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CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA	
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8 UNITED STATES BANKRUPTCY COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10	In re	)	CASE NO. 02-09721-H7
11	COMMERCIAL MONEY CENTER, INC.,	)	(Jointly Administered with
12	Debtor.	)	Case No. 02-09720-H7)
13		)	ADVERSARY CASE NO. 04-90235-H7
14	RICHARD M. KIPPERMAN, Chapter	)	
15	7 Trustee for the Bankruptcy	)	MEMORANDUM DECISION
16	Estates of Commercial Money	)	
17	Center, Inc. and Commercial	)	
18	Servicing Corporation,	)	
19	Plaintiff,	)	
20	v.	)	
21	ANTHONY & MORGAN SURETY and	)	
22	INSURANCE SERVICES, INC., a	)	
23	California Corp., MICHAEL	)	
24	T. ANTHONY, an individual,	)	
25	and SCOTT MORGAN, an	)	
26	individual	)	
27	Defendants.	)	
28		)	

23 At issue is whether the trustee is entitled to summary  
24 judgment on the grounds there are no undisputed facts with respect  
25 to Defendant Anthony and Morgan Surety and Insurance Services,  
26 Inc.'s ("A&M Surety"), as the initial transferee, and Defendant  
27 Michael T. Anthony's ("Anthony"), as the subsequent transferee,  
28 good faith defense. This Court denies summary judgment because it

1 finds there are material disputed issues of fact as set forth  
2 below.

3 This Court has jurisdiction to determine this matter pursuant  
4 to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order No. 312-D of  
5 the United States District Court for the Southern District of  
6 California. This is a core proceeding pursuant to 28 U.S.C. §§  
7 157(b)(2)(A), (E) and (H).

8 I.

9 FACTS

10 THE TRANSACTIONS BETWEEN DEBTORS AND DEFENDANTS

11 Debtors' business consisted of originating and selling at a  
12 discount to investors (usually Banks), "sub-prime" commercial  
13 equipment and automobile leases. To induce investors to purchase  
14 the leases, Debtors obtained surety bonds from sureties (the  
15 "Sureties") to guaranty the lease payments. Debtors packaged the  
16 insured leases into a "lease pool" and assigned the payment stream  
17 due under the leases along with the surety bonds to the investors.  
18 Debtors continued to service the leases, collecting the payments  
19 and remitting the promised monthly amounts to the investors.

20 A&M Surety acted as Debtors' exclusive agent in obtaining  
21 surety bonds from the various Sureties. In exchange for obtaining  
22 these bonds, Debtors paid to A&M Surety at least \$3,750,100 in  
23 "commissions." The evidence submitted shows that A&M Surety  
24 devoted substantial time and resources in furtherance of its  
25 contractual obligations and it received commissions proportionate  
26 to those earned for similar services in the industry. [Anthony  
27 Decl. at ¶¶ 53-63]. A&M Surety also acted as an agent for the  
28 various Sureties and was compensated for these services, as is

1 customary in the industry. [Id. at ¶ 65].

2 Debtors, in their capacity as the servicer, experienced a high  
3 default rate on the lease payments. Debtors did not notify the  
4 investors or the various Sureties of the collection shortfalls.  
5 Instead, Debtors made up the shortfall of the actual lease  
6 collections and the amounts promised to the investors through so-  
7 called "servicer advances." [Elledge Decl. at ¶ 12]. Debtors  
8 financed the servicer advances by selling new lease pools to new  
9 investors. [Id.] As the number of nonperforming leases grew,  
10 Debtors needed an increasing volume of lease pool sales proceeds to  
11 make up the shortfalls between the actual collections and the  
12 amounts due to investors. [Id.] In short, Debtors' business was a  
13 classic ponzi scheme. [Id.]

