

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
PACE AMERICAN ENTERPRISES, INC.,	)	CASE NO. 11-33416 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
REBECCA HOYT FISCHER, TRUSTEE,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 12-3002
	)	
KEN-MAC METALS, A DIVISION OF	)	
THYSSENKRUPP MATERIALS, NA, INC.,	)	
	)	
DEFENDANT.	)	

Appearances:

Rebecca Hoyt Fischer, Esq., counsel for Trustee, Laderer & Fischer, P.C., 401 East Colfax, Suite 305, South Bend, Indiana; and

Anne E. Simerman, Esq., Cathleen M. Shrader, Esq., and Thomas P. Yoder, Esq., counsel for defendant, Barrett & McNagny LLP, 215 East Berry Street, Fort Wayne, Indiana 46802.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 21, 2013.

Before the court are the cross-motions for partial summary judgment filed by the plaintiff Rebecca Hoyt Fischer, Trustee (“plaintiff” or “Trustee”) of the chapter 7 debtor Pace American Enterprises, Inc. (“debtor” or “Pace”), and by the defendant Ken-Mac Metals (“defendant” or “Ken-Mac”), creditor of the debtor. Each party asserts that it is entitled to judgment as a matter of law with respect to Count I of the Plaintiff’s Complaint.<sup>1</sup> The Complaint was filed pursuant to 11 U.S.C. § 544(a)(1) and § 548(a)(1) to recover certain property that the Trustee determined was avoidable and was fraudulently transferred

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<sup>1</sup> Count II of the Complaint, alleging that the Trustee could avoid certain preferential payments made by the debtor to or for the benefit of the defendant, was settled by the parties. *See* R. 30 at 1.

immediately prior to the filing of the bankruptcy proceeding. For the reasons that follow, the Trustee's Motion for Partial Summary Judgment is granted and Ken-Mac's Motion for Partial Summary Judgment is denied.<sup>2</sup>

### BACKGROUND

The parties agree that there are no material facts in dispute. They have presented to the court, as attachments to their briefs, the relevant contract between the parties, price quotes, answers to interrogatories, and affidavits. Based upon these documents, the court sets forth the uncontested factual background to the legal dispute.

Pace, a manufacturer of enclosed trailers with its principal place of business in Middlebury, Indiana, and Ken-Mac, a processor and distributor of aluminum and stainless steel products (designated herein as "the Metal") with its principal place of business in Cleveland, Ohio, entered into a "Supply Agreement" on December 29, 2010. The Agreement was premised on Pace's desire to receive a reliable supply of high-quality Metal to provide to its manufacturing locations and Ken-Mac's desire to secure a substantial portion of Pace's Metal business. *See* R. 30, Ex. A, p. 1. "[T]o establish a stable and mutually advantageous long-term strategic supply relationship," the Agreement set forth the obligations and rights of each party, pricing policies, mill selection procedures, shipping and payment terms, and other provisions. *Id.* Of relevance to this proceeding is the section titled "Consigned Inventory," which stated the following:

Buyer [Pace] and Seller [Ken-Mac] may agree to establish an inventory consignment program at some of [Pace's] facilities whereupon the following conditions will apply:

1. [Pace] and [Ken-Mac] shall jointly determine the mix and quantity of consigned inventory, generally intended to constitute no more than a 60 day supply.
2. [Pace] will promptly notify [Ken-Mac] of all withdrawals [of Metal from inventory]. Opening of any banded skid or coil by [Pace] shall constitute withdrawal of the entire skid or coil. [Ken-Mac] may immediately invoice for all withdrawals.

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<sup>2</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200-1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H).

3. [Ken-Mac] may invoice [Pace] for any consigned inventory not withdrawn within 180 days, from the date placed into inventory.
4. [Pace] is responsible to [sic] for maintaining adequate storage conditions and shall provide [Ken-Mac] adequate protection against loss, damage, fire and theft of inventory.
5. [Ken-Mac] retains a purchase money security interest in all consigned inventory until withdrawn by [Pace]. [Ken-Mac] shall be granted reasonable access during regular business hours for inspection of consigned inventory.

