UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In Re:

UNIFIED COMMERCIAL CAPITAL,

Debtor.

DOUGLAS J. LUSTIG, as Trustee in Bankruptcy of UNIFIED COMMERCIAL CAPITAL, INC.,

Plaintiff,

DECISION AND ORDER

01-MBK-6004L

v.

WEISZ & ASSOCIATES, INC. and FRANK B. WEISZ,

Defendants.

DOUGLAS J. LUSTIG, as Trustee,

Plaintiff,

01-MBK-6005L

v.

SUSAN E. ANDERSON,

Defendant.

INTRODUCTION

On March 29, 2001, Bankruptcy Judge John C. Ninfo, II, entered a Decision and Order in this Chapter 7 adversary proceeding, in which he held, *inter alia*, that the debtor, Unified Commercial Capital, Inc. ("Unified") received reasonably equivalent value within the meaning of § 548 of the Bankruptcy Code for its payment to defendants-appellees, Weisz and Associates, Inc. ("Associates") and Associates' principal, Frank B. Weisz ("Weisz") of about $12,000 in interest on a $100,000 "investment" made with Unified by Associates and Weisz, allegedly in the course of a Ponzi scheme being run by Unified. *In re Unified Commercial Capital, Inc.*, 260 B.R. 343 (Bankr.W.D.N.Y. 2001).

On June 26, 2001, I granted the Trustee's motion for leave to take an interlocutory appeal from Judge Ninfo's Decision and Order, and I subsequently heard oral argument on the appeal. For the following reasons, the Decision and Order appealed from is affirmed.[1]

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[1] Following a trial calendar call on April 18, 2001 in the case of *Lustig v. Anderson*, A.P. No. 00-2205, an adversary proceeding also involving Unified, Judge Ninfo *sua sponte* issued a Decision and Order dated May 2, 2001, stating that for the reasons set forth in his March 29 Decision and Order in the *Weisz* action, he found that defendant Susan Anderson gave Unified reasonably equivalent value and fair consideration, provided that she was at all times acting in good faith, for the payment to her of interest in the amount of $2406.58. I subsequently granted the Trustee's motion for leave to appeal in *Anderson* as well. This Decision and Order, then, relates to both the *Weisz* and *Lustig* adversary proceedings.

BACKGROUND

The relevant facts, which are not in dispute,[2] are set forth in Judge Ninfo's Decision and Order, and will only be summarized briefly here. In connection with certain proceedings in the district court initiated by the Securities and Exchange Commission, a Chapter 7 case was filed by Unified on October 16, 1998, and a Trustee was appointed.

In various proceedings in both the district and bankruptcy courts, the Trustee asserted that Unified and certain other related entities had been engaged in a Ponzi scheme, although to date no hearing has been held to determine whether that allegation is true. On October 14, 2000, the Trustee commenced an adversary proceeding against Associates and Weisz. The complaint in the adversary proceeding alleged that Unified was engaged in the apparent business of selling "debentures" and "certificates of deposits" to investors promising "guaranteed" returns of twelve percent annually or more and "safety of principal." In fact, the Trustee alleged, Unified was engaged in a Ponzi scheme, because Unified was only able to satisfy its obligations to its investors by using funds obtained from new investors; by 1997, Unified was insolvent.

The Trustee alleged, and the parties here agree, that Associates invested $100,000 with Unified, which repaid Associates the principal, plus installment payments totaling $11,926.32 ("the interest payments"), which represented the interest due Associates pursuant to the terms of their

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[2]There is a dispute about whether Unified was in fact engaged in a Ponzi scheme, but that dispute is not relevant to the issues before me, since Judge Ninfo's decision was limited to "the narrow issue of whether, *if* Unified Commercial was engaged in a 'Ponzi' scheme, it had received reasonably equivalent value and fair consideration under Section 548(a) and Article 10 of the DCL for the payment of the Interest to Associates." *Unified Commercial Capital*, 260 B.R. at 349 (emphasis added).

account agreement with Unified. The Trustee further asserted that the interest payments were avoidable fraudulent transfers pursuant to §§ 544(b)(1), 548(a) and 550(a) of the Bankruptcy Code and Article 10 of the New York Debtor and Creditor Law ("DCL") because, *inter alia*, Unified received less than reasonably equivalent value and no fair consideration in exchange for the interest payments.