14 II.

15 PROCEDURAL HISTORY OF SUMMARY JUDGMENT MOTION

16 Richard M. Kipperman, chapter 7 trustee ("trustee") for the  
17 jointly administered bankruptcy estates of Commercial Money  
18 Centers, Inc. and Commercial Servicing Corporation ("Debtors"),  
19 filed a first amended complaint ("Amended Complaint") against  
20 defendants A&M Surety, Anthony and Scott Morgan ("Morgan")  
21 (hereinafter collectively "Defendants") alleging, *inter alia*,  
22 claims to recover alleged fraudulent transfers pursuant to  
23 §§ 544(b), 548 and 550.<sup>1</sup> The trustee seeks to recover broker  
24 commissions totaling at least \$3,750,100 paid by Debtors to A&M

25 \_\_\_\_\_  
26 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule references  
27 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of  
28 Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the  
effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of  
2005, Pub. L. 109-8, 119 Stat. 23, because the debtors filed their bankruptcy cases  
before its effective date (generally October 17, 2005).

1 Surety (and allegedly distributed to Anthony and Morgan) during the  
2 four-year period prior to the petition date. The trustee alleges  
3 that Debtors were operating a ponzi scheme and, therefore, the  
4 commissions paid by Debtors to A&M Surety in furtherance of the  
5 ponzi scheme are recoverable as a matter of law.

6 Trustee filed a motion for summary judgment on the Amended  
7 Complaint<sup>2</sup> seeking a ruling in his favor based upon the following  
8 undisputed facts: 1) Debtors were operating a ponzi scheme; (2)  
9 Defendants actively participated in and provided services that  
10 perpetuated Debtors' ponzi scheme in return for their commissions;  
11 and (3) the admissions by Anthony that Defendants were, at an  
12 absolute minimum, on inquiry notice from Debtors' "infancy" that  
13 Debtors were operating a ponzi scheme yet, instead of performing  
14 the requisite due diligence, turned a complete blind eye.

15 At the hearing on December 11, 2007, this Court found the  
16 undisputed evidence established Debtors operated a ponzi scheme and  
17 paid commissions to A&M Surety in furtherance of the scheme. The  
18 Court further found the trustee had identified evidence A&M Surety  
19 and Anthony had actual or constructive notice of the ponzi scheme,  
20 but the competing evidence presented a triable issue of fact for  
21 ///

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22  
23 <sup>2</sup> The Amended Complaint alleges seven claims for relief: (1) against A&M  
24 Surety - avoidance of actual fraudulent transfers pursuant to § 544(b)  
25 (incorporating Cal.Civ.Code §§ 3439.04(a)(1) and 3439.07, and Nev. Rev. Stat. §§  
26 112.180(a)(1) and 112.220); (2) against A&M Surety - avoidance of constructively  
27 fraudulent transfers pursuant to § 544(b) (incorporating Cal.Civ.Code §§  
28 3439.04(a)(2), 3439.05 and 3439.07 and Nev. Rev. Stat. §§ 112.180(1)(b) and  
112.220); (3) against A&M Surety - avoidance of fraudulent transfers pursuant to  
§ 548; (4) against A&M Surety - recovery of fraudulent transfers pursuant to § 550;  
(5) against A&M Surety - recovery of transfers due to unjust enrichment; (6) against  
individual defendants Anthony and Morgan - recovery of avoidable transfers pursuant  
to § 550; and (7) against all defendants - recovery of the transfers from Anthony  
and Morgan as the alter egos of A&M Surety.

1 trial.<sup>3</sup> Regarding the alter ego and unjust enrichment claims, the  
2 Court ruled that the trustee had not met his initial burden of  
3 proof and these claims remained for trial.

4 The Court took under submission for further briefing the issue  
5 of whether Defendant Anthony and Morgan, as the initial transferee,  
6 and Defendant Michael Anthony as the subsequent transferee, have  
7 met their burden of demonstrating their defense of good faith.<sup>4</sup>

8 III.

9 DISCUSSION

10 A. STANDARDS FOR SUMMARY JUDGMENT

11 Rule 56(c) of the Federal Rules of Civil Procedure, made  
12 applicable to adversary proceedings by Fed. R. Bankr. P. 7056,  
13 provides that summary judgment:

14 [S]hall be rendered forthwith if the pleadings,  
15 depositions, answers to interrogatories, and  
16 admissions on file, together with the  
17 affidavits, if any, show that there is no  
genuine issue as to any material fact and that  
the moving party is entitled to a judgment as a  
matter of law.

