By order of the Bankruptcy Appellate Panel, the precedential effect of this decision is limited to the case and parties pursuant to 6th Cir. BAP LBR 8013-1(b). See also 6th Cir. BAP LBR 8010-1(c).

File Name: 05b0010n.06

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

In re: WILLARD EDGAR CONGROVE,
BARBARA ANN CONGROVE,

Debtors.

WILLARD EDGAR CONGROVE,

Plaintiff-Appellant,

v.

MCDONALD'S CORPORATION,

Defendant-Appellee.

No. 04-8049

Appeal from the United States Bankruptcy Court
for the Southern District of Ohio, Eastern Division at Columbus.
Bankr. Case No. 01-59398, Adv. Proc. 03-02360.

Argued: May 4, 2005

Decided and Filed: August 31, 2005

Before: LATTA, PARSONS, and WHIPPLE, Bankruptcy Appellate Panel Judges.

COUNSEL

ARGUED: Michael D. Bornstein, RICKETTS COMPANY L.P.A., Columbus, Ohio, for Appellant. Kenneth M. Richards, LUPER NEIDENTHAL & LOGAN, Columbus, Ohio, for Appellee. **ON BRIEF:** Michael D. Bornstein, RICKETTS COMPANY L.P.A., Columbus, Ohio, for Appellant. Kenneth M. Richards, LUPER NEIDENTHAL & LOGAN, Columbus, Ohio, for Appellee.

OPINION

JENNIE D. LATTA, Bankruptcy Appellate Panel Judge. The Debtor, Willard Congrove, appeals from the bankruptcy court's order granting summary judgment in favor of McDonald's Corporation on the basis that conveyances made pursuant to a franchise termination agreement were not fraudulent conveyances or preferential transfers within the meaning of federal or state law. For the reasons below, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings.

I. ISSUES ON APPEAL

1. Whether McDonald's gave reasonably equivalent value in exchange for conveyances made pursuant to the franchise termination agreement.

2. Whether McDonald's was an "insider" for purposes of determining whether the conveyances made pursuant to the franchise termination agreement were fraudulent conveyances or preferential transfers.

3. Whether the conveyances by Congrove to McDonald's pursuant to the franchise termination agreement were preferential transfers within the meaning of Ohio Revised Code § 1313.56.

4. Whether McDonald's was unjustly enriched as the result of the conveyances by Congrove to McDonald's made pursuant to the franchise termination agreement.

5. Whether the relief granted McDonald's exceeded the relief requested in its cross-motion for summary judgment.

II. JURISDICTION AND STANDARD OF REVIEW

The judgment on appeal concludes an adversary proceeding and is therefore final and appealable as of right pursuant to 28 U.S.C. § 158(a)(1). The United States District Court for the Southern District of Ohio has authorized appeals to the Bankruptcy Appellate Panel (the "Panel"). Neither party has timely elected to have this appeal heard by the district court. 28 U.S.C. § 158(b)(6), (c)(1). Accordingly, the Panel has jurisdiction to decide this appeal.

Questions of law are reviewed *de novo*, as are orders granting summary judgment. *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir. 1997). "De novo means that the appellate court determines the law independently of the trial court's determination." *Treinish v. Norwest Bank Minn., N.A. (In re Periandri)*, 266 B.R. 651, 653 (B.A.P. 6th Cir. 2001).

> "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Thus, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."

Moore v. Philip Morris Companies, Inc., 8 F.3d 335, 339-40 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 250, 106 S. Ct. 2505, 2510, 2511 (1986); *Stein v. Nat'l City Bank,* 942 F.2d 1062, 1064 (6th Cir.1991)).

III. FACTS

Willard Congrove ("Congrove") owned two franchises for McDonald's restaurants. The franchise agreement for the first restaurant, executed in 1990, (1) authorized Congrove to use "those tangible assets normally required for the operation of a McDonald's restaurant" (signs, fixtures, and equipment), with an option to purchase, which (if exercised) would extend the term of the agreement to July 31, 2004, (2) gave Congrove the right to occupy the restaurant buildings, and (3) licensed

to Congrove the right to use the trademarks and service marks of McDonald's. The franchise was also evidenced by a license agreement and a lease, which provided that McDonald's could unilaterally terminate those agreements upon a default under either the license agreement or the lease. Congrove exercised the option to purchase the "personal property" portion of the assets in 1990 and paid McDonald's $700,000. On January 1, 1998, the franchise agreement was amended to include a second restaurant, the tangible personal property of which Congrove acquired outright for $100,095.

On February 2, 2001, McDonald's issued a memorandum finding Congrove's financial position critical and suggesting that the total value of the two restaurants was $850,000 (later adjusted to $700,000). Congrove and McDonald's began negotiating the terms of a franchise termination agreement. During the course of the negotiations between the parties, three options were presented by McDonald's to Congrove to settle their mutual claims: (1) McDonald's could purchase both restaurants for $700,000 and assist Congrove in entering into a composition with his creditors; (2) Congrove could plunge into bankruptcy and let the chips fall where they may; or (3) Congrove could voluntarily terminate his franchises and then have McDonald's "work [ ] with his creditors in an informal manner." After consulting with his financial advisors, Congrove chose the last of these options, hoping to minimize his tax burdens in so doing.

The parties executed an agreement on March 28, 2001 (the "Franchise Termination Agreement"). The Franchise Termination Agreement terminated both franchises and licenses, conveyed all restaurant assets to McDonald's, and provided that McDonald's would not assume or forgive any of Congrove's liabilities. Under the express terms of the Franchise Termination Agreement, McDonald's had no duty to pay any of Congrove's debts. A provision for the payment of the debts which had been present in the first draft of the agreement was not in the final draft. The executed Franchise Termination Agreement included an integration provision, stating that the agreement superseded "all prior and contemporaneous, oral or written, agreements or understandings of the parties" and that there were "no representations, warranties or other inducements which have been made other than those specifically set forth in this Agreement."