On November 2, 2000, Associates and Weisz filed a Rule 12(b)(6) motion in the bankruptcy court to dismiss the adversary proceeding, on a variety of grounds. When they appeared before Judge Ninfo to argue the motion, the parties agreed that the motion to dismiss could not be granted in all respects because there were material issues of fact about whether Associates and Weisz had at all times acted in good faith in connection with the transactions, which would affect some of the grounds for avoidance asserted by the Trustee. The parties nevertheless requested that the bankruptcy court issue a decision on the issue of whether, if in fact Unified was engaged in a Ponzi scheme, it had received reasonably equivalent value and fair consideration for the interest payments to Associates for purposes of § 548(a) and Article 10 of the DCL.

In his Decision and Order, Judge Ninfo answered that question in the affirmative, holding that even if it had been running a Ponzi scheme,

> Unified Commercial received reasonably equivalent value within the meaning of Section 548 of the Bankruptcy Code for the use (loan) of the $100,000.00 for a year. In addition, assuming that Associates and Weisz at all times operated in good faith in connection with the transaction, Unified Commercial received fair consideration within the meaning of Article 10 of the DCL.

Unified Commercial Capital, 260 B.R. at 354.

As stated, the Trustee then appealed to this Court pursuant to my order granting leave to appeal under 28 U.S.C. § 158(a) and Bankruptcy Rule 8001(b). The only issue raised by the Trustee in his motion for leave to appeal is whether, assuming that Unified was running a Ponzi scheme, it received reasonably equivalent value for its payments to Associates in excess of the original amount of their $100,000 "investment." *See* Motion to District Court for Leave to Appeal Interlocutory Order (Docket #1) ¶ 5.

DISCUSSION

I. Standard of Review

Bankruptcy Rule 8013 provides that "[o]n an appeal [from a judgment, order or decree of a bankruptcy judge] the district court ... may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." The bankruptcy court's conclusions of law, however, are reviewed *de novo*. *In re Bonnanzio*, 91 F.3d 296, 300 (2d Cir. 1996).

In the case at bar, the issue before the Court is whether, assuming the truth of the Trustee's allegation that Unified was engaged in a Ponzi scheme, Unified nevertheless received reasonably equivalent value under § 548(a) for the interest payments to Associates. In general, "[w]hether 'reasonably equivalent value' was received in a transaction is a question of fact." *In re Image Worldwide, Ltd.*, 139 F.3d 574, 576 (7th Cir. 1998); *accord Matter of Dunham*, 110 F.3d 286, 289 (5th Cir. 1997); *In re Wise*, 119 B.R. 392, 394 (E.D.N.Y. 1990) ("It has long been held that reasonably equivalent value is a question of fact"). *See also Klein v. Tabatchnick*, 610 F.2d 1043, 1047 (2d Cir. 1979) ("[f]airness of consideration is generally a question of fact").

In many cases, though, determining whether reasonably equivalent value was received simply requires the court to assess the actual market, or monetary, value of the goods or services exchanged. In the case at bar, however, the issue is really more legal than factual in nature: whether, *as a matter of law*, appellees' investment with Unified should be deemed not to constitute "value" that would support Unified's payment of interest to Associates. The Trustee's position is essentially that, regardless of whether a Ponzi schemer's receipt of funds from innocent investors has some actual value to the schemer, courts should refuse to recognize that value for purposes of § 548, because of the effect that such a recognition would have on other creditors. *See Unified Commercial Capital*, 260 B.R. at 348 (stating that the Trustee had argued that "the use of funds by an entity engaged in a 'Ponzi' scheme, which would otherwise clearly constitute value received, should be deemed by the Court, as a matter of law, not to be value received because to do so would once again negatively impact on the distribution to be received by other investors").

