NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. CC-05-1179-PaJK
	CC-05-1207-PaJK
HEARTBEAT OF THE CITY, N.W., INC.,	(Consolidated)
	Bk. No. LA 99-45650-EC
Debtor.	
	Adv. No. LA 01-02307-EC
HOWARD EHRENBERG, Chapter 7 Trustee,	
Appellant,	
v.	**M E M O R A N D U M**[1]
BERT TENZER; HEARTBEAT OF THE NATION,	
Appellees.	

Argued and Submitted on February 23, 2006
at Pasadena, California

Filed - April 5, 2006

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

Honorable Ellen Carroll, Bankruptcy Judge, Presiding.

Before: PAPPAS, JAROSLOVSKY[2] and KLEIN, Bankruptcy Judges.

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

[2] Hon. Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

Howard Ehrenberg ("Ehrenberg"), the chapter 7[3] trustee, appeals two orders of the bankruptcy court entered in an adversary proceeding: (1) Order and Judgment entered in favor of defendant Bert Tenzer ("Tenzer") on May 6, 2005, "that Plaintiff [Ehrenberg] take nothing by way of this complaint against Bert Tenzer"; and (2) Order Denying Motion for Default Judgment against defendant Heartbeat of the Nation ("HBN") entered April 20, 2005.[4] We AFFIRM.

FACTS

Tenzer is a writer, producer and director of theatrical feature films for television. In 1990, he created a television series called Heartbeat of the City ("HBOC"). HBOC is a series of 30-minute "infomercials," i.e., programs created to promote and market products, services and commercial activities of various business, commercial and professional interests and entities. To produce and market HBOC, Tenzer formed a business called Heartbeat

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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 promulgated and enacted prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCA"), Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

[4] The Clerk issued an Order on July 1, 2005, compelling Ehrenberg to establish BAP jurisdiction in light of the apparent interlocutory nature of the two orders on appeal. Ehrenberg responded by submitting a copy of an Amended Judgment entered by the bankruptcy court on July 28, 2005, providing "that the Plaintiff shall take nothing by way of his complaint against defendants Bert Tenzer and Heartbeat of the Nation and that judgment is hereby entered in favor of defendants Bert Tenzer and Heartbeat of the Nation." In an order entered September 23, 2005, our motions panel determined that entry of the Amended Judgment satisfied any finality concerns and consolidated the appeals. As explained below, we agree with the conclusion of the motions panel.

of the City U.S.A., Inc. ("HBOC-USA") and incorporated it in New York.

From 1990 to 1997, Tenzer produced and marketed HBOC. In addition to HBOC-USA, Tenzer formed a second company, Heartbeat of the Nation ("HBN"), for the sole purpose of processing the payroll of HBOC-USA. HBOC-USA would deposit funds as needed into an HBN account which HBN then used to meet HBOC-USA's payroll.

On December 3, 1997, Tenzer sold all rights to the name and concept of HBOC, and all the assets of HBOC-USA (but not the corporate shell itself), to New World Holding, Inc. ("New World"). The December 3, 1997, sales agreement was signed by Tenzer and by Anthony Moulton ("Moulton") as CEO of New World. The purchase price was $3 million, of which $2 million was paid immediately and $1 million was to be paid to Tenzer in deferred monthly payments. The agreement also provided that Tenzer would become an employee for a period of five years and a director of New World, with his compensation solely based on the number of shows he produced in each calendar month, at the rate of $15,000 for the first show and $10,000 for each additional show. Tenzer admits that he performed his duties as writer, producer and director of shows until August 1999. Among his other duties was training new staff members, which included the New World CFO, Ken McBride ("McBride").

Shortly after New World acquired the rights to HBOC, Tenzer dissolved HBOC-USA and allowed HBN to become inactive. Moulton incorporated a new company, Heartbeat of the City, N.W. ("HBOC-NW"), the debtor in this bankruptcy case. HBOC-NW was treated as a subsidiary of New World.

It is alleged that in 1998 and 1999, Moulton and McBride used HBN for processing the payroll of HBOC-NW. Tenzer contends that he repeatedly demanded that HBOC-NW cease using HBN for payroll purposes.

Disputes arose between Tenzer and Moulton. On January 19, 1999, Tenzer and Moulton signed a new agreement by which Tenzer resigned as CEO and director of HBOC-NW and New World; Moulton assumed the position of CEO of HBOC-NW and New World in addition to his position as Chairman.[5] Tenzer became a consultant to the corporations and continued as writer, director and producer of HBOC. As consideration for the January 19 agreement, Tenzer was to be paid all fees, stock acquisition and expenses due to Tenzer from HBOC-NW through January 1999.

