IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STEVEN M. SPECTOR, a Professional Corporation, Assignee for the Benefit of Creditors of Ventura Distribution, Inc., a California Corporation,	)	
Plaintiff,	)	
	)	C.A. No. 07C-03-191 PLA
v.	)	
MELEE ENTERTAINMENT LLC,	)	
Defendant.	)	

Submitted: September 20, 2007
Decided: February 6, 2008

UPON DEFENDANT'S MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT
DENIED

John T. Carroll, III., Esquire, Sean Bellew, Esquire, & David A. Felice, Esquire (argued), COZEN O'CONNOR, Wilmington, Delaware, Attorneys for Plaintiff.

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ABLEMAN, JUDGE

I. Introduction

Ventura Distribution, Inc. ("Ventura") made a voluntary assignment for the benefit of creditors to Plaintiff Steven M. Spector ("Spector") under California law, soon after making a payment to one of its creditors, Melee Entertainment LLC ("Melee") in the amount of $139,681.87. Spector, as assignee for the benefit of Ventura's creditors, now seeks to recover that payment as preferential under California Code of Civil Procedure ("CCCP") § 1800.

In response, Melee filed the instant Motion to Dismiss the Complaint or, in the Alternative, Motion for Summary Judgment. Melee argues that Spector cannot recover any preferential payments made from Ventura to Melee because Spector failed to assume and cure all pre-assignment defaults as required under California and Federal law. Melee further submits that federal bankruptcy law preempts the California voluntary assignment statute at issue in this case, precluding any recovery for Spector under California law. Melee argues alternatively that the Court should grant summary judgment in Melee's favor because it created "new value" for the Assignor, giving it a complete defense to any preference action.

After analyzing the pertinent California law, the Court concludes that Spector, as the assignee for the benefit of creditors of Ventura, did not

assume the contract and was not obligated to cure any pre-default debts. Even if he had assumed the contract, however, the Court cannot identify any California law, nor has Melee cited any, which requires that an assignee for the benefit of creditors cure any defaults before assigning the contract. Moreover, the Court finds that federal bankruptcy law does not preempt California Code of Civil Procedure § 1800(b), and Spector may attempt to recover the preferential transfers as the assignee for the benefit of Ventura's creditors. Finally, the Court concludes that there are genuine issues of material fact as to whether Melee created new value for Ventura's creditors. Accordingly, Melee's motion is **DENIED**.

II. Facts

Ventura Distribution, Inc. ("Ventura" Or "Assignor"), its affiliate entity, UrbanWorks LLC ("Urbanworks"), and others, were in the business of distributing filmed entertainment.[1] On or about October 1, 2004, Melee, a Delaware Limited Liability Company, entered into an exclusive distribution agreement with UrbanWorks/Ventura as Distributor.[2] Under the agreement, Ventura obtained the exclusive home video distribution rights to

[1] Docket 5 (Declaration of Scott Aronson), ¶¶ 2 & 5. Melee included the Declaration of Scott Aronson, the Chief Operating Officer of Melee, as support for its motion.

[2] Docket 5, Ex. 3. Both parties agree that UrbanWorks and Ventura conducted their affairs as one entity. *See id.*, ¶ 4. As a result, the Court will refer to "UrbanWorks", "UrbanWorks/Ventura" and "Ventura" as Ventura for purposes of this motion.

retailers for certain films/programs that Melee produced.[3] Ventura received payment when these retailers paid their invoices.[4] In exchange, Melee was entitled to receive the net proceeds attributable to the movies as a general creditor of Ventura.[5]

On or about February 20, 2006, Ventura paid to Melee $139,681.87 pursuant to a regular accounting statement due under their agreement.[6]

On March 20, 2006, Ventura executed a general assignment for the benefit of creditors under California law.[7] Plaintiff Spector is the Assignee.[8] On the same date, Spector entered into an Asset Purchase Agreement ("APA") with First Look Entertainment ("First Look"), whereby First Look purchased substantially all of Ventura's assets.[9] First Look then changed its name to Ventura Home Entertainment, Inc. ("VHE").[10] Under the APA, among other things, VHE acquired the distribution agreement for the

[3] Docket 5, ¶ 3.

[4] Docket 11, p. 3.

[5] Docket 5, Ex. 3; Docket 11, p. 3.

[6] Complaint, ¶ 4.

[7] *Id.*, ¶ 1. The assignment was made under California Code of Civil Procedure § 439.010.

[8] *Id.*

[9] Docket 5, ¶ 5, Ex. 1.

