



1 The confirmed plan of the appellee provided for the  
2 remediation of Ponzi scheme activities by authorizing the  
3 revested debtor to sue under Arizona's Uniform Fraudulent  
4 Transfer Act ("UFTA") to recover excess returns from "net  
5 winners" in the Ponzi scheme who had received more than their  
6 investments. The appellants, who received interest at rates of  
7 up to 25 percent per week during the period the debtor was  
8 operated as a Ponzi scheme, appeal the summary judgment avoiding  
9 \$397,313 in transfers to them. We AFFIRM.

10  
11 FACTS

12 United Development, Inc. ("appellee" or "UDI"), an Arizona  
13 corporation in the business of land development, is a revested  
14 debtor whose plan of reorganization was confirmed on January 9,  
15 2001. UDI financed its operations and activities primarily  
16 through syndication fees from limited partnerships that were  
17 established when real estate was purchased in Mesa, Arizona. Due  
18 to a downturn in the real estate market in the late 1980s, the  
19 limited partnerships were not able to adequately fund their  
20 operations.

21 In its effort to continue its operations, help the limited  
22 partnerships, and maintain the real property assets, UDI borrowed  
23 funds from numerous private investors and institutions at  
24 interest rates so high that it became a Ponzi scheme.<sup>1</sup>

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26 \_\_\_\_\_  
27 <sup>1</sup>By mid-1998, UDI had loaned over \$4,000,000 to the limited  
28 partnerships collectively. And, UDI was unable to collect on  
these debts because the limited partners themselves were then  
about \$7,000,000 delinquent in their capital contributions to the  
limited partnerships.

1 Joe Auza ("appellant" or "Auza") was one such investor who  
2 loaned money to UDI. Between September 1997 and December 1998,  
3 Auza loaned UDI \$1,225,000 at interest rates of up to 25 percent  
4 per week and received \$1,622,313 in repayments.<sup>2</sup>

5 UDI could not keep up with its loan payments to Auza and  
6 others like him, which resulted in borrowing additional funds  
7 from existing and new investors to repay previous loans. As a  
8 result of UDI's insufficient assets or profits generated from its  
9 business activities from which to repay its lenders, UDI used the  
10 funds obtained from later lenders to repay the principal and  
11 above-market rates of return to earlier investors.

12 The cycle of borrowing from one set of investors to pay  
13 previous investors caused UDI's liabilities to mount to  
14 unsustainable levels.<sup>3</sup> In October 1998, a Reorganization Team  
15 ("RT"), appointed by UDI, took over UDI's operations, and ceased  
16 the borrowing and paying pattern.

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18 <sup>2</sup>Auza testified:

19 Q And you agreed to loan [UDI] money, and you  
20 took an interest rate of approximately 25  
21 percent per week for those loans. Is that  
correct?

22 A Most of them, yeah.

23 (Auza Dep. 34:20-23, July 26, 2005)

24 <sup>3</sup>UDI claims to have been insolvent since at least 1995 with  
25 large losses aggregating each year. Over 90 percent of the 1995-  
26 1997 losses were attributable to interest expense. According to  
27 UDI's September 30, 1997, Balance Sheet, UDI had assets of  
28 \$9,987,000 and liabilities of \$30,000,000. UDI's primary source  
of capital at this time were funds loaned or "invested" by other  
third parties, not from its business operations.

1 In June 1999, petitioning creditors filed an involuntary  
2 bankruptcy against UDI, which UDI converted to a case under  
3 chapter 11 on September 7, 1999.

4 The RT conducted an investigation into UDI's past financial  
5 affairs and discovered that UDI had been run in the manner of a  
6 Ponzi scheme, with subsequent investors' funds being used to pay  
7 off earlier investors. Recognizing the inequity of UDI's  
8 preference of earlier investors over later investors, the RT  
9 developed a plan of reorganization that permitted the estate to  
10 recover from those UDI creditors who received amounts in excess  
11 of the principal amount invested. Those individuals who received  
12 more than the principal amount loaned to UDI (i.e., received  
13 their entire investment plus interest) were referred to as  
14 "negative cash-at-risk" or "net winners."<sup>4</sup>

15 To ensure that collective losses of the business were evenly  
16 distributed among all of its investors, UDI brought adversary  
17 proceedings against individual investors that were net winners so  
18 that the proceeds from these actions could be returned to all  
19 similarly situated unsecured creditors.<sup>5</sup>

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21 <sup>4</sup>Creditors that received payment of less than the principal  
22 amount loaned were referred to as "positive cash-at-risk" or "net  
23 losers."

