NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. CC-05-1455-LBPa
MARON & DAVIS ADVERTISING, INC.,	)	Bk. No. LA 03-12640-SB
Debtor.	)	Adv. No. LA 04-02687-SB
AUTONATION, INC.,	)	
Appellant,	)	
v.	)	**MEMORANDUM**[1]
NANCY KNUPFER, Chapter 7 Trustee,	)	
Appellee.	)	

Argued and Submitted on
September 22, 2006 at Pasadena, California

Filed - March 12, 2007

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

Honorable Samuel Bufford, Bankruptcy Judge, Presiding.

Before: LEE,[2] BRANDT and PAPPAS, Bankruptcy Judges.

[1]This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see FED.R.APP.P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2]Hon. W. Richard Lee, United States Bankruptcy Judge for the Eastern District of California, sitting by designation.

I. INTRODUCTION

In this appeal, we examine whether the bankruptcy court erred in granting summary judgment for the chapter 7 trustee (the "Trustee"), against defendant/appellant AutoNation, Inc. ("AutoNation"), in a preference action brought under 11 U.S.C. § 547(b)[3]. The bankruptcy court denied AutoNation's motion for summary judgment and granted the Trustee's counter-motion for summary judgment. The bankruptcy court concluded that AutoNation had not established any of its defenses. AutoNation contends that the bankruptcy court erred in its application of the law to the undisputed facts. We AFFIRM.

II. FACTS

The debtor, Maron & Davis Advertising, Inc. (the "Debtor") was a commercial advertising agency which operated under the name "Mad Ads, Inc." AutoNation was a party to a convoluted business relationship with the Debtor relating to the prepayment and reimbursement of advertising expenses. This adversary proceeding relates to the last two "reimbursement" payments that the Debtor made to AutoNation within 90 days prior to the bankruptcy.

AutoNation was an automobile retailer which had a relationship with several affiliated companies. AutoNation also operated an outdoor advertising business known as Republic

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[3]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

Media, which it sold to Infinity Outdoor, Inc. AutoNation still needed advertising services for itself and its affiliates, and in November 2000, in connection with the sale of Republic Media, AutoNation entered into a Master Advertising Agreement (the "MAA") with Infinity Outdoor, Inc. AutoNation purchased $15 million worth of future advertising services (the "Prepaid Advertising") from Infinity Outdoor, Inc. and radio stations owned and operated by its parent company, Infinity Broadcasting Corporation (referred to collectively herein as "Infinity").

The MAA contemplated that the Prepaid Advertising would be used by AutoNation's affiliated companies, which are unnamed in the MAA. The MAA also required Infinity to provide AutoNation with monthly invoices for, inter alia, all advertising provided to AutoNation's affiliates under the MAA. Infinity was required to deduct the Prepaid Advertising from its invoices in an amount not to exceed $7.5 million per year, until the Prepaid Advertising had been exhausted.

One of AutoNation's affiliates is an automobile dealer known as House of Imports, a California Corporation. In December 2001, AutoNation sent a letter to the Debtor summarizing the "details" of a "final agreement" to provide advertising services to House of Imports (the "HOI Agreement"). The HOI Agreement contemplated the purchase of $20,000 per month of radio, television, and cable advertising services and advertising time to begin in January 2002, and continuing on a month-to-month basis thereafter. The Debtor would receive a 5% commission. The record does not show that the HOI Agreement was separately documented. The HOI Agreement makes no mention of

the MAA, the Prepaid Advertising, or the reimbursement of advertising fees to AutoNation.

The Debtor, in turn, purchased advertising time for House of Imports through a media buying service, Round2 Communications ("Round2"). Round2 procured some of AutoNation's Prepaid Advertising for House of Imports through Infinity. Round2 billed the Debtor for the full cost of the advertising services (the "Round2 Invoices"). Round2 would indicate on its Invoices by handwritten interlineation how much of the Prepaid Advertising had been used for House of Imports. The Debtor would send the Round2 Invoices to House of Imports. House of Imports, in turn, would pay the full amount of the Round2 Invoices to the Debtor with checks drawn on House of Imports' business checking account.

AutoNation had a loosely structured agreement with the Debtor, documented only by three short emails from AutoNation in August 2001, relating to AutoNation's "Infinity reconciliation process" and the payment of money to AutoNation (the "Reimbursement Agreement"). The Debtor would send to AutoNation a copy of each Round2 Invoice relating to House of Imports. After House of Imports paid the Round2 Invoices, the Debtor would reimburse to AutoNation the amount that Round2 had allocated to Prepaid Advertising, less the agreed commission. The terms of the Reimbursement Agreement required the Debtor to send "[A] check payable to AutoNation and copies of all support documentation . . . due by the 15th day of the 2nd month" after the advertising services were rendered.

House of Imports was not a party to the Reimbursement Agreement. It is unclear from the record whether Round2's allocation of Prepaid Advertising was ever disclosed to House of Imports, or if House of Imports had knowledge that the Debtor was "reimbursing" a portion of its advertising fees to AutoNation.