[10] For purposes of this motion, the Court will refer to First Look as VHE.

films/programs between Ventura and Melee.[11] As a result, VHE was entitled to the rights under the contract with Melee and became its new distributor.[12]

On March 16, 2007, Spector filed the instant action, wherein he seeks to recover for the benefit of Ventura's creditors the $139,681.87 paid to Melee, asserting that the transfer was preferential under California Code of Civil Procedure ("CCCP") § 1800(b).

III. Parties' Contentions

The parties agree that California law controls this dispute. Melee submits that this Court should interpret California law analogously with federal bankruptcy law. Under federal bankruptcy law, since Spector assigned the underlying executory contract to the Buyer, Ventura must first assume and cure all pre-assignment defaults before the assignee can recover any preferential payments. As a result, Melee contends that Spector cannot establish one of the essential elements of his claim under CCCP § 1800(b).[13] If the Court permits Spector to recover, Melee argues that California law

[11] Docket 5, ¶ 5, Ex. 4.

[12] Docket 11, p. 4-5.

[13] Melee argues that Spector did not receive more than other similarly situated creditors, preventing Spector from establishing CCCP § 1800(b)(5). *See* CCCP § 1800(b)(5) ("[T]he assignee of any general assignment for the benefit of creditors . . . may recover any transfer of property of the assignor that is all of the following: (5) [e]nables the creditor to receive more than another creditor of the same class." *Id.*

would conflict with federal bankruptcy law, thereby preempting and suspending California state law. In the alternative, Melee asserts that Spector continued to receive "new value" through Melee's programs, from February 20, 2006 through March 20, 2006. Therefore, Melee has a complete defense that precludes Spector's recovery of the preferential payment.

Spector, on the other hand, argues that the Bankruptcy Code has no application to this case. Although he agrees that California Courts have interpreted parts of Section 1800 consistently with federal bankruptcy law in circumstances where the sections are analogous, federal law does not preempt the California voluntary assignment statute. This is so, he claims, because 11 U.S.C. § 365 has no analogous counterpart under California law and, hence, cannot be interpreted in the same manner. Spector stresses that the instant case is not a federal bankruptcy case, and that California law respects the free transferability of contracts without requiring pre-assignment curing of defaults. In support of his argument, Spector cites numerous cases establishing that Section 1800, as well as other state voluntary assignment statutes, do not conflict with the Bankruptcy Code and are therefore not preempted.

IV. Standard of Review

Superior Court Civil Rule 12(b)(6) states, in pertinent part: "[T]he following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted. . . ."[14] When judging a motion to dismiss a complaint for failure to state a claim, the Court must accept all well-pleaded allegations as true.[15] The Court must determine "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[16] Where a plaintiff may recover, the Court must deny the motion to dismiss.[17]

When considering a party's Motion to Dismiss under Superior Court Rule 12(b)(6), the Court may evaluate only the allegations contained in the complaint.[18] If the moving party provides documents with the motion to dismiss, and the Court considers those materials in addition to the complaint,

[14] Super. Ct. Civ. R. 12(b)(6).

[15] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[16] *Id.*

[17] *Id.*

[18] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

the motion to dismiss is converted to a motion for summary judgment, and the parties may expand the record.[19]

When considering a motion for summary judgment, the Court's function is to examine the record in order to ascertain whether genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.[20] The court must "view the evidence in the light most favorable to the non-moving party."[21] "The moving party bears the initial burden of demonstrating that the undisputed facts support his legal claims."[22] If the proponent properly supports his claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[23] Summary judgment will not be granted if, after viewing the record in a light most favorable to the non-moving party, there are material facts in dispute, or if judgment as a matter of law is not appropriate.[24] If, however, the record reveals that there are no

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[19] *Id.*

[20] Super Ct. Civ. R. 56(c).

[21] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. Ct. 2005).

[22] *Id.* at 879.

[23] *Id.* at 880.

[24] *Id.* at 879.

material facts in dispute and judgment as a matter of law is appropriate, summary judgment will be granted.[25]

V. Analysis

1. The Court Will Not Consider Summary Judgment on the Present Record

Although Melee labeled its motion as a "Motion to Dismiss the Complaint Or, In the Alternative, For Summary Judgment",[26] in its brief there was no mention whatsoever of the absence of any genuine issues of material fact, nor was there any mention of the reason for the inclusion of the affidavit of Scott Aronson or of any provisions of the contract upon which Melee was relying to support its alternative request for summary judgment. With the exception of the new value defense argument, which likewise made no mention of the absence of a genuine issue of material fact, Melee's arguments in its brief focused solely and exclusively on the applicability and interpretation of federal bankruptcy law provisions vis-à-vis Section 1800. It was not until oral argument that Melee's counsel first mentioned that its request for summary judgment was based on specific provisions in the contract between Melee and Spector. Melee's attempt to convert its Motion to Dismiss into a Motion for Summary Judgment, without

[25] *Id.*
[26] Emphasis added.

any briefing to support it, precludes consideration of summary judgment at this stage.