Tenzer admits receiving a payment of $120,000 "for current services" on or about February 6, 1999.

On March 8, 1999, another agreement was signed by Tenzer and Moulton which provided for a buyout of all existing obligations to Tenzer dating back to the 1997 purchase. Under this agreement, Tenzer was to be paid $8,000 per month for 46 months in settlement of all amounts due to him for the purchase of his business under the December 1997 purchase agreement. Tenzer was not required to provide any services, nor to assume any continuing duties or obligations to receive these payments. In the event of default in the monthly payments for a period exceeding 45 days, Tenzer had

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[5] No corporate minutes, resolutions or other records of the corporations identified in this appeal were included in the excerpts of record for this appeal. Thus, there is no record of when, or if, the corporations ever formally elected Tenzer or Moulton to these positions. However, from the agreements, it appears that Tenzer ceased to be an officer and director of HBOC-NW and New World on January 19, 1999.

the right to accelerate all payments with the total amount immediately due and payable. In addition, HBOC-NW, New World and Moulton executed a general release holding Tenzer harmless for any claims, litigation or liability of any kind.

Tenzer was not paid according to the terms of the March 1999 agreement, and in a July 20, 1999, letter, Gary J. Cohen, Tenzer's attorney, informed Moulton that Tenzer was owed in excess of $500,000 in connection with the December 1997, January 1999 and March 1999 agreements. The amount allegedly represented the sum of the $360,000 of accelerated payments of $8,000 per month for 45 months, $15,000 for five shows at $3,000 per show, payments of $150,000 owed for the sale of stock, and attorneys' fees, costs and interest.

On August 6, 1999, Tenzer and Moulton executed a Settlement Agreement and Release among New World, HBOC-NW, Moulton as an individual and Tenzer as an individual. Tenzer was to receive $100,000 in exchange for any claims he might have under the December 1997, January 1999 or March 1999 agreements. Tenzer acknowledged receipt of $100,000 on or about August 5, 1999 "from Tony Moulton."

HBOC-NW filed a chapter 7 bankruptcy petition on September 27, 1999. Appellant Howard Ehrenberg was appointed chapter 7 trustee.

In 2001, Ehrenberg commenced avoidance actions against Moulton, McBride and Tenzer and HBN to recover alleged preferences and fraudulent conveyances. The action against Moulton was dismissed after Moulton moved to Connecticut where he filed his own bankruptcy case. The action against McBride resulted in a

$46,326.93 judgment in favor of Ehrenberg. The adversary proceeding against Tenzer and HBN is the subject of this appeal.

The adversary proceeding against Tenzer and HBN was filed on September 21, 2001.[6] As described in a pre-trial order entered by the bankruptcy court, Ehrenberg sought to avoid three preferential transfers made to or for the benefit of Tenzer: the $120,000 payment of February 6, 1999; the $100,000 payment of August 5, 1999; and a payoff of a certain loan for approximately $50,000 which is not at issue in this appeal. Ehrenberg also sought a default judgment against HBN for an allegedly fraudulent transfer in excess of $115,000 made by debtor to HBN, arguing that the debtor did not receive reasonably equivalent value for this transfer.

The bankruptcy court conducted a one-day trial and, thereafter, the parties submitted closing arguments. The bankruptcy court issued oral findings of fact and conclusions of law on April 19, 2005. It found in favor of Tenzer on all four transfers that Ehrenberg sought to avoid. To implement its decision, the bankruptcy court entered an order denying the motion for default judgment against defendant HBN on April 20, 2005.

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[6] Clerk's defaults were originally entered against Tenzer and HBN. When Ehrenberg moved for default judgment, the bankruptcy court dismissed this adversary proceeding along with the remaining HBOC-NW avoidance actions that had been administratively consolidated, because Ehrenberg had failed to file pretrial orders in violation of local bankruptcy rules. Ehrenberg appealed the dismissals to this Panel, which reversed the dismissals and remanded to reinstate the adversary proceedings. Ehrenberg then entered into a stipulation with Tenzer and HBN which provided for setting aside the defaults against them and the filing of an amended complaint by Ehrenberg. Ehrenberg filed his First Amended Complaint against Tenzer and HBN on June 30, 2004. Tenzer filed an Answer, but HBN failed to respond and a clerk's default was entered.

Ehrenberg timely filed a notice of appeal concerning that order on April 29, 2005.

