

MAR 12 2007

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

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

In re:)	BAP No.	CC-05-1455-LBP
)		
MARON & DAVIS ADVERTISING, INC.,)	Bk. No.	LA 03-12640-SB
)		
Debtor.)	Adv. No.	LA 04-02687-SB
)		
_____)		
AUTONATION, INC.,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
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.

¹This 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.

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

1 **I. INTRODUCTION**

2 In this appeal, we examine whether the bankruptcy court
3 erred in granting summary judgment for the chapter 7 trustee
4 (the "Trustee"), against defendant/appellant AutoNation, Inc.
5 ("AutoNation"), in a preference action brought under 11 U.S.C.
6 § 547(b)³. The bankruptcy court denied AutoNation's motion for
7 summary judgment and granted the Trustee's counter-motion for
8 summary judgment. The bankruptcy court concluded that
9 AutoNation had not established any of its defenses. AutoNation
10 contends that the bankruptcy court erred in its application of
11 the law to the undisputed facts. We AFFIRM.

12 **II. FACTS**

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

21 AutoNation was an automobile retailer which had a
22 relationship with several affiliated companies. AutoNation also
23 operated an outdoor advertising business known as Republic
24

25 ³Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 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.

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

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

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

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

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

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

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

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

14 On or about November 29, 2002, AutoNation received and
15 deposited a check drawn on the Debtor's bank account in the
16 amount of \$50,405 (the "November Payment"). The November
17 Payment related to Prepaid Advertising used by House of Imports
18 in the month of August 2002. On or about December 27, 2002,
19 AutoNation received and deposited another check from the Debtor
20 in the amount of \$41,862.50 (the "December Payment").⁵ The
21

22
23 ⁴The HOI Agreement references the production of a bi-
24 monthly "AutoNation Newsletter" at a cost of \$1,000 per
25 month. This part of the HOI Agreement was not discussed in
relationship to any of the issues before the bankruptcy
court.

26 ⁵The November and December Payments were issued on November
27 15 and December 19 respectively. The record is silent as to when
28 these checks were actually delivered to AutoNation. The above
dates represent the dates that the Payments actually cleared the
Debtor's checking account.

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

7 **III. PROCEDURAL BACKGROUND**

8 The Debtor filed for relief under chapter 7 of the
9 Bankruptcy Code on January 29, 2003. The Debtor scheduled
10 AutoNation as an general unsecured creditor with a claim of
11 \$64,600, presumably for money owed under the Reimbursement
12 Agreement. Altogether, the Debtor scheduled unsecured
13 nonpriority claims in excess of \$802,000. The assets
14 administered by the Trustee were not sufficient to pay 100% of
15 the unsecured claims.

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

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

25
26 ⁶In October 2005, the bankruptcy court approved a stipulated
27 Joint Pretrial Order which set forth a number of undisputed facts
28 (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 (1) the Subject Payments were covered by the earmarking
2 doctrine, (2) the Subject Payments were protected by a
3 constructive trust,⁷ (3) the Subject Payments were made in the
4 ordinary course of business, and (4) the Debtor received new
5 value after the Subject Payments were made.

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

18
19
20 ⁷AutoNation did not raise the "constructive trust" as an
21 affirmative defense in its responsive pleading. The issue first
22 appears in the record in AutoNation's summary judgment brief.
23 The Trustee did not raise the "failure to plead" issue but
elected to respond to the "constructive trust" argument on the
merits.

24 ⁸The record includes a copy of a letter dated April 26,
25 2001, from AutoNation to another advertising agency, Zimmerman &
26 Partners, relating to the placement of advertising on Infinity
27 radio stations. That letter outlines an elaborate scheme for
28 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.

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

15 AutoNation objected to the Trustee's counter-motion for
16 summary judgment on procedural grounds. Thereafter, on August
17 30, the court held a hearing and ordered further briefing. The
18 transcript of that hearing is not in the record. However, on
19 September 8, the bankruptcy court issued a "Scheduling Order" to
20 resolve the procedural issues. The Trustee was ordered to file
21 additional briefs, including a Separate Statement of Undisputed
22 Facts in support of her counter-motion. AutoNation responded
23 with a Statement of Genuine Facts in Controversy. The summary
24 judgment motions were set for oral argument on October 4, 2005
25 (the "October Hearing").