The bankruptcy court, then, really decided two questions, or at least legal and factual aspects of one question: whether Unified's receipt of funds from appellees constituted "actual" value, as that concept is generally understood; and whether, as a matter of law, the court should refuse to consider that receipt of funds to constitute value for purposes of § 548, for reasons of policy or otherwise.

The bankruptcy court's conclusion on the first issue is one of fact and is, therefore, subject to a clearly-erroneous standard of review. The bankruptcy court's determination of the latter issue rested upon a conclusion of law, which this Court must review *de novo*. *See In re Stanley*, 66 F.3d 664 (4th Cir. 1995) ("the 'clearly erroneous' standard does not insulate findings 'made on the basis of the application of incorrect legal standards'") (quoting *Consolidation Coal Co. v. Local 1643, UMWA*, 48 F.3d 125, 128 (4th Cir. 1995)); *Hays v. Jimmy Swaggart Ministries*, 263 B.R. 203, 210

(M.D.La. 1999) ("The reasonably equivalent value determination is a question of fact to be reviewed under the clearly erroneous standard. The clearly erroneous standard is, however, subject to modification if the bankruptcy court fails to invoke the proper method of analysis") (citing *In re Dunham*, 110 F.3d 286, 289 (5th Cir. 1997)); *McCanna v. Burke*, 197 B.R. 333, 337 (D.N.M. 1996) ("whether the bankruptcy court applied the correct standard for determining whether the debtor received 'reasonably equivalent value.' This is a legal determination and entails de novo review by this Court"); *In re Angelika Films 57th, Inc.*, No. 97 CIV. 2239, 1997 WL 283412, *5 (S.D.N.Y. May 29, 1997) ("When a finding involves mixed questions of law and fact, whether the Court applied the correct legal standard is subject to *de novo* review, while the Court's underlying factual findings are subject to the 'clearly erroneous' standard").

II. Ponzi Schemes and "Value" under § 548

Section 548(a)(1) of the Bankruptcy Code provides, *inter alia*, that "[t]he trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily ... received less than a reasonably equivalent value in exchange for such transfer or obligation," and the debtor "was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation ... ." "Value," as defined in § 548(d)(2), "means 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 ... ."

The Trustee argues that, as a matter of public policy, courts should hold that a Ponzi schemer does not receive reasonably equivalent value in exchange for the transfer of any funds to an innocent investor in excess of the investor's principal. Even though under the parties' account agreement Unified had a contractual obligation to pay interest, the Trustee contends that if Associates were permitted to enforce that obligation and receive the interest, Associates would be unjustly enriched at the expense of other investor-creditors of Unified, who would receive less of a distribution, or perhaps none at all. The Trustee further argues that the use of funds by an entity engaged in a Ponzi scheme should also be deemed by the court, as a matter of law, not to be value received because to do so would negatively affect the distribution received by other investors.

Appellees respond that Unified did receive reasonably equivalent value in exchange for the payment of the interest, because value for purposes of § 548(a) and (d) includes a transfer in satisfaction of an antecedent debt, and at the time Unified made the interest payments to Associates, Unified had a contractual obligation to pay the interest. Appellees also contend that the use of $100,000 for a year constitutes reasonably equivalent value for the payment of interest at an annual rate of twelve percent.

As Judge Ninfo recognized in his Decision and Order, his conclusion that Unified received reasonably equivalent value for the interest payments is at odds with the decisions of a number of other courts that have addressed the issue of what constitutes "value" in connection with a Ponzi scheme. A leading case in this area, with which Judge Ninfo expressly disagreed, is *Merrill v. Abbott (In re Independent Clearing House Co.)*, 77 B.R. 843 (D.Utah 1987). In *Independent Clearing House*, the district court held that the debtors, who ran a Ponzi scheme similar to the one in the case at bar, "received a 'reasonably equivalent value' in exchange for all transfers to a defendant that did not exceed the defendant's principal undertaking but, to the extent a defendant received more than he gave the debtors, the debtors did not receive a reasonably equivalent value." *Id.* at 857.