An order that "Plaintiff take nothing by way of his complaint against Bert Tenzer and that judgment is hereby entered in favor of defendant Bert Tenzer" was entered on May 9, 2005. Ehrenberg timely appealed that order on May 12, 2005.

Then, on July 28, 2005, the bankruptcy court entered an Amended Judgment, providing that "plaintiff shall take nothing by way of his complaint against defendants Bert Tenzer and Heartbeat of the Nation, a California corporation, and that judgment is entered in favor of defendants Bert Tenzer and Heartbeat of the Nation, a California corporation." Ehrenberg appealed this third order on August 9, 2005. On September 23, 2005, our motions panel dismissed the appeal of the Amended Judgment as untimely.

Therefore, the Panel has before it the appeals of the bankruptcy court orders of April 20, 2005, and May 9, 2005.

JURISDICTION

The bankruptcy court had jurisdiction over the avoidance action pursuant to 28 U.S.C. § 1334 and § 157(a) and (b)(2)(F) and (H).

Tenzer objects to this Panel's jurisdiction on appeal. First, according to Tenzer, the Order Denying Judgment Against Defendant Bert Tenzer, entered May 9, 2005, is not a final order and was superseded when the Amended Judgment was entered on July 28, 2005. Once the Amended Judgment was entered, Tenzer argues, the Order Denying Judgment was mooted. According to Tenzer, the Amended Judgment became a final judgment when no appeal was taken by Ehrenberg from that Amended Judgment.

Tenzer also argues that the Panel lacks jurisdiction to consider an appeal from the Order Denying Default Judgment Against Defendant Heartbeat of the Nation. He insists it, too, is an interlocutory order.

We disagree with Tenzer's arguments. "Rule 54(b) controls the analysis of finality [of judgments and orders] for purposes of appeal in federal civil actions, including bankruptcy adversary proceedings. Fed. R. Civ. P. 54(b), incorporated by Fed. R. Bankr. P. 7054(a)." Belli v. Temkin (In re Belli), 268 B.R. 851, 855 (9th Cir. BAP 2001). Rule 54(b) provides that in an action where more than one claim for relief is presented, and multiple parties are involved, the bankruptcy court "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon express determination that there is no just reason for delay and upon express direction for entry of judgment." There are two primary consequences if this so-called "Rule 54(b) certification" is not present in an order: (1) the order is interlocutory and not appealable as a final order; and (2) the order may be revised by the bankruptcy court at any time before entry of a judgment adjudicating all the claims as to all the parties. Belli, 268 B.R. at 855-56.

Here, the bankruptcy court did not certify either of the orders appealed as final for purposes of Rule 54(b), and thus, neither was a final order for purposes of appeal under 28 U.S.C. § 158(a). However, as noted above, the Panel previously considered the possible lack of jurisdiction over these appeals. The Panel directed the Clerk to issue an Order to Ehrenberg on July 1, 2005, compelling Ehrenberg to take steps necessary to

establish BAP jurisdiction in light of the apparently interlocutory nature of the two orders on appeal. In response, Ehrenberg provided the Panel with a copy of the bankruptcy court's Amended Judgment of July 28, 2005, "that the Plaintiff shall take nothing by way of his complaint against defendants Bert Tenzer and Heartbeat of the Nation and that judgment is hereby entered in favor of defendants Bert Tenzer and Heartbeat of the Nation."

Clearly, the July 28 Amended Judgment constitutes a final judgment disposing of all remaining claims against all the parties to this appeal by providing that Ehrenberg "take nothing by way of his complaint against [Tenzer and HBN]." As a result, the prior orders entered by the bankruptcy court became immediately appealable. As the Ninth Circuit has observed in a similar situation, "[a] failure to obtain a Rule 54(b) certification is cured and finality is achieved as a practical matter when the [trial court] has since adjudicated all claims with regard to all parties." TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 695 (9th Cir. 2001). In other words, even if the two orders on appeal were not final and appealable before, when the bankruptcy court entered the Amended Judgment, any issues concerning finality of the orders on appeal were resolved.

It is also of no consequence here that Ehrenberg did not timely file his notice of appeal after entry of the Amended Judgment. The Ninth Circuit has instructed in a similar setting that any prematurity that may result from appealing a non-final order is cured by the entry of a final judgment on the merits by the trial court. Eastport Assoc. v. City of Los Angeles (In re Eastport Assoc.), 935 Fd.2d 1071, 1075 (9th Cir. 1991). The

court explained,

> Anderson v. Allstate Insurance Co., 630 F.2d 677 (9th Cir. 1980) set out the rule in this circuit that once a final judgment is entered, an appeal from an order that otherwise would have been interlocutory is then appealable. "There is no danger of piecemeal appeal confronting us if we find jurisdiction here, for nothing else remains in the federal courts." Id. at 681.