The Franchise Termination Agreement did not provide for the payment of any consideration to Congrove in exchange for the termination of the franchises or the conveyance to McDonald's of the restaurant assets. At the time the Franchise Termination Agreement was executed, Congrove's liabilities, including a debt to McDonald's in the amount of $135,770.86, totaled more than $1.5 million. After the execution of the agreement, McDonald's paid a total of $768,060.38 of Congrove's debts, including debt to McDonald's, taxes, utilities, equipment rentals, and previously dishonored paychecks.

After the Franchise Termination Agreement was executed and after McDonald's paid obligations of Congrove, he and his spouse filed a Chapter 11 petition on August 10, 2001. Congrove then filed a complaint, later amended, alleging that his transfers of the franchises and stores back to McDonald's constituted fraudulent conveyances under 11 U.S.C. § 548(a)(1)(B) and comparable Ohio law, preferences under 11 U.S.C. § 547(b)(4)(B) and comparable Ohio law, transfers to insiders in contemplation of bankruptcy prohibited by Ohio law, and unjust enrichment as defined under Ohio law. In due course both parties moved for summary judgment, and the bankruptcy court granted summary judgment to McDonald's on all counts of Congrove's complaint. This timely appeal followed.

IV. DISCUSSION

A. McDonald's gave reasonably equivalent value for conveyances made pursuant to the Franchise Termination Agreement.

Count One of the complaint sought to avoid the Franchise Termination Agreement as a fraudulent transfer under § 548(a)(1)(B) of the Bankruptcy Code. All three grounds for avoidance provided in that subparagraph require that the debtor have "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. § 548(a)(1)(B)(i). Count Two of the complaint sought to avoid the agreement as a fraudulent transfer under §§ 1336.04(A)(2) and 1336.05(A) of the Ohio Revised Code and § 544 of the Bankruptcy Code. Like 11 U.S.C. § 548(a)(1)(B), all three grounds for avoidance set forth in those provisions of the Ohio Revised Code

require that the transferor have made the transfer "without receiving a reasonably equivalent value in exchange for the transfer." The bankruptcy court determined that there is no genuine issue that Congrove received reasonably equivalent value in exchange for the transfers effected by the Franchise Termination Agreement and so granted summary judgment to McDonald's on both counts.

The Bankruptcy Code defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." 11 U.S.C. § 548(d)(2)(A). "Reasonably equivalent" is not defined by the Bankruptcy Code. In determining whether value is reasonably equivalent, focus should be placed upon the consideration received by the debtor rather than the value given by the transferee:

> [T]he proper focus is on the net effect of the transfers on the debtor's estate, the funds available to the unsecured creditors. As long as the unsecured creditors are no worse off because the debtor, and consequently the estate, has received an amount reasonably equivalent to what it paid, no fraudulent transfer has occurred.

Harman v. First Am. Bank (In re Jeffrey Bigelow Design Group, Inc.), 956 F.2d 479, 484 (4th Cir. 1992). "[I]t is clear that the debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value." *Butler Aviation Int'l, Inc. v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1125-26 (5th Cir. 1993). The Sixth Circuit has summarized Ohio law in this regard as follows:

> In assessing whether a challenged transfer is supported by reasonably equivalent value, courts generally compare the value of the property transferred with the value of that received in exchange for the transfer. . . .
>
> . . . .
>
> Thus, the test used to determine whether a transfer was supported by reasonably equivalent value focuses on whether there is a reasonable equivalence between the value of property surrendered and that which was received in exchange.

Corzin v. Fordu (In re Fordu), 201 F.3d 693, 707-08 (6th Cir. 1999).

Under the Bankruptcy Code, the "debtor-in-possession . . . has the burden of proving it did not receive a reasonable value in return for [the transfer]," *CLC Corp. v. Citizens Bank (In re CLC Corp.)*, 833 F.2d 1011 (Table), 1987 WL 38995, at *3 (6th Cir. 1987) (citing 4 *Collier on Bankruptcy* ¶ 548.10 (15th ed. 1985)), and the same is true under Ohio law, *Cardiovascular & Thoracic Surgery of Canton, Inc. v. DiMazzio*, 524 N.E.2d 915, 918 (Ohio Ct. App. 1987) ("in an action to set aside a conveyance as fraudulent, the burden of proof rests upon the plaintiff to prove the existence of fraud").

Congrove does not seriously contend that the payment by McDonald's of $768,060.38 to Congrove's creditors is not "reasonably equivalent" to the value of the assets transferred to McDonald's by virtue of the Franchise Termination Agreement. While Congrove does not admit the amount of the debts paid by McDonald's and points out that the bankruptcy court did not make a finding regarding the value of the property received by McDonald's as a result of the Franchise Termination Agreement, he did not present any contrary evidence and the burden of proving lack of reasonably equivalent value was on Congrove. There is no genuine issue that the amount paid by McDonald's on account of debts of Congrove is reasonably equivalent to the value of the assets conveyed to McDonald's pursuant to the Franchise Termination Agreement.

Congrove's primary argument in this regard is that McDonald's payments were not required according to the terms of the Franchise Termination Agreement and were made by McDonald's for its own selfish purposes, i.e., to maintain the restaurants as going concerns. Thus he maintains that McDonald's did not actually give Congrove any value in exchange for the transfers. He further argues that McDonald's, not being contractually obligated to pay his debts, was a mere volunteer and therefore was not entitled to treat the payments as payments to him for purposes of equivalent value calculations.

