Dated: June 14, 2016
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re

CECIL RAY DAVIS, Case No. 05-15794-L
Chapter 7

Debtor.

MICHAEL T. TABOR,
Chapter 7 Trustee,
Plaintiff,
v. Adv. Proc. No. 07-05152
CAROL D. DAVIS,
Defendant.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

BEFORE THE COURT is the motion of Plaintiff, Michael T. Tabor, Trustee in Bankruptcy (the "Trustee"), seeking summary judgment with respect to his claims that the Defendant, Carol D. Davis, wife of the Debtor, benefitted from certain transfers made by the Debtor. The Trustee seeks to avoid these transfers under sections 544, 547, and 548 of the Bankruptcy Code, and to recover the value of the transfers pursuant to section 550. In support of his motion, the Trustee offers the Depositions of Cecil Ray Davis, Carol D. Davis, and Elton Sims, together with related exhibits. The court has also taken judicial notice of certain matters contained in the bankruptcy papers filed by the Debtor. For reasons set forth below, summary judgment will be granted for the Plaintiff in part and for the Defendant in part.

JURISDICTION

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). Proceedings to determine, avoid, or recover preferences, and proceedings to determine, avoid, and recover fraudulent conveyances are core proceedings arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(F) and (H). Accordingly, the bankruptcy court has statutory authority to enter summary judgment with respect to these claims subject only to appellate review under section 158 of title 11. 28 U.S.C. § 157(b)(1). The bankruptcy court may not, however, have Constitutional authority to hear and finally determine some or all complaints to determine, avoid, and recover fraudulent conveyances. *See Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594 (2011). So long as the parties knowingly and voluntarily consent, the bankruptcy court may hear and finally determine so-called "*Stern* claims." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. ___, 135 S. Ct. 1932 (2015). The Plaintiff asserts and the Defendant agrees that the causes of action raised in Count I (Fraudulent Transfers) and Count II (Ponzi Scheme Preferential Transfers) of the Complaint are core proceedings which the bankruptcy court may hear and determine. With respect to Count III (Unjust Enrichment), the Defendant asserts that the Trustee lacks standing to pursue that cause of action against the Defendant. The Trustee's Motion for Summary Judgment is silent with respect to Count III.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), incorporated at Fed. R. Bankr. P. 7056. "'Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.'" *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d. 582, 586 (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir. 2007). The Court of Appeals for the Sixth Circuit has described the standards for granting summary judgment as follows:

> A genuine issue of material fact exists when, "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding whether this burden has been met by the movant, this court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587; 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, to survive summary judgment, the plaintiff must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson,* 477 U.S. at 249, 106 S. Ct. 2505. Therefore, "[i]f evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50, 106 S. Ct. 2505.

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 475-76 (6th Cir. 2010).

FINDINGS OF FACT

The following facts are not in dispute:

1. The underlying bankruptcy case was commenced by the filing of an involuntary petition against the Debtor on December 22, 2005.

2. The Plaintiff, Michael T. Tabor, is the duly appointed and acting Trustee.

3. The Defendant, Carol D. Davis, is the non-filing wife of the Debtor.

4. On January 16, 2007, the Debtor entered into a Plea Agreement in the case of *United States of America v. Davis,* Cr. No. 1-07-10002 (W.D. Tenn. January 16, 2007), in which he agreed to plead guilty to Counts I and II of a two-count Information which alleged that he engaged in a Ponzi scheme from 2001 until October 2005. Dep. of Cecil Ray Davis, February 23, 2007, Exs. 3 and 4.

5. The Debtor's scheme included obtaining personal loans from a number of individuals by promising them interest at 25-30% per annum and later, per quarter. Dep. of Cecil Ray Davis, pp. 9-12; 32-33.

6. Proceeds from these loans were deposited to the Debtor's personal checking account at Farmers & Merchants Bank, Milan, Tennessee. Dep. of Cecil Ray Davis, pp. 22, 27, 42, 46-47.

7. The Debtor then wrote checks from that account to pay interest as it came due to lenders, and to make deposits to accounts held by the various companies that he controlled, and to transfer funds to joint accounts held by him and the Defendant. Dep. of Cecil Ray Davis, pp. 21-24, 27.

8. The Farmers & Merchant account is the only one of the accounts listed by the Debtor on Schedule B held in the Debtor's name alone. Schedule B shows three accounts held by "Ray or

Carol Davis," one at the Bank of Milan, and two at BancorpSouth. Bankr. Dkt. 51, Schedules A-J, p. 9.

9. During the period of time that the Debtor was engaged in a Ponzi scheme, the Debtor and the Defendant obtained a number of loans from BancorpSouth. Dep. of Elton Sims, President of BancorpSouth, Exs. 2-3, 5-8.

10. When the bankruptcy petition was filed, the Debtor and the Defendant were indebted to BancorpSouth on six notes which are the subject of this adversary proceeding and are described as follows:

Note Number	Collateral[1]	Owners[2]	Balance Due at Filing[3]
064499	Residence - 1st TD - 10 Forrest Ford Road	Ray and Carol Davis	$79,608.89
033159	Commercial Bldgs - 1st TD - 6090 E Van Hook - Tracts 2 and 1	Ray Davis	$103,023.09
277412	Commercial Property - 2nd TD - 6090 E Van Hook; 2nd TD Hwy 70-79; 2nd TD Belews Chapel Rd.	Ray Davis	$152,360.86
094678	Farm -1st TD - Belews Chapel Rd. - Tract 4	Ray and Carol Davis	$4,752.11
328253	Vacant Land - 1st TD - Hwy 79 and 70A	Ray and Carol Davis	$12,442.99

1 Based upon deeds of trust provided as exhibits to Deposition of Elton Sims.

2 Dep. of Elton Sims, Exs. 2-3, 4-8; Schedule A Real Property, Bankr. Dkt. 51.

3 Based upon proofs of claim filed by BancorpSouth and not objected to by the Trustee.

222194	2 Residential Lots - 1st TD - Lots 22 & 23 Oak Tree Subdivision	Ray and Carol Davis	$39,167.01
Total			$391,354.95

11. For each of these loans, the note describes the Defendant and the Debtor as "co-borrowers," "makers," or "co-signers," and indicates that the Defendant and the Debtor are "jointly and severally" liable for the debts. Dep. of Elton Sims, Exs. 2-3, 5-8.

12. During the period in which the Debtor was engaged in the Ponzi scheme, numerous payments were made on the six loans which are the subject of this adversary proceeding.

13. Elton Sims testified that he thought that the payments were made from the Debtor's and Defendant's personal checking account at BancorpSouth. Dep. of Elton Sims, p. 63.

14. The Defendant testified that she and the Debtor maintained joint checking and savings accounts at BancorpSouth. Dep. of Carol Davis, p. 29.

15. The Defendant also testified that during the period 2001-2005, she was not employed, and could not have contributed any funds to the joint accounts except one-half of an inheritance in the amount of $55,000.

16. Either before the case was filed or during the course of the bankruptcy case, most of the collateral for these loans was sold. The following table compares the scheduled value of the collateral to the net sale proceeds:

Collateral	**Scheduled Value**	**Sale Proceeds**
10 Forrest Ford Road	$250,000.00	$113,000.00[4]

[4] Sale of 13 acres adjacent to residence only. The residence and three acres were retained by the Debtor and the Defendant.

6090 E Van Hook and Vacant Land - Hwy 79 and 70A	$400,000.00	$215,000.00
Belews Chapel Rd.	$35,000.00	$26,800.00[5]
Lot 22 Oak Tree Subdivision	35,500.00[6]	$35,500.00
Lot 23 Oak Tree Subdivision	$45,000.00	$45,000.00
Total	$765,500.00	$435,300.00

17. The residence and barn together with surrounding acreage were valued by the Debtor at $250,000 at the time of filing. Schedule A, Bankr. Dkt. 51.

18. Thirteen acres of land surrounding the residence were sold by the Trustee for $113,000. Dep. of Elton Sims, p. 56, ll. 18-21.

19. The net proceeds of $109,183.27 were applied as follows:

Loan Number	**Amount**	**Balance**
277412	$22,884.27	Paid in full
385512	$14,368.21	Paid in full
064499	$71,930.79	$580.75
Total	$109,183.27	

Dep. of Elton Sims, Ex. 10.

20. The residence and three acres were retained by the Debtor and the Defendant.

21. BancorpSouth released its liens on the residence and three acres retained by the Debtor and the Defendant.

[5] Sold to the Debtor's and Defendant's son after BancorpSouth obtained relief from the automatic stay.

[6] Sold by Debtor one month prior to bankruptcy filing.

22. The residence and barn together with surrounding acreage were held by the Debtor and Mrs. Davis as tenants by the entirety. Schedule A, Bankr. Dkt. 51.

23. The value of the residence and three acres according to Elton Sims is between $125,000 and $150,000, which is consistent with the Debtor's estimate of the total value of the residence and barn (($250,000) less the actual sales proceeds ($113,000) = $137,000).

24. After the sale of all collateral except the residence and three acres, BancorpSouth's loans were completely satisfied.

25. The Debtor and Mrs. Davis retain their residence and land valued between $125,000 and $150,000.

ANALYSIS

The Complaint consists of three counts. Count I alleges that payments made by the Debtor to BancorpSouth within four years of the bankruptcy filing were made in furtherance of his fraudulent scheme, and thus were actually fraudulent. In the alternative, Count I alleges that the payments were constructively fraudulent. The Trustee seeks to avoid these transfers pursuant to Tennessee Code Annotated sections 66-3-101 et seq., 66-3-305, and 66-3-306, made applicable in bankruptcy by Bankruptcy Code sections 544(b), 548(a), and/or 548(e). The Trustee seeks to avoid transfers to the extent provided in the applicable statutes, and to obtain a money judgment for the value of the avoidable transfers against the Defendant as the person for whose benefit the transfers were made pursuant to Bankruptcy Code section 550(a)(1). Count II of the Complaint alleges that payments made by the Debtor to BancorpSouth within one year of the filing of the bankruptcy may be avoided by the Trustee as preferential transfers pursuant to Bankruptcy Code section 547(b), and may be recovered from the Defendant pursuant to section 550(a)(1). Count III of the Complaint alleges that as the result of the payments made to BancorpSouth, it was not necessary to sell all of its collateral to satisfy its loans resulting in the release of its lien upon the residence and surrounding three acres. The Trustee alleges that as the result of the payments to BancorpSouth, the Defendant was unjustly enriched.

The Trustee's Motion for Summary Judgment appears to address Counts I and II only. It states that he may recover from the Defendant the value of transfers avoidable under section 544 of the Bankruptcy Code in the amount of $759,666.90, the value of transfers avoidable under section 548 of the Bankruptcy Code in the amount of $700,928.17, and the value of transfers avoidable under section 547 of the Bankruptcy Code in the amount of $533,835.14. The motion also asks that the Trustee be awarded prejudgment interest at the rate of 10% per annum pursuant to Tennessee Code Annotated section 47-14-123. The court will consider whether summary judgment may be granted as to Counts I and II of the Complaint.

A. Fraudulent Transfers

In Count I of the Complaint, the Trustee alleges that payments made by the Debtor to BancorpSouth were either actually or constructively fraudulent within the meaning of various Tennessee statutes and the Bankruptcy Code. The Trustee seeks to avoid transfers to the extent provided in the applicable statutes, and to obtain a money judgment for the value of the avoidable transfers against the Defendant as the person for whose benefit the transfers were made pursuant to Bankruptcy Code section 550(a)(1).