*Id.*, pp. 4-5. Ken-Mac did not file a UCC financing statement with respect to Pace or the Metal.

Ken-Mac sent its first shipment under the consignment program on February 28, 2011, and additional shipments were made beginning on April 4, 2011. Under the consignment program, Pace stored Ken-Mac's inventory on Pace's property and would, from time to time, withdraw inventoried Metal to use in the manufacturing of its trailers. Pace would break open the banded skid or coil and move the Metal into its production facility. It then would notify Ken-Mac of the withdrawal. Upon notification, Ken-Mac would then generate an invoice and bill Pace for the Metal withdrawn from inventory.

However, Pace failed to make timely payments on its account. On August 15, 2011, Pace was in possession of approximately 290,000 pounds of metal coils located at six different Pace warehouses. Ken-Mac informed Pace that it would pick up its remaining inventory on Pace's premises. The Metal transferred back to Ken-Mac was the banded skids or coils that Pace had not opened. Although there is some dispute about whether Ken-Mac notified Pace of the inventory withdrawal or which Ken-Mac employee informed Pace of the pick-up, that fact is not material to the resolution of the legal issues herein.<sup>3</sup> The parties agree that Ken-Mac removed its inventoried Metal from Pace's premises by August 17, 2011, and did not list the Metal on any invoice sent by Ken-Mac to Pace. They also confirm that Ken-Mac paid no money or other consideration to Pace for the transferred Metal.

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<sup>3</sup> The Trustee alleged that the transfer was arranged by Jay Loprest, the Vice-President of Operations of Pace, and Denise Long, the Corporate Credit Manager of Ken-Mac, without knowledge or consent of Craig R. Graff, the financial advisor for Pace. *See* R. 30, p. 3. Ken-Mac commented that the Trustee's identity of the Ken-Mac employee who arranged for the pick-up of the Metal was incorrect, but it noted that that fact was not material to the court's inquiry. *See* R. 34, p. 2, n.2.

On August 31, 2011, an involuntary bankruptcy petition for relief under chapter 7 was filed by three creditors of Pace, including Ken-Mac.<sup>4</sup> Pace's schedules showed debt of \$18,408,619.23 and assets of \$7,072,451.12 when the involuntary petition was filed.<sup>5</sup> Pace's financial condition did not substantially change between the date of the transfer, August 17, 2011, and the date the involuntary petition was filed, August 31, 2011.

### DISCUSSION

Each party has filed a motion for summary judgment. This court renders summary judgment only if the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

When, as in this case, the parties have filed cross motions for summary judgment, the court must examine the evidence and "construe all facts and inferences therefrom 'in favor of the party against whom the motion under consideration is made.'" *In re United Air Lines, Inc.*, 453 F.3d 463, 468 (7th Cir. 2006) (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 536 (7th Cir. 2005)). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an

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<sup>4</sup> The three petitioning creditors filing the Pace involuntary bankruptcy were Ken-Mac Metals, Z Technologies Corp., and Aluminum Line Products Co.

<sup>5</sup> On January 26, 2012, Ken-Mac filed a proof of claim, Claim No. 242, under the name "ThussenKrupp Materials NA Inc., dba Ken Mac Metals Division," valued at \$1,046,682.59.

element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The Trustee seeks to avoid Ken-Pac's transfer of Metal under 11 U.S.C. § 548 of the Bankruptcy Code<sup>6</sup> by exercising her "strong-arm powers" under 11 U.S.C. § 544.<sup>7</sup> The Trustee's position is that the transfer of the Metal from Pace to Ken-Mac about two weeks before the Pace bankruptcy filing was a transfer that the Trustee, as a § 544 judgment lien creditor, can avoid as an unperfected lien or as an actual or constructive fraudulent transfer under § 548. The Trustee seeks to recover the value of the Metal for the benefit of the estate pursuant to 11 U.S.C. § 550. She asserts that a trustee, as lien creditor under § 544(a)(1),

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<sup>6</sup> Section 548 of the Bankruptcy Code provides, in relevant part:

(a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made . . . on or within 2 years before the date of filing of the petition, if the debtor voluntarily or involuntarily –

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a 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.