During the course of the negotiations between the parties leading to the Franchise Termination Agreement, several options were presented by McDonald's to Congrove to settle their mutual claims. After consulting with his financial advisors, Congrove chose to terminate his franchise agreements with no written agreement with McDonald's concerning his creditors.

Congrove hoped to minimize his tax burden by doing so. An *express* agreement by McDonald's to pay the claims of the Congrove's creditors to the extent of $700,000, which appeared in a draft of the Franchise Termination Agreement, was omitted from the final version of the Franchise Termination Agreement. Thus, McDonald's had no duty under the express terms of the Franchise Termination Agreement to pay any of Congrove's debts. The bankruptcy court concluded, however, that "[e]ssentially, the Debtor and McDonald's had a side agreement that McDonald's would pay down certain of the Debtor's obligations outside the Franchise Termination Agreement."

Congrove argues that as a result of the terms of the written agreement, reasonably equivalent value was not given "in exchange for" the transfer. He argues that McDonald's was a volunteer in paying Congrove's debts. Generally, "equity will not aid a volunteer." *Farm Bureau Mut. Auto. Ins. v. Buckeye Union Cas. Co.*, 67 N.E. 2d 906, 911 (Ohio 1946). Congrove argues that if McDonald's were a mere volunteer in the payment of these obligations, then the payment would not be "in exchange for" the transfers. Further, Congrove argues that the integration and incorporation clauses in the Franchise Termination Agreement render McDonald's a volunteer because the agreement did not obligate it to pay the debts in question and because the agreement denied all other contemporaneous agreements.

In essence, Congrove argues that in order for value to be given "in exchange for" a transfer, the value must be given as the result of a contractual obligation. This is also the position of the dissenting member of the Panel. We believe, however, that no contractual necessity is indicated. Rather the determination must be made, based upon a totality of circumstances, that reasonably equivalent value was given in exchange for the transfer of property. This, in essence, was the determination made by the bankruptcy court in this case. Based upon a totality of the circumstances, including the substantial equivalence of the value given for the property transferred and the discussions leading up to the Franchise Termination Agreement, the payment of debts by McDonald's was in exchange for the franchises transferred to it.

Turning to the specific arguments made by Congrove, we note that McDonald's is not a volunteer beyond the aid of equity for several reasons. The general definition of a volunteer, as adopted by the Ohio Supreme Court, is as follows:

> Generally speaking, the party making payment is a volunteer if, in so doing, he has no right or interest of his own to protect, and acts without obligation, moral or legal, and without being requested by anyone liable on the obligation.

Aetna Cas. & Sur. Co. v. Buckeye Union Cas. Co., 105 N.E. 2d 568, 572 (Ohio 1952) (quoting 50 Am. Jur. § 22, now 73 Am. Jur. 2d *Subrogation* § 24 (1974)); *United Nat'l. Ins. Co. v. SST Fitness Corp.,* 309 F.3rd 914, 922 (6th Cir. 2002) ("The volunteer defense applies if the paying party has not been asked for the payment.") The aforesaid section in American Jurisprudence goes on to make three more pertinent points: (1) "One is not a volunteer when he has an interest of his own to protect"; (2) "[A] payment is not voluntary when made under a moral obligation, since such an obligation is regarded in equity as a form of compulsion that may be the basis of subrogation"; (3) "One is not a volunteer within the rule here considered where he pays the debt at the instance, solicitation, or request of the person whose liability he discharges . . . ." 73 Am. Jur. 2d *Subrogation* § 24 (1974).

McDonald's was protecting its own interests when it paid the debts that threatened the going concern value of its restaurants. It may also have been under a "moral obligation" to pay the debts, since it had specifically agreed to do so, albeit not in the Franchise Termination Agreement.[1] Further, it paid the debts after extensive negotiations with Congrove, negotiations which included discussions about Congrove's creditors. The fact that McDonald's may have benefitted from the payments does not extinguish the benefit to Congrove. McDonald's was not a volunteer.

Equally unpersuasive is Congrove's argument that any verbal agreement regarding McDonald's paying Congrove's debts is unenforceable due to the integration or merger clause set forth in the Franchise Termination Agreement. It is irrelevant whether the oral agreement is enforceable or even whether there was an agreement to pay the debts at all. The only requirement

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[1] In this vein, the argument could be made that Congrove himself has unclean hands and should be estopped from making the argument that McDonald's was a mere volunteer. He asked McDonald's to remove the debt payment provision from the Franchise Termination Agreement for his own benefit, then turned on McDonald's and used the absence of that provision in an attempt to achieve what amounts to a double payment of the debt.

is that the value have been given in exchange for the transfers to McDonald's effected by the Franchise Termination Agreement. The fact that the debt-payment provision was removed from the written agreement (at Congrove's request) is of no consequence in light of the fact that the provision was, in fact, performed. There is simply no question that Congrove's debts were paid "in exchange for" the transfers to McDonald's, whether or not Congrove could have compelled the payments, and irrespective of whether McDonald's was motivated by self-interest or Congrove's interests.

Congrove's reliance on *Allard v. Flamingo Hilton (In re Chomakos)*, 69 F.3d 769, 771 (6th Cir. 1995), is misplaced. While the Sixth Circuit did hold that the time as of which the courts must determine whether a debtor receives reasonably equivalent value in exchange for a transfer is the time of the transfer, Congrove introduced no evidence that the debts paid by McDonald's were not paid contemporaneously with the execution of the Franchise Termination Agreement. Moreover, the *Chomakos* case's holding was made in the context of rejecting the argument that the court should consider post-transfer changes in value of the property given in exchange for the transfer. Here, there is no contention that the value given by McDonald's (the payment of Congrove's debts) changed after the value was given (the debts were paid).