1. The Trustee Has Standing To Proceed Under Section 544(b)

In order to prevail by way of the Tennessee Code, the Trustee must first show that he has standing to proceed under section 544(b) of the Bankruptcy Code. Section 544(b) permits a trustee in bankruptcy to "avoid any transfer of an interest of the debtor in property ... that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of [title 11] or that is not allowable only under section 502(e) of [title 11]." 11 U.S.C. § 544(b)(1).[7] The "applicable law" relied upon by the Trustee in support of his right to avoid transfers under section 544 of the Bankruptcy Code is Tennessee law concerning Fraudulent Conveyances and Devises, Tennessee Code Annotated §§ 66-3-101 through 104, and 66-3-301 through 310 (the "Tennessee Uniform Fraudulent Transfer Act."). Section 66-3-305 permits the avoidance of transfers fraudulent as to both present and future creditors. When a trustee in bankruptcy brings an action pursuant to that section, it is not necessary for the trustee to show that there was a creditor of the bankruptcy estate who also was a creditor *before* the transfers in question. It is only necessary that the trustee demonstrate that there is at least one creditor holding an allowable unsecured claim. Under sections 66-3-101 and 66-3-306, the trustee must show that there is a creditor of the bankruptcy estate who holds a claim that arose before the targeted transfers were made. Under Bankruptcy Code section 502(a), a claim or interest, proof of which is filed, is allowed unless a party in interest objects. If an objection is filed, the court is to determine the amount of the claim as of the date of the filing of the petition. 11 U.S.C. § 502(b).

The Trustee has made no attempt to show that he has standing to proceed under any of the applicable theories available to a creditor with an allowable claim, but the claims register reflects that numerous proofs of claim have been filed by creditors who assert that they hold unsecured claims. The register further reflects that no objections to claims have been filed. Thus, those

[7] Section 502(e) disallows certain claims for contribution which are not implicated in the fraudulent transfer analysis.

creditors who have filed proofs of unsecured claims satisfy the requirement of section 544(b) with respect to section 66-3-305. While the Trustee failed to identify a particular creditor on whose claim he is relying to give him standing to proceed under that section, the court will take judicial notice that there are such creditors. *See In re Phillips,* 379 B.R. 765 (Bankr. N.D. Ill. 2007) ("The Trustee need not identify the creditor, as long as an unsecured creditor exists."). With respect to sections 66-3-101 and 66-3-306, however, the Trustee has failed to show that any of the creditors of the bankruptcy estate were also creditors when the targeted transfers were made. As a result, summary judgment should be denied to the Trustee on those theories based upon his lack of standing to proceed.

2. Actual Fraud

The fraudulent transfer provisions of the Bankruptcy Code and the Tennessee Uniform Fraudulent Transfer Act are substantially similar. Therefore, conclusions reached under the Bankruptcy Code are applicable to actions under the uniform act. *Slone v. Lassiter (In re Grove-Merritt),* 406 B.R. 778, 789 (Bankr. S.D. Ohio 2009). The primary difference between them is the reach-back period. The Bankruptcy Code permits avoidance of transfers that occurred within two years prior to the filing of the bankruptcy petition while the Tennessee Uniform Fraudulent Transfer Act permits avoidance of transfers up to four years after the transfer occurred. 11 U.S.C. § 548(a)(1) and Tenn. Code Ann. § 66-3-310.

To prevail either under Tennessee Code section 66-3-305(a)(1) or Bankruptcy Code section 548(a)(1)(A), the Trustee must show:

(1) a transfer;
(2) of an interest of the debtor in property;
(3) made with actual intent to hinder, delay or defraud a creditor.

See Tenn. Code Ann. § 66-3-305(a)(1), 11 U.S.C. § 544(b)(1), and 11 U.S.C. § 548(a)(1)(A). The Trustee carries the burden of proving each of these elements by a preponderance of the evidence. *Congrove v. McDonald's Corp. (In re Congrove)*, 222 Fed. Appx. 450 (6th Cir. 2007); *Lisle v. John Wiley & Sons, Inc. (In re Wilkinson)*, 196 Fed. Appx. 337 (6th Cir. 2006).

(a) Transfers

The Trustee relies upon the deposition of the bank's president, Elton Sims, and copies of transaction histories for each of the loans identified as subjects of the Complaint showing that numerous payments were made to BancorpSouth during the four years preceding the entry of the order for relief in the bankruptcy case to show that there were numerous payments to the bank. These payments are "transfers" within the meaning of the Tennessee Uniform Fraudulent Transfer Act and the Bankruptcy Code. "Transfer" is defined by the Tennessee Uniform Fraudulent Transfer Act as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." Tenn. Code Ann. § 66-3-302(12). Likewise, "transfer" is defined in the Bankruptcy Code as:

> (A) the creation of a lien;
> (B) the retention of title as a security interest;
> (C) the foreclosure of a debtor's equity of redemption; or
> (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with–
> (i) property; or
> (ii) an interest in property.

11 U.S.C. § 101(54). The Defendant does not dispute that the payments to BancorpSouth were "transfers" for purposes of the fraudulent transfer laws. In the memorandum in opposition to the motion for summary judgment, her counsel states: "each and every *transfer* was a *transfer by the*

Debtor directly to [BancorpSouth].” Defendant’s Memorandum, p. 3 (emphasis added), Adv. Proc. Dkt. 53. The Trustee has shown that there were transfers by the Debtor to a creditor.

(b) Of An Interest of the Debtor in Property

Although neither of the parties focused on this element, the court must make an independent review to determine that each statutory element is satisfied. *See Sikirica v. Wettach (Inre Wettach)*, 489 B.R. 496, 510 (Bankr. W.D. Pa. 2013). The second element requires a showing that the transfer was of an interest *of the debtor* in property. 11 U.S.C. § 548(a)(1). The record seems to show that the payments made to BancorpSouth were made from a checking account held in the names of “Ray or Carol Davis” and that they paid notes made by Ray and Carol Davis as co-makers. The collateral for four of the six notes was owned by Ray and Carol Davis. The collateral for the other two notes, generally known as the “Commercial Property,” was owned by Ray Davis alone.

In Tennessee, spouses may own both realty and personalty as tenants by the entirety. *In re Garbett,* 410 B.R. 280, 286 (Bankr. E.D. Tenn. 2009); *Grahl v. Davis,* 971 S.W.2d 373, 378 (Tenn. 1998). Entirety is “a form of co-ownership held by a husband and wife with right of survivorship [; it] is defined as an estate held by husband and wife by virtue of title acquired by them jointly after marriage ... [a]nd an estate by the entireties involves the unities of time, title, interest, and possession, as well as the husband and wife unity of ownership.” *Garbett*, 410 B.R. at 287-88, quoting *In re Estate of Russell*, 1997 WL 249961, at *7 (Tenn. Ct. App. May 14, 1997). When property is acquired during the marriage, there is a presumption that it is held by the entirety unless proven otherwise. *Garbett*, 410 B.R at 286; *In re Estate of Grass,* 2008 WL 2343068, * 13 (Tenn. Ct. App. 2009). The Tennessee Supreme Court has expressly held that tenancy by the entirety may exist in bank accounts. *Grahl,* 971 S.W.2d at 378. The Tennessee Supreme Court has also made clear that, "[u]se of the word "or" between the names of spouses on a bank account or negotiable instrument does not preclude their ownership of the asset by the entirety and ... joint property of spouses will be deemed so held in the absence of proof to the contrary." *Griffin v. Prince,* 632 S.W.2d 532, 536 (Tenn. 1982). As explained by the Tennessee Court of Appeals in *Grass,* however, the law has been modified somewhat to protect paying banks. It absolves the paying bank upon payment to either joint tenant or the survivor, and was further modified in 1989 to give explicit instructions concerning ownership of joint accounts:

> Tennessee Code Annotated section 45-2-703(d)(1), which applies to all accounts opened after January 1, 1989, provides that "[w]hen opening a multi-party deposit account, or amending an existing deposit account so as to create a multiple-party deposit account, each bank shall utilize account documents which enable the depositor to designate ownership interest therein...." Tennessee Code Annotated section 45-2-703(e)(4) provides that "[i]n the absence of any specific designation in accordance with subsection (d), property held under the title, tenancy by the entireties, carries a right of survivorship; property held under the title, joint tenancy, carries no right of survivorship unless a contrary intention is expressly stated." Therefore, if the account was created after January 1, 1989, and a specific designation was made in accordance with Tennessee Code Annotated section 45-2-703(d), the specific designation controls. If the account had no specific designation or was created before January 1, 1989, the ... Court must determine how the bank account was held ..., i.e., tenancy by the entirety, which is presumed, or tenants in common.

Id. at *13. Money withdrawn from a bank account held by husband and wife as tenants by the entirety is impressed with the entirety provision. *Id.* at *14. Any balance held as tenants by the entirety, however, is "subject to assignment by, or the claim of any creditor of, either depositor, as if the depositor were the sole owner of the funds; provided, that if the creditor realizes its claim by any means other than enforcement of an assignment, pledge, or the grant of a security interest made by any one (1) of the depositors, any other depositor not indebted to the creditor may, by commencing a separate action against the creditor, establish the rights that the depositor may have in the funds." Tenn. Code Ann. § 45-2-703(a).

When the Debtor received funds during his marriage to the Defendant, a rebuttable presumption arose that he and his wife held those funds as tenants by the entirety. This was so even as to funds that were initially deposited to the Debtor's separate account. Transfers from the Debtor's sole account to the joint accounts at BancorpSouth also give rise to a presumption that those funds are held as tenants by the entirety. In either case, the Debtor would have an interest in the accounts, but the nature of that interest is not entirely clear. It does not appear from the record when the joint accounts at BancorpSouth were created. If they were created before January 1, 1989, then it is presumed that they were held by the entirety. If they were created after January 1, 1989, and a specific designation was made in accordance with the Tennessee statute, that designation controls and defines the nature of the Debtor's interest in the fund.

I was unable to find any decisions under Tennessee law directed to the question of whether payments made by a debtor from separate funds on debt secured by property owned by him and his non-filing spouse as tenants by the entirety constitute fraudulent transfers, but I was able to find some discussion of this issue in other jurisdictions.

There is a line of cases from the bankruptcy courts of Michigan dealing with the question of whether payments made by a debtor on loans secured by a home owned by the debtor and his non-filing spouse are fraudulent conveyances under Michigan law. Michigan adopted the Uniform Fraudulent Transfer Act on December 29, 1998. These cases are discussed at *Lewis v. Harlin (In re Harlin)*, 321 B.R. 836 (E.D. Mich. 2005), with respect to the question of whether an insolvent debtor received "fair consideration" (language used in the superceded Uniform Fraudulent Conveyance Act) or "reasonably equivalent value" (language used in the Uniform Fraudulent Transfer Act) when he used personal funds to pay an obligation owed by himself and his wife as tenants by the entireties. In each of the preceding cases, the Michigan courts determined that the payment was fraudulent in law (i.e., constructively fraudulent) because the estate of the insolvent debtor, when viewed from the point of view of his creditors, did not receive fair consideration or reasonably equivalent value. For example, in *Glazer v. Beer,* 343 Mich. 495, 72 N.W.2d 141 (1955), the Michigan Supreme Court affirmed the trial court's granting of a lien on entireties property the debtor had improved with a loan to himself saying, "[t]his court has consistently held that during insolvency entireties estates cannot be created or enhanced at the expense of creditors and that relief can be granted without reference to any actual fraud." 72 N.W.2d at 142. The court further stated that it did not matter whether the funds came from the debtor himself or from a third party because "it is the mere fact that funds which are available to creditors are put beyond their reach, which affords the basis for relief, without any particular reference to the origin of those funds." *Id.* at 143. The *Harlin* decision also includes an excerpt from an American Law Reports annotation, which states:

> Michigan cases, dispersed over half a century, consistently hold that it is fraudulent for one with other debts to continue after insolvency to make payments on a mortgage of entireties property or under a contract to purchase property by the entireties, and such property is liable for the insolvent's debt to the extent he has placed assets therein, notwithstanding the mortgage or contract may have been executed while solvent and before other debts were contracted. R.F. Martin, *Use of Debtor's Individual Funds or Property for Acquisition, Improvement of, or Discharge of Liens on, Property Held in Estate by Entireties as a Fraud Upon Creditors,* 7 A.L.R. 2d. 1104 *7.

The district court in *Harlin* applied this clearly articulated Michigan rule, which it said applied under both the Uniform Fraudulent Conveyance Act and the Uniform Fraudulent Transfer Act, and directed that summary judgment be granted for the trustee.