11 U.S.C. § 548(a)(1).

<sup>7</sup> Section 544 of the Bankruptcy Code provides, in relevant part:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by –

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists.

11 U.S.C. § 544(a)(1).

has priority over Ken-Mac, a consignor that failed to perfect its security interest by filing a UCC financing statement. She requests summary judgment on the issue of liability, and states that the parties will accept mediation concerning the amount of damages, if necessary.

A. 11 U.S.C. § 544(a)(1)

Ken-Mac claims that § 544(a)(1) is inapplicable to the facts in this case. It points out that a § 544 hypothetical judicial lien arises at “the commencement of the case.” However, when this case commenced, the defendant notes, the Metal was no longer in the debtor’s possession or control. For that reason, it argues, “there was nothing over which a hypothetical Pace creditor could obtain judicial lien rights.” R. 32 at 9. Although the result would have been different if the Metal had been in Pace’s possession on the date of the bankruptcy petition, Ken-Mac admitted, in this case the Metal had been reclaimed before bankruptcy and thus no hypothetical judicial lienholder could have reached it. *See id.*

The court agrees with Ken-Mac that the bankruptcy filing is the event that triggers the trustee’s ability and right to assume the position of hypothetical lien creditor. At the moment the petition is filed, the trustee becomes, hypothetically, a creditor with a perfected lien who has the power to avoid any competing claims over which she has lien priority. “The purpose of [§ 544] is to equip the trustee with the ability to gather property of the estate for the benefit of unsecured creditors.” *In re Couillard*, \_\_ B.R. \_\_, 2012 WL 6924391 at \*2 (Bankr. Nov. 9, 2012).

However, in gathering the property of the estate the Trustee is not limited to only the property in the debtor’s possession on the date of the bankruptcy petition. Section 544(a) authorizes a trustee to avoid transfers of a debtor’s property, or of unperfected liens on a debtor’s property, when those transfers or obligations are avoidable under nonbankruptcy law. *See In re Lancelot Investors Fund, L.P.*, 467 B.R. 643, 648 (Bankr. N.D. Ill. 2012). The statute “vests the trustee with the ability of a judgment lien creditor to attach or seize both tangible and intangible property transferred by the debtor to a third party *prior to filing for bankruptcy . . .*” *Id.* (emphasis added) (quoting *Alberts v. Tuft (In re Greater Southeast Community*

*Hosp. Corp.*, 333 B.R. 506, 520 (Bankr. D.D.C. 2005)); *see also In re Mullen*, 402 B.R. 353, 356 (Bankr. D. Idaho 2008) (describing trustees' powers to recover transfers made pre-bankruptcy). It is clear that the trustee has the power to avoid transfers of property of the debtor made prior to the bankruptcy filing. For that reason, the avoidance provision § 544 is certainly applicable to the circumstances herein.

However, Ken-Mac also claims that the transfer of the Metal was not a transfer of Pace's property; by repossessing the Metal, it says, it was simply reclaiming its own property. The Trustee insists that the debtor had an interest in the Metal under the Supply Agreement: It had the right to possess it and to use it in manufacturing its trailers. The court therefore turns to the question whether there was a "transfer of property of the debtor" and, if so, what the relative rights of Ken-Mac and the bankruptcy Trustee are.