AutoNation did not send invoices to the Debtor for the "reimbursements." AutoNation relied solely on the Debtor to account for the use of Prepaid Advertising and send a check each month corresponding to Round2's calculation of the "reimbursement" due. The record does not show that there was any other business relationship between the Debtor and AutoNation relevant to this adversary proceeding.[4]

On or about November 29, 2002, AutoNation received and deposited a check drawn on the Debtor's bank account in the amount of $50,405 (the "November Payment"). The November Payment related to Prepaid Advertising used by House of Imports in the month of August 2002. On or about December 27, 2002, AutoNation received and deposited another check from the Debtor in the amount of $41,862.50 (the "December Payment").[5] The

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[4]The HOI Agreement references the production of a bi-monthly "AutoNation Newsletter" at a cost of $1,000 per month. This part of the HOI Agreement was not discussed in relationship to any of the issues before the bankruptcy court.

[5]The November and December Payments were issued on November 15 and December 19 respectively. The record is silent as to when these checks were actually delivered to AutoNation. The above dates represent the dates that the Payments actually cleared the Debtor's checking account.

December Payment related to Prepaid Advertising used by House of Imports in the months of October, November and December 2002. The November and December payments are collectively referred to herein as the "Subject Payments." The Subject Payments were the last two "reimbursements" made to AutoNation before the Debtor filed bankruptcy.[6]

III. PROCEDURAL BACKGROUND

The Debtor filed for relief under chapter 7 of the Bankruptcy Code on January 29, 2003. The Debtor scheduled AutoNation as an general unsecured creditor with a claim of $64,600, presumably for money owed under the Reimbursement Agreement. Altogether, the Debtor scheduled unsecured nonpriority claims in excess of $802,000. The assets administered by the Trustee were not sufficient to pay 100% of the unsecured claims.

In November 2004, the Trustee commenced this adversary proceeding against AutoNation to avoid and recover the Subject Payments under §§ 547(b) and 550. In response, AutoNation asserted three affirmative defenses relevant to this appeal: the "ordinary course of business" defense, the "new value" defense, and the "earmarking" doctrine.

In July 2005, AutoNation filed a motion for summary judgment. AutoNation argued that the Subject Payments were not avoidable as a matter of law based on alternative theories that:

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[6]In October 2005, the bankruptcy court approved a stipulated Joint Pretrial Order which set forth a number of undisputed facts (the "Pretrial Order"). The Pretrial Order established the dates and amounts of the Subject Payments and the fact that the Subject Payments were made within the 90 day preference period.

(1) the Subject Payments were covered by the earmarking doctrine, (2) the Subject Payments were protected by a constructive trust,[7] (3) the Subject Payments were made in the ordinary course of business, and (4) the Debtor received new value after the Subject Payments were made.

In support of its motion, AutoNation lodged a declaration of Ilyse Wertheim, AutoNation's Director of Marketing, Finance and Budget ("Ms. Wertheim"). In that declaration, Ms. Wertheim summarized the nature of the Reimbursement Agreement with the Debtor. She also stated, without giving any specifics, that "AutoNation had the same agreement with other advertising agencies around the country and each was handled in similar way."[8] With regard to the Subject Payments, Ms. Wertheim stated: "The Debtor's method and time of payment for [the Subject Payments] was not dissimilar to the manner other advertising agencies made payment to [AutoNation] on this unique transaction involving Infinity." (Emphasis added.)

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[7]AutoNation did not raise the "constructive trust" as an affirmative defense in its responsive pleading. The issue first appears in the record in AutoNation's summary judgment brief. The Trustee did not raise the "failure to plead" issue but elected to respond to the "constructive trust" argument on the merits.

[8]The record includes a copy of a letter dated April 26, 2001, from AutoNation to another advertising agency, Zimmerman & Partners, relating to the placement of advertising on Infinity radio stations. That letter outlines an elaborate scheme for approval of the media placement, approval of the advertising invoices, the issuance of invoices from AutoNation for the Infinity services, and follow-up billing adjustments. The record is silent as to why AutoNation's Reimbursement Agreement with the Debtor was not similarly structured.

In August 2005, the Trustee filed her opposition to AutoNation's motion and made a counter-motion for summary judgment. In support of her counter-motion, the Trustee lodged the transcript of Ms. Wertheim's deposition taken in April 2005. With regard to the November Payment, Ms. Wertheim testified that the November payment should have been made in October pursuant to the terms of the Reimbursement Agreement, and that it was roughly 30 days late. With regard to the December Payment, Ms. Wertheim acknowledged that it covered three separate months and was therefore not made in the way "things were supposed to be handled." The Trustee's counter-motion was also supported by, inter alia, a declaration from the Trustee in which she testified that the estate did not have enough money to pay 100% of the nonpriority unsecured claims.

