NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: AFI HOLDING, INC., Debtor.	BAP Nos. CC-05-1483-SnKMo CC-05-1499-SnKMo (cross-appeal)
ELITE PERSONNEL, INC., Appellant/Cross-Appellee, v. CHRISTOPHER BARCLAY, Trustee, Appellee/Cross-Appellant.	Bk. No. LA 01-41567-VZ Adv. No. LA 03-02508-VZ **MEMORANDUM**[1]

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.

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[1]This 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.

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

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

I

FACTS[4]

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

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

[4]Unless otherwise indicated, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, prior to its amendment by the Bankruptcy Abuse Prevention and Consumer 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.

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

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

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

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

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

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

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

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

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

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

[5]The excerpts of record provided to us did not include a copy of the Cross-Appeal filed by the Trustee, nor of the Trustee's Reply on its motion for summary judgment. We have obtained a copy 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.

II

JURISDICTION

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

III

ISSUES

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

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

IV

STANDARD OF REVIEW

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

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[6]CCC references are to the California Civil Code.

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

V

DISCUSSION

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

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

[7]Section 544(b)(1) provides as follows:
Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is 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.

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

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

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

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

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

> (2) Without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
> (A) Was engaged or was about to engage in a business or 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.

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

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

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

received. United Energy, 944 F.2d at 595. As shown below, however, Ninth Circuit case law establishes that United Energy is not controlling here because that case involved investors and constructive fraud, while the instant case involves equity security[10] holders and actual fraud.

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

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

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

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

transfers under the Hawaii counterpart to § 548.[12] In its discussion of reasonably equivalent value for purposes of establishing actual intent, the Circuit acknowledged and distinguished the Panel's decision in United Energy (BAP), as follows:

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

Agretech, 916 F.2d at 538.

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

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

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

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

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

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

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

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

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

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

Elite contends that United Energy is controlling and that a debt owing from the Debtor to Elite arose the moment Elite paid the purchase price for its limited partnership interest in reliance on the fraudulent misrepresentations made by Eisenberg. Further, Elite argues that the bankruptcy court should have applied the "equity rule of equality" utilized in Eby, 1 F.2d at 972.[14] Elite's contentions ignore the plain and binding case law decided by the Circuit.

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

[14]Eby involved another fraudulent investment scheme. Eby, 1 F.2d at 971-72. In applying the equity rule of equality, the Fourth Circuit concluded that because the investor received money 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.

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

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

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

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

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

> [T]he dissimilar expectations of investors and creditors should be taken into account in setting a standard for mandatory subordination. Shareholders expect to take more risk than creditors in return for the right to 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.

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

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

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

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

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

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

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

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

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

> "Damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of [Civil Code] section 3287 where there is essentially no 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."

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

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

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[15] CCC § 3287(a) provides as follows:
Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the 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.

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

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

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

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

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

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

VI

CONCLUSION

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