The Supreme Court, considering the § 541 definition of "property of the debtor" in relation to § 547(b), the preference statute, made clear in *Begier v. Internal Revenue Service* that "property of the debtor' subject to the preferential transfer provision is best understood as that property that *would have been* part of the estate had it not been transferred before the commencement of bankruptcy proceedings." *Begier*, 496 U.S. 53, 58, 110 S. Ct. 2258, 2263, 110 L.Ed.2d 46 (1990) (italics added). The Fourth Circuit applied that analysis to § 548:

Section 541 defines "property of the estate" as, *inter alia*, all "interests of the debtor in property." 11 U.S.C. § 541(a)(1). In turn, § 548 allows the avoidance of certain transfers of such "interest[s] of the debtor in property." 11 U.S.C. § 548(a)(1). By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that *would have been* "property of the estate" prior to the transfer in question – as defined by § 541 – even if that property is not "property of the estate" *now*. . . . Through this incorporation, Congress made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, wherever that property is located.

*French v. Liebmann (In re French)*, 440 F.3d 145, 151-52 (4th Cir.), *cert. denied*, 549 U.S. 815 (2006) (citing *Begier*) (*quoted in In re Fabian*, 458 B.R. 235, 260 (Bankr. D. Md. 2011)). In fact, the statute allows a trustee to "reach back" two years prior to the bankruptcy filing date to avoid fraudulent conveyances. *See In re Fabian*, 458 B.R. at 260. It is indubitable that the Metal was property that would have been part of

the Pace bankruptcy estate had it not been transferred two weeks before the bankruptcy petition was filed. This court finds, therefore, that the Trustee has the capacity to avoid the prepetition transfer of the Metal as long as she fulfills the requirements of § 544(a) and/or § 548(a).

To determine whether the Trustee, as hypothetical lien creditor, has the power under § 544 to avoid Ken-Mac's transfer of the Metal, the court turns to federal law for the rules defining and governing "property of the estate" and looks to state law for the rules governing the extent of the debtor's interest in that property. *See In re Airadigm Communications, Inc.*, 519 F.3d 640, 650 (7th Cir. 2008) (stating that the "strong-arm" power comes from federal bankruptcy law but rules governing perfection of security interests come from nonbankruptcy law); *Matter of Chaseley's Food, Inc.*, 726 F.2d 303, 307 (7th Cir. 1983) (stating that priority rules governing lien creditors come from state law); *In re Berg*, 387 B.R. 524, 566 (Bankr. N.D. Ill 2008) (stating that trustee's rights are governed by federal law but extent of those rights regarding priority of lien holders is controlled by state law). Section 544, the "strong-arm" provision, gives a trustee the authority to "seek to avoid unperfected liens, assert a superior interest in assets, and distribute the value of those assets to other creditors." *In re Baker*, 430 F.3d 858, 858-59 (7th Cir. 2005). A trustee is entitled "to void a security interest because of defects that need not have misled . . . anyone." *In re Vic Supply Co., Inc.*, 227 F.3d 928, 932 (7th Cir. 2000). In this case, the Trustee claims she is entitled to void Ken-Mac's interest in the Metal because of a defect: Ken-Mac failed to perfect its security interest in the Metal. The rules governing perfection of security interests are found in state law.

In this case, the parties' relationship was based upon and governed by the "Supply Agreement," and in particular by the consignment section of the Agreement. The Agreement provided that it was to be administered and interpreted according to the laws of the State of Ohio. *See* R. 30, Ex. A at 6. Therefore Ohio law provides the rules governing security interests and their perfection.

Article 9 of the Uniform Commercial Code governs the secured interests of commercial transactions and sets forth how a lien is created and what makes it valid. "Ohio, like the other forty-nine

states, adopted Revised Article 9 of the UCC.”<sup>8</sup> *In re Westfall*, 599 F.3d 498, 502 (6th Cir. 2010) (reviewing definition of purchase money security interest).

Under the UCC, a creditor ordinarily files with the state a financing statement giving notice of its lien, thus perfecting the lien, and such filing puts future purchasers or creditors on notice of the prior encumbrance. The ability to search the state UCC filings provides a convenient way for future purchasers or creditors to ensure that they are buying or accepting goods as collateral with full knowledge of any earlier encumbrance.