AutoNation objected to the Trustee's counter-motion for summary judgment on procedural grounds. Thereafter, on August 30, the court held a hearing and ordered further briefing. The transcript of that hearing is not in the record. However, on September 8, the bankruptcy court issued a "Scheduling Order" to resolve the procedural issues. The Trustee was ordered to file additional briefs, including a Separate Statement of Undisputed Facts in support of her counter-motion. AutoNation responded with a Statement of Genuine Facts in Controversy. The summary judgment motions were set for oral argument on October 4, 2005 (the "October Hearing").

IV. THE BANKRUPTCY COURT'S RULING

The record on appeal is devoid of any findings of fact or conclusions of law on the elements of the Trustee's prima facie

claim, and reveals little relating to AutoNation's defenses. The bankruptcy court posted a tentative ruling prior to the October Hearing. The tentative ruling itself is not in the record. AutoNation's counsel appeared at the October Hearing and argued for a different ruling, exclusively with regard to the "earmarking" and "ordinary course" defenses. The only transcript in the record on appeal is from the October Hearing.[9]

At the October Hearing, the bankruptcy court addressed AutoNation's arguments with respect to the earmarking doctrine and the ordinary course of business defense. The court concluded that the earmarking doctrine was not applicable based on AutoNation's own argument that the Subject Payments were funded by House of Imports, an affiliate of AutoNation, and not by a third party. Following Ninth Circuit case law, specifically Superior Stamp & Coin Co., Inc. v. Anderson (In re Superior Stamp & Coin Co., Inc.), 223 F.3d 1004, 1008 (9th Cir. 2000), the court stated that the:

> Earmarking doctrine applies when a third party lends money to a Debtor for the specific purpose of paying a select creditor. That is . . . [the doctrine] requires a third party. Counsel has argued that the money didn't come from a third party, it came from an affiliate who we should find is essentially the same as the defendant here. That disqualifies it. (Oct. Hr'g. Tr. 10:6-15.)

[9]After the October Hearing, the Trustee submitted the order which is now on appeal denying AutoNation's motion and granting her counter-motion. That order summarily states the grounds for the ruling, ". . . that there are no genuine issues of material fact and that the Trustee is entitled to summary judgment as a matter of law, for all of the reasons set forth on the record and good cause appearing . . . ."

In addition, the bankruptcy court noted that House of Imports was not a party to the Reimbursement Agreement between the Debtor and AutoNation. The court declined to apply the earmarking doctrine in the absence of an express agreement between the Debtor and House of Imports designating AutoNation's entitlement to receive some of the money used to pay the Round2 Invoices. The court stated that the:

> Earmarking doctrine requires the existence of an agreement between a new lender and the Debtor that new funds will be used to pay a specified antecedent debt. I have not seen an agreement . . . which has that specific provision, or anything from which that can be inferred. (Oct. Hr'g. Tr. 10:16-23.)

The bankruptcy court further concluded that the earmarking doctrine does not apply to the Subject Payments because the Debtor had complete control over the flow of funds through its general checking account; that is, the Debtor had the ability and legal right to use the payments from House of Imports for other purposes. Looking again to Superior Stamp & Coin Co., Inc., 223 F.3d at 1009, the court stated:

> The proper inquiry is not whether the funds entered the Debtor's account, but whether the Debtor had the right to disburse the funds to whomever it wished, or whether their disbursement was limited to a particular old creditor or creditors under the agreement with the new creditor. Further, [s]o long as the funds are advanced on the condition that they be used to pay that specific creditor. These are the requirements of earmarking. I have not found evidence to support satisfying these requirements. (Oct. Hr'g. Tr. 11:23-25, 12:1-9.)

With regard to AutoNation's "ordinary course of business" defense, the bankruptcy court concluded that AutoNation had failed to sustain its burden of proof as to each element of the defense. The court stated rhetorically:

> Is there the evidence before the Court, sir, that prepayment is ordinary course both between the Debtor and creditor and in the industry? (Oct. Hr'g. Tr. 5:14-16.)
>
> Ordinary course of business, [s]ection 547(c)(2), provides a defense of ordinary course of business: To the extent that . . . . The payment of the transfer was made in the ordinary course of business or financial affairs of the Debtor and the transferee. (Oct. Hr'g. Tr. 12:14-25.)
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> The court finds the evidence wanting with respect to what was the ordinary course of business between the Debtor and this particular creditor. What happened between the parties in the past is simply not shown. (Oct. Hr'g. Tr. 13:5-8.)

On November 2, 2005, the bankruptcy court entered its order denying AutoNation's motion for summary judgment and granting the Trustee's counter-motion against AutoNation. The court entered judgment November 10, 2006, and AutoNation timely appealed.