18 "The moving party bears the initial responsibility of informing the  
19 district court of the basis for its motion, and identifying those  
20 portions of 'the pleadings, depositions, answers to  
21 interrogatories, and admissions on file, together with the  
22 affidavits, if any,' which it believes demonstrate the absence of a  
23 genuine issue of material fact." Hughes v. United States, 953 F.2d  
24

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25 <sup>3</sup> The Court denied the trustee's request for summary judgment against  
26 Morgan.

27 <sup>4</sup> At the hearing, the trustee relied on Gredd v. Bear Sterns Sec. Corp.  
28 (In re Manhatttan Inv. Fund Ltd.), 359 B.R. 519 (S.D.N.Y. 2007) and In re Warfield,  
436 F.2d 551, 560 (5th Cir. 2006). These cases were not in the trustee's initial  
moving papers which is the reason why additional briefing was authorized.

1 531, 541 (9th Cir. 1992) citing Celotex Corp. v. Catrett, 477 U.S.  
2 317, 323(1986). "After the moving party has met its initial burden,  
3 Rule 56(e) . . . requires the non-moving party to go beyond the  
4 pleadings and by her own affidavits, or by the 'depositions,  
5 answers to interrogatories, and admissions on file,' designate  
6 'specific facts showing that there is a genuine issue for trial.'" Hughes,  
7 953 F.2d at 541 (citation omitted).

8 The non-moving party is not required to produce evidence in a  
9 form that would be admissible at trial. Rule 56(e) permits a  
10 summary judgment to be opposed by any of the kinds of evidentiary  
11 materials listed in Rule 56(c), except the mere pleadings  
12 themselves. Celotex Corp., 477 U.S. at 324. "The burden on the  
13 non-moving party is not a heavy one; the non-moving party simply is  
14 required to show specific facts, as opposed to general allegations,  
15 that present a genuine issue worthy of trial." Dark v. Curry  
16 County, 451 F.3d 1078, 1082 (9th Cir. 2006).

17 In contrast, if the non-moving party bears the burden of proof  
18 at trial on a dispositive issue, the moving party is not required  
19 to submit evidence negating the opponent's claim. Celotex, 477  
20 U.S. at 323. Rather, the party opposing summary judgment (who  
21 bears the burden of proof at trial) is required to go beyond the  
22 pleadings and make an evidentiary showing sufficient to establish  
23 the existence of a genuine issue for trial. Id.; Hayes v. Palm  
24 Seedlings Partners (In re Agric. Research and Tech. Group), 916  
25 F.2d 528, 533 (9th Cir. 1990). The non-moving party must present  
26 significant and probative evidence. "A mere scintilla of evidence  
27 is not sufficient to withstand the motion." Agric. Research, 916  
28 F.2d at 533. Therefore, in ruling on summary judgment, "the

1 question is whether a reasonable jury could find that the party  
2 which bears the evidentiary burden of proof at trial with respect  
3 to a claim or defense has proved its case 'by the quality and  
4 quantify of evidence required by [Rule 56].'" Id.

5 **B. BROKER'S COMMISSIONS PAID IN FURTHERANCE OF A PONZI SCHEME ARE**  
6 **INTENTIONALLY FRAUDULENT PER SE**

7 Trustee's first claim for relief against A&M Surety seeks to  
8 avoid the commissions pursuant to § 544(b) (incorporating  
9 Cal.Civ.Code §§ 3439.04(a)(1) and 3439.07) as intentionally  
10 fraudulent transfers.<sup>5</sup> Trustee cites numerous cases finding the  
11 existence of a ponzi scheme is presumptive evidence of a debtor's  
12 actual intent to defraud. These cases include: Agricultural  
13 Research, 916 F.2d at 536 (noting that the mere existence of a  
14 ponzi scheme has been found to fulfill the requirement of actual  
15 intent [to defraud] on the part of debtor); Plotkin v. Pomona  
16 Valley Imports, Inc. (In re Cohen), 199 B.R. 709, 716-17 (9th Cir.  
17 BAP 1996) (finding that proof of a ponzi scheme is sufficient to  
18 establish the ponzi operator's actual intent to hinder, delay, or  
19 defraud creditors for purposes of actually fraudulent transfers);  
20 Martino v. Edison Worldwide Capital (In re Randy), 189 B.R. 425,  
21 439 (Bankr. E.D. Ill. 1995 (finding that operation of ponzi scheme  
22 fulfills the actual intent element); and In re Taubman, 160 B.R.  
23 964, 983 (Bankr. S.D. Ohio 1993) (finding actual intent from the  
24 debtor's active participation in a ponzi scheme).