The bankruptcy court correctly determined that there is no genuine issue that McDonald's gave reasonably equivalent value in exchange for the restaurant assets by paying $768,060.38 in debts in exchange for assets believed by the parties to have a value of $700,000. The bankruptcy court was correct in deciding that no fraudulent transfer was involved in the transaction and in granting summary judgment to McDonald's as to Counts One and Two of the complaint.

B. McDonald's was not an "insider" for purposes of determining whether the conveyances made pursuant to the Franchise Termination Agreement were fraudulent conveyances or preferential transfers.

Count Three of the complaint sought to avoid the Franchise Termination Agreement as a fraudulent transfer under § 1336.05(B) of the Ohio Revised Code and § 544 of the Bankruptcy Code. Section 1336.05(B) provides:

> A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the transfer was made to or the obligation was incurred with respect to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

A transfer is avoidable under this statute only if the transfer was made to an insider. Count Five of the complaint sought to avoid the agreement as a preferential transfer under § 547(b) of the Bankruptcy Code. A transfer made more than 90 days but less than one year before the bankruptcy petition was filed may be avoided under that statute only if the transfer was made to or for the benefit of an "insider." 11 U.S.C. § 547(b)(4)(B). The bankruptcy court determined that McDonald's was not an insider and so granted summary judgment to McDonald's on both counts.

Ohio law defines "insider" as follows:

> (G) "Insider" includes all of the following:
>
> (1) If the debtor is an individual, any of the following:
>
> (a) A relative of the debtor or of a general partner of the debtor;
>
> (b) A partnership in which the debtor is a general partner;
>
> (c) A general partner in a partnership described in division (G)(1)(b) of this section;
>
> (d) A corporation of which the debtor is a director, officer, or person in control.
>
> . . . .
>
> (4) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.

Ohio Rev. Code § 1336.01(G). The Bankruptcy Code definition is essentially the same. *See* 11 U.S.C. § 101(31).

Congrove contends, first, that McDonald's qualified as an insider because it was an "affiliate." An affiliate is defined, *inter alia*, as a "person whose business is operated by the debtor

under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor." Ohio Rev. Code § 1336.01(A)(3). The Bankruptcy Code definition is essentially the same. *See* 11 U.S.C. § 101(2)(C). The provisions apply only if an entity's business or property is operated by the debtor. The business of McDonald's is operated by McDonald's, not Congrove, so the two are not affiliates.

Congrove next correctly points out that the statutes' use of the word "includes" in defining "insider" means that relationships other than those listed in the statutes may be sufficiently close to render one entity an insider of the other. For purposes of the Bankruptcy Code, "'includes' and 'including' are not limiting." 11 U.S.C. § 102(3). The term insider includes anyone with "a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor." *In re Krehl*, 86 F.3d 737, 741 (7th Cir. 1996) (quoting S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5810); *accord*, *e.g.*, *Wilson v. Huffman (In re Missionary Baptist Found. of Am., Inc.)*, 712 F.2d 206, 210 (5th Cir. 1983). With respect to the question of whether a creditor may be an insider of a debtor, one bankruptcy court has explained:

> In determining who is an insider, the Court must examine the closeness of the purported insider to the debtor, the degree to which the former is able to exert control or influence over the debtor, and whether the transactions between them were conducted at arms length. The primary focus of the determination is upon the degree of control. . . .
>
> The courts have been reluctant to construe financial oversight--even intrusive oversight-- as the control required to impose insider status. The fact that a [party] examines, monitors, and even controls some aspects of the debtor's financial affairs does not render the [party] an insider.

Meeks v. Bank of Rison (In re Armstrong), 231 B.R. 746, 749-50 (Bankr. E.D. Ark. 1999) (internal citations omitted).

Congrove presented no evidence of day-to-day, extra-contractual control by McDonald's. The record contains no indication that the relationship between Congrove and McDonald's went

beyond an arm's-length franchisor-franchisee relationship. The bankruptcy court correctly determined that there is no genuine issue that McDonald's was not an insider of Congrove, so the court was correct in granting summary judgment as to Counts Three and Five of the complaint.

C. The bankruptcy court erred in holding that § 1313.56 of the Ohio Revised Code requires an intent to hinder, delay or defraud creditors.

Count Four of the complaint sought to avoid the Franchise Termination Agreement as a preferential transfer under Ohio Revised Code § 1313.56. That section provides in pertinent part:

> A sale, conveyance, transfer, mortgage, or assignment, made in trust or otherwise by a debtor, and every judgment suffered by him against himself in contemplation of insolvency and with a design to prefer one or more creditors to the exclusion in whole or in part of others, and a sale, conveyance, transfer, mortgage, or assignment made, or judgment procured by him to be rendered, in any manner, with intent to hinder, delay, or defraud creditors, is void as to creditors of such debtor at the suit of any creditor.

In granting summary judgment to McDonald's and denying summary judgment for Congrove on Count Four, the bankruptcy court stated that Congrove failed to allege that he made the transfer in contemplation of insolvency. This statement is incorrect. Congrove's complaint and amended complaint contain this allegation in paragraph 36.

The bankruptcy court also held that Congrove failed to allege facts necessary to support a cause of action for fraudulent conveyance under Ohio Revised Code § 1313.56. The bankruptcy court apparently overlooked the possibility that the section provides two independent causes of action, one for fraudulent conveyance and another for preferential transfer.