24 <sup>5</sup>UDI based its authority to bring such actions on well-  
25 settled case law holding that, because the "profits" or interest  
26 payments of the scheme are illusory, the only appropriate course  
27 of action is to permit the trustee (or debtor-in-possession) to  
28 maintain actions against the earlier investors (the "net  
winners") on behalf of the more recent investors (the "net  
losers"). See In re Taubman, 160 B.R. 964, 978 (Bankr. S.D. Ohio  
1993); Dicello v. Jenkins (In re Int'l Loan Network, Inc.), 160  
B.R. 1, 7 (Bankr. D.D.C. 1993); see also Official Cattle Contract

(continued...)

1           On September 7, 2001, UDI filed an adversary proceeding  
2 against Auza and his wife (the "Auzas") seeking recovery of  
3 \$497,313 allegedly fraudulently transferred to the Auzas by UDI  
4 while UDI was insolvent, pursuant to Arizona's UFTA, Ariz. Rev.  
5 Stat. § 44-1001 et seq. as applied through 11 U.S.C. § 544(b).  
6 The Auzas denied they received \$497,313 more than they had loaned  
7 and generally denied all other material allegations of the  
8 complaint.

9           UDI filed a motion for summary judgment against the Auzas on  
10 February 8, 2005, re-alleging that the Auzas received \$497,313 in  
11 excess of the complete return of principal invested. An account  
12 analysis and copies of other financial records attached as  
13 exhibits to the motion indicated that, by loaning UDI \$1,225,000  
14 and receiving back at least \$1,722,313 between September 1997 and  
15 December 1998, Auza was negative cash-at-risk ("net winner") in  
16 the amount of \$497,313 ("UDI Account Analysis"). See UDI's  
17 Statement of Facts in Support of UDI's Mot. for Summ. J., Ex. B,  
18 52, Feb. 8, 2005.

19           In their response to the motion, the Auzas raised three main  
20 arguments. First, they asserted that inaccurate accounting  
21 analysis by the RT confused Joe Auza's records by including  
22 receipts and payments of his son, Joseph Auza, Jr., who had his  
23 same name, and who had also invested and received transfers from  
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26           <sup>5</sup>(...continued)  
27 Holder's Comm. v. Commons (In re Tedlock Cattle Co.), 552 F.2d  
28 1351, 1353-54 (9th Cir. 1977) (approving equitable distribution  
to creditors involved in Ponzi scheme).

1 UDI.<sup>6</sup> The Auzas corroborated their position by noting that a  
2 previous, undated account analysis provided by UDI showed  
3 separate accounts of "Joe Auza" and "Joseph Auza" ("Segregated  
4 Account Analysis"). The analysis listed total investments of  
5 "Joe Auza" from September 1997 to January 1998 of \$1,125,000 and  
6 repayments of \$1,143,125, a difference of only \$18,125. A  
7 separate accounting on the Segregated Account Analysis identified  
8 total investments of "Joseph Auza" from September 1997 to  
9 November 1997 of \$100,000 and four repayments totaling \$149,188.  
10 The Auzas contended that the repayments to "Joseph Auza" refer to  
11 the son, not the father.

12 Second, the Auzas contended that UDI did not present  
13 sufficient evidence to show that Auza had received all of the  
14 funds alleged in UDI's Account Analysis, specifically a \$355,000  
15 payment on December 31, 1998.<sup>7</sup>

16 Furthermore, the Auzas argued that UDI was a legitimate  
17 business that simply made poor business decisions and pursued  
18 fiscal strategies totally unrealistic in hindsight, and thus, UDI  
19 could not be a Ponzi scheme.

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21 <sup>6</sup>Joe Auza and his son have identical names in that they are  
22 both "Joseph Anthony Auza." To avoid confusion, it appears the  
23 parties have adopted the convention of referring to the  
24 appellant/father as Joe and his son (who was not sued) as Joseph.  
UDI's complaint against the Auzas did not name their son, Joseph  
Auza, Jr. as a party to the action.

25 <sup>7</sup>The Auzas also disputed a \$600,000 payment allegedly made  
26 to the Auzas on January 5, 1998, as shown on UDI's Account  
27 Analysis. However, this dispute was subsequently resolved when  
28 UDI affirmatively established that Auza received the \$600,000  
payment on January 5, 1998, through his admission in his  
deposition that the payment was part of ending a contract between  
UDI and a person named Hoover.

1           Several continuances of the matter ensued to allow time to  
2 conduct additional discovery on UDI's books and Auza's bank  
3 records, to depose Auza to resolve the newly asserted Joe/Joseph  
4 argument, and to permit the parties to file supplemental briefs  
5 on the remaining issues.