V. ISSUES ON APPEAL

1. Whether the bankruptcy court properly concluded that there were no triable issues of material fact and that the issues could be adjudicated by summary judgment;

2. Whether the bankruptcy court properly concluded that the "earmarking doctrine" was not applicable;

3. Whether the bankruptcy court properly concluded that the payments made to the Debtor by House of Imports were not subject to a constructive trust for AutoNation's benefit;

4. Whether the bankruptcy court properly concluded that AutoNation had failed to prove each element of the "ordinary course of business" defense; and

5. Whether the bankruptcy court erred in not making any ruling on the "new value" defense.

VI. STANDARD OF REVIEW

We review the bankruptcy court's grant of summary judgment de novo. Svob v. Bryan (In re Bryan), 261 B.R. 240, 243 (9th Cir. BAP 2001) (citation omitted). The appellate court should

consider the matter anew, the same as if it had not been heard before, and as if no decision had been previously rendered. Ness v. C.I.R., 954 F.2d 1495, 1497 (9th Cir. 1992).

VII. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157. We have jurisdiction under 28 U.S.C. § 158(b)(1).

VIII. ANALYSIS

Applicable Law

Sections 547(b) and 550(a) of the Bankruptcy Code permit a bankruptcy trustee to avoid and recover a preferential transfer "for proper distribution among all the debtor's creditors." Ganis Credit Corp. v. Anderson (In re Jan Weilert RV, Inc.), 315 F.3d 1192, 1197 (9th Cir. 2003). There are six elements which must be established to prevail under § 547(b). The trustee must show that the subject transaction involved:

> (1) the transfer of an interest of the debtor in property;
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> (2) to or for the benefit of a creditor;
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> (3) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (4) made while the debtor was insolvent;[10]
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> (5) made on or within 90 days before the date of the filing of the petition; and
>
> (6) that enabled such creditor to receive more than such creditor would receive if the transfer had not been made and the debt was paid to the extent provided by the Bankruptcy Code.

[10]Pursuant to § 547(f), the Debtor is presumed to be insolvent during the last 90 days before the filing of the petition. The "insolvency" presumption is rebuttable.

AutoNation's defenses are based on subsections 547(c)(2) and (4) which provide respectively that a trustee may not avoid a transfer:

> (2) to the extent that such transfer was–
>
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (C) made according to ordinary business terms.
>
> . . .
>
> (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor.

Summary Adjudication of This Adversary Proceeding was Appropriate Because Neither Party Established That There Was A Triable Issue Of Material Fact.

The appellate court's review is governed by the same standard used by the bankruptcy court under Federal Rule of Civil Procedure 56(c) (made applicable to this adversary proceeding by Rule 7056). Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir. 1999). 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 bankruptcy court correctly applied the relevant substantive law. Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004). The moving party has the burden of showing the absence of any genuine issue of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Material facts are those which may

affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court must decide if the moving party is entitled to judgment as a matter of law based on the undisputed facts as established. FED.R.CIV.P. 56(c). To defeat summary judgment, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." FED.R.CIV.P. 56(e). Celotex Corp. v. Catrett, 477 U.S. 317, 322, n.3, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

AutoNation contends in its Statement of Issues, but fails to argue in its opening brief, that there were triable issues of material fact which precluded the granting of the Trustee's motion for summary judgment.[11] We begin this analysis by noting that both parties filed motions for summary judgment. Both parties asserted in support of their motions that there were no triable issues of material fact. AutoNation disputed the Trustee's Separate Statement of Undisputed Facts, but its opposition was not based on any new or conflicting facts; instead, it differed with the Trustee's interpretation of the evidence already in the record. AutoNation did not produce its own Separate Statement of Undisputed Facts, nor did AutoNation

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[11]AutoNation's statement of issues on appeal sets forth six separate grounds for error, including whether there were triable issues of material fact. AutoNation's opening brief includes a statement of the issues required by Rule 8010(a)(1)(C). The opening brief only states four grounds for error. The "triable issue of material fact" question is not argued in the opening brief. We consider that issue as part of our de novo review.

come forward with any evidence to show that there was some disputed issue of fact material enough to warrant a trial. Further, AutoNation does not make that argument in this appeal.

At the October Hearing, AutoNation debated the court's intention to rule for the Trustee on the "ordinary course of business" defense. The transcript reveals that AutoNation's counsel chose to argue about the burden of proof and relied upon the evidence then in the record,

> Like I said, your Honor, I believe we've presented that, in terms of the documents that we've presented. Burden of proof goes to the evidence, and we've presented that evidence, your Honor, and I think that within that evidence is it shows that it's in the ordinary course, and that, in that situation, that it all comes down to a legal issue, as to whether the evidence that has been presented - - and I can't imagine any other evidence that could have been presented, given what we have at this point, on that issue. Then the issue simply becomes a legal issue, as to what constitutes ordinary course. (Emphasis added.) (Oct. Hr'g. Tr. 9:8-19.)