25 At the hearing on his motion, the trustee cited In re  
26 \_\_\_\_\_

27 <sup>5</sup> Trustee's "choice of law" analysis imports California law instead of  
28 Nevada law into the § 544(b). Trustee notes that California and Nevada have both  
adopted the Uniform Fraudulent Transfers Act ("UFTA"), and any difference in  
Nevada's adoption does not bear on the issues presented in the motion.

1 Manhattan Inv. Fund Ltd., 359 B.R. at 510. In Manhattan, the  
2 bankruptcy court found that "acts taken in furtherance of the ponzi  
3 scheme, such as paying brokers commissions, are also  
4 [intentionally] fraudulent." Id. at 518 (emphasis added). "[W]hen  
5 a person running a ponzi scheme takes incoming funds and transfers  
6 them to early investors and brokers, he is making such transfers  
7 with the actual intent to hinder, delay or defraud later investors  
8 and creditors." Id. (emphasis added) (citation omitted). Thus,  
9 the Manhattan bankruptcy court held, as a matter of law, that  
10 commissions paid to brokers are "fraudulent transfers." Id.

11 Defendants' response is that "[f]raud is never presumed."  
12 Defendants' argument is not well taken. First, in Agricultural  
13 Research cited above, the Ninth Circuit addressed the issue of  
14 presumptive actual fraud in the context of a ponzi scheme. The  
15 Ninth Circuit recognized the "mere existence of a ponzi scheme,  
16 which can be established by circumstantial evidence, has been found  
17 to fulfill the requirement of actual intent on the part of the  
18 debtor." Agric. Research, 916 F.2d at 536. Second, in Balaber-  
19 Strauss v. Sixty-Five Brokers (In re Churchill Mortg. Inv. Corp.),  
20 256 B.R. 664, 675-76 (Bankr. S.D.N.Y. 2000), a case relied upon by  
21 Defendants', also recognizes it has been generally held that a  
22 debtor who operates a ponzi scheme presumptively possesses the  
23 intent for actual fraud. Accordingly, this Court found as a matter  
24 of law, the commissions paid by Debtors to A&M Surety in  
25 furtherance of the ponzi scheme are intentionally fraudulent  
26 transfers pursuant to Cal.Civ.Code § 3439.04(a)(1) and § 544(b).

27 Because the trustee has prevailed under Civil Code §  
28 3439.04(a)(1), the Court next examines whether the trustee is

1 entitled to summary judgment on the Defendants' good faith defense.

2 C. THE GOOD FAITH DEFENSE UNDER CALIFORNIA CIVIL CODE  
3 SECTION 3439.08

4 A&M Surety is the initial transferee and Defendant Anthony is  
5 a subsequent transferee. Defendants have the burden of  
6 establishing the affirmative defense of good faith under  
7 Cal.Civ.Code § 3439.08. A&M Surety must establish 1) good faith  
8 and 2) reasonably equivalent value. Anthony, as the subsequent  
9 transferee, must establish 1) good faith or 2) that he took from  
10 A&M Surety who took in good faith and reasonably equivalent value.  
11 In re Cohen, 199 B.R. at 716.