6           UDI refuted the Joe/Joseph argument through Auza's  
7 admissions during his deposition that all of the transfers  
8 originally shown on the UDI Account Analysis, regardless of  
9 whether they were deposited to "Joe Auza" or "Joseph Auza," were  
10 made into one of two bank accounts held by Auza, the father.<sup>8</sup>  
11 See UDI's Demonstrative Ex. used at Summ. J. Hr'g (Aug. 1, 2006)  
12 ("Joe Auza Investment Summary"). Even in regard to four checks  
13 payable to "Joseph Auza," which the appellants had argued were  
14 paid to the son as shown on the Segregated Account Analysis they  
15 rely on, Auza admitted in his deposition that these were all  
16 transactions to himself and his signature is on the backs of  
17 these checks which were deposited into his bank account. The  
18 bank records and testimony established the amount in excess of  
19 principal that Auza received from UDI by showing that Auza  
20 received and deposited \$1,622,313 into either of his two bank  
21 accounts (and not an account belonging to his son).<sup>9</sup> Auza's

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22  
23           <sup>8</sup>Auza's deposition established that he had at least two bank  
24 accounts (a Bank of America account and a Bank One account), in  
25 which payments from UDI were deposited.

26           <sup>9</sup>The total of all repayments to Auza is actually  
27 \$1,722,312.50. However, UDI noted that, because it did not have  
28 sufficient documentation to support the first entry on the Auza  
account analysis, which listed a \$75,000 payment made on October  
10, 1997 to an "unknown" payee in an "unknown" account, UDI did  
not seek to include the \$75,000 payment as part of its negative  
(continued...)

1 investments totaling \$1,225,000 meant he was a "net winner" by  
2 \$397,313.

3 In response to Auza's argument that \$100,000 was invested by  
4 Auza's son, through Auza's admission in his deposition that the  
5 \$100,000 for "Joseph's" investment came from Auza's bank account  
6 and that his son only received \$100,000 back into the same  
7 account, UDI argued that (even accepting Auza's version of the  
8 Joe/Joseph story in which Auza only invested \$1,125,000) Auza  
9 still received \$1,522,313 in repayment from UDI. Thus, even  
10 after adjusting for the \$100,000, he was still a \$397,313  
11 negative cash-at-risk net winner.

12 Furthermore, in response to Auza's contention that UDI did  
13 not present sufficient evidence to demonstrate that Auza received  
14 a \$355,000 payment from UDI on December 31, 1998, UDI established  
15 Auza had received \$330,000 on January 15, 1998, through bank  
16 records produced by the Auzas during discovery. For the reason  
17 that UDI was unable to establish what happened as to the  
18 remaining \$25,000 of the \$355,000 entry on UDI's account  
19 analysis, this amount was not sought in connection with UDI's  
20 summary judgment motion.

21 At the hearing on UDI's motion for summary judgment on  
22 August 1, 2006, UDI's counsel argued that the reason UDI's  
23

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24 <sup>9</sup>(...continued)  
25 cash-at-risk number for purposes of the motion for summary  
26 judgment. UDI also did not include \$25,000 as part of its  
27 negative cash-at-risk number because of the lack of accurate  
28 records to show that \$355,000 was deposited on December 31, 1998.  
Instead, UDI had evidence of \$330,000 deposited into a Bank One  
Account on January 15, 1998, corroborated by Auza's Bank records.  
Thus, \$1,722,312 - \$75,000 - \$25,000 = \$1,622,312 in repayments  
to Auza.

1 Account Analysis showed the \$355,000 amount received on December  
2 31, 1998, after UDI had ceased operations, was because the  
3 transaction was linked to an agreement with Auza to reduce his  
4 Form 1099 tax document interest amount. See UDI's Statement of  
5 Facts in Support of UDI's Mot. for Summ. J., Ex. B, 52, Feb. 8,  
6 2005 (UDI Account Analysis showing the \$250,000 principal  
7 adjustment). UDI's counsel also noted that Auza's deposit slip  
8 was corroborated by a corresponding accounting entry in UDI's  
9 books and records.

10 On September 26, 2006, the bankruptcy court entered its  
11 memorandum decision on UDI's motion for summary judgment, which  
12 avoided as fraudulent transfers the \$397,313 the Auzas received  
13 in excess of their principal amount invested. Although the Auzas  
14 had argued that UDI was not a Ponzi scheme, the court reiterated  
15 its previous determination that UDI was both insolvent and a  
16 Ponzi scheme at all times material to this dispute. The court  
17 also concluded that UDI "properly supported its factual claims  
18 based upon both the business records of UDI, the admissions by  
19 the defendants regarding their transactions with UDI, and the  
20 relevant banking records (bank statements, checks and deposit  
21 records etc.)." Moreover, the court found that the Auzas'  
22 assertion that their son received certain transfers "as not  
23 supported by the record as the transfers were to the defendants  
24 [or] their bank accounts, and not to their son."