AutoNation did not meet its burden, or even attempt to establish before the bankruptcy court that there was a triable issue of fact. Based on AutoNation's insistence that all pertinent facts are in the record, its failure to argue before the bankruptcy court that there were any triable issues of material fact, and its failure to perfect that issue on appeal, we conclude that the "triable issue of material fact" issue has been waived. We therefore hold that summary disposition of this matter on the facts in the record was appropriate. We move on to review the bankruptcy court's application of the law to the evidence that was before it.

Appellant Has Waived Any Issue Respecting the Trustee's Prima Facie Preference Case.

Again, the record on appeal does not include any findings of fact or conclusions of law with regard to the Trustee's prima facie case. The court notes that FED.R.CIV.P. 52(a) (applicable here through Rule 7052) does not require findings of fact and conclusions of law for decisions of summary judgment motions. However, in reviewing the bankruptcy court's ruling, the appellate court should have before it "all documents necessary to afford a full understanding of the case." Fleet Nat'l Bank v. Teller, 171 B.R. 478, 485 (D.R.I. 1994) (citations omitted). Where an appellant fails to provide a record on appeal which gives a "cogent demonstration . . . of error committed below," the court of appeals should not disturb the order of the bankruptcy judge. See Gardner Sav. Bank v. John J. Slavin Contracting, Inc. (In re John J. Slavin Contracting, Inc.), 29 B.R. 444, 445-46 (1st Cir. BAP 1983).

With the possible exception of the earmarking defense discussed below, nothing in the record on appeal, or in AutoNation's opening brief, suggests any error with regard to the bankruptcy court's ruling for the Trustee on her prima facie case. Rather, AutoNation's argument to the bankruptcy court, and its opening brief to us, focus solely on its affirmative defenses. Accordingly, AutoNation has waived any issues respecting the elements of the Trustee's preference claim. Law Offices of Neal Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998). (The court of appeals will not ordinarily consider matters that are not

specifically and distinctly argued in the appellant's opening brief.)

AutoNation argues in its reply brief that the money used to fund the Subject Payments was never the Debtor's property. Based thereon, AutoNation posits that it did not receive more than it would have under a chapter 7 because, as the money belonged to AutoNation, the Trustee would have had to account to it for those funds. AutoNation's argument here is simply a restatement of its earmarking defense which we address below.

The Bankruptcy Court Correctly Declined to Expand Application of the Earmarking Doctrine.

The defendant in a preference action has the burden of proving by a preponderance of the evidence every element necessary to establish a defense. 11 U.S.C. § 547(g); Kepler v. Sec. Pac. Hous. Serv. (In re McLaughlin), 183 B.R. 171 (Bankr. W.D. Wis. 1995). In a summary judgment context, the burden to prove a defense rests where it would be at trial. Edison v. Reliable Life Ins. Co., 664 F.2d 1130, 1131 (9th Cir. 1981).

We begin our analysis of the "earmarking" defense by recognizing that the Trustee established the existence of a debtor-creditor relationship between the Debtor and AutoNation. AutoNation was an unsecured creditor based on the Reimbursement Agreement and it apparently held a large unsecured claim for unpaid "reimbursements" at the commencement of the case. "The purpose of the bankruptcy law is to establish a uniform system . . . for equal distribution among creditors." England v. The Indus. Comm'n of Utah (In re Visiting Home Services, Inc.), 643 F.2d 1356, 1360 (9th Cir. 1981). AutoNation had the burden to

show that its relationship with the Debtor somehow distinguished it from that of the general unsecured creditors who did not get paid prior to the bankruptcy.

In an effort to make that case, AutoNation argues that the Subject Payments were not "a transfer of property of the Debtor" because they were "earmarked" for AutoNation. Debtor argues that the earmarking doctrine is a complete defense to the Trustee's preference action. AutoNation's argument here is offered both as an affirmative defense and, by implication, a challenge to the first element of the Trustee's prima facie case. The Trustee had the burden to establish in the first instance that the Subject Payments were made from the Debtor's property. In that regard, the evidence shows that the Subject Payments were made with business checks issued from the Debtor's checking account. Payment by check is universally accepted as a method for transferring property in a form that is equivalent to cash. AutoNation does not contend that the Debtor did not have a property interest in its general checking account. That having been established, we are not persuaded that the "earmarking doctrine" is applicable here.

The Ninth Circuit discussed the "earmarking" defense in Superior Stamp & Coin Co., Inc., 223 F.3d at 1004. In Superior Stamp & Coin Co., Inc., a bank lent money to the debtor on the express condition that the money was to be used to pay a specific third-party creditor. The Ninth Circuit defined the scope of the "earmarking" defense:

> [T]he proper inquiry is not whether the funds entered the debtor's account, but whether the debtor had the right to disburse the funds to whomever it wished, or whether their

> disbursement was limited to a particular old creditor or creditors under the agreement with the new creditor.