*In re Southern Air Transport, Inc.*, 511 F.3d 526, 532 (6th Cir. 2007); *see also Union Bank Co. v. Heban*, 2012 WL 32102 at \*3 (Ohio App. 6 Dist., Jan. 6, 2012) (“In general, a financing statement must be filed in order to perfect a security interest.”). The UCC codified its underlying purposes, including its intent to “make uniform the law [governing commercial transactions] among the various jurisdictions.” UCC § 1-103(a)(3).

In Ohio, Article 9 is codified in the Ohio Revised Code Chapter 1309, R.C. §§ 1309.101-1309.709. *See In re Giaimo*, 440 B.R. 761, 767 (6th Cir. BAP 2010). The definition of “consignment” is provided in the definitional section, § 1309.102:

(20) “Consignment” means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale and:

- (a) The merchant:
  - (i) Deals in goods of that kind under a name other than the name of the person making delivery;
  - (ii) Is not an auctioneer; and
  - (iii) Is not generally known by its creditors to be substantially engaged in selling the goods of others;

- (b) With respect to each delivery, the aggregate value of the goods is one thousand dollars or more at the time of delivery.

R.C. § 1309.102(20). The statute’s Official Comment noted that the consignment definitions were new and that they reflected the expanded scope of Article 9. It further explained:

The definition of “consignment” requires that the goods be delivered “to a merchant for the purpose of sale.” If the goods are delivered for another purpose as well, such as milling or

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<sup>8</sup> The court notes that the Ohio statutes governing consignment are identical or substantially similar to the Indiana statutes and to the statutes of all states that have adopted the UCC’s Revised Article 9.

processing, the transaction is a consignment nonetheless because a purpose of the delivery is “sale.”

R.C. § 1309.102, Official Comment, ¶ 14. Based upon that Comment and on the fact that Ken-Mac’s Metal was delivered to Pace for the purpose of processing the Metal to manufacture trailers, the court finds that the commercial relationship between Ken-Mac and Pace constitutes a consignment under Article 9 pursuant to Ohio’s R.C. § 1309.102(20).

Ohio courts have long upheld the broad policy reflected in UCC § 9-114, codified in R.C. § 1301.111, that a consignor was required to comply with the rules found in Article 9 of the Ohio UCC for the creation and perfection of security interests.<sup>9</sup> See *National City Bank, Northeast v. Specialty Tires of America, Inc.*, 672 N.E.2d 232, 236 (Ohio App. 9 Dist. 1996) (requiring consignor to perfect security interest in accounts receivable). Under Ohio’s Article 9 provisions, therefore, a consignor’s security interest in its consigned goods “is a purchase-money security interest in inventory.” R.C. § 1309.103(D). The Supply Agreement confirms that relationship.<sup>10</sup> See R. 30, Ex. A, p. 5.

The method by which a consignor perfects its security interest is found in § 1309.317:

[I]f a person files a financing statement with respect to a purchase money security interest before or within twenty days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor that arise between the time the security interest attaches and the time of filing.

R.C. § 1309.317 (E). The Official Comment provides further insight:

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<sup>9</sup> Since the UCC revisions of 2001, “consignments are no longer subject to Article 2, and its rule that goods on sale-or-return are subject to the claims of creditors no longer applies to them.” 20 Am. Bankr. Inst. J. 30, 31 (2002). The Supreme Court of Tennessee, quoting that commentary, confirmed that many consignment transactions now are governed by the revised Article 9, which deals with secured transactions, rather than Article 2, which deals with sales. See *In re Music City RV, LLC*, 304 S.W.3d 806, 809, 812 (Tenn. 2010)).

<sup>10</sup> Ken-Mac enigmatically stated: “While the Supply Agreement also states that Ken-Mac retains a ‘purchase money security interest’ in the metal, that statement is inconsistent with the remainder of the contract.” R. 34, p. 5, n.4. The court finds that the statement is fully consistent with the consignment provisions of Ohio’s version of the UCC’s Revised Article 9. Ken-Mac’s security interest, as consignor, was a purchase money security interest.

A consignee of goods . . . is deemed to have rights in the collateral which a lien creditor may reach, as long as the competing security interest of the consignor or buyer is unperfected.