25 On October 5, 2006, the bankruptcy court entered its  
26 judgment in favor of UDI, and against the Auzas, for \$397,313.

27 The Auzas timely appealed.  
28

1 JURISDICTION

2 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.  
3 We have jurisdiction under 28 U.S.C. § 158(a)(1).  
4

5 ISSUES

6 (1) Whether the bankruptcy court erred in finding that the  
7 funds returned to Auza in excess of the amount loaned to UDI was  
8 a fraudulent conveyance under Arizona's UFTA because UDI was  
9 operating a Ponzi scheme.

10 (2) Whether the bankruptcy court erred in determining that  
11 Auza received \$397,313 in "profit" or "interest," from UDI that  
12 was voidable as an actually fraudulent transfer.  
13

14 STANDARD OF REVIEW

15 We review summary judgment de novo to assess whether there  
16 is a genuine issue of material fact and whether the moving party  
17 is entitled to judgment as a matter of law. Khaligh v. Hadaegh  
18 (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP 2006).  
19

20 A summary judgment shall be rendered forthwith if the movant  
21 can show that there is no genuine issue as to any material fact  
22 and the movant is entitled to judgment as a matter of law. Fed.  
23 R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056.

24 The mere existence of some alleged factual dispute between  
25 the parties will not defeat an otherwise properly supported  
26 motion for summary judgment; the requirement is that there be no  
27 genuine issue of material fact. Anderson v. Liberty Lobby, Inc.,  
28 477 U.S. 242, 247 (1986) (emphasis in original). The movant  
seeking summary judgment bears the initial burden of

1 establishing, in light of the pleadings, depositions, answers to  
2 interrogatories, admissions, and affidavits, the absence of a  
3 genuine issue of material fact. However, the ultimate burden of  
4 demonstrating the existence of a genuine issue of material fact  
5 lies with the non-moving party. Horphag Research Ltd. v. Garcia,  
6 475 F.3d 1029, 1035 (9th Cir. 2007). When the movant has carried  
7 its burden under Rule 56(c), the non-moving party must come  
8 forward with "specific facts showing that there is a genuine  
9 issue for trial." Id. (quoting Fed. R. Civ. P. 56(e) (emphasis  
10 added)); see also Hayes v. Palm Seedlings Partners (In re Agric.  
11 Research), 916 F.2d 528, 533 (9th Cir. 1990).

## 12 13 DISCUSSION

### 14 I

15 In conjunction with their argument that the funds returned  
16 to Auza in excess of his principal investment were not a  
17 fraudulent transfer under Arizona's UFTA, the Auzas contend that  
18 UDI was not conducting a Ponzi scheme in the first place. Since  
19 this matter is critical to the rest of the analysis, we discuss  
20 it first.

### 21 22 A

23 The Ninth Circuit describes a Ponzi scheme as:

24 an arrangement whereby an enterprise makes payments to  
25 investors from the proceeds of a later investment  
26 rather than from profits of the underlying business  
27 venture, as the investors expected. The fraud consists  
28 of transferring proceeds received from the new  
investors to previous investors, thereby giving other  
investors the impression that a legitimate profit  
making business opportunity exists, where in fact no  
such opportunity exists.

1 Hayes, 916 F.2d at 531; Wyle v. C.H. Rider & Family (In re United  
2 Energy Corp.), 944 F.2d 589, 590 n.1 (9th Cir. 1991); see also  
3 Cunningham, Tr. of Ponzi v. Brown, 265 U.S. 1, 13 (1924) (“when  
4 the fund with which the wrongdoer is dealing is wholly made up of  
5 the fruits of the frauds perpetrated against a myriad of victims,  
6 . . . [i]t is a case the circumstances of which call strongly for  
7 the principle that equality is equity.”).

8         The Auzas contend UDI was not a Ponzi scheme because it was  
9 not insolvent from its inception. Rather, they say UDI claims it  
10 was a legitimate business that simply made poor business  
11 decisions. In addition, the Auzas contend that UDI did not  
12 provide sufficient evidence to prove UDI was conducting a Ponzi  
13 scheme because it did not present even one name of a later  
14 investor, who did not receive a return of his investment from UDI  
15 and who invested money at the time the Auzas were paid a portion  
16 of their loans.

17         UDI contends that the Auzas’ argument that a Ponzi scheme  
18 must be insolvent from its inception misstates and oversimplifies  
19 the case law regarding Ponzi schemes. UDI cites a Colorado  
20 bankruptcy court decision which, notwithstanding its  
21 determination that the debtor’s prior business affairs were  
22 legitimate, had granted summary judgment in favor of the trustee  
23 and avoided transfers to the investor-defendant under 11 U.S.C.