Other jurisdictions have reached different results. For example, in *Shaia v. Meyer (In re Meyer)*, 244 F.3d 352 (4th Cir. 2001), the court of appeals held that the debtor's use of nonexempt funds which he had received as a bequest from his late father, in order to prepay his mortgage debt and increase the equity that he and his wife enjoyed in property held by them as tenants by the entireties, was not avoidable under Virginia voluntary conveyance law. The applicable law, Virginia Code § 55-81, provides:

> Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, by an insolvent transferor, or by a transferor who is thereby rendered insolvent, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made.

The bankruptcy court determined that when the debtor prepaid the mortgage, there were two distinct transfers: first, a transfer to the mortgage creditor and second, a transfer to the tenancy by the entirety, which was increased by the payments. The bankruptcy court said that the second transfer was not supported by consideration and the district court agreed. The court of appeals, however, disagreed and held that the mortgage pre-payment was a single transaction that was supported by "consideration deemed valuable at law." 244 F.3d at 355-56. The court focused on prior Virginia cases that found the satisfaction of an outstanding mortgage indebtedness to be a conveyance upon consideration deemed valuable at law. The court held that there was but one transfer, the payment to the mortgage creditor, and that transfer was supported by consideration. The court expressly rejected the second transfer theory. *Id.* at 357.

A second case that reached a result seemingly contrary to the Michigan courts is *Daly v. Richardson (In re Carrozzella & Richardson)*, 302 B.R. 415 (Bankr. D. Conn. 2003). In that case, a trustee in bankruptcy sought to avoid payments made by the debtor law firm to or on behalf of the wife of one of the debtor's principals. The other principal was engaged in a Ponzi-like scheme. When the firm ran short of cash, he induced the other principal and his wife to obtain a loan secured by a second mortgage on their home and to pay the proceeds to the firm on the promise that the firm would make all of the mortgage payments. The firm did make payments until an involuntary bankruptcy petition was filed against it. The trustee in bankruptcy sought to recover the value of the "indirect payments" made to the defendant wife in the year preceding the filing of the bankruptcy petition as fraudulent transfers. The court determined that the record was insufficient under a "clear and convincing" standard,[8] that payments made by the debtor to the mortgage creditor which resulted in "indirect payments" to the defendant were made with actual intent to hinder, delay or defraud a creditor. The court did not, however, discuss the requirement that there be a transfer of the interest of the debtor in property, which is required under the Bankruptcy Code.

The Michigan cases place the right emphasis upon the transfer of funds that would have been available to pay the debtor's creditors to an asset that is beyond those creditors' reach. The initial question, and the one dealt with here, is whether there has been a transfer of the interest of the Debtor in property. As the Trustee has pointed out, the only source of funds available to pay BancorpSouth during the four years preceding the bankruptcy filing were funds received from the Debtor's Ponzi scheme "lenders." The Debtor acquired an interest in those funds, which were made as personal loans to him when they were paid to him. Notwithstanding the presumption that assets received during a marriage are held as tenants by the entireties, these funds were available for the payment of the Debtor's creditors when he received them. If the funds became entirety property when they were transferred to the joint accounts held at BancorpSouth, the Debtor retained an

[8] A higher standard than the preponderance of the evidence standard applicable here.

interest in those accounts and, pursuant to Tennessee law, they were available for the payment of his creditors. Payments to BancorpSouth were transfers of an interest of the Debtor in property.

(3) Made with Actual Intent to Hinder, Delay or Defraud a Creditor

The third element under both Bankruptcy Code section 548(a) and Tennessee Code Annotated section 66-3-305(a)(1), requires that the Trustee show that the Debtor made transfers of his interests in property with actual intent to hinder, delay, or defraud a creditor. In order to show that payments to BancorpSouth were made with actual intent to hinder, delay, or defraud creditors of the Debtor, the Trustee alleges that the payments were made in furtherance of the Debtor's overall fraudulent scheme. Complaint, ¶ 19, Adv. Proc. Dkt. 1.[9] The court has dealt extensively with the legal issues arising from a debtor's involvement in a Ponzi scheme in proposed findings of fact and conclusions of law written in connection with the related case of *Tabor v. Kelly (In re Davis),* Adv. Proc. No. 07-05181. *See Tabor v. Kelly (In re Davis)*, 2011 WL 5429095 (Bankr. W.D. Tenn. Oct. 5, 2011); *Tabor v. Kelly (In re Davis)*, Ch. 7 Case No. 05-15794, Adv. Proc. No. 07-05181, *slip op.* (Bankr. W.D. Tenn. Mar. 11, 2013). The second of those, entered on March 11, 2013, dealt with the so-called "Ponzi scheme presumption," a presumption that actual fraud is present when a Ponzi scheme is established. *See Bear, Stearns Sec. Corp. v. Gredd (In re Manhattan Inv. Fund, Ltd.),* 397 B.R. 1, 13 (S.D. N.Y. 2007)*; Picard v. Cohmad Sec. Corp. (In re Bernard L. Madoff Inv. Secs. LLC)*, 454 B.R. 317, 330 (Bankr. E.D. N.Y. 2011); *Conroy v. Shott (In re Stickler)*, 363 F.2d 90, 92 (6th Cir. 1966). As an initial matter, "whether a conveyance is fraudulent ... is determined by reference

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[9] The Trustee also alleges that in addition to being actually fraudulent, the payments to BancorpSouth were constructively fraudulent, but he did not address this alternative strategy in the motion for summary judgment. Because the court finds that the transfers to BancorpSouth were actually fraudulent, it is not necessary to address alternative theories.

to the intent of the debtor-transferor in making the transfer; 'the state of mind of the transferee is irrelevant.'" *Christian Bros. High Sch. Endowment v. Bayou No Leverage Fund, LLC (In re Bayou Group, LLC),* 439 B.R. 284, 304 (Bankr. S.D. N.Y. 2010), cited in *Bash v. Textron Fin. Corp.,* 483 B.R. 630, 656 (N.D. Ohio 2012); and *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec., LLC),* 2011 WL 3897970, *4 (S.D. N.Y. Aug. 31, 2011). Moreover, "'[w]ith respect to Ponzi schemes, transfers made in furtherance of the scheme are presumed to have been made with the intent to defraud ....'" *Bash v. Textron Fin. Corp.,* 483 B.R. at 656, quoting *Perkins v. Haines,* 661 F.3d 623, 626 (11th Cir. 2011). "If the underlying fraud constitutes a Ponzi scheme, and if the transfer at issue serves to further that scheme, 'actual intent' under the Bankruptcy Code [or Uniform Fraudulent Transfer Act] is presumed." *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec., LLC),* 2011 WL 3897970, *4 (S.D. N.Y. Aug. 31, 2011), citing *Bear, Stearns Secs. Corp. v Gredd (In re Manhattan Inv. Fund Ltd.),* 397 B.R. 1, 11 (S.D. N.Y. 2007). The Ponzi scheme presumption may be overcome if the defendant is able to show, for example, that the transfers to it were not made in furtherance of the Ponzi scheme. *Manhattan Inv. Fund Ltd.,* 397 B.R. at 13.

Not every payment made by a Ponzi scheme perpetrator is made in furtherance of the fraudulent scheme. The cases draw a distinction based upon the recipient of the payment. On the one hand are payments made to Ponzi scheme "investors." Courts routinely find that these payments are made in furtherance of the fraudulent scheme. *See, e.g., Vaughan Company, Realtors v. Oliva (In re Vaughan Company, Realtors),* 500 B.R. 778, 790 (Bankr. D. N.M. 2013) (each payment trustee sought to recover was on account of the defendant's investment in the debtor's "Note Program"); *Perkins v. Haines,* 661 F.3d 623, 627 (11th Cir. 2011) (payments trustee sought to recover were those made to defrauded investors in excess of the principal amount of their investment); *Barclay v. Mackenzie (In re AFI Holding, Inc.)*, 525 F.3d 700, 704 (9th Cir. 2008) (trustee sought to avoid payments made to "investor"); *Conroy v. Shott (In re Stickler)*, 363 F.2d 90, 92 (6th Cir. 1966) (trustee sought to recover repayments in excess of loans made to the debtor by the defendant).

On the other hand, payments made to third-party vendors and landlords are generally found not to be fraudulent either because they are not made "in furtherance of" the Ponzi scheme or because the recipients may avail themselves of the defense that they took such payments "for value and in good faith." 11 U.S.C. § 548(c). As Bankruptcy Judge Jennemann explained:

> Simply because a debtor conducts its business fraudulently does not make every single payment by the debtor subject to avoidance. If so, every vendor supplying goods to the debtor would receive an avoidable fraudulent transfer when the debtor paid the vendor's invoice. Every employee, even lower level custodial and clerical employees, would be required to return their wages, regardless of the work they performed. Landlords would have to return rent payments, even if the debtor actually occupied the leased premises. No one conducting business with a debtor operating a Ponzi scheme could prevent the avoidance of payments they received from the debtor, regardless of the extent of the transferee's knowledge or culpability or the actual services provided. The law does not require this result.

Cuthill v. Greenmark, LLC (In re World Vision Entertainment, Inc.), 275 B.R. 641, 658 (Bankr. M.D. Fla. 2002).

Somewhere between these are payments made, for example, as broker's fees or commissions from sales of fraudulent investments. *See World Vision*, 275 B.R. at 657 (payments made to brokers for sale of Ponzi scheme perpetrator's notes were made in furtherance of the scheme and were actually fraudulent; defendants acted not in good faith on an objective basis; payments to brokers were avoidable fraudulent transfers); *but see, Balabar-Strauss v. Sixty-Five Brokers (In re Churchill Mortgage Inv. Corp.)*, 256 B.R. 664, 680 (Bankr. S.D. N.Y. 2000) (commissions paid by operator of Ponzi scheme to brokers for originating mortgages and soliciting investors were made with fraudulent intent, but could not be avoided as to brokers who acted in good faith and without knowledge that the debtor was operating a Ponzi scheme).

The Trustee has introduced evidence in the form of the Information and Guilty Plea that conclusively show that the Debtor participated in a Ponzi scheme. The Trustee argues that each payment made to BancorpSouth was made from funds taken from the Debtor's "investors," and thus was made in furtherance of the Debtor's scheme to defraud. I, however, agree with Bankruptcy Judge Jennemann that not every payment made by a Ponzi scheme participant to his vendors is made in furtherance of the fraudulent scheme. Payments to BancorpSouth appear to fall outside the classes of recipients for which furtherance of the fraudulent scheme is presumed. That is, at least at first glance, they appear to be more in the nature of payments made to a vendor or landlord, rather than payments made to a Ponzi scheme investor or to a broker. It is conceivable, however, that loans from the bank were necessary to the perpetration of the fraud, and thus that repayments of those loans were made in furtherance of the fraud. *See In re Manhattan Inv. Fund, Inc.,* 397 B.R. 1, 13 (E.D. N.Y. 2007). This is especially true with respect to the revolving loan secured by the Commercial Property, which involved numerous advances and withdrawals beginning in 2001.

The Defendant made no attempt to rebut the Ponzi scheme presumption. While I am not prepared to accept the Trustee's position that *all* payments made by a Ponzi scheme perpetrator are fraudulent per se, I do find in this case that the Trustee has produced evidence tending to show that the loans from BancorpSouth were integral to the Debtor's fraudulent scheme. Because the Defendant has made no attempt to counter this evidence, the presumption remains unrebutted. Payments made to the BancorpSouth by the Debtor were made in furtherance of the Ponzi scheme, and thus were actually fraudulent.

Even when payments are made in furtherance of a Ponzi scheme (viewed from the point of view of the perpetrator), the transferee may be able to prevent the avoidance of payments based upon an affirmative defense provided by the Bankruptcy Code or the Tennessee Uniform Fraudulent Transfer Act.

(4) Lack of Good Faith

Both the Tennessee Uniform Fraudulent Transfer Act and the Bankruptcy Code provide an affirmative defense to preclude the avoidance of certain transfers. The Tennessee Uniform Fraudulent Transfer Act provides a defense to the avoidance of a transfer to persons "who take in good faith and for a reasonably equivalent value or against any subsequent transferee ...." Tenn. Code Ann. § 66-3-309(a). Value is given for purposes of the Tennessee Uniform Fraudulent Transfer Act "if, in exchange for the transfer ..., property is transferred or an antecedent debt is secured or satisfied ...." Tenn. Code Ann. § 66-3-304(a). The Bankruptcy Code section 548(c) provides:

> Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of [title 11], a transferee ... of such a transfer ... that takes for value and in good faith has a lien on or may retain any interest transferred ... to the extent that such transferee ... gave value to the debtor in exchange for such transfer ....