935 F.2d at 1074; see also, Ehtridge v. Harbor House Rest., 861 F.2d 1389, 1402 (9th Cir. 1988) (finding jurisdiction because "subsequent events can validate a prematurely filed appeal.")[7]

Simply put, the orders of the bankruptcy court are now final and we have jurisdiction to adjudicate Ehrenberg's appeals under 28 U.S.C. § 158(a) and (b)(1).

STANDARD OF REVIEW

The issues on appeal involve whether the source of the two payments Tenzer admits he received was property of the bankruptcy estate of HBOC-NW, and whether the debtor received "reasonably equivalent value" for other funds transferred to HBN.

Whether the payments to Tenzer were from property of the debtor for purposes of § 547(b) is a question of fact. The bankruptcy court's findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. FED. R. BANKR. P. 8013. Leichty v. Neary (In re Strand), 375 F.3d 854, 857 (9th Cir. 2004). Review under the clearly erroneous standard is significantly deferential; to

[7] This approach is consistent with other Rules, albeit not precisely applicable in this setting. Under Rule 8002(a), a premature notice of appeal filed by a party after announcement of a decision by the bankruptcy court, but before the formal entry of the judgment or order implementing that decision, is treated as though filed after entry of such judgment or order.

reverse a bankruptcy court's fact finding requires that we hold a "definite and firm conviction that a mistake has been committed." Easley v. Cormartie, 532 U.S. 234, 242 (2001); Lentini v. California Center for the Arts, Escondido, 370 F.3d 837, 843 (9th Cir. 2004).

There is no clear statement in the Ninth Circuit case law concerning whether determining if reasonably equivalent value has been given for a transfer for purposes of § 548 is a question of law, subject to de novo review, or a question of fact, subject to the clearly erroneous standard. Eight other circuits,[8] and the leading treatise,[9] consider the issue a question of fact.

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[8] Tex. Truck Ins. Agency v. Cure (In re Dunham), 110 F.3d 286, 288-89 (5th Cir. 1997) offered the following survey of circuit cases determining whether reasonable equivalency is a question of law, subject to de novo review, or a question of fact: Consove v. Cohen (In re Roco Corp.), 701 F.2d 978, 982 (1st Cir. 1983) (factual issue to be reviewed for clear error); Klein v. Tabatchnick & Emmer, 610 F.2d 1043, 1047 (2nd Cir. 1979)(fairness of consideration is generally a question of fact); Morrison v. Champion Credit Corp. (In re Dewey Barefoot), 952 F.2d 795, 800 (4th Cir. 1991)(factual determination that can only be set aside if clearly erroneous); Bundles v. Baker (In re Bundles), 856 F.2d 815, 825 (7th Cir. 1988)(great deference to the district court); Jacoway v. Anderson (In re Ozark Rest. Equip. Co., Inc.), 850 F.2d 342, 344 (8th Cir. 1988)(question of fact reversible only if clearly erroneous); Clark v. Sec. Pac. Bus. Credit, Inc. (In re Wes Dor, Inc.), 996 F.2d 237 (10th Cir. 1993)(suggesting fact question); and Nordberg v. Arab Banking Corp. (In re Chase & Sandborn Corp.), 904 F.2d 588, 593 (11th Cir. 1990)(fair consideration is largely a question of fact). The Dunham court noted that in the Ninth Circuit, according to Prejean, reasonable equivalency is subject to de novo review.

[9] Whether the transfer is for "'reasonably equivalent value' in every case is largely a question of fact as to which considerable latitude must be allowed to the trier of facts." 5 COLLIER ON BANKRUPTCY ¶ 548.05[1][b], pg. 548-35 (15th ed. Rev. 2000); see also, Salven v. Munday (In re Kemmer), 265 B.R. 224, 232 (Bankr. E.D. Cal. 2001) ("In order to determine whether a fair economic exchange has occurred, the court must analyze all the circumstances surrounding the transfer in question.").