26 IV. THE BANKRUPTCY COURT'S RULING

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

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

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

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

25 ⁹After the October Hearing, the Trustee submitted the
26 order which is now on appeal denying AutoNation's motion and
27 granting her counter-motion. That order summarily states
28 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"

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

8 Earmarking doctrine requires the existence of an agreement
9 between a new lender and the Debtor that new funds will be
10 used to pay a specified antecedent debt. I have not seen
11 an agreement . . . which has that specific provision, or
12 anything from which that can be inferred. (Oct. Hr'g. Tr.
13 10:16-23.)

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

21 The proper inquiry is not whether the funds entered the
22 Debtor's account, but whether the Debtor had the right to
23 disburse the funds to whomever it wished, or whether their
24 disbursement was limited to a particular old creditor or
25 creditors under the agreement with the new creditor.
26 Further, [s]o long as the funds are advanced on the
27 condition that they be used to pay that specific creditor.
28 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:

1 Is there the evidence before the Court, sir, that
2 prepayment is ordinary course both between the Debtor and
creditor and in the industry? (Oct. Hr'g. Tr. 5:14-16.)

3 Ordinary course of business, [s]ection 547(c)(2), provides
4 a defense of ordinary course of business: To the extent
5 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.)

6 The court finds the evidence wanting with respect to what
7 was the ordinary course of business between the Debtor and
8 this particular creditor. What happened between the
parties in the past is simply not shown. (Oct. Hr'g. Tr.
13:5-8.)

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

14 **V. ISSUES ON APPEAL**

- 15 1. Whether the bankruptcy court properly concluded that
16 there were no triable issues of material fact and that
the issues could be adjudicated by summary judgment;
- 17 2. Whether the bankruptcy court properly concluded that
18 the "earmarking doctrine" was not applicable;
- 19 3. Whether the bankruptcy court properly concluded that
20 the payments made to the Debtor by House of Imports
were not subject to a constructive trust for
AutoNation's benefit;
- 21 4. Whether the bankruptcy court properly concluded that
22 AutoNation had failed to prove each element of the
"ordinary course of business" defense; and
- 23 5. Whether the bankruptcy court erred in not making any
24 ruling on the "new value" defense.

25 **VI. STANDARD OF REVIEW**

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

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

4 **VII. JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C.
6 §§ 1334 and 157. We have jurisdiction under 28 U.S.C.
7 § 158(b)(1).

8 **VIII. ANALYSIS**

9 **Applicable Law**

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

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

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

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

4 (2) to the extent that such transfer was-

5 (A) in payment of a debt incurred by the debtor
6 in the ordinary course of business or
7 financial affairs of the debtor and the
8 transferee;

9 (B) made in the ordinary course of business or
10 financial affairs of the debtor and the
11 transferee; and

12 (C) made according to ordinary business terms.

13

14 (4) to or for the benefit of a creditor, to the
15 extent that, after such transfer, such creditor
16 gave new value to or for the benefit of the
17 debtor.

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

21 The appellate court's review is governed by the same
22 standard used by the bankruptcy court under Federal Rule of
23 Civil Procedure 56(c) (made applicable to this adversary
24 proceeding by Rule 7056). Adcock v. Chrysler Corp., 166 F.3d
25 1290, 1292 (9th Cir. 1999). We must determine, viewing the
26 evidence in the light most favorable to the nonmoving party,
27 whether there are any genuine issues of material fact and
28 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

1 affect the outcome of the case. Anderson v. Liberty Lobby,
2 Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

3 The court must decide if the moving party is entitled to
4 judgment as a matter of law based on the undisputed facts as
5 established. FED.R.CIV.P. 56(c). To defeat summary judgment,
6 the nonmoving party must go beyond the pleadings and, by its own
7 affidavits or discovery, "set forth specific facts showing that
8 there is a genuine issue for trial." FED.R.CIV.P. 56(e).
9 Celotex Corp. v. Catrett, 477 U.S. 317, 322, n.3, 106 S.Ct.
10 2548, 91 L.Ed.2d 265 (1986).

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

23
24 ¹¹AutoNation's statement of issues on appeal sets forth
25 six separate grounds for error, including whether there were
26 triable issues of material fact. AutoNation's opening brief
27 includes a statement of the issues required by Rule
28 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.

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

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

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

21 AutoNation did not meet its burden, or even attempt to
22 establish before the bankruptcy court that there was a triable
23 issue of fact. Based on AutoNation's insistence that all
24 pertinent facts are in the record, its failure to argue before
25 the bankruptcy court that there were any triable issues of
26 material fact, and its failure to perfect that issue on appeal,
27 we conclude that the "triable issue of material fact" issue has
28 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

3 223 F.3d at 1009.