24 § 548(a)(1) (actual intent) because the debtor was operating a  
25 Ponzi scheme (and insolvent) at the time of the transfers. See  
26 Jobin v. McKay (In re M&L Bus. Machs. Co.), 155 B.R. 531, 535 n.7  
27 and 540 (Bankr. D. Colo. 1993). Thus, applying M&L Bus. Machines  
28 and Ninth Circuit case law, UDI argues that even though UDI

1 initially had some legitimate business, it was, at all times  
2 relevant to the Auzas' case, operating as a Ponzi scheme by using  
3 money from later investors to pay earlier investors.

4 UDI further maintains that UDI was conducting a Ponzi scheme  
5 by referring to the evidence presented to the bankruptcy court  
6 indicating that UDI was insolvent from 1996 forward and that 90  
7 percent of its losses between 1995 and 1997 arose from interest  
8 expense. UDI contends that the Auzas did not present any  
9 evidence to challenge UDI's facts, its assertions that UDI was  
10 conducting a Ponzi scheme, or that it was insolvent.

11 After noting that it had previously made this determination  
12 on multiple occasions, the bankruptcy court determined that UDI  
13 was both a Ponzi scheme and insolvent at all times material to  
14 this dispute. We agree. In seeking to avoid summary judgment,  
15 the nonmoving party must come forward with "specific facts  
16 showing that there is a genuine issue for trial." Fed. R. Civ.  
17 P. 56(e). Simply challenging UDI by relying upon unsupported  
18 allegations does not create a genuine issue of material fact.  
19 Thus, the Auzas did not meet their burden of producing specific  
20 controverting evidence. The bankruptcy court did not err in  
21 finding that UDI was operating as a Ponzi scheme.

22  
23 B

24 UDI seeks avoidance of the alleged fraudulent transfer of  
25 funds that the Auzas received in excess of the amount they loaned  
26 to UDI, pursuant to 11 U.S.C. § 544(b) which incorporates  
27  
28

1 Arizona's UFTA, Ariz. Rev. Stat. § 44-1004.<sup>10</sup>

2 "The trustee [or debtor-in-possession] may avoid any  
3 transfer of an interest of the debtor in property . . . that is  
4 voidable under applicable law by a creditor holding an unsecured  
5 claim. . . ." 11 U.S.C. § 544(b). The applicable law in this  
6 instance, Arizona's UFTA, provides that a transfer is fraudulent  
7 if the debtor made the transfer with the "actual intent to  
8 hinder, delay or defraud any creditor of the debtor." Ariz. Rev.  
9 Stat. § 44-1004(A)(1).<sup>11</sup>

10 In evaluating a fraudulent transfer claim under Arizona law,  
11 a court can infer intent to defraud, hinder, or delay from the  
12 mere fact that the individual was running a Ponzi scheme, because  
13 no other reasonable inference is possible. Warfield v. Alaniz,  
14 453 F. Supp. 2d 1118, 1137 (D. Ariz. 2006) (Arizona's UFTA);

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16 <sup>10</sup>In footnote 6 of appellee's brief, UDI notes that Auza  
17 inexplicably asserts that UDI also sought relief under 11 U.S.C.  
18 § 548; however, the one-count complaint plainly shows this is  
incorrect. UDI further explains:

19 With regard to the statute of limitations, an  
20 argument that Auza did not raise in the Bankruptcy  
21 Court, A.R.S. § 44-1009(1) specifically provides a  
22 four year limitation period for bringing avoidance  
23 actions under Arizona's fraudulent transfer  
24 statute. All of the transactions complained of  
25 occurred after September 15, 1997, within four  
26 years of the September 7, 2001 complaint.

(Appellee's Br. 19 n.6)

25 <sup>11</sup>Alternatively, a transfer is constructively fraudulent if  
26 the debtor made the transfer without receiving a reasonably  
27 equivalent value in exchange for the transfer, and the debtor  
28 either: (a) was insolvent, or (b) intended to incur, or should  
have believed he would incur, debts beyond his ability to pay as  
they became due. Ariz. Rev. Stat. § 44-1004(A)(2). This case,  
however, is an actual fraudulent intent case and is not a  
constructive fraud case.

1 Plotkin v. Pomona Valley Imports (In re Cohen), 199 B.R. 709, 717  
2 (9th Cir. BAP 1996) (proof of a Ponzi scheme is sufficient to  
3 establish the operator's actual intent to hinder, delay, or  
4 defraud creditors for purposes of actually fraudulent transfers  
5 under both the Bankruptcy Code and UFTA); accord, Gredd v. Bear  
6 Stearns Sec. Corp. (In re Manhattan Inv. Fund Ltd.), 359 B.R.  
7 510, 517-18 (Bankr. S.D.N.Y. 2007). Actual intent to defraud,  
8 hinder, or delay may be shown by direct proof or circumstantial  
9 evidence from which actual intent may be reasonably inferred.  
10 Id. at 1136; Gerow v. Covill, 960 P.2d 55, 63 (Ariz. App. Div.  
11 1998).