2. Federal Bankruptcy Law Does Not Preempt California Code of Civil Procedure Section 1800

Melee contends that California law – specifically, CCCP § 1800 – must be interpreted analogously with federal bankruptcy law because it is modeled after 11 U.S.C. § 547. Accordingly, Melee submits that federal bankruptcy law preempts California law, and Spector, as assignee for the benefit of Ventura's creditors, must therefore cure any pre-assignment defaults before recovering preferential payments under federal bankruptcy law. While recognizing the split of authority regarding preemption of Section 1800, Melee urges this Court not to follow those California cases that reject preemption as they do not address the conflict between Section 365(b) of the Bankruptcy Code and Section 1800.

CCCP § 1800 permits an assignee to recover preferential transfers for the benefit of the assignor's creditors in certain situations.[27] Because of the similarity between CCCP § 1800 and 11 U.S.C. § 547, California Courts have interpreted CCCP § 1800 in conformity with analogous sections of

[27] Cal. C. Civ. P. § 1800.

federal bankruptcy law.[28] Nonetheless, there is a split among California courts on the question of whether federal law in fact preempts Section 1800.

In *Sherwood Partners, Inc. v. Lycos, Inc.*,[29] the Ninth Circuit Court of Appeals held that the Federal Bankruptcy Code preempts section 1800.[30] After determining that Congress intended federal bankruptcy law to be "pervasive" and "so dominant" as to "preclude enforcement of state laws on the same subject[,]"[31] the *Sherwood* Court found that California Section 1800, which gives assignees avoidance powers, "trench[es] too close upon the exercise of the federal bankruptcy power[.]"[32] Congress enacted the bankruptcy code in order to establish elaborate substantive and procedural standards to treat creditors and debtors fairly. Under that analysis, the *Sherwood* Court determined that the avoidance powers under Section 1800

[28] *Angeles Elec. Co. v. Super. Ct. of Los Angeles County*, 27 Cal. App. 4th 426, 431 (Cal. Ct. App. 1994) [hereinafter *Angeles*]. Notably, the *Angeles* Court also relied on federal law in construing section 1800 because of "the scarcity of decisional law construing [the] statute" available at the time of the decision. *Id.* As discussed herein, however, California courts have since addressed section 1800, providing courts with further guidance from California courts in interpreting the section and limiting the need to rely on federal case law.

[29] 394 F.3d 1198 (9th Cir. 2005) [hereinafter *Sherwood*].

[30] *Sherwood*, 394 F.3d at 1206.

[31] *Id.* at 1201.

[32] *Id.* at 1205.

would conflict with the avoidance powers of a federal bankruptcy trustee.[33] Specifically, a bankruptcy trustee could not recover a preferential payment for the benefit of creditors if an assignee for the benefit of creditors under California law had already recovered that sum.[34] As a result, the Court ruled that Congress intended for federal bankruptcy law to preempt Section 1800.[35]

In her dissenting opinion, Judge Nelson rejected the majority's reasoning because it would "preempt any number of state laws governing voluntary assignments for the benefit of creditors . . . ."[36] After noting that voluntary assignment statutes have existed since English common law, and that voluntary assignments "are recognized by and incorporated in the federal bankruptcy code[,]" Judge Nelson found that Section 1800 offers an alternative mechanism to bankruptcy for creditors that effectuates the same goal of equitable distribution.[37] Since there were no "persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained[,]" justifying

[33] *Id.* at 1205-06.

[34] *Id.* at 1205.

[35] *Id.* at 1204.

[36] *Sherwood*, 394 F.3d at 1206 (Nelson, J., dissenting).

[37] *Id.* at 1206-07.

federal preemption – Judge Nelson concluded that Section 1800 was not preempted.[38]

Adopting Judge Nelson's analysis, two California intermediate appellate courts more recently determined that federal bankruptcy law did not preempt section 1800.[39] In both *Haberbush v. Charles and Dorothy Cummins Family Limited Partnership*[40] and *Credit Managers Association of California v. Countrywide Home Loans, Inc.*,[41] the Court relied on five primary factors in holding that federal bankruptcy law did not preempt Section 1800.[42] First, "Congress intended, in general, to permit the coexistence of state laws governing voluntary assignments for the benefit of creditors."[43] Second, the Court explained that any state statute that implicates a policy objective of the Bankruptcy Code does not necessarily preempt it, noting that Section 1800's goal of equitable distribution does not

[38] *Id.* at 1207.