The Sixth Circuit Court of Appeals has recognized on four different occasions that the Ohio statute includes a preference action distinct from a fraudulent conveyance action. In *Berman,* the court of appeals held that Ohio's preference law is correctly summarized as follows:

> Ohio follows the rule that the property and assets of a corporation constitute a trust fund for the payment of its debts, and that an

> insolvent corporation which has ceased to do business can not by transfer of its property to one of its creditors in payment of antecedent debts create a valid preference to that creditor over its other creditors. When such a situation occurs, the property transferred may be traced and recovered unless the holder is a bona fide purchaser for value, and without notice.

Nat'l Fin. Co. v. Marlow (In re Berman & Co., Inc.), 343 F.2d 125, 126-27 (6th Cir. 1965) (citing Ohio Rev. Code §§ 1313.56 - .57); *accord United States v. Adams Bldg. Co.*, 531 F.2d 342, 346 (6th Cir. 1976); *Delia v. Comm'r*, 362 F.2d 400, 404 (6th Cir. 1966); *see also Conroy v. Shott*, 363 F.2d 90, 91 (6th Cir. 1966) (Ohio Rev. Code § 1313.56 "provides for voidability where there has been an intent to establish preference among *or* to defraud creditors") (emphasis added).

Similarly, the Ohio Supreme Court in *Carruthers v. Kennedy*, 166 N.E. 801 (Ohio 1929), interpreted Ohio General Code §§ 11104 - 05, the predecessors to Ohio Revised Code §§ 1313.56 - .57, which are materially unchanged from the present statutes. The issue on appeal was whether the requirement of knowledge of fraudulent intent applied only to conveyances made with intent to defraud or applied also to conveyances made with a design to prefer. The court's syllabus states its holding:

> A conveyance by an insolvent debtor in contemplation of insolvency, made with a design to prefer the purchaser to the exclusion in whole or in part of other creditors, the purchaser not knowing of such insolvency or of the design to prefer but believing the vendor to be solvent, is valid.
>
> A conveyance by an insolvent debtor in contemplation of insolvency, made with intent to hinder, delay, and defraud creditors, the purchaser not knowing of such insolvency or of such fraudulent intent, is valid.
>
> That part of section 11105, General Code, which provides that the provisions of section 11104 shall not apply unless the person or persons to whom a sale, conveyance, transfer, mortgage, or assignment is made knows of such fraudulent intent on the part of the debtor or debtors, has application to a design to prefer one creditor to the exclusion in whole or in part of other creditors, and likewise has

> application to a conveyance made with intent to hinder, delay and defraud creditors.

Carruthers, 166 N.E. at syllabus. The Ohio Supreme Court has clearly interpreted this statute to provide two independent causes of action, one based on design to prefer, and one based on fraud. Accordingly, Congrove need not satisfy the elements with respect to fraud in order to maintain a cause of action based on a preferential transfer under § 1313.56.

Four elements must be proved to establish a preferential transfer under § 1313.56: (1) a sale, conveyance, transfer, mortgage, or assignment made by a debtor; (2) in contemplation of insolvency; (3) with a design to prefer; and (4) the receiving party knew of the insolvency and intent to prefer. *See* Ohio Rev. Code §§ 1313.56 - .57; *Carruthers*, 166 N.E. at syllabus; *Diamond Sav. & Loan Co. v. Cole*, No. 5-85-24, 1986 WL 12366, at *2 - *3 (Ohio Ct. App. Oct. 29, 1986); Thomas D. Buckley, *The Use of Ohio's Preference Law in Bankruptcy: An Alternative to Section 547 With a Longer "Reach-Back" Period*, 20 Cap. U. L. Rev. 863, 879 (1991). "Insolvency," within the Ohio preference statute, is an inability to pay debts as they become due, and a debtor makes a transfer "in contemplation of insolvency" when he transfers property to a creditor due to the state of his financial affairs and an inability to meet his financial obligations. *See Kearney v. Nat'l Brass & Copper Co. (In re Wright Indus., Inc.)*, 93 F. Supp. 58, 65 (N.D. Ohio 1950) (citing *Cincinnati Equip. Co. v. Degnan*, 184 F. 834, 840 (6th Cir. 1910); *Mitchell v. Gazzam*, 12 Ohio 315, 316 (Ohio 1843)). In addition to the four elements required by the Ohio statute, Bankruptcy Code § 544(b) requires the existence of an actual creditor with a claim under the statute in order for a debtor in possession to invoke this state law remedy.

Congrove submitted evidence on each of these elements. In the affidavit submitted in support of his summary judgment motion, Congrove states that he transferred to McDonald's all of his interests in the restaurant and franchises; that at the time of the transfer he was not paying his debts as they became due; and that prior to the transfer, McDonald's had closely scrutinized his financial condition. With respect to knowledge of intent to prefer and the existence of an actual creditor eligible to exercise the Ohio preference statute, Congrove observes in his reply memorandum that at least one creditor was disclosed to McDonald's that was not paid. The

McDonald's memorandum "pricing proposal," dated February 2, 2001, and attached as an exhibit to Congrove's motion for summary judgment, listed a $30,065.98 debt due to MACOCO from Congrove. This debt is not listed among those paid by McDonald's, and MACOCO is listed on Congrove's schedule F as a creditor holding an unsecured claim.

McDonald's offered no evidence to dispute these assertions. To the contrary, in Mark Hertel's affidavit supporting McDonald's cross-motion for summary judgment, he asserts that Congrove's failure to make payments due McDonald's was the material default triggering McDonald's right to terminate the franchise agreement, a statement which supports Congrove's assertion that he made the transfer in contemplation of insolvency and that McDonald's had knowledge of the insolvency.