R.C. § 1309.317, Official Comment ¶ 5. In addition, while the consigned goods are in the consignee’s possession, “the consignee is deemed to acquire all rights and title that the consignor had, if the consignor’s security interest is unperfected.” R.C. § 1309.319, Official Comment ¶ 2; *see also In re Niblett*, 441 B.R. 490, 492 (Bankr. E.D. Va. 2009) (“Consigned goods in the hands of the consignee (here, the debtor) are subject to all of the claims of the consignee’s creditors.”). Insofar as creditors of the consignee are concerned, however, “a perfected security interest held by the consignor would have priority over the rights of the creditor.” R.C. § 1309.319(B). The consignor is in the best position “to determine whether its transaction with the consignee falls under the UCC’s definition of ‘consignment’ and to file a financing statement to perfect its interest if it does.” *In re Downey Creations, LLC*, 414 B.R. 463, 470 (Bankr. S.D. Ind. 2009).

Ken-Mac, the consignor, did not protect itself by filing a financing statement. As a result, its security interest in the Metal is unperfected, and under the Ohio statutes a consignee like Pace is deemed to have rights in the collateral which a hypothetical lien creditor like this bankruptcy Trustee may reach.<sup>11</sup> *See* R. C. § 1309.317, Official Comment ¶ 5. The court concludes that the Trustee has fully demonstrated that the defendant Ken-Mac is an unperfected consignor under Ohio law whose rights are subordinate to the rights of the judicial lien creditor Trustee under § 544(a)(1).

B. 11 U.S.C. § 548(a)(1)

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<sup>11</sup> It is well settled in the case law that, when a consignor has not perfected its interest under state law by filing a financing statement with respect to its consigned goods, a debtor-consignee’s interest in those goods has been found to be property of the estate. *See, e.g., In re Salander-O’Reilly Galleries, LLC*, 475 B.R. 9 (S.D.N.Y. 2012) (New York law); *In re Wolverine Fire Apparatus Co.*, 465 B.R. 808 (Bankr. E.D. Wis. 2012) (Wisconsin law); *In re Vogue Coach Co.*, 132 B.R. 454 (Bankr. N.D. Okla. 1991) (Okla. law); *In re Flo-Lizer, Inc.*, 121 B.R. 324 (S.D. Ohio 1990) (aff’d, 946 F.2d 1237 (6th Cir. 1991)) (Ohio law); *In re Fisher*, 100 B.R. 351 (Bankr. S.D. Ohio 1989) (Ohio law).

The Trustee also asserts that the transfer of the Metal back to Ken-Mac is a fraudulent transfer under § 548(a).<sup>12</sup> A trustee generally must prove, by a preponderance of the evidence, that there was a fraudulent transfer and that recovery is appropriate. *See, e.g., Friedrich v. Mottaz*, 294 F.3d 864, 867 (7th Cir. 2002); *In re Cahillane*, 408 B.R. 175, 188 (Bankr. N.D. Ind. 2009); *In re Knippen*, 355 B.R. 710, 725 (Bankr. N.D. Ill. 2006). Section 548 “focuses not on the property itself, but on the fraud of transferring it.” *In re French*, 440 F.3d 145, 150 (4th Cir. 2006).

Section 548 empowers the bankruptcy trustee to avoid certain transfers out of the bankruptcy estate, including one for which the debtor “received less than a reasonably equivalent value” for the property and thus “became insolvent as a result of such transfer.” 11 U.S.C. § 548(a)(1)(B)(i)-(ii)(I).

*Smith v. SIPI, LLC (In re Smith)*, 614 F.3d 654, 657 (7th Cir. 2010). “The trustee’s avoidance powers are limited by a two-year look-back period; the transfer must have occurred ‘on or within 2 years before the date of the filing of the petition.’” *Id.* (citing *Ojeda v. Goldberg*, 599 F.3d 712, 716 (7th Cir. 2010)). The trustee has the burden of proving the following elements in order to establish a fraudulent conveyance:

- (1) a transfer of the debtor’s property or the debtor’s interest therein;
- (2) made within two years of the filing of the bankruptcy petition;
- (3) for which the debtor received less than a reasonably equivalent value; and
- (4) the debtor was insolvent when the transfer was made or was rendered insolvent as a result of the transfer.