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

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

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

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

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

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

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

17
18 **The Bankruptcy Court Correctly Rejected the Constructive**
19 **Trust Defense.**

20 AutoNation argues that the Subject Payments were traceable
21 to payments from House of Imports and that they were therefore
22 subject to a constructive trust for AutoNation's benefit. A
23 constructive trust is an equitable remedy which the court can
24 impose after a "wrongful" event to avoid unjust enrichment.
25 Taylor Assoc. v. Diamant (In re Advent Mgmt. Corp.), 178 B.R.
26 480, 486 (9th Cir. BAP 1995) aff'd 104 F.3d 293 (9th Cir. 1997)
27 (citations omitted). Even if it is shown that State law would
28 impose a constructive trust, that remedy will not be given

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

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

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

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

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

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

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

20
21 **AutoNation Failed to Establish The Ordinary Course Of**
22 **Business Defense.**

23 The ordinary course of business defense set forth in
24 § 547(c)(2) is to be strictly construed. The intent of Congress
25 in adopting this defense was to insulate from avoidance ordinary
26 trade credit transactions which are kept current. See H.R.Rep.
27 No. 595, 95th Cong., 1st Sess. 373, reprinted in 1978 U.S. Code
28 Cong. & Ad. News 5787, 5963, 6329; see S.Rep. No. 989, 95th

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

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

18 The bankruptcy court concluded that there was no evidence
19 in the record to establish the subjective component - the prior
20 business practice between the Debtor and AutoNation. AutoNation
21 challenges this conclusion on appeal and contends that the
22
23

24
25 ¹²The Bankruptcy Abuse and Consumer Protection Act of
26 2005 amended § 547(c)(2) to replace the conjunction "and"
27 with "or" thus making the two "ordinary course of business"
28 inquires disjunctive. In bankruptcy cases filed on or after
showing that the disputed transfer of property was
consistent with either the subjective or the objective test.

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

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

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

23 In this statement, the Jan Weilert RV, Inc. court
24 implicitly recognized that there is a point at which certain
25

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

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

4 The Jan Weilert RV, Inc. court held that "ordinary business
5 terms" cannot be reduced to a "bright line" test. 315 F.3d at
6 1200. Instead, the bankruptcy court must look at the broad
7 range of business terms within an industry to determine what the
8 ordinary business terms are within the industry, the goal being
9 to protect ordinary trade credit transactions within the
10 industry. 315 F.3d at 1198.

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

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

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

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

17 Here, the record does not show that the Subject Payments
18 were part of a unique or erroneous transaction of the level
19 addressed in Jan Weilert RV, Inc. The Subject Payments were not
20 the product of a unique or isolated incident like the erroneous
21 double payment in Jan Weilert RV, Inc. The Debtor and
22 AutoNation entered into and performed under the Reimbursement
23 Agreement for more than one year before the Subject Payments
24 were made. Unlike Jan Weilert RV, Inc.'s obligation to repay an
25 erroneous overpayment, House of Imports' duty to pay the Debtor
26 for its advertising services was legally disconnected from the
27 Debtor's duty to AutoNation under the Reimbursement Agreement.
28

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

9
10 **The Bankruptcy Court Did Not Err In Failing To Rule On The**
11 **New Value Defense.**

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

18 The plain language of § 547(c)(4) requires that the
19 creditor, who received or benefitted from the alleged
20 preferential payment, must provide "new value" to the debtor
21 after the payment is made. The term "new value" as offered here
22 is specifically defined in § 547(a)(2) to mean "money or money's
23 worth in goods, services, or new credit ... but does not include
24

25
26 ¹⁴Again, the Tentative Ruling is not in the record and the
27 issue was not argued at the October Hearing. When the bankruptcy
28 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.)

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

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

20 **IX. CONCLUSION**

21 We hold that the bankruptcy court properly resolved the
22 issues by summary judgment. The Trustee established a prima
23 facie case for avoidance and recovery of the Subject Payments
24 under §§ 547(b) and 550. AutoNation failed to establish any of
25 its defenses or show why the Trustee was not entitled to
26 judgment as a matter of law on the undisputed facts.
27 Accordingly, the judgment of the bankruptcy court is AFFIRMED.
28