In reaching that conclusion, the court reasoned that "to the extent a transfer merely repaid a defendant's undertaking, the debtor received not only a 'reasonably equivalent value' but the exact same value–dollar for dollar." *Id.* With respect to transfers from the debtor to the defendant in *excess* of the defendant's undertaking, however, the court held that "[t]o allow an undertaker to enforce his contract to recover promised returns in excess of his undertaking would be to further the debtors' fraudulent scheme at the expense of other undertakers." *Id.* at 858. The court "therefore conclude[d] that, as a matter of public policy, the contracts involved in this case were unenforceable to the extent they purported to give the defendants a right to payments in excess of their undertaking." *Id.*

The *Independent Clearing House* court also rejected the defendants' argument that the use of the defendants' money over a period of time constituted property which was in turn "value" for the transfers. Though conceding that "[t]he use of money may be 'property' in some contexts," the court held "that the use of investors' money to perpetuate a Ponzi scheme is not the type of 'property' and hence 'value' Congress had in mind when it passed section 548(a)(2)." *Id.* at 859. The court stated that "[i]f the use of the defendants' money was of value to the debtors, it was only because it allowed them to defraud more people of more money. Judged from any but the subjective viewpoint of the perpetrators of the scheme, the 'value' of using others' money for such a purpose is negative." *Id.*

As stated, Judge Ninfo disagreed with that reasoning, and I do as well. While Judge Ninfo set forth a detailed analysis and rebuttal of the various rationales that have been advanced for holding that transfers of interest or other funds in excess of principal are not made in exchange for reasonably equivalent value, the gist of his position was that the courts in *Independent Clearing House* and cases that have agreed with its reasoning "have made policy decisions that should be made by Congress." *Unified Commercial Capital*, 260 B.R. at 350.

Judge Ninfo pointed out that many of the arguments in favor of avoidance of interest payments in a Ponzi-scheme situation rest upon seemingly arbitrary distinctions that ultimately represent policy judgments. For example, payments by Ponzi scheme operators to ordinary trade creditors, or their payments to investors of principal (as opposed to interest) may also deplete the debtor's estate at the expense of innocent investors, and may also further the debtor's fraudulent scheme, yet those transfers are rarely sought to be avoided as long as they are not facially unreasonable. *Id.* at 352. Similarly, the estates of "hopelessly insolvent" debtors who borrow money that they have no realistic possibility of repaying are diminished by paying interest on those loans, yet trustees do not seek to avoid such payments as fraudulent conveyances. *Id.* If distinctions are to be drawn between those types of situations and Ponzi schemes, Judge Ninfo reasoned, that is for Congress to do, not the courts.

Judge Ninfo also held that "Unified Commercial received value and fair consideration from Associates when it loaned Unified Commercial $100,000.00 for a year, which entitled Associates to the payment of reasonable contractual interest." *Id.* at 353. He reiterated his view that "if what is clearly value and fair consideration, the use (loan) of funds for a period of time in exchange for the payment of reasonable contractual interest, is not to be value as a matter of law for purposes of the fraudulent conveyance statutes, which is contrary to common sense," then "that determination should be made by Congress." *Id.*

After considering the matter, I agree with Bankruptcy Judge Ninfo that the holding of *Independent Clearing House* and some other courts that an innocent investor in a Ponzi scheme does not give reasonably equivalent value, or even simply "value," in exchange for the payment of reasonable interest on his investment, ultimately rests not upon the governing statutes themselves, but upon considerations of what an individual judge believes to be sound "public policy." Such determinations, however, are committed to the judgment of Congress, not to the courts, and thus far Congress has made no such determination.

Courts that have held that payments to Ponzi scheme investors in excess of principal are avoidable under § 548(a) have generally based those holdings on two broad grounds: (1) that the debtor/Ponzi schemer did not receive "value" or "reasonably equivalent value" for the payments; and (2) that such payments are against public policy. An analysis of these arguments, however, reveals that ultimately they rest on policy determinations alone, and that the argument that the Ponzi-scheme debtor does not receive value for interest payments is itself based, in the end, on policy judgments.