11 U.S.C. § 548(c). The Bankruptcy Code defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor ...." 11 U.S.C. § 548(d)(2)(A). Transferees that received transfers that may be avoided pursuant to Bankruptcy Code section 544, i.e., by state law made available to the trustee in bankruptcy, do not enjoy the defense provided by section 548(c).

Both Tennessee Code section 66-3-309(a) and Bankruptcy Code section 548(c) constitute affirmative defenses which must be established by the defendant. *Steed v. Hawkins (In re Rivas),* 2012 WL 1156406, at *5 (Bankr. E.D. Tenn. April 6, 2012), citing *Wilson v. Carmen (In re Blazo Corp.),* 73 F.3d 361 (6th Cir. 1995) (unpublished table decision), available at 1995 WL 764130, at *3; *Rieser v. Hayslip (In re Canyon Systems Corp.),* 343 B.R. 615, 650-51 (Bankr. S.D. Ohio 2006), also citing *Blazo.* "In order to establish a defense to avoidability, a transferee must show *both* that the transfer was for a reasonably equivalent value and was received in good faith." *Canyon Systems,* 343 B.R. at 651, citing *Durkin v. Shields (In re Imperial Corp. of America),* 1997 WL 808636, at *4 (S.D. Cal. Aug, 14, 1997).

The Bankruptcy Code does not define "good faith" for purposes of section 548(c). Most courts agree that "good faith" is determined using an "objective" or "reasonable person" standard. *See, e.g., Manhattan Inv. Fund,* 397 B.R. at 22. The question of good faith is divided into two parts: (1) whether the transferee was on inquiry notice of the debtor's fraud; and (2) whether the transferee was diligent in its investigation. *Id.* at 22-23. The first inquiry asks whether the transferee had information that would have caused a reasonable, in this case, banker, to "investigate the matter further." *Id.* at 23, quoting *Nat'l W. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 89 Fed. Appx. 287, 291 (2nd Cir. 2004). The second inquiry asks whether any investigation undertaken was diligent. *Manhattan Inv. Fund,* 397 B.R. at 24, citing *In re Agric. Research and Tech. Group, Inc.,* 916 F.2d 528, 536 (9th Cir. 1990), citing *In re Polar Chips Int'l, Inc.,* 18 B.R. 480 (Bankr. S.D. Fla. 1982).

The record is clear that payments made by the Debtor to BancorpSouth were on account of antecedent debts. Unfortunately, however, the Defendant made no attempt to establish the good faith of BancorpSouth that, together with the fact that payments were made on account of antecedent debts, would prevent the payments to the bank from being avoidable. *See* Answer and Affirmative

Defenses, October 30, 2007, Adv. Proc. Dkt. 13. The record does show that Mr. Sims, the president of BancorpSouth, was aware of the unusually large number of overdrafts in the Debtor's accounts and related fees incurred by him. Dep. of Elton Sims, pp. 7-8, 10-11, 14-16, 65-66. Mr. Sims also testified that he became aware of the Debtor's business of paying large amounts of interest on personal loans from various individual "lenders" in May of 2005, well before the involuntary bankruptcy petition was filed on December 22, 2005. Dep. of Elton Sims, pp. 14-17. Mr. Sims described the meeting that he had with the Debtor at that time:

> Sims. I had a meeting with him in May of '05 concerning late payments on his loans, excessive overdraft payments on his loans, excessive overdraft payments and just general cash flow shortage in his business and during that meeting, I asked him about interest that was paid or that he used as a deduction on his 2003 tax return and that amount of interest that he paid was $315,000, somewhere in that range and I knew the majority of his debt that he had reported on financial statements to me was to BancorpSouth.
>
> He had a couple of other little notes, one to First Citizens, I think, in Dyersburg and maybe another one or two, Bank of Troy, but other than that, I was his major creditor so just by simple math, I mean, if he owed me somewhere around $400,000, then the interest he was paying wasn't over $30- to $40,000 a year.
>
> So I asked him where was that coming from, what's going on and I didn't get a straight answer at first and I kept pressing him and he finally told me that there were some loans out there to individuals.
>
> Q. Did you elaborate on the amount?
>
> A. I asked him. I asked him to what extent and again, I didn't get a straight answer. I asked for the amount, I asked for the number of individuals and I reminded him that he had given me financial statements in years past and he had not disclosed that information on his personal financial statements and still, I never got a straight answer. He just said there's a lot and that's – he never gave me any information as far as what all was out there.
>
> Q. And that was in May of 2005?

A. That's correct.

Dep. of Elton Sims, pp. 14-15.

At least as early as May of 2005, BancorpSouth was on inquiry notice of the Debtor's fraud, and in fact was aware of the nature of the Debtor's fraud. Mr. Sims knew that there were overdrafts in the Debtor's accounts; he knew that the Debtor was experiencing cash flow shortages; and he knew that the Debtor was accepting borrowed funds from "lots" of individual lenders. It would not have been difficult for Mr. Sims to reach the conclusion that the Debtor was engaged in a Ponzi-type scheme. A reasonable banker would have undertaken an investigation to confirm this conclusion.

Prior to May of 2005, Mr. Sims knew about the large number of overdrafts in the Debtor's accounts and his cash flow shortage. It is not clear from the record how early Mr. Sims became aware of these circumstances, but he acknowledged in his deposition (which occurred on March 5, 2007) that the Debtor had been a customer of the bank for some 19 years, and the significant overdraft problem had occurred over the 7- to 10-year period prior to his deposition. Dep. of Elton Sims, pp. 9-13, 17. This period would coincide with the admitted duration of the Ponzi scheme – 2001 to October 2005.

It is not incumbent upon the Trustee to prove a lack of good faith on the part of the transferee-bank. *In re Rivas,* 2012 WL 1156406, at *5. Rather, it is the responsibility of the Defendant to prove that BankcorpSouth received payments from the Debtor in good faith. The record raises serious concerns about what BancorpSouth knew and when. The Defendant has not tried to explain or overcome these circumstances to demonstrate the good faith of BancorpSouth. The Defendant is not entitled to the protection of the Bankruptcy Code section 548(c) or the Tennessee Code section 66-3-309(a) defenses.

5. The Trustee May Avoid Fraudulent Transfers Made Within Four Years Prior to the Entry of the Order for Relief in the Bankruptcy Case

The Trustee has taken inconsistent positions concerning the reachback period applicable to avoidance actions brought pursuant to section 544 of the Bankruptcy Code. In the Complaint, he asserts that he may avoid transfers made within four years of the bankruptcy filing. Complaint, ¶ 23, Adv. Proc. Dkt. 1. In his Memorandum of Facts and Law in support of the motion for summary judgment, he asserts that he may recover transfers made within four years before the filing of the bankruptcy petition and in the same paragraph asserts that he may avoid transfers made within four years of the filing of the Complaint in this adversary proceeding. Memorandum of Facts and Law, pp. 11-12, Adv. Proc. Dkt. 44. The Defendant made no response to this inconsistency.

The question raised by the inconsistencies in the Trustee's papers is whether the period of time for avoidance is fixed pursuant to the Bankruptcy Code or whether it runs according to "applicable law" incorporated by section 546. The distinction is important in this case because the Complaint commencing this adversary proceeding was not filed until June 22, 2007, eighteen months after the bankruptcy case was commenced.

Section 546 of the Bankruptcy Code specifies that an action or proceeding:

> [M]ay not be commenced after the earlier of–
> (1) the later of
> (A) 2 years after the entry of the order for relief; or
> (B) 1 year after the appointment or election of the first trustee under section 702 ... if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a). An involuntary bankruptcy case is "commenced" by the filing of a petition with the bankruptcy court. 11 U.S.C. § 303(b). Unlike a voluntary case, the "order for relief" in an

involuntary case is entered after commencement of the case. The Debtor's bankruptcy case was commenced on December 22, 2005, but the order for relief was entered on February 2, 2006, and the Trustee was appointed trustee in bankruptcy on February 6, 2006. The time for the Trustee to commence an action under section 546 ran from February 2, 2006, until February 2, 2008. The Complaint that commenced this adversary proceeding was timely filed on June 22, 2007.

Bankruptcy Code section 544(b)(1) gives the trustee in bankruptcy the right to "avoid any transfer of an interest of the debtor in property ... that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of [title 11] or that is not allowable only under section 502(e) of [title 11]." 11 U.S.C. § 544(b)(1).[10] The "applicable law" relied upon by the Trustee in support of his right to avoid transfers under section 544 of the Bankruptcy Code is Tennessee's Uniform Fraudulent Transfer Act, Tennessee Code Annotated §§ 66-3-301 et seq., specifically § 66-3-305(a)(1), which permits avoidance of transfers made with actual intent to hinder, delay or defraud any creditor of the debtor, both present and future creditors. The Tennessee Uniform Fraudulent Transfer Act extinguishes a cause of action with respect to a fraudulent transfer that is not brought within four years after the transfer was made or, if later, within one year after the transfer was or could reasonably have been discovered by the claimant. Tenn. Code Ann. § 66-3-310(1). Again, the Complaint that commenced this adversary proceeding was filed June 22, 2007.

So long as a complaint is brought within the period specified in section 546(a) of the Bankruptcy Code, it appears there are two possibilities with regard to applicable statutes of limitations: either (1) the reachback period is calculated from the date of the filing of the complaint,

[10] Section 502(e) disallows certain claims for contribution which are not implicated in the fraudulent transfer analysis.

as it would be outside of bankruptcy, or (2) the reachback period is measured from the order for relief in the bankruptcy case, and section 546(a) is treated as a tolling statute to preserve the right of action as it existed when the bankruptcy petition was filed.

The second position is the better reasoned one. It gives the trustee in bankruptcy the longest reachback period and permits him a period of time to review potential causes of action without fear that those actions are being lost to the estate through the passage of time. This position is supported by the language of the Bankruptcy Code which, for example, permits the trustee to avoid any transfer of an interest of the debtor in property that is voidable by a creditor holding an allowed claim. 11 U.S.C. § 544(b)(1). "Creditor" is defined by the Bankruptcy Code as an "entity that has a claim against the debtor that arose *at the time of or before the order for relief* concerning the debtor." 11 U.S.C. § 101(10)(A)(emphasis added). "Claim" in turn is defined as "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" 11 U.S.C. § 101(5)(A). The reachback period for avoiding fraudulent transfers that could have been avoided by a creditor but for the filing of a bankruptcy case is measured from the entry of the order for relief. In other words, pursuant to sections 544(b) and 546(a), the trustee in bankruptcy is permitted to avoid fraudulent transfers that occur within four years before the entry of the order for relief so long as the action to avoid such transfers is commenced within two years after the date of commencement of the bankruptcy case. This gives the trustee in bankruptcy the full benefit of the reachback period provided by applicable law. *See, e.g., In re Petters Co., Inc.*, 494 B.R. 413, 441 (Bank. D. Minn. 2013) ("As long as the Trustee commenced any individual action in this avoidance docket by the deadline under § 546(a)(1), his avoidance power can reach, at a minimum, transfers that took place within the full length of the ... limitations period, ... dating back from the date of the subject Debtor's bankruptcy filing."), cited with approval in *Kaye v. Nath Companies, Inc. (In re Duke and King Acquisition Corp.)*, 508 B.R. 107, 126-27 (Bankr. D. Minn. 2014), and *Myers v. Malone (In re Malone)*, 2013 WL 6184994, at *4 (Bankr. D. Neb. Nov. 26, 2013).

In this case, the order for relief was entered February 2, 2006. Pursuant to section 546 of the Bankruptcy Code and section 66-3-310(1) of the Tennessee Code, the Trustee potentially may avoid as fraudulent transfers payments made to BancorpSouth between February 2, 2002, and February 2, 2006.