Rather than dispute the factual basis of Congrove's motion, McDonald's own summary judgment motion as it related to Count Four only asserted various legal arguments: that the transaction between the parties was a termination of a franchise agreement rather than a "transfer" within the meaning of the state and bankruptcy preference and fraudulent conveyance statutes,[2] and that Ohio law was not controlling because the franchise agreements indicated that they were governed by Illinois law. The bankruptcy court made no reference to the latter issue and made no ruling on the issue of whether a transfer had occurred in light of its conclusion that reasonably equivalent value had been given. McDonald's did argue in its response to Congrove's motion that Congrove had failed to allege the existence of a creditor who could assert the state preference cause of action, but arguably, Congrove remedied this failure by noting in his reply memorandum the evidence regarding MACOCO.

Based on all of the foregoing, the Panel concludes that Congrove presented sufficient evidence to withstand summary judgment as to Count Four of the complaint. The statement by the

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[2] In remanding this case, the Panel makes no ruling as to the legal issue of whether the termination of a franchise agreement constitutes a "transfer." The Panel notes, however, that the Franchise Termination Agreement executed by the parties herein not only cancelled Congrove's franchise agreements with McDonald's, but also provided for the transfer of Congrove's interest in the restaurant assets, including certain personalty that Congrove had previously purchased outright from McDonald's.

bankruptcy court that Congrove made no allegation that he made the transfer in contemplation of insolvency is clearly erroneous. Congrove's complaint and amended complaint contain this allegation in paragraph 36. The bankruptcy court's statement that Congrove does not and cannot allege that the transfer was made with intent to hinder, delay, or defraud creditors is irrelevant. As discussed above, this allegation is not required by Ohio law. Congrove has alleged sufficient facts to support a claim under the Ohio preference statute. The bankruptcy court's decision with respect to Count Four of the complaint was incorrect.

D. McDonald's was not unjustly enriched as the result of the conveyances by Congrove to McDonald's pursuant to the Franchise Termination Agreement.

Count Six of the complaint alleged that McDonald's was unjustly enriched by the Franchise Termination Agreement. To recover under such a theory in Ohio, three elements must be shown: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment ('unjust enrichment')." *Hambleton v. R.G. Barry Corp.*, 465 N.E.2d 1298, 1302 (Ohio 1984) (quoting *Hummel v. Hummel*, 14 N.E.2d 923 (Ohio 1938)) (internal quotation marks omitted). Congrove contends that "McDonald's received a benefit in the form of the Transfer worth $700,000.00 for which it paid no consideration." However, Congrove clearly *did* receive value in exchange for the assets transferred to McDonald's, namely the payment of debts on his behalf totaling $768,060.38. Thus, while Congrove conferred a benefit on McDonald's and McDonald's had knowledge of that benefit, retention of the benefit without additional payment would not be unjust under the circumstances.

E. The relief granted McDonald's did not exceed the relief requested in its cross motion for summary judgment.

Finally, Congrove contends that the relief accorded by the bankruptcy court was improper because it exceeded the scope of the relief sought by the cross-motion for summary judgment filed by McDonald's. Specifically, Congrove asserts that "the only relief requested by Defendant in its Cross Motion for Summary Judgment was a determination that the pre-petition termination of the Franchise Agreement was not a transfer as defined in the Bankruptcy Code, that Plaintiff could not utilize 11 U.S.C. § 365 to reinstate the Franchise Agreement, and that the enforcement of a contract cannot serve as the basis of a claim for unjust enrichment," and so the bankruptcy court should not have granted judgment for McDonald's on all counts. Congrove is factually incorrect. McDonald's sought "summary judgment in its favor and against Plaintiff for the reason that no genuine issue of material facts exist and Defendant is entitled to judgment as a matter of law." Moreover, a court may enter summary judgment against the moving party even if no cross-motion has been filed. *Township of Benton v. County of Berrien*, 570 F.2d 114, 119 (6th Cir. 1978) (citing *Lowenschuss v. Kane*, 520 F.2d 255, 261 (2d Cir. 1975)). Accordingly, it was appropriate for the bankruptcy court to grant McDonald's summary judgment on those causes of action to which it was entitled to judgment as a matter of law based on facts not subject to a bona fide dispute.

V. CONCLUSION

For the foregoing reasons, the bankruptcy court's entry of summary judgment against Congrove and in favor of McDonald's is **AFFIRMED** as to Counts One, Two, Three, Five, and Six of the complaint; is **REVERSED** as to Count Four of the complaint; and is **REMANDED** for further proceedings consistent with this opinion.

MARY ANN WHIPPLE, Bankruptcy Appellate Panel Judge, concurring in part and dissenting in part.

I concur in the majority's opinion except for Part IV.A. I write separately because, although I agree that Congrove is not entitled to summary judgment on Counts One and Two of his complaint, I conclude that McDonald's was not entitled to summary judgment on those counts either.

The determination of whether "reasonably equivalent value" has been given in exchange for a transfer requires a determination that (1) value was given, (2) it was given in exchange for the transfers, and (3) what was transferred was reasonably equivalent to what was received. *Pummill v. Greensfelder, Hemker & Gale (In re Richards & Conover Steel Co.)*, 267 B.R. 602, 612 (B.A.P. 8th Cir. 2001); *cf.* 5 *Collier on Bankruptcy* ¶ 548.05[1][b] (15th ed. rev. 2005) ("The statute has two components to the reasonably equivalent value analysis. The first is whether sufficient value was received. The second is whether the value was received 'in exchange for' the transfer that was made or obligation that was incurred."). I agree with the majority that there was no genuine issue that its payments to Congrove's creditors were "reasonably equivalent" vis-à-vis the value of whatever property was transferred to McDonald's by virtue of the Franchise Termination Agreement. The problem is that the record does not support a conclusion that McDonald's paid or released the debts "in exchange for" any such property as required by the Bankruptcy Code and Ohio law. The majority's analysis effectively reads those words out of both statutes under the circumstances of this case.