In a slightly different context, the Ninth Circuit seemed to analyze the reasonable equivalence of a transfer in a bankruptcy case as a question of law. Maddox v. Robertson (In re Prejean), 994 F.2d 706, 708 (9th Cir. 1993). In Prejean, the court determined that a transfer of security by a debtor to a sibling to secure a "time-barred" debt constituted reasonably equivalent value for purposes of the California fraudulent conveyance laws, invoked in a trustee's avoidance action under § 544(b). The court decided that "moral consideration" could constitute reasonably equivalent value and that the bankruptcy court's refusal to avoid the transfer was proper. The court described the issues raised in the appeal as "legal ones," and the standard of review as de novo, although, for authority, the court cited to its decision in a § 523(a)(2) action. Prejean, 994 F.2d at 708 (citing Siriani v. Nw. Nat. Ins. Co., of Milwaukee, Wisc. (In re Siriani), 967 F.2d 302, 303-304 (9th Cir. 1992).

The Panel notes that the language of the California and federal bankruptcy fraudulent conveyance statutes are similar, and we acknowledge Prejean's statement that "[t]he issues now in dispute are legal ones" and that one of the issues considered in that appeal was the propriety of the bankruptcy court's determination of reasonable equivalent value for a transfer. Nevertheless, under the overwhelming weight of authority, we presume the Court of Appeals for the Ninth Circuit would consider the bankruptcy court's ruling under § 548 on reasonably equivalent value of a transfer to be a question of fact subject to review under the clearly erroneous standard.

ISSUES PRESENTED

1. Did the bankruptcy court clearly err in finding that Ehrenberg failed to prove that the payments to Tenzer of $120,000 on February 6, 1999, and of $100,000 on August 5, 1999, were transfers of property of the debtor?
2. Did the bankruptcy court clearly err in finding that reasonably equivalent value was given to debtor in exchange for the funds transferred to HBN?

DISCUSSION

1. The bankruptcy court did not clearly err in declining to find that the transfers to Tenzer were made from property of the debtor.

Section 547(b) provides that a trustee may avoid a transfer of an interest of the debtor in property that meets these elements:

> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made –
> (A) on or within 90 days before the filing of the petition;
> or
> (B) between ninety days and one year before the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if:
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Section 547(g) assigns the burden of proving these elements to the trustee. And each and every one must be proven before a

transfer may be avoided as a preference. Danning v. Bozak (In re Bullion Reserve of N. Am.), 836 F.2d 1214, 1217 (9th Cir. 1988). The burden of proof standard in preference actions is a preponderance of the evidence. Arrow Elecs., Inc. v. Justus (In re Kaypro), 218 F.3d 1070, 1073 (9th Cir. 2000).[10] The converse of these rules is equally apparent: a failure to prove any element of a preference will doom a trustee's avoidance claim.

When the bankruptcy court evaluated Ehrenberg's two preference claims against these standards, the court found Ehrenberg failed to prove an essential element: that the transfers in question were made from property of the debtor corporation.

To show that a transfer of property of the debtor had occurred, Ehrenberg directed the bankruptcy court's attention to the testimony of Tenzer at trial, where the following exchange occurred between Tenzer and Ehrenberg's counsel:

> Counsel: Okay. Did, did you receive other checks from debtor?
> Tenzer: No.
> Counsel: You never received any other checks from debtor?
> Tenzer: I received the two that we are talking about, and there might have been a few expense checks.
> Counsel: So the two checks that we are talking about, the hundred thousand

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[10] Ehrenberg suggests that the bankruptcy court appeared to apply a higher standard of proof than appropriate in both the preference and fraudulent transfer actions. We disagree. Although the bankruptcy judge did not expressly recite the standard of proof she applied in making her decisions, we conclude that her approach was consistent with a preponderance of the evidence review, i.e., sufficient evidence to persuade a reasonable trier of fact that the proposition being advanced is more likely true than not. See U.S. v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177 B.R. 648, 654 (9th Cir. BAP 1994), aff'd 85 F.3d 1415 (9th Cir. 1996).

dollar ($100,000) check and the hundred and twenty thousand dollar check ($120,000) are the only checks you received from debtor?

Tenzer: Other than, as I say, there might have been expense checks.

Trial Tr. 84:15-25 – 85:1, April 8, 2005. Ehrenberg also cited to other portions of Tenzer's testimony and to his responses to interrogatories where it would appear that Tenzer impliedly supported Ehrenberg's argument that the checks he received for the payments in question came from the debtor.