*See In re Cahillane*, 408 B.R. at 188-89; *In re Knippen*, 355 B.R. at 725.

The Trustee points out that the debtor, Pace, had an interest in the Metal because the Supply Agreement gave it the right to possess it in inventory and to use it when needed for manufacturing. The court confirmed *supra* that Pace held an interest in the Metal pursuant to its role as consignee under the Supply Agreement and the Ohio Statutes. It is not disputed that (a) the Metal was transferred within the 2-year period set by the statute, and (b) the debtor was insolvent when the transfer was made. The Trustee

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<sup>12</sup> The relevant portions of the statutory provision are quoted in footnote 6 *supra*.

argued that the transfer demonstrated both actual and constructive fraud, but the court finds the constructive fraud argument more persuasive.<sup>13</sup>

Generally, under Section 548(a)(1)(A) of the Code a trustee can avoid a transfer made with the actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted. This is the Code's actual fraudulent transfer provision. Under Section 548(a)(1)(B), a trustee can avoid a transfer made for less than reasonably equivalent value if the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer. This is the Code's constructive fraudulent transfer provision.

*In re Lancelot Investors Fund, L.P.*, 467 B.R. 643, 647-48 (Bankr. N.D. Ill. 2012). The constructive fraud alternative of § 548(a)(1)(B) omits the element of actual intent found in § 548(a)(1)(A). *See In re 4100 West Grand LLC*, 481 B.R. 444, (Bankr. N.D. Ill. 2012) (*citing In re FBN Food Services, Inc.*, 82 F.3d 1387, 1394 (7th Cir. 1996)).

The dispute in this case focuses on whether the debtor received a reasonably equivalent value in exchange for the transferred Metal. Although the term "reasonably equivalent value" is not defined in the statute, "value" is: It means "property, or satisfaction or securing of a present or antecedent debt of the debtor." § 548(d)(2)(A). In determining value, a court is directed to find the fair market value of the property at the time of the transfer. *See Grochocincki v. Schlossberg*, 402 B.R. 825, 841 (N.D. Ill. 2009). According to our Seventh Circuit precedent, no specific mathematical formula is applied when determining reasonably equivalent value; instead, the court examines all the facts of each case. *See Barber v. Golden Seed Co., Inc.*, 129 F.3d 382, 387 (7th Cir. 1997); *Grochocincki*, 402 B.R. at 835-36. The court then must "determine the value of what was transferred and compare it to what was received." *Barber*, 129 F.3d at

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<sup>13</sup> In their reply briefs, the parties elaborated upon factually explicit arguments concerning Ken-Mac's alleged actual fraud. Those positions were not developed in their opening briefs or in the Trustee's Complaint. The Seventh Circuit has stated that, "[w]hile arguments made for the first time in a reply brief are generally treated as waived, it does not necessarily follow that arguments that are better developed in a reply brief are waived." *Hernandez v. Cook County Sheriff's Office*, 634 F.3d 906, 913 (7th Cir. 2011). Nevertheless, the court found that genuine issues of material fact were being raised in the Trustee's and Ken-Mac's arguments on actual fraud. For that reason, it turned to the Trustee's alternative request for relief, constructive fraudulent transfer pursuant to § 548(a)(1)(B).

387; *see also In re 4100 West Grand*, 481 B.R. at 454 (“First, the court must ‘determine whether the debtor received value, and then examine whether the value is reasonably equivalent to what the debtor gave up.’”).