The result under Bankruptcy Code section 548 is similar, but the reachback period is shorter. Section 548 permits the trustee to avoid transfers made within two years prior to the date of the filing of the petition. The petition in the bankruptcy case was filed December 22, 2005, so the reachback period under section 548(a)(1) commenced on December 22, 2003. The Trustee potentially may avoid as fraudulent transfers payments made to BancorpSouth between December 22, 2003, and December 22, 2005. This period is encompassed by the reachback period under the Tennessee Code so will not be considered separately.

6. The Trustee May Avoid Fraudulent Transfers in Their Entirety for the Benefit of the Estate

Having shown that payments made to BancorpSouth within four years prior to the order for relief potentially may be avoided, the next question is the extent to which such transfers may be avoided. The Tennessee Uniform Fraudulent Transfer Act permits the avoidance of a fraudulent transfer "*to the extent necessary to satisfy the creditor's claim*." Tenn. Code Ann. § 66-3-308(a)(1) (emphasis added). In *Moore v. Bay (In re Sassard & Kimball, Inc.)*, 284 U.S. 4, 52 S. Ct. 3, 76 L. Ed. 133 (1931), decided under the Bankruptcy Act of 1898, the Supreme Court decided that the rights of the trustee in bankruptcy by subrogation are enforceable for the benefit of the estate, and thus for the benefit of all creditors. *Id.* at 5, 52 S. Ct. at 4. This result was codified in the Bankruptcy Code of 1978, in which Congress specifically rejected limiting the estate's recovery to the amount of a particular creditor's claim. *Stalnaker v. DLC, Ltd. (In re DLC, Ltd.),* 295 B.R. 593, 606 (B.A.P. 8th Cir. 2003), citing *Committee of Unsec. Creditors of Interstate Cigar Co., Inc. v. Interstate Distrib., Inc. (In re Interstate Cigar Co., Inc.),* 278 B.R. 8, 18 (Bankr. E.D. N.Y. 2002). *See also Liebersohn v. Internal Revenue Serv. (In re C.F. Foods, L.P.),* 265 B.R. 71, 86 (Bankr. E.D. Pa. 2001) ("When enacting the Bankruptcy Code of 1978, ... Congress' intent was to retain the controversial rule of ... *Moore v. Bay* ... which held that a trustee could avoid an entire transfer without regard to the size of the claim of the unsecured creditor whose rights and power the trustee was asserting."). As one bankruptcy court explained:

> [The *Moore* case] contains two holdings: (1) that any property recovered by the trustee comes back into the estate for the benefit of all the unsecured creditors, not just those named as plaintiffs ..., and (2) improper transfers may be avoided in their entirety, regardless of the relationship between the size of the transfer and the amount of the unsecured claims.

Pajaro Dunes Rental Agency, Inc. v. Spitters (In re Pajaro Dunes Rental Agency, Inc.), 174 B.R. 557, 595-96 (Bankr. N.D. Cal. 1994) (citing *Vadnais Lumber Supply, Inc. v. Byrne (In re Vadnais Lumber Supply, Inc.),* 100 B.R. 127, 134 (Bankr. D. Mass. 1989), quoted in *DLC, Ltd.,* 295 B.R. at 606. Moreover, because the Bankruptcy Code separates the avoidance of the transfer from recovery, the amount of recovery is established under federal law rather than state law. The amount of recovery is determined by Bankruptcy Code section 550, which has been interpreted broadly to permit recovery for the benefit of the bankruptcy estate, and not simply for the benefit of the pool of unsecured creditors. *Stalnaker v. DLC, Ltd. (In re DLC, Ltd.),* 376 F.3d 819, 823 (8th Cir. 2004).

“If the trustee identifies a creditor with an allowable claim and a valid right to avoid the transfer, the trustee may avoid the [transfer] and recover the entirety of the property or the value of the property ‘for the benefit of the estate.’” *Id.* Thus, even when all unsecured claims are settled prior to trial, the trustee may recover the value of fraudulently transferred property in order to pay administrative claims. *Id.*, 376 F.3d at 823-24; *see also In re Leonard*, 125 F.3d 543, 544-45 (7th Cir. 1997) (“Even if he can’t point to creditors whose claims total more than the value of the [property transferred],the Trustee can avoid the transaction in its entirety.”).

7. The Trustee May Recover the Value of Avoidable Transfers from the Entity for Whose Benefit the Transfer Was Made

Having shown that payments made to BancorpSouth within four years prior to the entry of the order for relief potentially are avoidable as fraudulent transfers, the Trustee seeks to recover the value of those transfers from the Defendant pursuant to Bankruptcy Code section 550(a)(1) because she is the person “for whose benefit such transfer[s] [were] made.” Each transfer benefitted Mrs. Davis, according to the Trustee, because it reduced the amount of her indebtedness to BancorpSouth.

The Defendant does not deny that she benefitted from the payments to BancorpSouth. Instead, she argues that the value of payments made to BancorpSouth may not be recovered from her for the following reasons:

1. The Trustee’s suit to recover payments made to BancorpSouth from BancorpSouth was settled under an agreement that provides for no admission of guilt on the part of either party.

2. The Defendant is not a transferee of the payments made to BancorpSouth.

3. Neither the Bankruptcy Code nor the Tennessee Uniform Fraudulent Transfer Act permits avoidance of a transfer that merely benefits a non-transferee third party.

The court will consider each of these arguments in turn.

(a) Settlement of Claims Against BancorpSouth Does Not Prevent Recovery from the Defendant

First, the Defendant argues that the settlement of the Trustee's claim against BancorpSouth precludes his recovery from her. The Defendant refers to *Tabor v. BancorpSouth Bank,* Adversary Proceeding 07-05130 (Bankr. W.D. Tenn.). The complaint in that adversary proceeding alleged in four counts that: (1) BancorpSouth received $44,000 in overdraft charges from the Debtor which constituted fraudulent transfers; (2) overdraft charges in the amount of $10,200 received from the Debtor in the 90 days prior to the bankruptcy filing constituted preferential transfers; (3) the deed of trust given to secure Loan Number 385512 in the amount of $15,000, proceeds of which were used to cover a deposit the Debtor made into his checking account, and payments made on that loan were fraudulent transfers under Tennessee law and federal bankruptcy law; and (4) a payment received by the bank on Loan Number 277412 in the amount of $22,884.27 should be recovered by the estate because the bank failed to comply with Regulation Z and the Tennessee Consumer Protection Act when the loan was made, and because the payment constituted a fraudulent transfer under the Bankruptcy Code. Defendant's Memorandum in Opposition to Trustee's Motion for Summary Judgment, Ex. 1, Adv. Proc. Dkt. 53. These claims do not mirror the claims raised by the Trustee in the present proceeding.

The Trustee's claims against BancorpSouth were settled pursuant to a Settlement Agreement and Mutual Release dated August 18, 2010, which was approved by order entered December 8, 2010. This agreement purports to release BancorpSouth and all of its attorneys, agents, etc., "from any and all claims, demands, contracts, obligations, suits, proceedings, debts, other controversies, etc., that the Trustee has or may have whether known or unknown." Defendant's Memorandum in Opposition to Trustee's Motion for Summary Judgment, Exs. 2 and 3, Adv. Proc. Dkt. 53. The

Defendant seems to assert that the release of claims against BancorpSouth has the effect of releasing claims against the Defendant, but this is not the case.

The Trustee has shown that payments made to BancorpSouth were made by the Debtor with actual intent to defraud because they were made in furtherance of a fraudulent scheme. The Trustee has also shown that he is entitled to avoid transfers that occurred within the four years prior to the entry of the order for relief. Once that is done, the Trustee looks to section 550(a) which permits him to recover the property transferred or the value of the property transferred (if ordered by the court) from the initial transferee (in this case, BancorpSouth) or the entity for whose benefit the transfer was made (in this case, the Defendant). 11 U.S.C. § 550(a)(1). Settlement with BancorpSouth does not prevent the Trustee from proceeding against the Defendant.

(b) The Defendant Need Not Be A Transferee

Next the Defendant argues that the Trustee cannot recover the value of property fraudulently transferred to BancorpSouth from her because she is not a transferee. The statute does not require that she be a transferee, however. It only requires that she be a transferee *or* a person for whose benefit such transfer was made. The Defendant's reliance upon *Taunt v. Hurtado (In re Hurtado)*, 342 F.3d 528 (6th Cir. 2003) is misplaced. That case does describe the minimum requisites to be an *initial transferee* under the statute (which, by the way, the court acknowledged is strictly liable for any fraudulent transfers he receives), but is silent as to the requisites to be an "entity for whose benefit such transfer was made." *See Hurtado*, 342 F.3d at 532-33. Those persons share the same level of responsibility as initial transferees under the statute, which indicates that they are strictly liable for the fraudulent transfers from which they benefit.

The payments to BancorpSouth provided a benefit to the Defendant. Every dollar paid to BancorpSouth reduced her liability to BancorpSouth by a corresponding amount. Nevertheless, account must be given for the collateral that BancorpSouth held. Had the payments not been made to BancorpSouth, it would have retained all of its collateral, including the house and three acres retained by the Debtor and the Defendant. Its claims would have been fully paid from its collateral, and funds paid to it by the Debtor would have been available to pay the Debtor's unsecured creditors.

(c) The Trustee Need Not Recover from Initial Transferee

The Defendant argues that "neither the Bankruptcy Code nor the Tennessee Uniform Fraudulent Transfer Act makes a transfer avoidable simply as a consequence of a benefit to a non-transferee third party." Defendant's Memorandum in Opposition to Trustee's Motion for Summary Judgment, p. 5, Adv. Proc. Dkt. 53. This is no doubt true, but fails to comprehend the distinction between avoidance, which focuses on the transfer, and recovery, which focuses on the transferees and beneficiaries. The Tennessee Uniform Fraudulent Transfer Act makes no mention of beneficiary in section 66-3-305(a)(1) for the same reason that it makes no mention of transferee. The focus in that section is on the transfer and the debtor's intent in making the transfer. Once a transfer is shown to be fraudulent, the focus then shifts to recovery. Because this is a proceeding brought pursuant to the Bankruptcy Code, the court looks to the Code to determine the trustee's right of recovery.

Bankruptcy Code section 550(a)(1) permits the Trustee to recover the value of property transfers from the initial transferee *or* the entity for whose benefit the transfer was made. The remedy is provided in the disjunctive. Section 550(a) states:

> (a) Except as otherwise provided in this section, to the extent that a transfer is *avoided* under section 544, 545, 547, 548, 549, 553(b), or 724(a) of [title 11], the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> >
> > (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a) (emphasis added). To the extent a transfer is avoided, the property may be recovered or a money judgment for the value of the property may be had against the first transferee *or* the person for whose benefit the transfer was made.

The Tennessee Uniform Fraudulent Transfer Act uses slightly different language from that of the Bankruptcy Code. A review of the Act is helpful to an understanding of the intent of the Bankruptcy Code. The two are so similar that they "are generally construed in consonance." *Farinash v. Bensusan (In re Prebul Jeep, Inc.)*, 2009 WL 4581900, at *3 (Bankr. E.D. Tenn. Nov. 30, 2009), citing *Creditor's Comm. Of Jumer's Castle Lodge, Inc. v. Jumer*, 472 F.3d 943, 947 (7th Cir. 2007).

The remedies provided under the Tennessee Uniform Fraudulent Transfer Act are spread over two sections. Tennessee Code section 66-3-308 is directed toward the thing transferred. It permits a creditor to avoid a transfer to the extent necessary to satisfy his claim, but also to obtain an attachment against the asset transferred, or to obtain an injunction against further disposition of it, or to obtain the appointment of a receiver to take charge of it, or, if the creditor has obtained a judgment on a claim against the debtor, to levy execution upon the asset or its proceeds in the hands of the transferee. These remedies are remedies *in rem.* They permit the judgment creditor, i.e., one whose claim has already been established, to act toward the asset as though it had never been transferred to the extent necessary to satisfy the claim. The judgment creditor may levy execution on the asset either in the hands of the transferor (after the transfer of the asset has been "avoided," i.e., the asset has been returned to the transferor) or in the hands of the transferee. If the plaintiff-creditor has not obtained judgment against the defendant-transferor, he can protect the asset from further transfer or encumbrance until he does obtain a judgment.