Contrary to Ehrenberg's arguments, the bankruptcy court found Tenzer's testimony and responses to interrogatories "inconclusive" concerning whether the funds used to pay Tenzer were property of the estate. For example, the court compared the answers given by Tenzer on direct examination by Ehrenberg's attorney in the exchange cited above with his later testimony in response to questions from Tenzer's own attorney on cross-examination:

Counsel: Okay. Did you in fact receive the checks [for $120,000 and $100,000) from debtor?

Tenzer: I received the checks, period.

Counsel: But, but, but any part of that –

Tenzer: I – the, the – I did not – had not [sic] knowledge that it was from the debtor.

Trial Tr. 109:20-24, April 8, 2005. The court considered the two statements by Tenzer contradictory, and therefore, of little value.

The bankruptcy court also examined the interrogatory responses relied upon by Ehrenberg. It noted that the questions asked to Tenzer were general and grouped payments together. As a result, the court observed that, in his responses, Tenzer seemed

to focus less on the source of the payment than on the fact that the payments were for services rendered. On the other hand, where payments were referred to specifically, as in those interrogatories focusing specifically on the $120,000 or $100,000 checks, the court noted that "there is no place that Mr. Tenzer admits that he received a particular payment from the debtor and, in several places in the testimony throughout the trial, as I mentioned, stated that they had come from Mr. Moulton." Trial Tr. 6:8-11, April 19, 2005.

The bankruptcy court considered other aspects of the evidence regarding the source of the $120,000 and $100,000 checks. One issue concerned the bank that issued the checks. Although there was no dispute that the checks were drawn on Chase Bank, the bankruptcy court noted that because they were cashier's checks, the funds used to purchase the checks could not be traced to any particular account. Ehrenberg had been unable to obtain Chase Bank records concerning these cashier's checks without knowing a bank account number or location where the transactions might have taken place.

The bankruptcy court pointed out that Ehrenberg had listed both Moulton, who was the CEO of the debtor, and McBride, the debtor's CFO, as potential witnesses, and that those two individuals would presumably have knowledge of how and when the two checks were obtained and the source of the funds. The court found it significant that Ehrenberg neither summoned them to testify, nor attempted to take their depositions, concerning these critical issues.

Ehrenberg asked the bankruptcy court to infer that the funds to purchase the checks were funded by debtor's assets because debtor had a bank account at Chase, and there were sufficient funds in the account to pay those checks on the dates they were drawn. On the other hand, the court found that there was some evidence that Moulton also had an account at Chase. Further, the bankruptcy court observed that the only financial records presented concerning the debtor's financial affairs in 1998 and 1999 showed that the debtor had $2,400,000 in income in 1998 and $625,000 in income in 1999. The court found that having gross annual income in those amounts did not necessarily establish that in January 1999 the debtor had cash available to purchase a $120,000 check or in November 1999 that it had cash available to purchase the $100,000 check.

For all these reasons – Tenzer's arguably contradictory testimony and vague responses to interrogatories; Ehrenberg's failure to trace source funds of the checks to the debtor via bank records; Ehrenberg's failure to call at trial or to depose the two individuals most knowledgeable about the finances of the debtor and the debtor's banking practice; and Ehrenberg's failure to establish that the debtor had sufficient funds to purchase the checks – the bankruptcy court concluded that Ehrenberg had not met his burden of proving that the $120,000 and $100,000 checks to Tenzer were transfers of property of the estate. On this record, we cannot say the bankruptcy court committed clear error in this regard. Instead, it appears the bankruptcy court applied the correct legal standard in evaluating the preference claims, and it supported its conclusion that no preference has been proven with

adequate findings of fact stated on the record.[11] While the inferences sought by Ehrenberg may have been justified if drawn, we are not persuaded that the bankruptcy court was required to draw them as a matter of law. The decision by the bankruptcy court to deny Ehrenberg's preference claims against Tenzer must therefore be affirmed.

2. The bankruptcy court did not commit clear error in declining to find that less than reasonably equivalent value was given to debtor in exchange for funds transferred to HBN.

As a preliminary matter, we note the following paragraph in Ehrenberg's Opening Brief regarding the fraudulent transfer claim:

> In order to secure a Default Judgment against Defendant Heartbeat of the Nation, Trustee Ehrenberg's burden of proof was to state a prima facia [sic] case that the transfer to Defendant HBN was a fraudulent conveyance under either State or Federal Law. This required a showing that (a) a transfer was made, (b) at a time when Debtor was insolvent, (c) for less than adequate consideration. See, CALIFORNIA CODE OF CIVIL PROCEDURE § 3439 and 11 U.S.C. § 548.