It is simply incorrect to say that the perpetrator of a Ponzi scheme does not receive "value" when an innocent victim "invests" money with him. The simple fact is that the use of funds for a period of time has value. "Money is valuable even when used for illegal purposes." *In re First Commercial Mgmt. Group*, ___ B.R. ___, 2002 WL 999881, *6 (Bkrtcy. N.D.Ill. May 9, 2002) (reasonably equivalent value was exchanged when debtor paid commissions to defendant for recruiting investors in debtor's Ponzi scheme, where defendant had no knowledge of fraudulent nature of debtor's activities). If the use to which those funds are put is one of which society disapproves, then society's elected representatives in Congress and state legislatures are free to pass appropriate legislation to address those problems. *See In re Carrozzella & Richardson*, 270 B.R. 92, 97 (Bankr. D.Conn. 2001) ("fraudulent conveyance remedies are designed to 'right' the singular 'wrong' of a windfall received at the expense of the debtor's estate, not to police the legality of transactions otherwise fair to the debtor. Other available remedies–both civil and criminal–are designed for that latter purpose"). But for a court to declare that there is no value in such a transaction, in order to make it subject to avoidance under the bankruptcy statutes, is to ignore reality and, in my view, to step into an impermissible legislative role.

Furthermore, as Judge Ninfo pointed out, if the loan of funds for a year is determined not to constitute value, because it allows the debtor to perpetuate his scheme, and because the payment of interest on that loan depletes the estate, then the same could be said of many other commercial transactions engaged in by the debtor, such as contracting for the supply of "utilities, space, supplies and labor," all of which also facilitated the scheme and depleted the estate at the expense of investors. *Unified Commercial Capital*, 260 B.R. at 353. If courts can engage in such legal fictions in the Ponzi scheme context, conceptually there is no reason why they could not refuse to recognize value in any number of other transactions, on these same grounds. To do so, however, would be to broaden the scope of the bankruptcy statutes beyond the expressed intent of Congress.

In sum, to hold that the use of appellees' funds in this case was not valuable, simply because Unified used those funds to continue perpetrating its Ponzi scheme, would not be an accurate assessment of the facts, but simply a legal fiction resting upon considerations of perceived public policy. *See Carrozzella & Richardson*, 270 B.R. at 97 ("This Court does not share the legal view that a transaction's illegality deprives the exchange of value. That view amounts to a *legal fiction*

..."); *First Commercial Mgmt.*, 2002 WL 999881, *6 ("it would be a legal fiction to say that brokers who produce investors to provide money for a Ponzi scheme are providing nothing of value").

This is not to say that courts may never properly take public policy concerns into account. Certainly in areas governed by the common law, or in applying statutes whose precise meaning is unclear, it may be proper to take matters of policy into account. In an area of the law as comprehensively governed by statute as bankruptcy, however, courts should be loath to base conclusions of law on their own views of what public policy demands. *See In re Weinstein*, 272 F.3d 39, 46 (1st Cir. 2001) ("A court must not, of course, impose its own views of proper bankruptcy policy in place of those of the legislature," though an understanding of congressional policies underlying Bankruptcy Code can help to reconcile otherwise indeterminate parts of the statutory text); *Indian Motocycle Associates III Ltd. Partnership v. Massachusetts Housing Finance Agency*, 66 F.3d 1246, 1251 (1st Cir. 1995) ("Where courts intrude into their decree their opinions on questions of public policy, they in effect constitute the judicial tribunals as law-making bodies in usurpation of the powers of the Legislature") (quoting *Baker v. United States*, 27 F.2d 863, 875 (1st Cir. 1928)); *Greer v. Mid-West Nat'l Fire & Cas. Ins. Co.*, 434 F.2d 215, 217 (8th Cir. 1970) ("It is not the function of a court to usurp the policy making rights of the legislature").