The second section, 66-3-309, is directed toward obtaining a money judgment for the value of the thing transferred. It states that, with certain exceptions, a judgment creditor may obtain a money judgment for the value of the asset transferred "to the extent the transfer is *voidable* in an action by a creditor under § 66-3-308(a)(1)." Tenn. Code Ann. § 66-3-309(b) (emphasis added). To recover a money judgment, a plaintiff-creditor need only show that the transfer is voidable, i.e., fraudulent, and to what extent (the value of the asset at the time of transfer or the amount that he is owed, whichever is less). Tenn. Code Ann. § 66-3-309(b). It is not necessary to actually return the asset to the hands of the transferor. Section 66-3-309 permits the judgment creditor to obtain a money judgment *in lieu of* the process of levy, execution, and sale of the asset transferred. If not subject to the defenses provided in section 66-3-309(a), a money judgment may be entered against "[t]he first transferee of the asset or the person for whose benefit the transfer was made." Tenn. Code Ann § 66-3-309(b)(1).

As we have seen, the fact that an action under the Tennessee Uniform Fraudulent Transfer Act is being brought by a trustee in bankruptcy results in one important deviation. The recovery that may be had by the Trustee is not limited to the amount of the creditor's claim. Rather, the Trustee may avoid the entire transfer for the benefit of the bankruptcy estate. *See* Section A.4. above.

This brings us to the question of whether the shift in language under Tennessee law from transfers *voidable* to that under federal law of transfers *avoided* changes the outcome when the "creditor" seeking recovery under the Tennessee Uniform Fraudulent Transfer Act is a trustee in bankruptcy. The Defendant asserts that it does. She asserts that a transfer must first be "avoided" before the value of the thing transferred may be recovered.

The impact of fraudulent transfer acts is not to *make* transfers void, but to *declare* them void. According to *Black's Law Dictionary* (10th ed. 2014), the verb "avoid" means "[t]o render void; void," and gives the example, "because the restrictive covenant was overbroad, the court avoided it." The dictionary goes on to warn: "Because this legal use of *avoid* can be easily confused with the ordinary sense of the word, the word *void* is preferable." The point, as was demonstrated in the discussion of the remedies available under the Tennessee Uniform Fraudulent Transfer Act, is that the result of the Act is to declare fraudulent transfers *void* as to judgment creditors who are harmed by them. The judgment creditor may act as if the transfer had not been made, i.e., as if it were void.

In support of her position, the Defendant relies on *Harrison v. Brent Towing Co. (In re H&S Transportation Co., Inc.),* 939 F.2d 355, 359 (6th Cir. 1991). The court of appeals in that case, however, states that "there must first be an *avoidable* transfer before there can be recovery by the trustee pursuant to section 550(a)." *Id.* at 359. The court goes on to explain, however, that "transfer" is determined from the transferor's perspective, not the transferee's. The court further explains that the trustee may have only one satisfaction. *Id.* at 359-60. The limit of only one recovery is spelled out in the Bankruptcy Code, section 550(d), which provides: "The trustee is entitled to only a single satisfaction under subsection (a) of this section." In other words, the trustee may receive the asset or the value of the asset, but not both, and only once. In *H&S Transportation*, the court of appeals explained that a trial court must look first to see whether a transfer is avoidable, i.e., fraudulent and not subject to any defenses, then to those from whom recovery may be had. *Id.* at 359.

The Defendant also relies upon *Tibble v. Farmers Grain Express, Inc. (In re Mich. Biodiesel, LLC),* 510 B.R. 792 (Bankr. W.D. Mich. 2014). That case takes up a quotation from *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1196 (7th Cir. 1989), which was included in *H&S Transportation* as well: "[T]he Bankruptcy Code 'specifically separates the identification of avoidable transfers (§ 547 [in that case]) from the identification of those who must pay (§ 550)....'" *Michigan Biodiesel*, 510 B.R. at 796. The question in *Michigan Biodiesel* was whether the trustee in bankruptcy could rely on a prior judgment that a particular transfer was avoided to establish his right to recover against an entity who benefitted from the transfer but was not a party to the prior action. The defendant argued "that a trustee must bring an avoidance claim in every single recovery action when he pursues separate adversary proceedings against the initial transferee and any subsequent transferees." *Id.* at 797. The court concluded that a separate avoidance action was not necessary once a transfer had been avoided. It did require that a transfer be avoided *before* recovery could be had, but did not say that an avoidance action cannot be combined with an action for recovery against the person for whose benefit the transfer was made; or that the initial transferee is a necessary party to an action for avoidance; or that recovery must be had against the initial transferee before recovery may be had against a person for whose benefit the transfer was made. Just as under the Tennessee Uniform Fraudulent Transfer Act, the question of avoidance under the Bankruptcy Code is separate from the question of recovery. The question of avoidance is focused upon the transfer and is analyzed with respect to the transferor. Once it is determined that an avoidable transfer has been made, then the focus shifts to the relief the trustee may obtain as to the property transferred or the value of the property transferred and from whom. *See* 11 U.S.C. § 550(a)(1) and (2). Just as under the Tennessee Uniform Fraudulent Transfer Act, recovery of the value of the property transferred may be had against "the initial transferee of such transfer *or* the entity for whose benefit such transfer was made." 11 U.S.C. § 550(a)(1) (emphasis added). The targets of possible recovery are provided in the disjunctive.

To interpret section 550(a) as the Defendant suggests would render section 550(c) meaningless. That section was added to override the result in *Deprizio* which permitted a trustee in bankruptcy to recover from an outside creditor (i.e., a bank) payments that benefitted an insider during the period between ninety days and one year before the filing of a bankruptcy petition. *Levit v. Ingersol Rand Finan. Corp.*, 874 F.2d 1186 (7th Cir. 1989) (commonly referred to as *Deprizio*). Section 550(c) provides:

> (c) If a transfer made between 90 days and one year before the filing of the petition–
>
> (1) is avoided under section 547(b) of this title; and
> (2) was made for the benefit of a creditor that at the time of such transfer was an insider;
>
> the trustee may not recover under subsection (a) from a transferee that is not an insider.

11 U.S.C. § 550(c). Granted, this section deals specifically with preferential transfers, not fraudulent conveyances, but the result is that recovery of avoided transfers from the initial transferee is not required before recovery from the insider who benefitted from the transfers. In the case of fraudulent transfers the reachback period for transfers is the same for both outsider transferees and insider beneficiaries. Thus, a subsection similar to section 550(c) is not necessary with respect to fraudulent transfers. The point, however, remains: it is not necessary to recover from the initial transferee before recovering against the entity for whose benefit a fraudulent transfer was made.

Despite her insistence that avoidance must be separated from recovery, the Defendant seems to have merged the requirement of avoidance with the concept of recovery from the initial transferee. The Defendant is correct that the transfer must be avoided or avoidable – there seems no real distinction between these concepts – before recovery may be had, but the Defendant is not correct if she asserts that recovery must be had from the initial transferee before it may be had from the party for whose benefit the transfer was made. She is correct, however, in asserting that the Trustee may recover the value of fraudulent transfers only once as the result of Bankruptcy Code section 550(d).

(d) Settlement of Claims Against the Initial Transferee Does Not Prevent Recovery from the Person for Whose Benefit Fraudulent Transfers Were Made

Because it is not necessary that the Trustee include the initial transferee in the determination of whether a fraudulent transfer has occurred or recover from the initial transferee the value of property transferred before he seeks recovery from the person for whose benefit the transfer was made, the Trustee's settlement of claims against BancorpSouth is relevant to his claim against Mrs. Davis only insofar as it establishes the amount that may be recovered from her. The Defendant argues, correctly, that the Trustee may receive but one satisfaction, but she fails to show that the settlement with BancorpSouth resulted in full recovery of the avoidable transfers for the benefit of the estate.

The Trustee has fully established his right to recover from the Defendant the value of transfers made by the Debtor to BancorpSouth during the four years prior to the entry of the order for relief, February 2, 2006. He is entitled to summary judgment against the Defendant on the encompassed legal issues. The amount of those transfers, however, may be the subject of a factual dispute. The Trustee has provided information concerning the amount of transfers made within four years before the filing of his Complaint. As was shown above, that period starts too late, and ends too late. The amount that may be recovered is the amount of payments made between February 2, 2002, and February 2, 2006. The revolving loan, number 277412, requires special consideration because BancorpSouth continued to make advances which should be netted against payments made by the Debtor. The net value of payments over the value of advances (if any), together with the payments made on the other loans resulted in a diminution of funds otherwise available to pay creditors. Had the payments not been made, that amount together with the value of the Debtor's expectancy interest in his home after satisfaction of BancorpSouth's loans from liquidation of its collateral would have been part of the bankruptcy estate. The court will not attempt to determine that amount, but will allow the Trustee to supplement his motion with an affidavit, and will give the Defendant an opportunity to respond before entering its final judgment.

B. Preferential Transfers

In Count II of the Complaint, the Trustee alleges that payments made by the Debtor to BancorpSouth within one year prior to the filing of the bankruptcy petition were preferential to the Defendant and may be recovered from her pursuant to sections 547 and 550 of the Bankruptcy Code. All payments made within one year prior to the filing of the bankruptcy petition are encompassed within the payments made within four years prior to the filing of the petition, which may be recovered as fraudulent transfers. It is not necessary for the court to consider the alternative theory that these transfers may also be recovered as preferential transfers because section 550(d) limits the trustee in bankruptcy to a single satisfaction for transfers avoided under section 550(a). That is, the trustee can recover the value of property that was the subject of an avoidable transfer only once.

Nevertheless, the court will consider whether payments made by the Debtor to BancorpSouth in the one year prior to the filing of the bankruptcy petition are also avoidable as preferential transfers. In order to prevail, the Trustee must show a transfer of an interest of the debtor in property–

> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made–
>> (A) on or within 90 days before the date of the filing of the petition; or
>> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if–
>> (A) the case were a case under chapter 7 of [title 11];
>> (B) the transfer had not been made; and
>> (C) such creditor received payment of such debt to the extent provided by the provisions of [title 11].

11 U.S.C. § 547(b).

The burden of proving each of the elements of a preferential transfer lies with the Trustee. 11 U.S.C. § 547(g). If transfers are found to be preferential under this analysis, and thus avoidable, the trustee in bankruptcy may recover the value of those transfers from the initial transferee *or* the entity for whose benefit the transfers were made. 11 U.S.C. § 550(a)(1) (emphasis added).

The Trustee argues that payments made to BancorpSouth in the year preceding the bankruptcy filing were preferential as to Mrs. Davis because she benefitted by the reduction of her obligation to BancorpSouth by each payment made. He asserts that the payments enabled Mrs. Davis to receive more than she would have received had the payments not been made.

1. The Defendant Is Not A Creditor of the Bankruptcy Estate

As a threshold issue, the Defendant raises the following question: Did payments to BancorpSouth benefit Mrs. Davis as a *creditor*? It is only if Mrs. Davis is a creditor of her husband's bankruptcy estate that payments to BancorpSouth made within one year prior to the filing of the bankruptcy petition may be avoided as preferential to *her*. The Trustee's theory is that Mrs. Davis is a creditor of the bankruptcy estate because she holds a contingent claim against the Debtor arising out of their joint and several obligations to BancorpSouth. The Trustee has pointed to no case in which a trustee in bankruptcy was permitted to recover as a preference payments made on a joint obligation owed by the debtor and his spouse from the non-filing spouse .

The ability of an assignee or trustee in bankruptcy to recover payments made by a borrower to his creditor that benefit an endorser, accommodation maker, or guarantor during the borrower's slide into bankruptcy has long been recognized. Under the Bankruptcy Act of 1898, it was well-settled that:

> An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a creditor ..., and a payment on such obligation by the principal debtor while insolvent to the innocent holder of the contract within four months before the filing of the petition for adjudication in bankruptcy will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankruptcy unless the amount so paid is first returned to the estate.