Ehrenberg never asserted a claim for avoidance of the transfer from debtor to HBN under the California Uniform Fraudulent Conveyance Act and his powers under § 544(b) in the bankruptcy court. As a result, he can not now, for the first time, argue such a claim on appeal.[12] Zenith Prods. v. AEG

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[11] As noted earlier, the bankruptcy court's rejection of a third preference claim for payment of a $50,000 debt on behalf of Tenzer was not challenged in Ehrenberg's appeal.

[12] Even were it possible for Ehrenberg to raise this new claim at this late stage of the proceedings, we note that (continued...)

Acquisition Corp. (In re AEG Acquisition Corp.), 161 B.R. 50 (9th Cir. BAP 1993), citing U.S. v. Oregon, 769 F.2d 1410, 1414 (9th Cir. 1985).[13] And because Ehrenberg has not properly presented to the bankruptcy court a fraudulent conveyance claim based on state law, Ehrenberg cannot invoke the California rule that the burden of proof shifts to the transferee once a showing has been made that the debtor was insolvent when the transfer was made. See Mayors v. Comm'r, 785 F.3d 756, 760 (9th Cir. 1986).

Ehrenberg also does not clearly indicate whether he seeks avoidance of the transfer in question under § 548(a)(1)(A) or (a)(1)(B). Because he never sought to establish in the bankruptcy court that debtor made this transfer with the intent to hinder, delay or defraud its creditors, and by focusing his argument on "reasonably equivalent value," we assume that Ehrenberg is proceeding under § 548(a)(1)(B), the subsection governing constructive fraudulent transfers.

To avoid a constructive fraudulent transfer, Ehrenberg must prove each and every one of the elements of § 548(a)(1)(B) by a preponderance of the evidence:

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[12](...continued)
Ehrenberg failed to plead or prove an essential element of a § 544(b)(1) claim in the bankruptcy court, (i.e., the existence of an unsecured creditor holding an allowed claim who could avoid the transfer).

[13] In Zenith Prods., this Panel noted that it might consider entertaining a new issue on appeal under "extraordinary circumstances." Zenith Prods., 161 B.R. at 55-56. The Panel and the Ninth Circuit, however, are extremely reluctant to consider new issues on appeal where the issue does not involve a "pure" question of law. Id. at 56, citing Telco Leasing, Inc. v. Transwestern Title Co., 630 F.2d 691, 692 (9th Cir. 1980). The new issue here, an assertion of a claim for avoidance under state law, is not a pure question of law.

> The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the filing of the petition, if the debtor voluntarily or involuntarily . . .
>
> (B)(i) received less than reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> (III)intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

The trustee must show that the debtor received less than reasonably equivalent value for the transfer. See Field v. United States (In re Abatement Envtl. Res., Inc.), 102 Fed. Appx. 272 (4th Cir. 2004); Mellon Bank, N.A. v. Metro. Commc'ns, Inc., 945 F.2d 655 (3rd Cir. 1991); CLC Corp. v. Citizens Bank of Cookville, Tenn. (In re CLC Corp.), 833 F.2d 1011 (6th Cir. 1987). See also 5 COLLIER ON BANKRUPTCY ¶ 548.10 (2005).

The bankruptcy court did not address whether Ehrenberg established all of the elements for avoidance of the transfer under § 548(a)(1)(B).[14] As it had done in its preference analysis,

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[14] One key element of Ehrenberg's claim, that property of the debtor was transferred from debtor to HBN, was admitted by the parties. Although not mentioned in the bankruptcy court's findings of fact, the deposition testimony of attorney Parker was that she had reviewed the books and records of the debtor and they showed that at least $115,000 was transferred from HBOC-NW to HBN (continued...)

the court concentrated on one of the required elements, and finding Ehrenberg's proof lacking, the court denied the avoidance claim. In particular, the bankruptcy court found Ehrenberg failed to prove that the debtor received less than reasonably equivalent value in exchange for the transfer in question. The court's decision on this issue centered on whether there was proof that the money transferred by debtor to HBN was used to make payroll payments for debtor's employees, or whether the funds were used for some other purpose, such as that alleged by Ehrenberg, to benefit Tenzer.