12 The trustee contends that the record shows that the Defendants  
13 A&M Surety and Anthony "actively participated in" and "perpetrated"  
14 the Debtors' ponzi scheme. He alleges that they helped "sell the  
15 scheme" to the Banks and Sureties by traveling around the country  
16 making pitches. The trustee relies on the following facts to  
17 establish the Defendants' "active participation": 1) a Marketing  
18 Letter which Defendants prepared designed to bait Sureties which  
19 the trustee submits is evidence that the "the line" between Debtors  
20 and A&M Surety is "blurry, at best"; 2) without Defendants'  
21 services, there would be no leasing program because the surety  
22 bonds were essential to Debtors' equipment leasing scheme -  
23 evidence that shows Defendants were actively involved in  
24 perpetrating the scheme; and 3) Anthony's declaration which  
25 supports these facts at ¶¶56-58, 61. see Lewis v. Superior Court,  
26 30 Cal.App.4th 1859, 37 Cal.Rptr.2d 63 (1994) (finding that a  
27 transferee lacks good faith only if he or she "colludes[s] with the  
28 debtor or otherwise actively participate[s] in the fraudulent

1 scheme of the debtor.").

2       Alternatively, the trustee maintains that the Defendants were  
3 on inquiry notice, yet they failed to perform the requisite due  
4 diligence and, therefore, they cannot establish good faith. The  
5 trustee cites numerous cases in support of his due diligence  
6 argument. see Cohen, 199 B.R. at 709 (finding that a transferee  
7 lacks good faith when he or she is possessed of enough knowledge of  
8 the actual facts to induce a reasonable person to inquire further  
9 about the transaction); see also Breenden v. L.I. Bride Fund, LLC  
10 (In re Bennett Funding Group), 232 B.R. 565, 573 (N.D.N.Y. 1999);  
11 Agric. Research, 916 F.2d at 535-36; Brown v. Third Nat'l Bank (In  
12 re Sherman), 67 F.3d 1348, 1357 (8th Cir. 1995); Manhattan Inv.  
13 Fund Ltd., 359 B.R. at 519. These cases stand for the proposition  
14 that good faith is measured against an objective standard and if a  
15 transferee possesses knowledge of facts that may suggest a transfer  
16 is fraudulent, and does not conduct any further inquiry into the  
17 matter, the good faith standard cannot be met.<sup>6</sup>

18       The trustee relies on Manhattan Inv. Fund to establish  
19 Defendants' lack of good faith with respect to inquiry notice. In  
20 that case, the trustee sought to avoid, pursuant to § 548(a)(1)(A),  
21 \$141.4 million in margin payments deposited into the ponzi scheme's  
22

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23       <sup>6</sup> Defendants contend that the inquiry notice standard espoused by  
24 Manhattan Inv. Fund is not the law in the Ninth Circuit and cite Lewis v. Superior  
25 Court, 30 Cal.App.4th 1859, 37 Cal.Rptr.2d 63 (1994) and CyberMedia, Inc. v.  
26 Symantec Corp., 19 F.Supp. 1070, 1075 (N.D. Cal. 1998) in support. In CyberMedia  
27 the district court found that the proper standard for good faith "for purposes of  
28 the UFTA, a transferee lacks good faith if he or she (1) colludes with the debtor  
or otherwise actively participates in the debtor's fraudulent scheme, or (2) has  
actual knowledge of facts which would suggest to a reasonable person that the  
transfer was fraudulent. Id. at 1075 (N.D. Cal. 1998). However, these cases are  
consistent with the objective standard for measuring good faith.

1 fund account at Bear Sterns Securities ("Bear Sterns"). The  
2 eighteen transfers at issue were deposited by the ponzi operator in  
3 its account at Bear Sterns to allow it to continue short selling  
4 activities within a year prior to the petition date. Bear Sterns  
5 held a security interest in all the monies in the account and had  
6 sole discretion to prevent the operator from withdrawing any money  
7 credited to its account as long as any short positions remained  
8 open. The bankruptcy court found that Bear Sterns had sufficient  
9 dominion and control over the margin payments that it had to be  
10 regarded as the "initial transferee" rather than a "mere conduit."<sup>7</sup>  
11 It should be noted, that the trustee in Manhattan Inv. Fund did not  
12 seek to recover from Bear Sterns (as the trustee in this case), the  
13 \$2.4 million in revenue for services it earned over the course of  
14 its involvement with the ponzi operator.