223 F.3d at 1009.

We note first that in Superior Stamp & Coin Co., Inc., the bank lent new money specifically to replace a pre-existing debt. The bank, a new creditor, substituted itself in place of the old creditor that was paid with the "earmarked" money. Here, House of Imports did not loan any money to the Debtor to replace any pre-existing debt and it did not replace any existing creditor. It paid its own debt to the Debtor as evidenced by the Round2 Invoices. The bank in Superior Stamp & Coin Co., Inc. had no duty to pay the debtor for anything. In contrast, House of Imports was obligated to pay Debtor for its advertising services as a matter of contract law.

Further, there is no evidence that House of Imports conditioned its payment of the Round2 Invoices with a restriction that some or any of the money must, in turn, be paid to AutoNation. Rather, the evidence reveals only that there was a collateral agreement between the Debtor and AutoNation such that when House of Imports did pay a Round2 Invoice, then the Debtor would reimburse AutoNation for some portion of the Invoice that Round2 had allocated to the Prepaid Advertising. Until those checks were negotiated by AutoNation, the Debtor remained in control of its bank account and had the legal right to disburse funds however it wished. House of Imports was not a party to the Reimbursement Agreement and had no apparent input into the amount of the reimbursements. House of Imports simply paid the Invoices which the Debtor received from Round2. Round2

calculated the portion of its bill that was allocated to the Prepaid Advertising. The Debtor's obligation to pay AutoNation under the Reimbursement Agreement did not arise until after House of Imports paid the Round2 Invoice.

AutoNation offered three types of evidence in support of its earmarking argument: a series of three emails from AutoNation to the Debtor, a form letter from AutoNation to another advertising agency not related to the Debtor (see footnote 8 supra), and testimony regarding AutoNation's business relationship with the Debtor. This evidence only shows that there was a debtor-creditor relationship between the Debtor and AutoNation. It does not establish an "earmarking" agreement of the kind in Superior Stamp & Coin Co., Inc., and it does not establish that AutoNation had any special interest in the Debtor's assets. The Debtor's duty to pay AutoNation may have been conditioned on the timing of House of Imports' payments to the Debtor, but House of Imports' payments to the Debtor were not conditioned or restricted in anyway.

AutoNation argues that House of Imports "delegated" its advertising purchasing to AutoNation and that reimbursement of the Prepaid Advertising was "implicit" in the various agreements between the parties. This argument fails, in part, because the various documents themselves are disconnected and inconsistent. As noted above, House of Imports was not a party to either the MAA or the Reimbursement Agreement. The HOI Agreement makes no mention of the MAA, or the reimbursement of fees paid by House of Imports. Indeed, the Reimbursement Agreement is demonstrably inconsistent with the MAA. The MAA contemplated direct billing

from Infinity to AutoNation and recognized AutoNation's right to deduct the Prepaid Advertising from the bill until the Prepaid Advertising was exhausted. In contrast, the Reimbursement Agreement contemplated direct billing to House of Imports and reimbursement to AutoNation for the Prepaid Advertising after House of Imports paid the bill.

AutoNation's reliance on its right to "reimbursement" as a basis for the earmarking of money paid by House of Imports is misplaced. AutoNation's right to "reimbursement" from the Debtor is not in dispute here, but that right only gave rise to a debtor-creditor relationship between the Debtor and AutoNation. The term "reimbursement" as it applies here refers only to a right to payment on an unsecured claim. Like the bankruptcy court, we decline to extend the application of the earmarking doctrine as AutoNation invites, and hold that the bankruptcy court properly declined to apply it here.

The Bankruptcy Court Correctly Rejected the Constructive Trust Defense.

AutoNation argues that the Subject Payments were traceable to payments from House of Imports and that they were therefore subject to a constructive trust for AutoNation's benefit. A constructive trust is an equitable remedy which the court can impose after a "wrongful" event to avoid unjust enrichment. Taylor Assoc. v. Diamant (In re Advent Mgmt. Corp.), 178 B.R. 480, 486 (9th Cir. BAP 1995) aff'd 104 F.3d 293 (9th Cir. 1997) (citations omitted). Even if it is shown that State law would impose a constructive trust, that remedy will not be given

effect in a bankruptcy case if it contravenes the federal bankruptcy policy favoring ratable distribution to all creditors. Id. at 489 citing Mitsui Mfr. Bank v. Unicom Computer Corp. (In re Unicom Computer Corp.), 13 F.3d 321, 325 n.6 (9th Cir. 1944).

AutoNation argues hypothetically that the Debtor's intentional or negligent failure to make the Subject Payments would have been "wrongful." In doing so, AutoNation seems to suggest that a financially distressed debtor's failure to pay any creditor could be classified as "wrongful." AutoNation asserts the constructive trust here as a substantive right, a condition or vested interest that somehow attached to the Round2 Invoices and transferred to the payments from House of Imports immediately upon receipt by the Debtor. AutoNation's argument fails for two reasons.

First, the Subject Payments were made with business checks drawn on the Debtor's general bank account. Presumably, the payments from House of Imports and all other monies received by the Debtor were commingled in the general bank account. AutoNation failed to show that the Subject Payments could be traced in any logical way to specific receipts from House of Imports.