Swarts v. Seigel, 117 F. 13, 18 (8th Cir. 1902).[11] The same result was reached under the Bankruptcy Act of 1867, under the theory that a payment by a borrower to a creditor on a guaranteed obligation

[11] Citing Bankr. Act. 1898 (30 Stat. 544) Secs. 1(9), 57i, 63a(1,4); *Landry v. Andrews*, 6 Am. Bankr. R. 281, 284, 48 Atl. 1036; *In re Rea*, 82 Iowa 231, 239, 48 N.W. 78; *Cutler v. Steele*, 85 Mich. 627, 632, 48 N.W. 631; *Dunningham v. Stevens*, 122 Ill. 396, 401, 404, 13 N.E. 651, 3 Am. St. Rep. 496; *Ahl v. Thornor*, 1 Fed. Cas. 220, 222 (No. 103); *Sill v. Solberg* (C.C.), 6 Fed. 468, 474, 477; *Scammon v. Cole*, 21 Fed. Case 627, 628 (No. 12,432); *Cookingham v. Morgan*, 6 Fed. Cas. 454, 455 (No. 3,183); *In re Gerson* (D.C.), 105 Fed. 891; *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866; *In re Waterbury Furniture Co.* (D.C.), 114 Fed. 255.

has the same economic effect as a repayment by the borrower of a guarantor who pays his note when it comes due. The amount of the borrower's payment to his guarantor, if made during the preference reachback period, could be recovered by the assignee in bankruptcy; thus the assignee should also be permitted to recover from the guarantor the same amount when paid directly to the underlying creditor. *Bartholow v. Bean*, 85 U.S. 635 (1873).

The Bankruptcy Code of 1978 describes a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor[.]" 11 U.S.C. § 101(10)(A). A "claim" is defined for purposes of the Bankruptcy Code as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" 11 U.S.C. § 101(5)(A). Because a guarantor is entitled to reimbursement or subrogation from the primary obligor when he pays a guaranteed obligation, courts readily find guarantors to be creditors holding contingent claims under the Bankruptcy Code. *See , e.g., Ray v. City Bank and Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490, 1493 (6th Cir. 1990); *Menninger v. Midwest Mfg. Solutions, LLC (In re Midwest Mobile Technologies, Inc.)*, 304 B.R. 787 (Bankr. S.D. Ohio 2003); *Gordon v Sturm (In re M2Direct, Inc.)*, 282 B.R. 60 (Bankr. N.D. Ga. 2002); *Backhus v. The Central Trust Co. (In re Duccilli Formal Wear, Inc.)*, 8 Bankr.Ct.Dec. 1180, 1982 Bankr.LEXIS 4641 (Bankr. S.D. Ohio, Mar. 8, 1982). In *Deprizio*, the Seventh Circuit agreed that a guarantor may be a creditor for purposes of preference analysis under the Bankruptcy Code, but carefully distinguished guarantors from other "insiders" who benefit from payments to outside creditors, but are not creditors of the debtor. 874 F.2d 1186, 7th Cir. 1989. For example, whenever a taxpayer entity pays its federal tax obligations, "responsible persons" are relieved from potential personal penalty equal to the total amount of the tax imposed owed *See* 26 U.S.C. § 6672(a). Each payment by a taxpayer *benefits* persons responsible for collecting, accounting for, and paying over taxes owed by the taxpayer. As the court in *Deprizio* points out, however, section 6672(a) does not authorize responsible persons to recover from the taxpayer entity in the event that they are called upon to pay the penalty. Thus responsible persons do not hold "claims" against the debtor and are not creditors of the bankruptcy estate. *Deprizio,* 874 F.2d at 1192. *Deprizio* expressly left open the question of whether a co-maker who pays his obligation on a note has a right to recover from other co-makers. It expressed no opinion about whether a co-maker holds a contingent claim in the event of the bankruptcy of his co-maker. *Id.,* at note 4.

Each of the notes signed by the Debtor and Mrs. Davis contains an unconditional promise to pay a fixed amount of money, and thus is a negotiable instrument governed by chapter 3 of the Uniform Commercial Code. Tenn. Code Ann. § 47-3-104. The Uniform Commercial Code ("UCC") provides two instances in which a person sharing liability on a negotiable instrument with another may be entitled to assert a claim against his co-obligor. The first is a right of contribution among parties who have the same liability on an instrument. Section 47-3-116(b) provides:

> Except as provided in § 47-3-419(e) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

This section applies, for example, to co-makers. Pursuant to statute (and often by agreement), co-obligors are jointly and severally liable on an instrument in the capacity in which they sign. Tenn. Code Ann. § 47-3-116(a). "'The right of contribution is the right of a person who has discharged a common liability or burden to recover of another, who is also liable, the portion he or she ought to pay or bear.'" *Thompson v. Davis*, 308 S.W.3d 872, 881 (Tenn. Ct. App. 2009), quoting ["Contribution"], 18 AM. JUR. 2D § 1 (2004).

The right of reimbursement, on the other hand, applies to accommodation parties. Section 47-3-419(e) provides:

> An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

An accommodation party is one who "signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument." Tenn. Code Ann. § 47-3-419(a). This section distinguishes between direct and indirect beneficiaries of the value obtained. Comments to Official Text 1. For example, the fact that the sole shareholder of a corporation receives an indirect benefit from a loan made to the corporation does not prevent him from being an accommodation party when he cosigns a note for the corporation. *Id.* An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against him. An accommodated party, i.e., one who receives the benefit of value given from an instrument, on the other hand, has no right of recourse against an accommodation party. Tenn. Code Ann. § 47-3-419(e). An accommodation party may sign an instrument as "maker," and if he does, he is obligated to pay the instrument in the capacity of maker, i.e., he is primarily liable, not entitled to notice of dishonor, etc. Tenn. Code Ann. § 47-3-419(b); *see Harrison v. Cravens*, 25 Tenn. App. 215, 155 S.W.2d 873 (Tenn. Ct. App. 1941) (decision under prior law). It is not necessary that the accommodation party be identified as such in the instrument. Tenn. Code Ann. § 47-3-419(c). Whether or not a maker of an instrument signs as an accommodated or accommodation party is a question of fact which turns upon the receipt of benefit by that maker. *See* Comments to Official Text 3. Generally, this status will be indicated by use of words of guaranty or by an "anomalous endorsement," i.e., an endorser who is not the maker, payee, or holder of a negotiable instrument.

Under the UCC, persons having joint and several liability on an instrument have the right to seek contribution, while accommodation parties have the right to reimbursement and subrogation. There is nothing in the record to suggest that Mrs. Davis was an accommodation maker. Rather, the language of the various notes indicates that she was a co-maker, jointly and severally liable with her husband, the Debtor. The Trustee presented no proof or argument tending to show that Mrs. Davis was an accommodation party and thus the holder of a contingent claim against the Debtor. Ironically, it was Mrs. Davis herself who made this argument. Counsel for Mrs. Davis argued that Mrs. Davis was not a direct beneficiary of the value given for the instrument because:

> The borrowed funds were used primarily for Mr. Davis' business enterprises, of and in which Mrs. Davis had no knowledge or involvement. *See* Depos. of Carol Davis, 24:13-25:15; 26:1-26:15 and 72-77 generally.

Defendant's Brief in Opposition to Trustee's Motion for Summary Judgment, p. 14, Adv. Proc. Dkt. 53. While it may be true that Mrs. Davis was not involved in the day to day workings of her husband's business endeavors, this does not mean that she did not receive a direct benefit from the BancorpSouth loans. As the Comments to the Official Text make clear, by "direct benefit" the UCC indicates that the entity or entities signing a note received the proceeds of the loan evidenced by it. The example given in the Comments is that of a loan extended to a corporation. If a corporation's note is co-signed by an individual, but the loan is extended to the corporation, the Comment explains, the individual is an accommodation maker even though he may have received an indirect benefit as an employee or shareholder of the corporation. Each of the loans at issue in this proceeding was extended to the Debtor and Mrs. Davis, jointly and severally. None was made to a separate business entity, and Mrs. Davis appeared to be knowledgeable about the loans during the course of her deposition. Mrs. Davis was a direct beneficiary of the loans even if she and her husband agreed that the loan proceeds would be used in her husband's business activities.

Only if she has a right of contribution would Mrs. Davis be a "creditor" for purposes of preference analysis. If Mrs. Davis had made payments on the notes prior to the filing of the bankruptcy case, she could have sought contribution from her husband "for the portion he ought to pay or bear." *Thompson v. Davis,* 308 S.W.3d 872, 881 (Tenn. Ct. App. 2009). The record shows that Mrs. Davis was not employed between 2001 and 2006 and that she and her husband maintained joint checking and savings accounts prior to the filing of the bankruptcy petition. Dep. of Carol Davis, pp. 20-24, 29-30. The record is silent about the source of payments to BancorpSouth, but is clear that any payments that could have been made by Mrs. Davis would have come from funds she held in common with her husband. The only separate fund that Mrs. Davis had during the period preceding the bankruptcy filing was proceeds of the sale of her mother's house which she inherited. Dep. of Carol Davis, pp. 13-14. Mrs. Davis received $55,000 from the sale of her mother's house. She gave half of it to her daughter to pay for her wedding, and used the other half "to pay bills, things like that, to live on." Dep. of Carol Davis, pp. 14-15, 34-35. She indicated that some portion of her half would have been deposited to one of the joint accounts at BancorpSouth. Dep. of Carol Davis, pp. 14-15.

Mr. Sims testified that there was a $20,000 certificate of deposit in Mrs. Davis's name that he thought was a portion of her inheritance. Dep. of Elton Sims, pp. 51-53. This certificate of deposit was pledged as security for a loan, number 380650, in the amount of $20,000 made on

August 5, 2005, after the FBI had taken all of the Debtor's records and locked him out of his building. The proceeds of this loan were used to pay the living expenses of the Debtor and the Defendant. Only one interest payment was made on the loan on February 22, 2006. The loan was eventually paid from the liquidation of the certificate of deposit on August 31, 2006. This loan and the funds used to pay it were separate and apart from the six loans which are at issue in this adversary proceeding. It was made by Ray Davis alone, but Mrs. Davis assigned her certificate of deposit as collateral for the loan and agreed to the terms of the note and security agreement. The certificate of deposit was liquidated *after* the bankruptcy case was filed. There simply is no factual basis to support a right of contribution held by Mrs. Davis when the bankruptcy petition was filed.

The Trustee might argue that the fact that Mrs. Davis did not have a right of contribution when the bankruptcy case was filed is irrelevant. He might argue that she held a contingent claim for contribution at that time, or he might argue that she held a contingent claim as the result of the fraudulent conveyances that she benefitted from in the years prior to the bankruptcy case.[12] Under either theory, the Trustee might argue that these contingencies give rise to a "claim" and thus to the status of "creditor" for the Defendant for purposes of section 547.

The Bankruptcy Code provides for the treatment of co-debtors in two sections. Section 509(a) provides for "an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, *and that pays such claim*" to be "subrogated to the rights of the creditor

[12] Section502(h) provides that, "[a] claim arising from the recovery of property under section ... 550 ... shall be determined, and shall be allowed under subsection (a), (b), or (c) of [section 502], or disallowed under subsection (d) or (e) of [section 502], the same as if such claim had arisen before the date of the filing of the petition." 11 U.S.C. § 502(h).

to the extent of such payment" (emphasis added). For those co-debtors who *do pay* the claim of a creditor against the debtor, no right of subrogation is provided to the extent that:

> (1) a claim of such entity for reimbursement or contribution on account of such payment of such creditor's claim is–
>
> (A) allowed under section 502 of ... title [11];
> (B) disallowed other than under section 502(e) of ... title [11]; or
> (C) subordinated under section 510 of ... title [11]; or
>
> (2) as between the debtor and such entity, such entity received the consideration for the claim held by such creditor.

11 U.S.C. § 509(b). In other words, a co-debtor who pays the claim of a creditor of the debtor must elect between his own right to reimbursement or contribution and subrogation to the rights of the creditor (which would include the right to obtain payment from any security held by the creditor). A co-debtor who actually received the consideration for the claim held by the creditor (i.e., an accommodated party under the UCC) has no right of subrogation against the accommodation party.