The Trustee claims that Pace received nothing of value from Ken-Mac in exchange for the transferred Metal – neither compensation nor an invoice indicating satisfaction of a debt in existence at the time of the transfer. Ken-Mac insists it gave value, “reasonably equivalent value,” in exchange for the transferred Metal through the satisfaction of the debt Pace would owe to Ken-Mac. It claims that, if the Metal belonged to Pace, Ken-Mac’s transfer of the Metal back to itself “was at least a dollar-for-dollar credit on Pace’s obligation” when Pace bought the Metal. R. 32 at 8. If, on the other hand, Pace had no interest in the Metal until it used the Metal, Ken-Mac’s removal of the unused Metal was a re-taking of its own property, and it cannot be a fraudulent transfer. *See id.* at 6; *see also* R. 34 at 8.

The court, examining all the undisputed facts and circumstances in this case, finds that the Metal was property in which the debtor retained an interest: The Metal was property that had been delivered to Pace by Ken-Mac to be held in Pace’s inventory until needed in Pace’s manufacturing process. The court further finds that Ken-Mac transferred the Metal out of Pace’s inventory and from its premises to Ken-Mac’s facilities two weeks before the involuntary bankruptcy of the debtor was filed – by Ken-Mac and two other creditors. In the court’s view, the transfer of the Metal by Ken-Mac soon before the bankruptcy filing was evidently a creditor’s swift retaking of valuable property, fully realizing Pace’s dire financial straits and probably in complete recognition that it would participate in the filing of Pace’s involuntary petition soon after reclaiming the goods.

In its Statement of Financial Affairs, the debtor listed the value of the Metal on the petition date (two weeks after the transfer) as \$520,000. Ken-Mac did not proffer a different valuation, and so the court finds it reasonable that the fair market value of the transferred property at the time of the transfer, only two weeks before the petition was filed, was \$520,000.

The court next considers what the debtor received in return. It examined the record to find something of value received by Pace in return, some property or some satisfaction of a present or antecedent debt that the debtor owed to Ken-Mac. It found no evidence in the record. Ken-Mac seems to argue that the debtor received reasonably equivalent value by means of a satisfaction of its obligation either to pay for the Metal or to return it. However, the value of the transferred Metal was \$520,000, and Ken-Mac took back the Metal without providing any consideration for the transfer, crediting Pace for the return, or documenting that a present or future debt had been satisfied by the removal of the Metal. The Trustee met her difficult burden of proving a negative – that the debtor received nothing of value from Ken-Mac in return for the removal of the Metal – and Ken-Mac did not rebut her proof by coming forward with any evidence or authority to indicate that the debtor received reasonably equivalent value. *See In re Fabian*, 458 B.R. 235, 263 (Bankr. D. Md. 2011) (“Trustee has proven, by reason of the fact that there was no consideration for any of the transfers in question, that [the debtor] ‘received less than a reasonably equivalent value in exchange for such transfer or obligation.’”); *In re Jacobs*, 394 B.R. 646, 672-73 (Bankr. E.D.N.Y. 2008) (finding that trustee established that transfer was made for less than fair consideration or value).

Based on the evidence before it and on the record in this adversary proceeding, the court concludes that the Trustee has demonstrated, by a preponderance of the evidence, all of the requisite elements to establish a constructive fraudulent transfer. Consequently, the Trustee is entitled to summary judgment on Count I of her Complaint, seeking avoidance of Ken-Mac’s transfer of the Metal as a constructive fraudulent transfer under § 548(a)(1)(B) and recovery of the value of the transfer under § 550.

### CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court denies the Motion for Partial Summary Judgment of the defendant Ken-Mac Metals and grants the Motion for Partial Summary Judgment of the plaintiff Rebecca Hoyt Fischer, Trustee of the chapter 7 debtor Pace American Enterprises, Inc. The court enters partial summary judgment in favor of the Trustee on Count I of the Trustee’s Complaint pursuant to 11 U.S.C. § 544(a)(1) and § 548(a)(1)(B). It further holds that the value of the pre-petition

transfer of the Metal to the defendant is recoverable for the benefit of the bankruptcy estate pursuant to 11 U.S.C. § 550(a).

SO ORDERED.

/s/ HARRY C. DEES, JR.  
HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT