee's Reply, however was not scanned into the bankruptcy
court's electronic case filing system. Nevertheless, we take
judicial notice that a reply was filed.

1 II

2 JURISDICTION

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
4 § 1334 and § 157(b)(1) and (b)(2)(H). The Panel has jurisdiction
5 to hear this appeal pursuant to 28 U.S.C. § 158(c).

6 III

7 ISSUES

8 A. Appeal (05-1483): Whether the bankruptcy court erred in
9 granting summary judgment to the Trustee on the claim for actual
10 fraud by determining that the Debtor's transfer to Elite was a
11 distribution on account of Elite's limited partnership interest,
12 and thus as a matter of law could not be for "reasonably equivalent
13 value" as required of an affirmative defense under CCC
14 § 3439.08(a)⁶.

15 B. Cross-Appeal (05-1499): Whether the bankruptcy court erred
16 in denying the Trustee's request for pre-judgment interest.

17 IV

18 STANDARD OF REVIEW

19 We review the granting of summary judgment de novo. Paine v.
20 Griffin (In re Paine), 283 B.R. 33, 36 (9th Cir. BAP 2002). We
21 must determine, viewing the evidence in the light most favorable to
22 the nonmoving party, whether there are any genuine issues of
23 material fact and whether the trial court correctly applied the
24 relevant substantive law. Graulty v. Brooks (In re Bishop,
25 Baldwin, Rewald, Dillingham & Wong, Inc.), 819 F.2d 214, 215 (9th
26 Cir. 1987).

27 _____
28 ⁶CCC references are to the California Civil Code.

1 We review a trial court's decision whether to award
2 prejudgment interest for abuse of discretion. Acequia, Inc. v.
3 Clinton (In re Acequia, Inc.), 34 F.3d 800, 818 (9th Cir. 1994).
4 A trial court abuses its discretion if it does not apply the
5 correct law, rests its decision on a clearly erroneous finding of
6 a material fact, or applies the correct legal standard in a manner
7 that results in an abuse of discretion. Engleson v. Burlington N.
8 R.R. Co., 972 F.2d 1038, 1043 (9th Cir. 1992).

9 V

10 DISCUSSION

11 A. The Bankruptcy Court Did Not Err in Concluding that
12 Distribution to a Limited Partner in a Ponzi Scheme Precludes
13 a Finding of Reasonably Equivalent Value under the Defense to
14 Actual Fraud Set Forth in CCC § 3439.08.

15 Section 544(b) allows a bankruptcy trustee to avoid any
16 transfer of a debtor's property that would be avoidable by an
17 unsecured creditor under applicable law.⁷ The applicable law in
18 the instant case is California law, which provides that as to
19 present and future creditors, "[a] transfer made . . . by a debtor
20 is fraudulent as to a creditor, whether the creditor's claim arose
21 before or after the transfer was made . . . if the debtor made the
22 transfer . . . [w]ith actual intent to hinder, delay, or defraud
23 any creditor of the debtor." CCC § 3439.04(a)(1). This fraud has

24 ⁷Section 544(b)(1) provides as follows:

25 Except as provided in paragraph (2), the trustee may
26 avoid any transfer of an interest of the debtor in
27 property or any obligation incurred by the debtor that is
28 voidable under applicable law by a creditor holding an
unsecured claim that is allowable under section 502 of
this title or that is not allowable only under section
502(e) of this title.

1 been referred to as actual fraud, while CCC § 3439.04(a)(2)⁸
2 addresses constructive fraud.

3 Elite has not appealed the bankruptcy court's determination
4 that the \$54,545 transfer by the Debtor to Elite was made with the
5 actual intent to hinder, delay, or defraud an entity.

6 At issue is whether the bankruptcy court correctly determined
7 that Elite could not establish an affirmative defense to actual
8 fraud available under CCC § 3439.08(a). This affirmative defense
9 provides that a transfer is not voidable under CCC § 3439.04(a)(1)
10 against a person "who took in good faith and for a reasonably
11 equivalent value." The bankruptcy court determined that the
12 transfer was a return on capital and interest on account of Elite's
13 limited partnership interest and under the holding of Agretech, was
14 not for reasonably equivalent value. The bankruptcy court did not
15 make a determination regarding the good faith element of the
16 defense.

17 California's fraudulent transfer statutes are similar in form
18 and substance to the Code's fraudulent transfer provisions. Wyle
19 v. C.H. Rider & Family (In re United Energy Corp.), 944 F.2d 589,
20 594 (9th Cir. 1991) ("United Energy"). Both allow a transfer to be

22 ⁸Under CCC § 3439.04(a)(2), a transfer is fraudulent if the
23 debtor made the transfer:

24 (2) Without receiving reasonably equivalent value in
25 exchange for the transfer or obligation, and the debtor
26 either:

27 (A) Was engaged or was about to engage in a business or
28 a transaction for which the remaining assets of the
debtor were unreasonably small in relation to the
business or transaction.

(B) Intended to incur, or believed or reasonably should
have believed that he or she would incur, debts beyond
his or her ability to pay as they became due.

1 avoided when the debtor acted with "actual intent to hinder, delay,
2 or defraud" an entity or creditor. § 548(a)(1)(A); CCC
3 § 3439.04(a)(1). Both also provide a safe harbor to transferees
4 who took in good faith and for value.⁹ § 548(c); CCC § 3439.08(a).
5 Accordingly, cases construing these Code counterparts, as well as
6 analogous state statutes, are persuasive authority due to the
7 similarity of the laws. Agretech, 916 F.2d at 534.

8 Elite contends that the controlling case in this instance is
9 United Energy. In that case, the Ninth Circuit Court of Appeals
10 ("Circuit") affirmed a Panel decision, Wyle v. C.H. Rider & Family
11 (In re United Energy Corp.), 102 B.R. 757 (9th Cir. BAP
12 1989) ("United Energy (BAP)"), holding that investors in a Ponzi
13 scheme exchanged reasonably equivalent value when their rights to
14 restitution were proportionately reduced by the payments they

16
17 ⁹Under the Code, if actual intent is established pursuant to
18 § 548(a)(1)(A), the transfer is avoided. The Code, in § 548(c),
19 however, "insulates the transferees of an avoided fraudulent
20 transfer who take for value and in good faith by providing that
21 such a transferee has a lien, or may retain the interest
22 transferred, to the extent the transferee gave 'value to the
23 debtor' in exchange for the transfer." Plotkin v. Pomona Valley
24 Imps., Inc. (In re Cohen), 199 B.R. 709, 719 (9th Cir. BAP 1996).
25 Significantly, California's fraudulent transfer statute "parts
26 company from the Bankruptcy Code and does not avoid every [actual]
27 fraudulent transfer." In re Cohen, 199 B.R. at 718. Rather, it
28 provides an affirmative defense to persons who take in good faith
and for reasonably equivalent value, so that the transfer is not
avoidable against such person or person's transferees. In re
Cohen, 199 B.R. at 718.

Section 548(c) actually refers to "value," while CCC
§ 3439.08(a) refers to "reasonably equivalent value." The
California statutes do not provide a definition for "reasonably
equivalent value." Both CCC § 3439.03 and § 548(d)(2)(A) of the
Code, however, similarly define "value" as property transferred, or
an antecedent debt satisfied or secured, but does not include an
unperformed promise to furnish support to the debtor or another
person.

1 received. United Energy, 944 F.2d at 595. As shown below,
2 however, Ninth Circuit case law establishes that United Energy is
3 not controlling here because that case involved investors and
4 constructive fraud, while the instant case involves equity
5 security¹⁰ holders and actual fraud.

6 In United Energy (BAP), the trustee sued to avoid a fraudulent
7 transfer based on the California statute governing constructive
8 fraudulent transfers, CCC § 3439.04(b).¹¹ The issue before the
9 Panel was whether the debtors received reasonably equivalent value
10 in exchange for the power payments to investors-not equity security
11 holders-in the debtors' Ponzi scheme. United Energy (BAP), 102
12 B.R. at 761. Adopting the holdings of Merrill v. Abbott (In re
13 Indep. Clearing House Co.), 41 B.R. 985 (Bankr. D. Utah 1984),
14 aff'd in part, rev'd in part, Merrill v. Dietz (In re Universal
15 Clearing House Co.), 62 B.R. 118 (D. Utah 1986), and Eby v. Ashley,
16 1 F.2d 971 (4th Cir. 1924), the Panel held that, "[i]n a suit for
17 damages, the power payments given to the defrauded investors would
18 be deemed to partially satisfy or release fraud or restitution
19 claims. . . . Satisfaction of such claims would constitute value
20 given for the receipt of the power payments within the meaning of
21 section 548(d)(2)(A) or the comparable California provision.
22 United Energy (BAP), 102 BR at 763.

23 The Circuit subsequently decided Agretech, also involving a
24 Ponzi scheme, where the trustee sued to recover fraudulent
25

26 ¹⁰"Equity security" includes "interest of a limited partner in
27 a limited partnership." § 101(16)(B).

28 ¹¹This provision is now contained in CCC § 3439.04(a)(2).

1 transfers under the Hawaii counterpart to § 548.¹² In its
2 discussion of reasonably equivalent value for purposes of
3 establishing actual intent, the Circuit acknowledged and
4 distinguished the Panel's decision in United Energy (BAP), as
5 follows:

6 United Energy is distinguishable because the issue before
7 that court concerned payment of an antecedent debt under
8 11 U.S.C. § 548(a)(2)^[13], the equivalent of
9 Haw.Rev.Stat. § 651C-4(a)(2). The present issue, in
10 contrast, concerns the avoidance of fraudulent transfers
11 under Haw.Rev.Stat. § 651C-4(a)(1), the equivalent of 11
12 U.S.C. § 548(a)(1), where the entire transfer may be
13 avoided, even if reasonably equivalent value was given,
14 so long as the transferor actually intended to hinder,
15 delay or defraud its creditors and the transferee
16 accepted the transfer without good faith. See In re
17 Independent Clearing House, 77 B.R. at 859.

18 Agretech, 916 F.2d at 538.

19 The Circuit then addressed the defense to actual fraud as it
20 pertained to transfers to the debtor's limited partners. Agretech,
21 916 F.2d at 540. Noting that limited partnership interests are
22 classified as "equity security" under the Code, the Circuit held
23 that the partnership distributions were not for value because they
24 were made "on account of the partnership interests and not on
25 account of debt or property transferred to the partnership in
26 exchange for the distribution." Agretech, 916 F.2d at 540. In
27 accordance with the Uniform Fraudulent Transfer Act, "value is to
28

24 ¹²Although it appears that the trustee sued under both actual
25 and constructive fraud, the Circuit stated that because the
26 district court correctly found for the trustee on its action for
27 actual intent, it need not reach the alternative basis for
28 avoidance. Agretech, 916 F.2d at 538-39.

¹³This former statute, now codified in § 548(a)(1)(B),
addressed constructive fraud.

1 be determined in light of the act's purpose, in order to protect
2 the creditors," and "[a]ny consideration not involving utility for
3 the creditors does not comport with the statutory definition."
4 Agretech, 916 F.2d at 540. Thus, "distributions to limited
5 partners is not value because any other definition would not
6 further protection of creditors." Agretech, 916 F.2d at 540.

7 Consistent with this holding, the Circuit determined in In re
8 Riverside-Linden Inv. Co., 925 F.2d 320, 323 (9th Cir. 1991), that
9 a partnership interest is not a claim:

10 "An ownership interest is not a debt of the partnership.
11 Partners own the partnership subject to the profits or
12 losses. Creditors, however, hold claims regardless of
13 the performance of the partnership business. Thus, an
14 ownership interest is not a claim against the
15 partnership."

16 Riverside-Linden, 925 F.2d at 323 (quoting In re Riverside-Linden
17 Inv. Co., 99 B.R. 439, 444 (9th Cir. BAP 1989)).

18 In United Energy, 944 F.2d at 590, the Circuit considered the
19 appeal of the Panel's decision in United Energy (BAP). While
20 setting out the law on constructive fraud, the Circuit
21 distinguished its decision in Agretech:

22 The Trustee in this matter did not seek to recover the
23 power payments pursuant to Code section 548(a)(1). Under
24 section 548(a)(1), a trustee in bankruptcy may recover
25 transfers made by the debtor if the debtor "made such
26 transfer . . . with actual intent to hinder, delay, or
27 defraud any entity to which the debtor was or became, on
28 or after the date that such transfer was made . . . ,
indebted"

Because section 548(a)(1) is not in issue in this
case, Hayes v. Palm Seedlings Partners-A (In re
Agricultural Research and Technology Group, Inc.), 916
F.2d 528 (9th Cir. 1990), is not applicable. See id. at
538 (distinguishing In re United Energy Corp. on this
basis).

United Energy, 944 F.2d at 594 n.4.

1 After reviewing the claim for constructive fraud, the Circuit
2 affirmed the Panel, holding that because the investors were duped
3 into investing in the Ponzi scheme, they clearly had claims for
4 rescission and restitution that arose when they invested in the
5 debtor. United Energy, 944 F.2d at 595-96. On this basis, the
6 investors exchanged reasonably equivalent value when their rights
7 to restitution were proportionately reduced by the power payments
8 they received. United Energy, 944 F.2d at 595.

9 Elite contends that United Energy is controlling and that a
10 debt owing from the Debtor to Elite arose the moment Elite paid the
11 purchase price for its limited partnership interest in reliance on
12 the fraudulent misrepresentations made by Eisenberg. Further,
13 Elite argues that the bankruptcy court should have applied the
14 "equity rule of equality" utilized in Eby, 1 F.2d at 972.¹⁴ Elite's
15 contentions ignore the plain and binding case law decided by the
16 Circuit.

17 When the Circuit decided Agretech, it was familiar with United
18 Energy (BAP), and presumably the holding therein that investors in
19 a Ponzi scheme had acquired claims for rescission and restitution
20 when they made their initial investments, thereby satisfying the
21 reasonably equivalent value element of constructive fraud. The
22 Circuit, however, chose to distinguish United Energy (BAP) on the
23

24
25 ¹⁴Eby involved another fraudulent investment scheme. Eby, 1
26 F.2d at 971-72. In applying the equity rule of equality, the
27 Fourth Circuit concluded that because the investor received money
28 in good faith, equity would not require him to pay the money back
while the debtor at the time owed him a greater amount for the
investor's initial investment. Eby, 1 F.2d at 973. Rather, it
would require him to credit it on the debt due by the debtor to the
investor. Eby, 1 F.2d at 973.

1 ground that it concerned a constructive fraudulent transfer, while
2 Agretech concerned an actual fraudulent transfer.

3 The Circuit confirmed this distinction between Agretech and
4 United Energy (BAP) in United Energy, when it specifically held
5 that Agretech did not apply because Agretech dealt with actual
6 fraudulent transfers, while United Energy dealt with constructive
7 fraudulent transfers.

8 Furthermore, armed with the rationale applied by the Panel in
9 United Energy (BAP), the Circuit in Agretech further distinguished
10 the two cases in its analysis of the unique characteristics of a
11 limited partnership interest and its relation to the value defense
12 for actual fraud. The Circuit made a holding that "distributions
13 to limited partners is not value because any other definition would
14 not further protection of creditors." Agretech, 916 F.2d at 540.
15 Notably, the Circuit did not limit its holding to the "appellants"
16 in that case, who were the limited partners. The Circuit confirmed
17 this holding in Riverside-Linden, when it held that a partnership
18 interest is not a claim against the partnership. Accordingly, the
19 controlling case law establishes that a distribution to a limited
20 partner, which is an equity security holder, in the context of a
21 Ponzi scheme cannot be for reasonably equivalent value, as required
22 by California's affirmative defense to actual fraudulent transfers.

23 This holding is consistent with the policy underlying the
24 Code's different treatment of equity security holders and
25 creditors. Section 510(b) requires the subordination of damages
26 claims "arising from the purchase or sale of a security." In
27 enacting § 510(b), Congress focused on the problem of claims
28 alleging fraud and other violations of law in the issuance of the

1 debtor's securities. Dugrayne v. Rombro (In re Med Diversified,
2 Inc.), 461 F.3d 251, 256 (2nd Cir. 2006). According to Professors
3 John L. Slain and Homer Kripke, on whom Congress relied in enacting
4 § 510(b),

5 [T]he dissimilar expectations of investors and creditors
6 should be taken into account in setting a standard for
7 mandatory subordination. Shareholders expect to take
8 more risk than creditors in return for the right to
9 participate in firm profits. The creditor only expects
repayment of a fixed debt. It is unfair to shift all of
the risk to the creditor class since the creditors extend
credit in reliance on the cushion of investment provided
by the shareholders.

10 Am. Broad. Sys., Inc. v. Nugent (In re Betacom of Phoenix, Inc.),
11 240 F.3d 823, 829 (9th Cir. 2001). Thus, "[o]ne of the primary
12 purposes of section 510(b) . . . is to prevent disappointed
13 shareholders, sometimes the victims of corporate fraud, from
14 recouping their investment in parity with unsecured creditors."
15 Racusin v. Am. Wagering, Inc. (In re Am. Wagering, Inc.), --F.3d--,
16 2006 WL 2846373, at *3 (9th Cir. Oct. 6, 2006).

17 Elite alleges that it relied on the fraudulent
18 misrepresentations of the Debtor in purchasing its limited
19 partnership interest. It is this precise scenario to which
20 § 510(b) was designed to apply. Clearly, as articulated by the
21 Circuit, there is a sound policy reason for treating defrauded
22 equity security holders, as Elite alleges it is, differently from
23 creditors.

24 Application of § 510(b) to this case also supports the
25 conclusion that there is no reasonably equivalent value. At oral
26 argument, Elite conceded that it is an equity security holder, that
27 any security claim is subordinated pursuant to § 510(b), and that
28 the Debtor was insolvent at the time of bankruptcy filing. It

1 necessarily follows, then, that at the time of the bankruptcy
2 filing, Elite's subordinated claim against the insolvent Debtor had
3 no monetary value.

4 Even considering value at the time of the transfer, as
5 proposed by Elite, Elite's claim still would had no value because
6 the Debtor, a Ponzi scheme enterprise, was insolvent at the time of
7 the transfer. Consequently, any claims against the Debtor for
8 rescission and restitution would have been worthless at that time
9 as well.

10 The record in this case provides a final basis to uphold the
11 bankruptcy court's conclusion that the transfer was not for
12 reasonably equivalent value. Elite's Uncontroverted Facts in the
13 Opposition to Plaintiff's Motion for Summary Judgment establish
14 that the Debtor transferred \$54,545 to Elite "on account of Elite's
15 limited partnership interest." Elite's contention that the
16 transfer was a release of its claims against the Debtor for
17 rescission and restitution is completely at odds with this
18 uncontroverted fact. This uncontroverted fact establishes that the
19 transfer was a return on the limited partnership interest, and not
20 for a release or satisfaction of any damages claims against the
21 Debtor.

22 Accordingly, the bankruptcy court did not err when it
23 concluded that Elite failed to establish the reasonably equivalent
24 value element of the defense to actual fraud. Because Elite did
25 not establish this element, the bankruptcy court further did not
26 err when it failed to determine the good faith element of the
27 defense.

28

1 B. The Bankruptcy Court Abused Its Discretion in Failing to Award
2 Prejudgment Interest.

3 In this case, California law regarding prejudgment interest is
4 applicable via § 544(b). Agretech, 916 F.2d at 541. Under
5 California law, the award of prejudgment interest "is a matter of
6 right where there is a vested right to recover 'damages certain' as
7 of a particular day." Otto v. Niles (In re Niles), 106 F.3d 1456,
8 1463 (9th Cir. 1997) (citing to CCC § 3287(a)¹⁵). The statute
9 "looks to the certainty of the damages suffered by the plaintiff,
10 rather than to a defendant's ultimate liability, in determining
11 whether prejudgment interest is mandated." Wisper Corp. N.V. v.
12 Cal. Commerce Bank, 49 Cal. App. 4th 948, 958, 57 Cal. Rptr. 2d
13 141, 147 (1996).

14 "Damages are deemed certain or capable of being made
15 certain within the provisions of subdivision (a) of
16 [Civil Code] section 3287 where there is essentially no
17 dispute between the parties concerning the basis of
computation of damages if any are recoverable but where
their dispute centers on the issue of liability giving
rise to damage."

18 Wisper Corp., 49 Cal. App. 4th at 958, 57 Cal. Rptr. 2d at 147
19 (quoting Esgro Cent., Inc. v. Gen. Ins. Co., 20 Cal. App. 3d 1054,
20 1060, 98 Cal. Rptr. 153, 157 (1971)).