15 In December 1998, a senior managing director for Bear Sterns  
16 was told by an individual who worked for an investment management  
17 firm that had clients who invested in the fund, that the fund was  
18 reporting a 20% profit. The director was under the impression at  
19 that time that the fund was losing money based upon his  
20 participation in risk-related conference calls. The director  
21 relayed the information to his boss who then followed up with the  
22 investment management firm and inquired about whether the fund's  
23 performance matched Bear Stern's books and records.

24 The boss then confirmed from Bear Sterns personnel internally,  
25 that the fund was losing money. A further follow-up discussion  
26

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27 <sup>7</sup> This question is not at issue in the pending motion.  
28

1 resulted in an explanation from the ponzi operator and fund's  
2 creator (Berger) that the discrepancy in the fund's performance was  
3 due to the fact that Bear Sterns was only one of eight or nine  
4 brokers used by the fund. More time went by and after a few more  
5 incidents, Bear Sterns finally took steps to determine what was  
6 really going on. Management contacted two credit bureaus and  
7 called other prime brokers to determine their experience with the  
8 fund. In August 1999, the gap between the fund's purported  
9 performance as reported by Berger and what the actual performance  
10 was had grown to \$367 million. A month later, the gap was nearly  
11 \$399 million. By the time the last transfers took place in  
12 December 1999, the gap stood at \$423 million. When Bear Sterns  
13 finally obtained the fund's financials, it was able to determine  
14 there was a problem after a ten minute review.

15       Based upon these facts, the court found that Bear Sterns was  
16 in inquiry notice from the time of the first conversation in  
17 December 1998 throughout the following year. Significantly, the  
18 court noted that Bear Sterns was required to do more than simply  
19 ask the wrongdoer if he was doing wrong.

20       The trustee urges that the facts in this case also show  
21 Defendants were in a position to be on inquiry notice from the  
22 "infancy" of Debtors' leasing program. The Defendants were  
23 experienced brokers, they knew Debtors had virtually no capital  
24 from their inception, the lessees were subprime credit risks, the  
25 leases were defaulting, the reserve account established by the  
26 Sureties was never tapped into, claims were not being made on the  
27 Surety Bonds, and the shortfall between the actual lease  
28 collections and amounts promised to the Bank were being made by the

1 Debtors through "servicer advances." According to the trustee, the  
2 Defendants would be on inquiry notice of Debtors' fraud. The  
3 trustee offers a long list of "due diligence" activities that  
4 Defendants should have engaged in under the circumstances of the  
5 case. [Supp. Brief at 13].

6 In applying the standards for good faith to this case, the  
7 Court cannot grant the summary judgment requested by the trustee  
8 because there are disputed issues of material fact. First, the  
9 evidence submitted with this motion does not support a finding that  
10 Defendants actively participated in Debtors' ponzi scheme.  
11 Furthermore, with respect to inquiry notice, Manhattan Inv. Fund  
12 underscores the lack of a bright line test with application of the  
13 objective standard which would be difficult even without disputed  
14 facts. What types of facts are necessary to put a reasonable  
15 person on inquiry notice that a ponzi scheme is being accomplished?  
16 Bear Sterns, a securities broker, was in a different position from  
17 those of the Defendants, who were merely insurance brokers. The  
18 ponzi operator maintained its accounts at Bear Sterns. Bear Sterns  
19 management easily confirmed that the fund was losing money, shortly  
20 after being advised that the fund was reporting a 20% profit for  
21 the year. Bear Sterns had access to easily obtainable sources of  
22 information. Further, Bear Sterns was the only prime securities  
23 broker for the fund. Also, the trustee sued to recover the margin  
24 payments, held by Bear Sterns, not the \$2.4 million in commissions  
25 it received for its services.