Furthermore, as Bankruptcy Judge Ninfo recognized, even when one does take public policy into account, nothing compels the conclusion that transfers such as the ones at issue in this case should be held to be avoidable on grounds of fairness. For one thing, as already noted, the same policy considerations that weigh in favor of avoidance would seem to apply to almost all transfers made by the debtor in the course of perpetrating his scheme, many of which no one would seriously argue should be avoidable for lack of reasonably equivalent value. Assume, for example, that the

Ponzi schemer places a newspaper ad intended to lure investors, and that he intends to, and does, pay for that ad using money entrusted to him by innocent investors. The court's statement in *Independent Clearing House*, that "[j]udged from any but the subjective viewpoint of the perpetrators of the scheme, the 'value' of using others' money for such a purpose is negative," would seem to apply as fully to this situation as it does to the perpetrator's payment of interest to an investor. In both situations, the other party–either the newspaper or the investor–provided the debtor with something of value: either advertising space, or the use of money over a period of time. The fact that the former is more tangible or visible than the latter does not necessarily make it any more valuable. Likewise, in both scenarios, the debtor put that thing of value to the same "bad" use–the perpetration of a Ponzi scheme. If public policy does not demand that the debtor's contract with the newspaper be deemed unenforceable, then why should it bar the investor from enforcing his contractual right to a reasonable rate of interest?

I also agree with Judge Ninfo that it is not obviously more equitable to require an innocent investor, who has received a bargained-for, contractual interest payment, at a commercially reasonable rate, to disgorge, rather than retain, those funds, in order to apportion losses more equally among all debtors. If that were the case, and if the principle of equality of distribution were to be elevated to such a paramount level, then it would seem to be at least as equitable to force the investor to return his principal investment as well.

The court in *Independent Clearing House* drew a distinction between repayment of principal and payments in excess of principal, holding that the Bankruptcy Code's definition of "debt" as "liability on a claim," 11 U.S.C. § 101(11), "is broad enough to cover the debtors' obligation to return a defendant's principal undertaking, whether that obligation was based on the contract between the debtors and the defendant or was based on the defendant's right to restitution." *Independent Clearing House*, 77 B.R. at 857. That court held that "[t]ransfers in excess of a defendant's undertaking are another matter," however, because the debtor's only liability for such payments arose from the contract, which the court held was unenforceable as against public policy, at least insofar as the payment of those amounts was concerned. *Id.*

In *Independent Clearing House*, the payments in excess of principal were payments of so-called "earnings," which were actually nothing more than payments from other investors' money; there were, of course, no "earnings" to be had. Likewise, in two court of appeals cases that have cited *Independent Clearing House* with approval, *In re Hedged-Investments Associates, Inc.*, 84 F.3d 1286, 1290 (10th Cir. 1996), and *Scholes v. Lehmann*, 56 F.3d 750, 757 (7th Cir.), *cert. denied*, 516 U.S. 1028 (1995)[3], the transfers at issue were not interest payments pursuant to a contractually agreed-upon rate, but payments of false profits, which the Ponzi schemer had simply fabricated in order to make it appear that his investments of the victims' money were yielding positive returns.

In the context of false profits, there may be some logic to such a distinction between transfers of principal and of amounts in excess of principal. If a person invests money with the understanding that he will share in the profits produced by his investment, and it turns out that there are no profits, it is difficult to see how that person can make a claim to receive any more than the return of his principal investment. The false representation by the Ponzi schemer that he is paying the investor

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[3]*Scholes* was not a bankruptcy case, but an action brought by the Securities and Exchange Commission in which the district court had appointed a receiver for the defendant corporations. The receiver then sought to recover certain assets from the corporations and related persons and entities under Illinois statutes concerning fraudulent conveyances.

his share of the profits, which are in fact nothing more than funds invested by other victims, cannot alter the fact that there are no profits to share.