12 The Auzas have raised no genuine issue of material fact  
13 questioning the conclusion that UDI was engaged in a Ponzi  
14 scheme. Proof of a Ponzi scheme is sufficient to establish the  
15 Ponzi scheme operator's actual intent to hinder, delay or defraud  
16 its creditors with fraudulent transfers. See Cohen, 199 B.R. at  
17 717. Thus, we agree with the bankruptcy court that any amount  
18 that Auza received in excess of his principal investment was a  
19 voidable transfer because UDI's operation of a Ponzi scheme  
20 established its actual intent to hinder, delay, or defraud its  
21 creditors.

22  
23 C

24 Under Arizona's UFTA, a transfer is not voidable under Ariz.  
25 Rev. Stat. § 44-1004(A) (1) against a person who took in good  
26 faith and for a reasonably equivalent value. Ariz. Rev. Stat.  
27 § 44-1008(A). This is an affirmative defense.

1           The Auzas argue that UDI received "reasonably equivalent  
2 value" for its transfers, and thus, the funds received in excess  
3 of their principal investment are not voidable. However, this  
4 argument is inadequate because there is a missing link: the Auzas  
5 are unable to establish that the transactions were made in good  
6 faith. The interest rate of 25 percent per week is fatal to the  
7 existence of a genuine issue of material fact suggesting good  
8 faith.

9           In his deposition, Auza admitted he knew that interest rates  
10 of up to 25 percent per week were, in effect, too good to be  
11 true. He testified:

12           Q     Was that a common rate, 25 percent per week or per  
                  two weeks?

13           A     Yeah. The risk factor - they didn't have nothing  
                  to back it up.

14           Q     So you knew that these were risky transactions?

15           A     Right.

16           Q     ....  
                  Would you say that 25 percent per week is higher  
                  than or lower than interest rates that you are  
                  ordinarily used to seeing?

17           A     Higher.

18 (Auza Dep. 16:23-25, 17:1-3, 17:23-25, 18:1, July 26, 2005)

19           It has already been determined that the payments to Auza in  
20 excess of his principal invested were voidable as actually  
21 fraudulent transfers because UDI was conducting a Ponzi scheme.  
22 Because the Auzas' position that the transfer was for reasonably  
23 equivalent value is irrelevant to actually fraudulent transfers,  
24 their argument to that effect does not raise a genuine issue of  
25 material fact.

26           Furthermore, regardless of the Auzas' argument that there  
27 was reasonably equivalent value for the transfer, this issue is  
28 not material because of Auza's fatal inability to demonstrate the

1 good faith that is essential to the affirmative defense.<sup>12</sup> Thus,  
2 the bankruptcy court was correct in determining that the return  
3 to Auza in excess of his principal investment was avoidable as an  
4 actually fraudulent transfer.

5  
6 II

7 The Auzas next argue on appeal that the bankruptcy court  
8 erred in determining that Auza received \$397,313 in "profit" or  
9 "interest," in excess of the amount loaned to UDI. The Auzas  
10 raise two arguments. First, they contend that the checks UDI  
11 paid to "Joe" and "Joseph" are separate transactions to the  
12 father and son, even though all the funds were deposited into the  
13 father's account. Second, they dispute the \$355,000 amount  
14 allegedly paid to Auza on December 31, 1998. We take each  
15 argument in turn.

16  
17 A

18 Alleging that the four checks totaling \$149,188 paid to  
19 "Joseph" meant the payments were to the son, the Auzas question  
20 how Joe and Joseph in essence became the same person by the  
21 bankruptcy court's apparent determination that it was immaterial

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22  
23 <sup>12</sup>In fact, other bankruptcy courts have concluded that a  
24 debtor in a Ponzi scheme does not receive reasonably equivalent  
25 value to the extent it pays amounts which exceed the creditor's  
26 original investment. See Noland v. Morefield (In re Nat'l  
27 Liquidators, Inc.), 232 B.R. 915, 919 (Bankr. S.D. Ohio 1998); In  
28 re Taubman, 160 B.R. 964, 985 (Bankr. S.D. Ohio 1993); see also  
United Energy, 944 F.2d at 595 n.6 (noting in dicta that amounts  
received by the investor in excess of the investments would be  
avoidable). The debtor receives less than a reasonably  
equivalent value because all that the debtor receives in return  
for the transfers is the use of the defendants' money to continue  
the Ponzi scheme. See Nat'l Liquidators, 232 B.R. at 919.