Second, a necessary element for the imposition of a constructive trust on property is that the property was wrongfully appropriated. Specifically, under California law, "a constructive trust may be imposed on property as a remedy for things 'wrongfully detain[ed]' or 'gain[ed] . . . by fraud, accident, mistake, undue influence, the violation of a trust, or

other wrongful act.'" In re Advent Mgmt. Corp., 104 F.3d at 295 (citing Cal.Civ.Code §§ 2223, 2224).

Here, the funds that were used to make the Subject Payments were not wrongfully appropriated or detained by Debtor. AutoNation does not attempt such an argument. Rather, AutoNation argues in the hypothetical that the money from House of Imports would have been subject to a constructive trust if the Subject Payments had not been made by the Debtor. This represents an unwarranted extension of the constructive trust remedy which we reject. To hold otherwise would sanction the use of this argument by any creditor that sells goods or services to a debtor and does not get paid when its product is resold. Again, the "constructive trust" defense should be narrowly construed as an exception to the trustee's avoiding powers.

We hold therefore that the bankruptcy court properly refused to impose a constructive trust on the Debtor's general bank account to protect the Subject Payments for AutoNation's benefit.

AutoNation Failed to Establish The Ordinary Course Of Business Defense.

The ordinary course of business defense set forth in § 547(c)(2) is to be strictly construed. The intent of Congress in adopting this defense was to insulate from avoidance ordinary trade credit transactions which are kept current. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 373, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6329; see S.Rep. No. 989, 95th

Cong., 1st Sess. 88, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5874.

"The transferee has the burden of proving the defense and must prove each of the three elements by a preponderance of the evidence." Arrow Elec., Inc. v. Justus (In re Kaypro), 230 B.R. 400, 404 (9th Cir. BAP 1999) citing Logan v. Basic Distrib. Corp. (In re Fred Hawes Org., Inc.), 957 F.2d 239, 243-44 (6th Cir. 1992). The defense involves a two-part subjective and objective inquiry. To qualify for "ordinary course of business" protection, a creditor must show by a preponderance of the evidence that 1) both the debt and its payment were "ordinary" in relation to past practices between the debtor and the creditor; and 2) the payment was "ordinary" in relation to prevailing business standards.[12] Sulmeyer v. Suzuki (In re Grand Chevrolet, Inc.), 25 F.3d 728, 732 (9th Cir. 1994)(quoting Mordy v. Chemcarb, Inc. (In re Food Catering & Hous., Inc.), 971 F.2d 396, 398 (9th Cir. 1992)).

The bankruptcy court concluded that there was no evidence in the record to establish the subjective component - the prior business practice between the Debtor and AutoNation. AutoNation challenges this conclusion on appeal and contends that the

[12]The Bankruptcy Abuse and Consumer Protection Act of 2005 amended § 547(c)(2) to replace the conjunction "and" with "or" thus making the two "ordinary course of business" inquires disjunctive. In bankruptcy cases filed on or after October 17, 2005, the defense can be established by a showing that the disputed transfer of property was consistent with either the subjective or the objective test.

relevant documents, invoices, checks, etc., are in the record.[13] In response we note Ms. Wertheim's deposition testimony which supports a finding that the Subject Payments, the last two Payments made after August 2002, were not made pursuant to the terms of the Reimbursement Agreement and were not consistent with the prior course of business between the parties. With that evidence in the record, it is not necessary that we review the offered documents to determine how the parties actually conducted their business affairs prior to August 2002. Further, we are persuaded that the bankruptcy court's ruling can be affirmed on other grounds, i.e., AutoNation's failure to establish the second prong of the two-part test – the objective "prevailing business standards" test.

AutoNation was required to establish that its relationship with the Debtor, as evidenced by the Reimbursement Agreement, fell within the broad spectrum of business relationships accepted as "ordinary" within the advertising industry generally. The scope of this test was discussed in Jan Weilert RV, Inc., 315 F.3d at 1198. The court stated that:

> "Only a transaction that is so unusual or uncommon 'as to render it an aberration in the relevant industry,' In re Carled, 91 F.3d at 818, falls outside the broad range of terms encompassed by the meaning of 'ordinary business terms.'"

In this statement, the Jan Weilert RV, Inc. court implicitly recognized that there is a point at which certain

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[13]AutoNation did lodge as exhibits in support of its summary judgment motion copies of Round2 Invoices and checks to AutoNation dating between November 2001 and December 2002.

business conduct takes a transaction, or even a series of transactions, outside the wide range of "ordinary" business terms within that industry.

The Jan Weilert RV, Inc. court held that "ordinary business terms" cannot be reduced to a "bright line" test. 315 F.3d at 1200. Instead, the bankruptcy court must look at the broad range of business terms within an industry to determine what the ordinary business terms are within the industry, the goal being to protect ordinary trade credit transactions within the industry. 315 F.3d at 1198.