In the case at bar, however, Unified represented that it was selling "debentures" and "certificates of deposit" to investors with "guaranteed" returns of twelve percent or more annually. Thus, the payments to Associates were not simply payments of nonexistent profits, but of a contractually provided-for, commercially reasonable rate of interest on what amounted to a loan by Associates to Unified. As stated by Judge Ninfo, that is ultimately no different from any other interest payments made by other types of debtors who were already hopelessly insolvent or unprofitable at the time that they borrowed money. Moreover, payment of principal "further[s] the debtors' fraudulent scheme at the expense of other undertakers," *Independent Clearing House*, 77 B.R. at 858, no less than the payment of interest. Therefore, if the statutory definition of "debt" is "broad enough to cover the debtors' obligation to return a defendant's principal undertaking, ... based on the contract between the debtors and the defendant," *id.* at 857, there is no apparent reason why it should not also include an obligation to pay a reasonable rate of interest, based on the contract between the debtor and the defendant.[4] *See Carrozzella & Richardson*, 270 B.R. at 97 (since there was no contention or proof that debtor/Ponzi schemer transferred more than the contractually agreed 15% interest to defendant, debtor received, in exchange for transfers of principal and interest, "a

[4]In his reply memorandum, appellant contends, based on certain provisions in the "Private Placement Memorandum" that Unified provided to appellants before they invested their money pursuant to their account agreement (which specified the 12% interest rate), that Unified was not obligated to pay any interest to Associates unless Unified was profitable. Appellant argues that since Unified was never genuinely profitable, it had no contractual obligation to pay interest to Associates. The fact remains, however, that Unified did receive value from Associates in the form of a $100,000 loan, and that Associates was entitled to reasonable interest on that loan. Unified therefore received reasonably equivalent value for the interest payments.

dollar-for-dollar satisfaction of the Debt" owed to defendant, which "provided 'reasonably'–indeed, perfectly–equivalent value in exchange for the Payments, and in particular, for the Challenged Transfers").

It is true that "[t]he principal policies underlying the Code's avoidance provisions are equal distribution to creditors and preserving the value of the estate through the discouragement of aggressive pre-petition tactics causing dismemberment of the debtor." *In re Maxwell Communication Corp. plc by Homan*, 93 F.3d 1036, 1052 (2d Cir. 1996) (citing *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991)). The extent to which those policies are to be promoted, however, are spelled out in those avoidance provisions, and, as Judge Ninfo observed, if the avoidance and fraudulent-conveyance statutes are to be used in order to effectuate an even further reallocation and redistribution where Ponzi schemes are involved, the decision to do so should come from Congress, not from the courts.

I also concur with the bankruptcy court's conclusion that under the particular facts of this case, the payment of interest here at an annual rate of twelve percent was reasonable. Accordingly, Unified received not only value, but reasonably equivalent value for the interest payments, which are not avoidable as fraudulent transfers under § 548(a)(1)(B).

Lastly, it should be noted that the Court's decision in this case does not necessarily leave the Trustee without a remedy, if the transfers were in fact fraudulent for some other reason, such as if Associates had knowledge of the fact that Unified was engaged in a Ponzi scheme, and that the source of Associates' interest payments was the funds of other, innocent investors who stood to lose their money when the scheme collapsed. Other provisions of the Bankruptcy Code and the DCL may make the transfers avoidable under those circumstances, and indeed the Trustee has also asserted claims under 11 U.S.C. § 548(a)(1)(A) (relating to transfers made with "actual intent to hinder, delay, or defraud" creditors), and Article 10 of the New York Debtor and Creditor Law, portions of which make the parties' good faith a relevant factor. As stated in Judge Ninfo's decision, the parties here have acknowledged that the resolution of those claims must await factual determinations concerning appellants' good faith. *Unified Commercial Capital*, 260 B.R. at 349.

CONCLUSION

The bankruptcy court's Decision and Order entered on March 29, 2001 in *Lustig v. Weisz & Associates*, No. 01-MBK-6004, and its Decision and Order entered on May 2, 2002, in *Lustig v. Anderson*, No. 01-MBK-6005, are affirmed, and the appeal is dismissed.

IT IS SO ORDERED.

David G. Larimer

DAVID G. LARIMER
Chief Judge
United States District Court

Dated: Rochester, New York
June 21, 2002.