1 that the son (not a party to the action) was a separate person  
2 merely because the son's \$100,000 investment came from the same  
3 account as investments by the father and payments went back to  
4 the same account. The Auzas contend that, at the very least, a  
5 genuine, material issue of fact is raised as to whether Joe and  
6 Joseph made separate transactions and essentially became the same  
7 person on the UDI accounts.

8 Auza's counsel's accounting of the funds that he received  
9 from UDI is at direct odds with his own client's testimony.  
10 Through bank records and Auza's testimony, UDI established that  
11 the four checks Auza identified as paid to Joseph were all  
12 deposited into the father's (Joe's) bank account. Furthermore,  
13 Auza himself admitted at his deposition that the disputed checks  
14 paid to Joseph were transactions with himself and acknowledged  
15 his signature on the backs of the checks.

16 Regardless of whether the checks were paid to "Joseph" the  
17 father or son, because \$100,000 was paid from and deposited back  
18 into the same account, it is essentially a wash.

19 Through the business records of UDI, the admissions by Auza  
20 regarding his transactions with UDI, and the relevant banking  
21 records, the bankruptcy court found that UDI had properly  
22 supported its factual claims. The bankruptcy court also found  
23 that the Auzas' assertion that their son received certain  
24 transfers was not supported by the record as the transfers were  
25 to the Auzas in their bank accounts, and not to their son. We  
26 believe the bankruptcy court was not in error. By not presenting  
27 controverting evidence or submitting any affidavits opposing  
28 summary judgment, the Auzas did not satisfy their burden of

1 setting forth specific facts to establish a genuine, material  
2 issue of fact.

3  
4 B

5 The Auzas next dispute the \$355,000 payment shown on UDI's  
6 account analysis as received on December 31, 1998, because this  
7 was approximately one year after the transactions were completed.  
8 The Auzas argue that UDI's attorney employed "innovative devices"  
9 to support the claim by making inconsistent arguments. The Auzas  
10 contend that UDI's first proposition, that the \$355,000 payment  
11 was evidenced by a \$330,000 deposit into Auzas' Bank One account  
12 on January 15, 1998, is illogical because this transaction was  
13 made nearly a year earlier than the alleged \$355,000 payment.  
14 The Auzas argue that UDI's next allegation, that the transaction  
15 may have been a cash transaction with no proof of actual payment  
16 to the Auzas, still does not explain why the entry was made  
17 months after all transactions had ceased. In response to UDI's  
18 explanation that the time discrepancy was due in part to an  
19 agreement with Auza to reduce his 1099 interest amount, Auza  
20 denied in his deposition that he ever received a 1099 from UDI.

21 UDI refutes the Auzas' arguments by contending that, even  
22 though the \$355,000 amount was not adequately documented, other  
23 uncontradicted evidence proves that \$330,000 was received by  
24 Auza, plus Auza never created an issue of fact by submitting an  
25 affidavit stating he had never received these funds.<sup>13</sup>

26  
27  
28 <sup>13</sup>For the reason that UDI was unable to establish what  
happened as to the remaining \$25,000 of the \$355,000 entry on the  
UDI Account Analysis, this amount was not sought in connection  
with UDI's summary judgment motion.

1 During discovery, the Auzas provided UDI with bank records  
2 which showed that Auza deposited \$330,000 into his Bank One  
3 account on January 15, 1998, which was corroborated by a  
4 corresponding accounting entry in UDI's books and records. UDI  
5 contends that, during the entire year and a half before hearing  
6 on the summary judgment motion after UDI first included the  
7 \$330,000 deposit slip in its original motion, the Auzas did not  
8 meet their burden to produce any evidence to contradict UDI's  
9 claim or supply an affidavit denying that Auza received the  
10 funds. UDI notes that even when the bankruptcy court twice  
11 specifically asked Auzas' counsel about affidavits, Auzas'  
12 counsel could not give a straight answer. During the hearing,  
13 Auzas' counsel stated he did not know where the \$330,000 came  
14 from when the court directly asked him about the money.

15 UDI argues that the difference between the accounting entry  
16 of \$355,000 and the actual deposit of only \$330,000 was because  
17 it was not uncommon for UDI's transactions to be in cash. As  
18 UDI's counsel indicated to the bankruptcy court,

19  
20 **MR. STAPLETON:** [What they have is] an accounting  
21 record. That's right, Your Honor. And - and - that's  
22 not, you know, it's not uncommon. There was, you know,  
23 fortunately or unfortunately, there was a lot of cash  
24 in this business. I mean, you know, the frank fact is,  
25 and if the Court is familiar with this from Hobbs,<sup>14</sup>  
26 these were the people, you know, at the end of the day  
27 that were loaning money, that were getting 20 percent  
28 per week. These were the people who dealt in cash.