Here, AutoNation presented no evidence of any practice within the advertising industry for either the prepayment of advertising, or the reimbursement of prepaid advertising services after they were rendered. Ms. Wertheim stated in her declaration regarding the Reimbursement Agreement that "AutoNation had the same agreement with other advertising agencies around the country and each was handled in a similar way." This statement stops short of suggesting that the prepayment of advertising and reimbursement of fees is an "ordinary" business practice within the general advertising industry. Indeed, Ms. Wertheim confirmed the limited application of AutoNation's "reimbursement" scheme which she described as a "unique transaction involving Infinity."

AutoNation does not contend that its arrangement with the Debtor was recognized anywhere else in the advertising industry. Indeed, AutoNation argues instead that its arrangement with the Debtor was so unique that the court should reject the objective "industry standard" test altogether. AutoNation acknowledged in

its opening brief "this was a unique business arrangement for which there could never be an 'industry standard.'" AutoNation cites Jan Weilert RV, Inc. for the proposition that the court could disregard the "industry standard" under the circumstances of this case. We disagree.

The facts of Jan Weilert RV, Inc. are not at all analogous to the facts in this case. Jan Weilert RV, Inc. involved an erroneous overpayment which was quickly refunded by the debtor. The court recognized that an erroneous double payment was highly unusual and that there was no "industry standard" for reimbursement of money that was not owed to the debtor in the first place. The holding in Jan Weilert RV, Inc. was expressly limited to its "exceptional" facts. "While we hold to the rule that evidence as to the range of industry practice is ordinarily required, the problem of refunds of mistaken payments is exceptional." 315 F.3d at 1200.

Here, the record does not show that the Subject Payments were part of a unique or erroneous transaction of the level addressed in Jan Weilert RV, Inc. The Subject Payments were not the product of a unique or isolated incident like the erroneous double payment in Jan Weilert RV, Inc. The Debtor and AutoNation entered into and performed under the Reimbursement Agreement for more than one year before the Subject Payments were made. Unlike Jan Weilert RV, Inc.'s obligation to repay an erroneous overpayment, House of Imports' duty to pay the Debtor for its advertising services was legally disconnected from the Debtor's duty to AutoNation under the Reimbursement Agreement.

AutoNation's argument on appeal, that there is no industry standard for its "reimbursement" arrangement with the Debtor, actually reinforces the Trustee's contention that the Subject Payments were "outside the broad range of terms encompassed by the meaning of 'ordinary business terms.'" Jan Weilert RV, Inc., 315 F.3d at 1198. We hold therefore that the bankruptcy court properly declined to apply the "ordinary course of business" defense to the facts of this case.

The Bankruptcy Court Did Not Err In Failing To Rule On The New Value Defense.

AutoNation argues that the Debtor received "new value" when House of Imports paid Round2 invoices after the November Payment was made, and that the "new value" defense under § 547(c)(4) should apply to offset some or all of the Subject Payments. The record does not show that the bankruptcy court made a ruling on this defense.[14]

The plain language of § 547(c)(4) requires that the creditor, who received or benefitted from the alleged preferential payment, must provide "new value" to the debtor after the payment is made. The term "new value" as offered here is specifically defined in § 547(a)(2) to mean "money or money's worth in goods, services, or new credit ... but does not include

[14]Again, the Tentative Ruling is not in the record and the issue was not argued at the October Hearing. When the bankruptcy judge asked AutoNation's counsel at the October hearing if he had anything else to argue after the "earmarking" and "ordinary course" discussions, AutoNation's counsel replied "No, your Honor."(Oct. Hr'g. Tr. 10:1.)

an obligation substituted for an existing obligation." AutoNation offered no evidence that the Debtor received any money, goods, services or new credit from AutoNation after AutoNation received either of the Subject Payments. Indeed, AutoNation acknowledges in its opening brief that AutoNation was not a provider of goods and services to the Debtor. On its face, the "new value" defense is therefore not available to AutoNation.

The Debtor was providing advertising to House of Imports and invoicing House of Imports for those services. AutoNation and House of Imports were separate corporations with separate checking accounts. House of Imports, and not AutoNation, was contractually obligated to pay the Debtor for those services once rendered. The obligations created upon tender of House of Import's checks merely substituted for those existing contractual obligations; the payments from House of Imports did not increase or diminish the Debtor's total assets and were not "new value" within the meaning of § 547(c)(4). We decline to apply the defense of "new value" to the facts of this case.

IX. CONCLUSION

We hold that the bankruptcy court properly resolved the issues by summary judgment. The Trustee established a prima facie case for avoidance and recovery of the Subject Payments under §§ 547(b) and 550. AutoNation failed to establish any of its defenses or show why the Trustee was not entitled to judgment as a matter of law on the undisputed facts. Accordingly, the judgment of the bankruptcy court is AFFIRMED.