26 Here, the red flags that the trustee points out are negated by  
27 Defendants' evidence. There is some evidence that Debtors'  
28 provided financial statements to Defendants which demonstrated that

1 their financial condition was strong. Further, the Sureties and  
2 the Banks would have been conducting their own due diligence. An  
3 anonymous letter from a disgruntled employee would not necessarily  
4 warrant more inquiry, than what Defendants engaged in. But this  
5 notice is a fact to be proved at trial.<sup>8</sup>

6 **D. LACK OF REASONABLY EQUIVALENT VALUE**

7 Besides good faith, A&M Surety must prove that it received the  
8 transfers (commissions) for reasonably equivalent value.  
9 Initially, the trustee relied on Martino v. Edison Worldwide  
10 Capital (In re Randy), 189 B.R. 425, 439 (Bankr. E.D. Ill. 1995)  
11 for the proposition that brokers who perform services in  
12 furtherance of a ponzi scheme give no "value" as a matter of law.  
13 The bankruptcy court in Randy held that brokers provide no "value"  
14 as a matter of law because their commission contracts are legally  
15 unenforceable. According to the court, brokers' efforts assist the  
16 debtor's ponzi scheme and serve to perpetuate the scheme. As such,  
17 they are participants of the scheme and their contract for payment  
18 is illegal. Randy, 189 B.R. at 441 (citing Gibbs & Sterrett Mfg.  
19 Co. v. Brucker, 111 U.S. 597, 601 (1884) (stating the general  
20 principle that one who himself participated in a violation of law  
21 cannot be permitted to assert in a court of law rights arising from  
22 the illegal transaction). The Randy court recognized that if a  
23 party seeking enforcement of an illegal contract is innocent of any  
24 wrongdoing, the rationale for refusing to enforce the bargain is

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26 <sup>8</sup> Trustee's First Amended Complaint alleges that the debtors made  
27 transfers to Defendants of at least \$3,750,000 between May 30, 1998 and May 30,  
28 2002. The anonymous letter bears Defendants' fax receipt stamp dated February 13,  
2001.

1 inapplicable. Id. at 441. Notwithstanding, the court concluded  
2 that in cases of a ponzi scheme, the interests of the public  
3 override the equitable standing of innocent parties. Id.

4 Many courts have rejected the Randy rationale. See e.g. Orlick  
5 v. Kozyak (In re Fin. Federated Title & Trust, Inc.), 309 F.3d 1325  
6 (11th Cir. 2002); Solow v. Reinhardt (In re First Commercial Mgmt.  
7 Group, Inc., 279 B.R. 230 (Bankr. E.D. Ill. 2002); Churchill  
8 Mortgage Inv. Corp., 256 B.R. 664 (Bankr. S.D.N.Y. 2000); Cuthill  
9 v. Greenmark, LLC (In re World Vision Entm't, Inc.), 275 B.R. 641  
10 (Bankr. M.D. Fla. 2002). These courts criticize Randy as "fatally  
11 flawed" because it focused on the significance of the broker's  
12 services in perpetuating the debtor's ponzi scheme instead of the  
13 specific consideration that was actually exchanged. First  
14 Commercial, 279 B.R. at 238.

15 This Court agrees that the reasoning of Randy is flawed. The  
16 Court must apply the statutory language of Civil Code §  
17 3439.04(a)(2) and Ninth Circuit case law to the "value" inquiry.  
18 Civil Code § 3439.04(a)(2) provides an obligation is constructively  
19 fraudulent if the debtor made the transfer "[w]ithout receiving  
20 reasonably equivalent value in exchange for the transfer ...."  
21 Thus, Civil Code § 3439.04(a)(2) directs the inquiry to the  
22 specific transaction to determine the value exchanged.

23 The Ninth Circuit has confirmed the inquiry is directed to the  
24 specific transaction. United Energy, 944 F.2d at 596. Courts are  
25 to determine whether the debtor received reasonably equivalent

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1 value in making the payments. Id. at 597.<sup>9</sup> The court explained  
2 that the analysis is "directed at what the debtor surrendered and  
3 what the debtor received irrespective of what any third party may  
4 have gained or lost." Id. Because the Randy rationale directs the  
5 inquiry to debtor's business enterprise and the impact on third  
6 parties, it is inconsistent with Ninth Circuit law.<sup>10</sup>