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25  
26 <sup>14</sup>UDI's counsel referred to Hobbs, another adversary  
27 defendant receiving interest at rates of up to 25 percent per  
28 week that was sued by UDI, and one that had several large cash  
transactions. UDI points out that Auza knew of Hobbs' case in  
that his account is referred to in Auza's summary judgment  
response.

1 Summ. J. Hr'g Tr. 36:16-23 (Aug. 1, 2006).

2 UDI contends that Auza's deposit of \$330,000 does not mean that  
3 Auza did not receive the \$355,000 listed on UDI's records, but  
4 only meant that he deposited \$330,000 of that money into his bank  
5 account. UDI claims Auza's deposit was likely in cash, which was  
6 common to many of UDI's later, very high interest, transactions,  
7 and a fact that the bankruptcy court was already familiar with  
8 from prior proceedings like Hobbs.

9 Furthermore, with respect to the time discrepancy between  
10 the dates, UDI points out that Auza's denial of ever receiving  
11 UDI's 1099 interest statement is misleading because Auza also  
12 admits that his accountant did all of his tax preparation. UDI  
13 maintains that the time discrepancy was due to an agreement with  
14 Auza to reduce his 1099 interest amount by referring to the UDI  
15 Account Analysis showing a \$250,000 principal reduction on  
16 December 31, 1998. See UDI's Statement of Facts in Support of  
17 UDI's Mot. for Summ. J., Ex. B, 52, Feb. 8, 2005 (UDI Account  
18 Analysis showing the \$250,000 principal adjustment). At the  
19 hearing, UDI's counsel explained that the 1099 showing a gain of  
20 \$598,125 was not sent to Auza precisely because of UDI's  
21 agreement with Auza regarding the payment and the principal  
22 reduction.

23 A mere alleged factual dispute between the parties will not  
24 defeat an otherwise properly supported motion for summary  
25 judgment; the requirement is that there be no genuine issue of  
26 material fact. Anderson, 477 U.S. at 247 (emphasis in original).  
27 While the Auzas allege that there is some factual dispute with  
28 regards to the \$355,000 payment to Auza shown on UDI's account

1 analysis, UDI refutes their argument with evidence of a \$330,000  
2 deposit slip propounded by Auza himself (and corroborated by  
3 UDI's books and records), and explanations as to the time and  
4 amount discrepancies. Auza did not present contrary evidence and  
5 never submitted an affidavit denying receipt of the funds during  
6 the entire year and a half before the summary judgment hearing  
7 occurred. With nothing more, Auza is left to rely on his  
8 counsel's uncorroborated assertion during the hearing that he did  
9 not know where the money came from. This is simply not enough to  
10 defeat UDI's motion for summary judgment. At most, the Auzas may  
11 have raised some conflict in the evidence. However, these  
12 alleged inconsistencies are insufficient to create a genuine  
13 issue of material fact.

14 Thus, we agree with the bankruptcy court that there are no  
15 questions of material fact that Auza received \$1,622,313 into his  
16 bank account. After subtracting the \$1,225,000 the Auzas  
17 initially invested, the bankruptcy court correctly determined  
18 that Auza received \$397,313 in excess of the principal amount  
19 loaned to UDI.

#### 20 21 CONCLUSION

22 The bankruptcy court did not err in granting UDI's motion  
23 for summary judgment seeking avoidance of fraudulent transfers to  
24 Auza in the amount of \$397,313, pursuant to Ariz. Rev. Stat.  
25 § 44-1004 as applied through 11 U.S.C. § 544.

26 UDI was engaged in a Ponzi scheme which allowed earlier  
27 investors to gain false profits or interest above their principal  
28 investment through money from later investors. Proof of a Ponzi

1 scheme is sufficient to establish UDI's actual intent to defraud  
2 its creditors with fraudulent transfers. The Auzas did not  
3 establish the good faith that is essential to the affirmative  
4 defense they attempted to raise when they argued the return of  
5 reasonably equivalent value. Thus, the bankruptcy court was  
6 correct in determining that the funds returned to Auza in excess  
7 of the amount loaned to UDI were actually fraudulent transfers  
8 because UDI was operating a Ponzi scheme.

9 Furthermore, the bankruptcy court was correct in its  
10 determination that Auza received \$397,313 in excess of the  
11 principal amount loaned to UDI. Based upon UDI's business  
12 records, Auza's admissions, and Auza's relevant banking records,  
13 UDI properly supported its factual claims and no genuine issue of  
14 material fact has been raised to the contrary.

15 We agree with the bankruptcy court's conclusions that there  
16 are no questions of material fact, and UDI is entitled to  
17 judgment as a matter of law. AFFIRMED.