Ehrenberg asserts in his Opening Brief that:

> During pretrial discovery, as well as during trial, Trustee Ehrenberg solicited evidence from Defendant Tenzer, the sole officer, director, and shareholder of Defendant HBN, in support of Defendant Tenzer's allegation that the $126,338.00 transfer was used to pay wages to individuals who rendered services for the benefit of Debtor. Defendant Tenzer, however, failed to produce any evidence to support this claim. The only evidence presented by Defendant Tenzer consisted of Defendant Tenzer's Trial Exhibit I, a 1999 Tax Return, which showed that HBN paid out $126,338.00 in wages in 1999. This tax return, however, contains no evidence to whom those wages were paid, or more specifically as was actually required, evidence that these individuals actually rendered services to or for the benefit of Debtor. Note, the W-3s attached to Defendant Tenzer's Trial Exhibit I, the 1999 Tax Return, were actually W-3s for the Tax Year 1998.

The only evidence before the bankruptcy court concerning the reasonable equivalence of the benefits or services received by

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[14](...continued)
in 1999. And Tenzer admitted that HBN received payroll funds from HBOC-NW in 1999, and he had records showing who was paid with those funds.

debtor in return for the funds transferred to HBN was: (1) the testimony of Tenzer that the funds were intended for, and used for, payment of debtor's payroll; (2) a tax return showing that the payroll expenses on the tax return were approximately equal to the amounts transferred by the debtor to HBN; (3) W-3 forms attached to the tax return; (4) testimony of Mr. Firewalker, a former employee of Debtor, who looked through the W-3 forms and testified that they were for debtor's employees. Firewalker testified that he recognized the names of the employees listed in the returns because he had hired many of them for the debtor.

Ehrenberg argued that Tenzer and HBN failed to produce any evidence to support its claim that $126,338.00 transferred to HBN was actually used to pay wages for HBOC-NW's staff. Ehrenberg also noted that the W-3 forms attached to the tax return were for the incorrect year. Finally, Ehrenberg argued that since Tenzer had control of the tax records of HBN, his failure to produce correct documentation concerning disposition of the transferred funds should result in an adverse inference that the debtor received no benefit from that transfer.

Ehrenberg's arguments are unavailing for the same reason: they each assume it was Tenzer/HBN's burden to show the funds were used to pay debtor's payroll, when instead, it was Ehrenberg's burden to prove the funds were committed to some other use (i.e., to benefit Tenzer) for which debtor received no reasonably equivalent value. While the evidence is not particularly enlightening concerning the circumstances surrounding this transfer, and there was some evidence that the funds, when transferred to HBN, may not have been used to make payroll

payments, there was also evidence adduced at trial from which it could be inferred that the money was indeed distributed by HBN for debtor's payroll.

The bankruptcy court noted that Tenzer had historically used HBN for purposes of making payroll payments, and that after Tenzer sold the company, Moulton and his associates continued this practice, something which Tenzer demanded they stop. During this period, Tenzer had no control over the payroll account.

The bankruptcy court was also unpersuaded by Ehrenberg's tax return evidence:

> So the trustee wants the Court to make inferences that because the wrong W-2's were attached to the tax return any money that actually was paid by the debtor Heartbeat of the Nation must have gone to Mr. Tenzer, a former Officer and Director of Heartbeat of the Nation, and must have been paid for his benefit. There is a complete failure of evidence on this issue, and the trustee who has the burden of proof here has not met it, has not called any of the witnesses who could have shed some light on the problem with the tax return. And for that reason, I'm going to find in favor of the - - Mr. Tenzer on this claim as well.

Trial Tr. 21:3-13, April 19, 2005.

Again, it was Ehrenberg's burden to prove that debtor did not receive reasonably equivalent value for the money transferred from debtor to HBN. Instead, the bankruptcy court found: "I don't think the trustee has established that there was a fraudulent conveyance, that any benefit was given to Mr. Tenzer for anything . . . less than fair value." Trial Tr., 22:9-12, April 19, 2005).

While the bankruptcy court might have inferred from the evidence that the money transferred to HBN by the debtor was not used to make payroll payments to the debtor's employees, the court

was not compelled to draw such an inference. In contrast, there was evidence in the record from which the bankruptcy court could infer that the funds in question were in fact used for payroll payments for the debtor. Because there were two plausible interpretations of the evidence, the bankruptcy court's finding that Ehrenberg failed to prove that debtor received less than reasonably equivalent value for funds transferred is not clearly erroneous. S.E.C. v. Rubera, 350 F.3d 1084, 1093-94 (9th Cir. 2003)("So long as the district court's view of the evidence is plausible in light of the record viewed in its entirety, it cannot be clearly erroneous, even if the reviewing court would have weighed the evidence differently had it sat as the trier of fact.").

CONCLUSION

For these reasons, we AFFIRM the decision of the bankruptcy court in all respects.