21 The test is whether "'defendant actually know[s] the amount
22 owed or from reasonably available information could the defendant
23 have computed that amount [Citation.]'" Wisper Corp., 49 Cal. App.

24
25 ¹⁵ CCC § 3287(a) provides as follows:
26 Every person who is entitled to recover damages certain,
27 or capable of being made certain by calculation, and the
28 right to recover which is vested in him upon a particular
day, is entitled also to recover interest thereon from
that day, except during such time as the debtor is
prevented by law, or by the act of the creditor from
paying the debt.

1 4th at 960, 57 Cal. Rptr. 2d at 148 (quoting Cassinovs v. Union Oil
2 Co., 14 Cal. App. 4th 1770, 1789, 18 Cal. Rptr. 2d 574, 585 (1993),
3 original italics). Thus, prejudgment interest is not authorized
4 where the amount of damage "depends upon a judicial determination
5 based upon conflicting evidence and is not ascertainable from
6 truthful data supplied by the claimant to his debtor." Esgro
7 Cent., Inc. 20 Cal. App. 3d at 1062, 98 Cal. Rptr. at 158.

8 Elite contends that the parties submitted conflicting evidence
9 regarding damages in the case, and thus prejudgment interest was
10 not authorized. Elite, however, does not cite to any such
11 conflicting evidence in the record on appeal, nor did it do so at
12 the bankruptcy court. Conversely, the Trustee argues that the
13 damages were certain, or capable of being made certain by simple
14 calculation, from the day the transfer was made, as it is
15 uncontroverted that Elite received \$54,545 on May 23, 2000.

16 Based on the mandatory nature of the California prejudgment
17 statute, it was an abuse of discretion by the bankruptcy court not
18 to award prejudgment interest to the Trustee. It is undisputed
19 that the Debtor transferred \$54,545 to Elite on May 23, 2000, on
20 account of Elite's limited partnership interest. Furthermore, it
21 is undisputed that Eisenberg knew he was running a Ponzi scheme
22 thereby establishing an actual fraudulent transfer pursuant to CCC
23 § 3439.04(a). While Elite may have disputed its liability under
24 the Uniform Fraudulent Transfer Act due to its assertion that it
25 could establish the defense pursuant to CCC § 3439.08(a), this does
26 not defeat a claim for prejudgment interest. See Wisper Corp., 49
27 Cal. App. 4th at 960, 57 Cal. Rptr. 2d at 148 (noting that interest
28 allowable under CCC § 3287 cannot be defeated by setting up an

1 unliquidated counterclaim as an offset). There is no evidence in
2 the record that Elite contested the amount transferred on account
3 of its limited partnership interest or the extent of its liability
4 in the event it could not establish the defense.

5 Additionally, in the Complaint, the Trustee sought to recover
6 the transfer in the amount of \$54,545. ER 9, 11. The bankruptcy
7 court awarded the Trustee principal damages of \$54,545 against
8 Elite. "[W]here there is no significant disparity between the
9 amount claimed in the complaint and the final judgment, this factor
10 generally tends to show that damages were certain or capable of
11 calculation." Wisper Corp., 49 Cal. App. 4th at 961, 57 Cal. Rptr.
12 2d at 148.

13 A further issue, however, is from what date the interest
14 should have been awarded. Because the bankruptcy court did not
15 award prejudgment interest, it did not exercise its discretion in
16 determining from what date the interest should commence, and the
17 matter should be remanded for a determination. See Indep. Clearing
18 House, 41 B.R. at 1015 (ordinarily, fixing of the time from which
19 prejudgment interest shall accrue is discretionary with the court).

20 VI

21 CONCLUSION

22 Having determined that the bankruptcy court committed no error
23 regarding its determination on summary judgment, but abused its
24 discretion in failing to award prejudgment interest and fix the
25 time from which the interest shall accrue, we (1)AFFIRM as to the
26 appeal (05-1483); and (2) REVERSE and REMAND as to the cross-appeal
27 (05-1499) for the bankruptcy court to fix the date to begin the
28 accrual of interest on the Trustee's judgment against Elite.