The Sixth Circuit requires an element of contemporaneity in the exchange of value for a transfer sought to be avoided under § 548(a)(1)(B) of the Bankruptcy Code. *Chomakos v. Flamingo Hilton (In re Chomakos)*, 69 F.3d 769, 771 (6th Cir. 1995). Specifically, "[t]he critical time is when the transfer is 'made.'" *Id.* (citation omitted). *Collier on Bankruptcy* explains:

> Items of value coming to the debtor after the transfer must likewise be excluded as any part of the consideration, at least when the subsequently acquired consideration was not bargained for at the date of the original transaction. . . .
>
> The language of section 548(d)(2)(A), seeming to contemplate only a present advance, or transfer of property as

> security for, or the discharge of, an antecedent debt, generally leaves no room for a mere executory promise to constitute value. . . .
>
> . . . . When, however, the promisor is solvent and the promise is enforceable, unless it is a mere promise of support, a transfer in exchange for a promise should not be held necessarily and automatically to have no value, especially when the promise has been partially or totally fulfilled in good faith and the creditors have profited by a reduction of their debtor's obligations after the transfer was made.

5 *Collier on Bankruptcy* ¶ 548.05[1][b] (15th ed. rev. 2005) (citations omitted). Thus, to be made "in exchange for" the property transferred, the reasonably equivalent value must be given or at least promised at the time of the transfer. *See also Cooper v. Ashley Communications (In re Morris Communications NC, Inc)*, 914 F.2d 458, 466 (4th Cir. 1990) ("The date for defining such reasonable equivalence is the date of the transfer.").

There are not many cases that interpret the "in exchange for" language of the statute. Those that do are consistent with this analysis. For example, in *Meeks v. Don Howard Charitable Remainder Trust (In re Southern Health Care of Arkansas, Inc.)*, 309 B.R. 314, 319 (B.A.P. 8th Cir. 2004), the bankruptcy appellate panel held that the mere fact that the transferee conferred a benefit on the debtor does not show that the value was given as a *quid pro quo* for the property transferred. Likewise, in *Wessinger v. Spivey (In re Galbreath)*, 286 B.R. 185, 210 (Bankr. S.D. Ga. 2002), the court held that there must be a "balance sheet change" at the time of the transfer. *See also Frank v. Kiesel (In re Denison)*, 292 B.R. 150, 156 (E.D. Mich. 2003) (enforceable contract rights to future consideration can provide reasonably equivalent value in exchange for a challenged transfer); *Simione v. NationsBank of Del., N.A. (In re Simione)*, 229 B.R. 329, 335 (Bankr. W.D. Pa. 1999) (alleged consideration of future support and payment of remodeling expenses for property transferred "do[es] not constitute value at the time of the Transfer."); *Bernstein v. Gailey (In re Gailey, Inc.)*, 119 B.R. 504, 513(Bankr. W.D. Pa.) (any future benefit conferred on transferor was not an exchange of reasonably equivalent value because it was not a *quid pro quo* for the transfers).

Moreover, the Ohio authorities are even clearer: "'While a pre-existing debt is a sufficient consideration to support a deed as between the grantor and the grantee, even in such case there must be an agreement that the debt is extinguished; the deed is without consideration if the parties

afterward treat the debt as still subsisting between them.'" *Cellar Lumber Co. v. Holley*, 224 N.E.2d 360, 364 (Ohio Ct. App. 1967) (citation omitted); *accord*, *Abood v. Nemer*, 713 N.E.2d 1151, 1155 n.4 (Ohio Ct. App. 1998) (noting that plaintiff has burden of proving lack of agreement).[1]

There is no evidence in the record showing that McDonald's gave any value to Congrove at the time the Franchise Termination Agreement was executed on March 28, 2001. Instead, the value relied upon by McDonald's is its subsequent payment or cancellation of $768,060.38 in debts owed by Congrove. According to its affidavit, McDonald's paid certain of Congrove's debts on various dates during the period from March 30, 2001, through July 11, 2001. The debt representing two-thirds of the total amount paid was the debt to Bank Boston/ Eagle Franchise Funding, which was not paid until May 18, 2001, 51 days after the execution of the Franchise Termination Agreement. The affidavit does not state at all when McDonald's paid Congrove's dishonored payroll checks or when his $135,770.86 debt to McDonald's was actually cancelled. Congrove still listed the debt to McDonald's on his bankruptcy Schedule F of unsecured debts. These facts do not display the contemporaneity required by *Chomakos*.

Nor is there any evidence that McDonald's made a contemporaneous agreement with Congrove to pay the debts later. Rather, the final, executed version of the Franchise Termination Agreement expressly provided that McDonald's was *not* assuming any of Congrove's liabilities and was *not* canceling his debts to McDonald's:

> **3.1 Operator's Obligation to Creditors.** Notwithstanding anything herein to the contrary, Operator [Congrove] shall remain liable for, and obligated for the full payment of, all the Liabilities and all the costs, expenses, and debts resulting from or arising out of the possession, operation and ownership of the Franchise, Restaurant and Assets through the Termination Date.
>
> . . . .