7 In his supplemental brief, the trustee primarily relies on  
8 Warfield v. Byron, 436 F.3d 551 (5th Cir. 2006) in support of his  
9 argument that there can be no reasonably equivalent value in a  
10 ponzi scheme. In Warfield the issue was whether the two defendants  
11 received the fraudulent transfers in question, in exchange for  
12 reasonably equivalent value for purposes of establishing an  
13 affirmative defense. The court found that both defendants, one an  
14 investor and the other an investor who provided broker services,  
15 failed to take the exchange for reasonably equivalent value. The  
16 Warfield court opined that "[t]he primary consideration in  
17 analyzing the exchange of value for any transfer is the degree to  
18 which the transferor's net worth is preserved. It takes cheek to  
19 contend that exchange for the payments he received, the [company's]  
20 ponzi scheme benefitted from his efforts to extend the fraud by  
21 securing new investment." Id. at 560. The Court finds that  
22 Warfield adds little to the analysis that Randy does not already

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24 <sup>9</sup> The Ninth Circuit applied § 548(a)(2), but its "reasonably equivalent  
25 value" analysis is interchangeable with Cal.Civ.Code § 3439.04(a)(2). United Energy,  
944 F.2d at 594.

26 <sup>10</sup> Taken to its logical extreme, the Randy rationale would avoid all  
27 payments made by Debtors during the course of their ponzi scheme. Debtors' landlord,  
28 salaried employees, accountants and attorneys, and utility companies all provided  
services to Debtors, and all would have assisted in furtherance of the ponzi scheme.  
Avoidance of all payments "as a matter of law" is absurd. Accord Financial  
Federated, 309 F.3d at 1332.

1 state.

2 An evidentiary showing of "value" has been made where A&M  
3 Surety actually performed the services for which they were paid,  
4 and the commissions were proportionate to those paid in the  
5 industry. Furthermore, this Court has already indicated the  
6 Defendants' competing evidence presents a classic triable factual  
7 issue of good faith. See Waltuch v. ContiCommodity Serv., Inc. (In  
8 re Conticommodity Serv., Inc.), 833 F.Supp. 302, 313 (S.D.N.Y.  
9 1993) (determinations such as "good faith" are necessarily fact  
10 laden and for that reason they are rarely decided on summary  
11 judgment). Specifically, the Anthony Declaration at ¶¶ 3,6-8, 34,  
12 41-47, 49-51, 56, 61, 64, and 66-71 evidences Defendants' lack of  
13 actual knowledge of a ponzi scheme and their good faith. [See also  
14 Anthony Deposition dated September 21, 2007 at 36-42].

15 The Court concludes a triable issue of fact exists as to  
16 whether Debtors and A&M Surety exchanged reasonably equivalent  
17 value. Accordingly, trustee's motion for summary judgment  
18 regarding the Defendants' good faith defense is denied.

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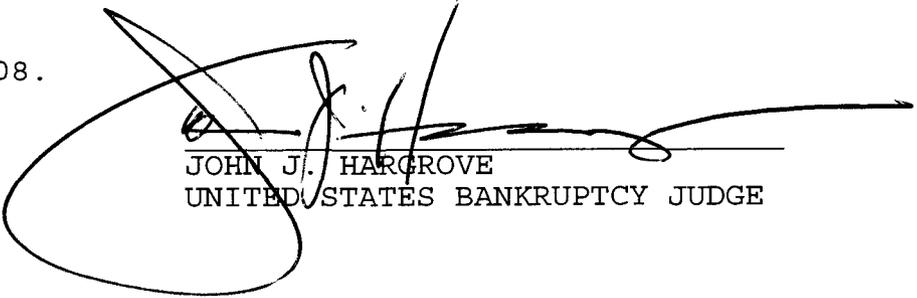
III.

CONCLUSION

For the reasons set forth above, the Court finds the transfers by Debtors were intentionally fraudulent transfers as a matter of law. The Court denies the balance of the motion.

This Memorandum Decision constitutes findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. Counsel for the trustee is directed to file with this Court an order in conformance with this Memorandum Decision within ten (10) days from the date of entry hereof.

Dated: January 3, 2008.



JOHN J. HARGROVE  
UNITED STATES BANKRUPTCY JUDGE