The second section of the Bankruptcy Code that deals with co-debtors is section 502(e). In that section, the court is directed to disallow a claim for reimbursement or contribution of an entity that is liable with the debtor or has secured the claim of a creditor to the extent that–

> (A) such creditor's claim against the estate is disallowed;
> (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or
> (C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

11 U.S.C. § 502(e)(1).

Section 502(e)(1) applies only to claims of persons who are liable with the debtor on a claim or who have secured the claim of the creditor. It typically applies to co-debtors, sureties, and guarantors. *See* 4 COLLIER ON BANKRUPTCY ¶ 502.06[2][b] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.). The claims of co-debtors for reimbursement or contribution may be disallowed in three instances. First, subsection (A) says that if the underlying creditor's claim is disallowed for any reason, the co-debtor's claim for contribution or reimbursement is likewise disallowed. Second, subjection (B) provides that unlike creditors with contingent claims (whose claims may be estimated for purposes of distribution under section 502(c)), a co-debtor has no right to share in the distribution of an estate's assets until he has paid the underlying creditor in full rendering his claim no longer contingent. *See* 11 U.S.C. § 502(e)(1)(2); 4 COLLIER ON BANKRUPTCY ¶ 502.06[2][i]. Third, subsection (C) indicates that when a co-debtor pays an underlying creditor, it may elect (1) to file its own claim for contribution or reimbursement or (2) to be subrogated to the rights of the creditor, but not both. *See* 11 U.S.C. § 502(e)(1)(C).

Most claims are determined as of the date of the filing of the bankruptcy petition. 11 U.S.C. § 502(b). Claims that are contingent or unliquidated may be estimated for purposes of allowance, (11 U.S.C. § 502(c)), but section 502(e)(1)(B) specifically excludes claims for reimbursement or contribution from this process. Claims for reimbursement or contribution that are contingent as of the time for allowance of the claim are simply disallowed. Claims for reimbursement or contribution appear to be contingent until the underlying claim is paid, and if that occurs after a bankruptcy petition is filed, the co-maker or guarantor is subrogated to the allowed claim of the underlying creditor.

Mrs. Davis made no payments to BancorpSouth in addition to those made by her husband, the Debtor, that would give rise to a right of contribution. Mrs. Davis filed no proof of claim against the estate for contribution. Had she filed a proof of claim, her claim would have been disallowed under section 502(e)(1)(B) because her claim for contribution would have been contingent upon her payment of the debt owed to BancorpSouth. Had she made a payment to BancorpSouth after the time for allowance or disallowance of her claim for reimbursement or contribution, she would have been entitled to be subrogated to the claim of BancorpSouth, i.e., she would stand in its shoes as creditor, but would not have her own claim against the estate. In fact, however, BancorpSouth was fully secured during the years preceding the filing of the bankruptcy petition, and BancorpSouth has been paid in full from the sales of its collateral. Mrs. Davis was never and cannot now be called upon to pay BancorpSouth, and thus never had a claim for contribution against the bankruptcy estate. The court is hesitant to declare as a matter of law that a co-maker could never have a contingent right of contribution when a bankruptcy petition is filed by or against her co-maker, but is prepared to say that the Trustee has failed to show as a matter of fact that Mrs. Davis holds a claim against her husband's bankruptcy estate, and thus that she is a creditor for purposes of preference analysis.

Because the Trustee has failed to establish an essential element of preferential transfer, judgment on Count II of the Complaint should be entered for the Defendant.

2. The Defendant Has Not Received More From the Bankruptcy Estate Than She Would Have Received Had the Payments to BancorpSouth Not Been Made

Even if the Defendant were a creditor of the bankruptcy estate, the Trustee's claim for recovery of preferential transfers would fail because the transfers to BancorpSouth did not result in Mrs. Davis receiving more than she would have received had the transfers not been made. The amounts owed to BancorpSouth one year before the filing of the bankruptcy petition and the amount owed at filing are set out below:

Note Number	Collateral[13]	Balance Due One Year Prior to Filing[14]	Balance Due at Filing[15]	Balance Due After Sales of Collateral[16]
064499	Residence - 1st TD -10 Forrest Ford Road	$91,279.19	$79,608.89	$0.00
033159	Commercial Bldgs - 1st TD - 6090 E Van Hook - Tracts 2 and 1	$129,698.04	$103,023.09	$0.00
277412	Commercial Property - 2nd TD - 6090 Van Hook; 2nd TD Belews Chapel Rd. - Tracts 1, 2, 3, 4	$123,726.45	$152,360.86	$0.00
094678	Farm -1st TD - Belews Chapel Rd. - Tract 4	$8,840.00	$4,752.11	$0.00
328253	Vacant Land - 1st TD - Hwy 79 and 70A	$30,000.00	$12,442.99	$0.00
222194	2 Residential Lots - 1st TD - Lot 22 & 23 Oak Tree Subdivision	$80,122.11	$39,167.01	$0.00
Total		$463,665.79	$391,354.95	$0.00

The difference between the total amount owed one year prior to the bankruptcy filing and the amount owed upon filing, was $72,310.84, which represents the net reduction of the loans during the one year period prior to filing.[17] If payments had not been made to BancorpSouth, it would have

[13] Based upon deeds of trust provided as exhibits to Deposition of Elton Sims.

[14] Based upon loan histories provided as exhibits to Deposition of Elton Sims.

[15] Based upon proofs of claim filed by BancorpSouth and not objected to by the Trustee.

[16] Deposition of Elton Sims, p. 55, ll. 1-5.

[17] One of the loans, number 277412, was a revolving loan. As set forth above, more was advanced to the borrowers during the year preceding the bankruptcy filing than was received from them. More was owed on that loan when the bankruptcy case was filed than was owed one year prior to filing.

been owed $463,665.79 when the bankruptcy petition was filed.[18] According to Mr. Sims, President of BancorpSouth, all of its loans were satisfied by liquidating its collateral. Dep. of Elton Sims, p. 55. As a result, BancorpSouth released its lien on the Debtor's residence and surrounding three acres. This property is valued by the Debtor and by Mr. Sims between $125,000 and $150,000. If the payments to BancorpSouth had not been made in the year preceding the bankruptcy filing, the bank would have liquidated this collateral as well, the proceeds of which would have been more than adequate to pay the additional $72,310.84 that would have been owed in that event. The bank would have been entitled to liquidate this collateral because the Debtor and Mrs. Davis were co-makers on the loans secured by their residence. Mrs. Davis would have lost her home, but she would not have *received* more than she would have received had the payments not been made and the case been one under chapter 7. This *is* a case under chapter 7, and the Defendant held no claim against the estate when the case was filed. The Trustee has failed to show that the payments to BancorpSouth enabled Mrs. Davis to receive more than she would have received had the payments not been made.

The Trustee's motion for summary judgment on Count II of the Complaint should be denied.

C. Pre-judgment Interest

The Trustee has asked that he be awarded pre-judgment interest on the amount of any recovery in this adversary proceeding. The amount of the Trustee's recovery will only be determined when he supplements the record with additional facts.

The Bankruptcy Code does not provide for the award of pre-judgment interest. The award of pre-judgment interest is discretionary and depends upon the equities of the case. *Acequia, Inc.*

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[18] This hypothetical does not take into account the payments that may be avoided as fraudulent transfers during the period between one year before the filing of the petition and four years prior to the order for relief.

v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 818 (9th Cir. 1994); *(McDonald v. Morgan) (In re Morgan)*, 415 B.R. 644, 652 (Bankr. E.D. Tenn. 2009). The purpose of awarding pre-judgment interest is to make the injured party whole. It is not intended to be punitive, nor should it be considered a windfall. Pre-judgment interest is "simply an ingredient of full compensation." *Brown v. Phillips (In re Phillips)*, 379 B.R. 765, 788 (Bankr. N.D. Ill. 2007), citing, *P.A. Bergner & Co. v. Bank One, Milwaukee, N.A. (In re P.A. Bergner & Co.)*, 140 F.3d 1111, 1123 (7th Cir. 1998). Full compensation to the bankruptcy estate for an avoidable transfer typically requires pre-judgment interest to compensate for the value, over time, of the amount recovered. *Gray v. Travelers Ins. Co. (In re Neponset River Paper Co.)*, 219 B.R. 918, 921 (Bankr. D. Mass. 1998), *aff'd, In re Neponset River Co.*, 231 B.R. 918, 921 (B.A.P. 1st Cir. 1999). Courts traditionally award pre-judgment interest to trustees who prevail in preference or fraudulent conveyance action. *Yoder v. T.E.L. Leasing, Inc. (In re Suburban Motor Freight, Inc.)*, 124 B.R. 984, 1005-06 (Bankr. S.D. Ohio 1990); *Lassman v. Keefe (In re Keefe)*, 401 B.R. 520, 526 (B.A.P. 1st Cir. 2009). Because it is of paramount importance in fraudulent conveyance proceedings to make the estate whole, it is appropriate to award pre-judgment interest in this proceeding.

The Trustee has requested pre-judgment interest at the rate of 10% per annum under Tennessee Code Annotated section 47-14-123. There is division among the courts over whether federal or state law governs the pre-judgment interest rate in fraudulent transfer actions brought by a bankruptcy trustee. *Kittay v. Korffe (In re Palermo)*, 739 F.3d 99, 107 (2nd Cir. 2014); *Keefe* at 526-27. Some apply the state law interest rate on fraudulent transfer judgments arising under Code section 544(b) because avoidance of the fraudulent conveyance is predicated on state law. *Id*. at 527. Others apply the federal rate to fraudulent conveyance judgments whether arising under sections 544, 548, or 550. *Id.* See, *In re Suburban Motor Freight, Inc.,* 124 B.R. at 1005, n. 20; *CNB Int'l, Inc. v. Kelleher (In re CNB Int'l, Inc.*), 393 B.R. 306, 336 (Bankr. W.D. N.Y. 2008) (The right to recover pre-judgment interest on a fraudulent conveyance derives from Code section 550 which allows recovery of the "value" of the transfer and thus should be calculated using the federal interest rate.). The federal rate is described in 28 U.S.C. § 1961 which mandates the award of post-judgment interest to a prevailing party in a federal civil action and governs calculation of the rate. According to the statute, "[s]uch interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[] the date of the judgment." 28 U.S.C. § 1961. When pre-judgment interest is awarded in bankruptcy proceedings at the federal rate, it is generally calculated, using this formula, from the date the adversary proceeding was filed or from the time demand was first made on the defendant, whichever is earlier. *In re Suburban Motor Freight, Inc.*, 124 B.R. at 1006.

As there is no indication in the record that the Trustee made demand upon the Defendant prior to filing his Complaint, pre-judgment interest will be awarded here at the rate prescribed in the federal statute from the date of commencement of the adversary proceeding.

CONCLUSION

Based on the foregoing, summary judgment should be **GRANTED** for the Trustee against the Defendant Carol D. Davis as to Count I of the Complaint as to legal issues only arising under Tennessee Code section 66-3-305. The Trustee may recover from Mrs. Davis the value of all payments made by the Debtor to BancorpSouth during the period February 2, 2002, through February 2, 2006, except for payments made on the revolving loan, number 277412, which must be netted against advances. The Trustee is directed to submit a calculation of the aggregate amount of those payments.

Summary judgment should be **DENIED** for the Trustee against the Defendant as to legal issues arising under Tennessee Code sections 66-3-101 and 66-3-306 based upon the Trustee's failure to demonstrate his standing to proceed.

Summary judgment should be **DENIED** to the Trustee but **GRANTED** to the Defendant as to Count II of the Complaint.

Judgment on Count III of the Complaint is reserved because it was not addressed by the parties in their briefs. The court notes, however, that any recovery that may be had under Count III may already be encompassed within the judgment granted as to Count I of the Complaint.

Finally, pre-judgment interest is awarded from the date that the Complaint was filed. The amount owed will only be determined when the Trustee supplements the record as directed.

cc: Debtor
Attorney for Debtor
Plaintiff
Attorney for Plaintiff
Defendant
Attorney for Defendant