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[1]These cases were decided under a prior version of the statute, which was Ohio's enactment of the Uniform Fraudulent Conveyance Act. The prior statute also required that consideration be given "in exchange for" the conveyance at issue. There is no reason to think that Ohio courts would apply a different analysis under the current statute, which is Ohio's enactment of the Uniform Fraudulent Transfer Act.

> **3.3 <u>No Assumption of Liability.</u>** Notwithstanding anything herein to the contrary, Operator acknowledges and agrees as follows:
>
> (1) that McDonald's does not assume any of Operator's liabilities or obligations for payment of any business creditors of Operator;
>
> (2) that McDonald's assistance pursuant to the terms of this Agreement shall not be deemed an agreement by McDonald's to forgive any indebtedness owed by Operator to McDonald's . . . .

(Joint Appendix at 44-45 (hereinafter, the Joint Appendix will be referred to as "J.A.")).

The record indicates that a previous draft of the Franchise Termination Agreement included a promise by McDonald's to pay $700,000 of Congrove's debts. According to McDonald's brief in opposition to Congrove's motion for summary judgment, that provision was removed from the agreement at Congrove's request in an attempt to avoid adverse tax consequences. The bankruptcy court thus concluded that "essentially, the Debtor and McDonald's had a side agreement that McDonald's would pay down certain of the Debtor's obligations outside of the Franchise Termination Agreement." (J.A. at 147, 150.) Yet neither of the affidavits submitted by the parties supports the existence of any such "side agreement." Indeed, a letter from the affiant to Congrove dated June 26, 2001, pointed out Section 3.1 of the Franchise Termination Agreement to Congrove and stated that "McDonald's is not obligated to pay your debts. Therefore, please do not direct any creditor to call McDonald's seeking payment." (J.A. at 137.) Another letter dated April 17, 2001, submitted by McDonalds as an attachment to one of its briefs, suggests developing an agreement as to payments of Congrove's debts so as to avoid fraudulent transfer claims. This letter to McDonald's is from an attorney apparently representing Congrove. Moreover, the Franchise Termination Agreement contains an integration clause, which provides that "[t]his Agreement sets forth the entire agreement and understanding of the parties hereto" and that "[t]his Agreement, including the attached exhibits, constitutes the entire agreement between the parties and supersedes all prior and contemporaneous, oral or written, agreements or understandings of the parties. There are no representations, warranties or other inducements which have been made other than those specifically set forth in this Agreement." (J.A. at 47.)

I am not, contrary to the majority, of the view that value is given in exchange for a transfer within the meaning of 11 U.S.C. § 548 only when the value is given pursuant to a binding contract. Rather, I do not disagree with the majority that the court must examine the totality of the circumstances. However, in this case, all of the evidence in the record – the timing of the debt payments and forgiveness in relation to the execution of the Franchise Termination Agreement; the fact that the parties had discussed including an agreement that McDonald's pay Congrove's debts and the unequivocal provision in the final, executed version of the Franchise Termination Agreement that McDonald's was *not* agreeing to pay any of Congrove's debts or forgive his debts to McDonald's; the agreement's express acknowledgment that there were no side agreements;[2] and post-agreement letters whereby McDonald's insisted that it was not obligated to pay Congrove's debts and suggested such an agreement as a means to avoid fraudulent conveyance issues – points to the conclusion that McDonald's did not pay or discharge Congrove's debts in exchange for whatever property was transferred to it by virtue of the Franchise Termination Agreement.

There is no question of fact that McDonald's made the debt payments after its reacquisition of Congrove's restaurants pursuant to the Franchise Termination Agreement. Such future payments certainly conferred a benefit on Congrove, a determination of assistance to McDonald's in fending off Congrove's common law claim of unjust enrichment, as discussed in Part IV.D. of the opinion. The record does not demonstrate, however, that the payments were made or the debt to McDonald's was cancelled "in exchange for" the reacquisition as required by the plain language of the statutes at issue. There is no evidence that any value was given at the time of the Franchise Termination Agreement or that there was at that time any executory agreement to give value in the future. I conclude, therefore, that the bankruptcy court committed error in granting McDonald's summary judgment on Counts One and Two of the complaint. Congrove met his burden of introducing evidence that no reasonably equivalent value was given by McDonald's "in exchange for" whatever

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[2]The majority suggests that one fact leading to a contrary conclusion is "the discussions leading up to the Franchise Termination Agreement." However, the existence of discussions of a provision for McDonald's payment of Congrove's debts combined with the fact that the final version of the agreement unambiguously disclaimed such an obligation and that there were any side agreements is a strong indication that the payments were not made in exchange for the transfer.

property was transferred by virtue of the Franchise Termination Agreement, and McDonald's failed to offer any evidence demonstrating the existence of any genuine issue of material fact on that point.

For the foregoing reasons, I would reverse the summary judgment in favor of McDonald's on Counts One and Two of the complaint, and remand the summary judgment against Congrove on those counts with the direction to enter partial summary judgment resolving in Congrove's favor the issue of whether reasonably equivalent value was given in exchange for the transfer that occurred, and to conduct necessary further proceedings thereon.[3] *See*, *e.g.*, *Garner v. Memphis Police Dep't*, 8 F.3d 358, 366 (6th Cir. 1993) ("In a case such as this, where both sides have had an opportunity to present evidence, the facts are uncontroverted, and the proper disposition is clear, this court may direct the entry of summary judgment.").

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[3]A ruling for Congrove on that issue would not mean that Congrove is entitled to judgment in his favor on Counts One and Two of the complaint. The court on remand would still need to determine what property was transferred and its value, the validity of McDonald's affirmative defenses of estoppel, setoff, and recoupment, and whether Congrove is entitled to invoke Ohio law under § 544 of the Bankruptcy Code.