[39] *See Haberbush v. Charles and Dorothy Cummins Family Ltd. P'ship*, 43 Cal. Rptr. 3d 814 (Cal. Ct. App. May 31, 2006); *Credit Managers Ass'n of Ca. v. Countrywide Home Loans, Inc.*, 50 Cal. Rptr. 3d 259 (Cal. Ct. App. Jan. 24, 2007) [hereinafter *Countrywide*].

[40] 43 Cal. Rptr. 3d 814 (Cal. Ct. App. May 31, 2006).

[41] 50 Cal. Rptr. 3d 259 (Cal. Ct. App. Jan. 24, 2007).

[42] The Court in *Countrywide* explicitly relied on the reasoning in *Haberbush* and rejected the reasoning in *Sherwood*. *Id.* at 261-66.

[43] *Haberbush*, 43 Cal. Rptr. 3d at 817.

"'stand[] as an obstacle' to [the Bankruptcy Code's achievement of the same] goal."[44] Third, because *Sherwood* effectively abrogates all state voluntary assignment statutes, voluntary assignments 'should be regarded as not inconsistent with the purposes of the federal Act.'"[45] Fourth, as noted by Judge Nelson in her dissent in *Sherwood*, the virtual identity of Section 1800 to 11 U.S.C. § 547, and the fact that both sections aim for equality of distribution, suggest that the sections complement, rather than interfere with, one another.[46] Finally, absent a clear indication from Congress that the federal bankruptcy code preempts state law, there is "no persuasive reason to conclude that California's less stigmatic, and less costly, voluntary assignment scheme – which, like the federal bankruptcy system, serves to ensure equality of distribution of a debtor's assets – stands as an obstacle to the accomplishment . . . of the full purposes and objectives of the federal bankruptcy system."[47] Accordingly, the *Haberbush* and *Countrywide* Courts held that federal law did not preempt CCCP § 1800.

Having considered the foregoing decisions, this Court is persuaded by the rationale of the California Court of Appeals, absent a contrary opinion

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[44] *Id.* at 818.

[45] *Id.* at 818 n.20 (citing *Pobreslo v. Joseph M. Boyd. Co.*, 287 U.S. 518, 526 (1933).

[46] *Id.* at 820.

[47] *Id.* (citations omitted).

from the Supreme Court of California. As noted by the Court in *Haberbush*, the California process of permitting an assignee for the benefit of creditors to liquidate and distribute the debtor's assets equally for the benefit of its creditors is not only "less stigmatic, and less costly" to the debtor, but also serves to complement the goals of the bankruptcy system.[48] Moreover, the existence of voluntary assignment statutes is well-established throughout the common law, and has been viewed favorably by the United States Supreme Court. I therefore decline to apply the Ninth Circuit Court of Appeals' holding in *Sherwood* which would preempt Section 1800.[49]

As a practical matter, federal law is not implicated here because Ventura never filed for bankruptcy. Should Ventura do so, then federal bankruptcy law would preempt any contrary state law and would control the outcome. Applying bankruptcy law to a common law assignment, such as

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[48] *Id.*

[49] *See In re Miles*, 430 F.3d 1084, 1092 (9th Cir. 2005) ("We recognize that 'because the common law of the various states provides much of the legal framework for the operation of the bankruptcy system, it cannot be said that Congress has completely preempted all state regulation which may affect the actions of parties in bankruptcy court.'"); *Ready Fixtures Co. v. Stevens Cabinets*, 488 F. Supp. 2d 787, 791 (W.D. Wis. June 7, 2007) (noting that "the problems with the *Sherwood* decision are manifold" and that "the code recognizes the existence of parallel state remedies under the Uniform Fraudulent Transfer Act, going so far as to permit a trustee in bankruptcy to operate under state remedies if she so chooses"); *Pobreslo*, 287 U.S. at 525-26 ("[*Q*]*uite in harmony with the purposes of the federal act*, . . . voluntary assignments serve to protect creditors against each other, and go to assure equality of distribution unaffected by any requirement or condition in respect of discharge.") (emphasis added).

here, however, would conflict with recent California case law rejecting federal law preemption of Section 1800.

The cases upon which Melee relies in support of its preemption argument do not compel a different result.[50] As noted in *Haberbush* and *Countrywide*, the well-established common law rights to assign property should not be preempted by federal bankruptcy law, especially where Congress explicitly refused to reject state voluntary assignment laws.[51] While the California Court of Appeals' cases do not address Section 365(b) of the federal Bankruptcy Code, these cases emphasize that a voluntary assignment for the benefit of creditors is not a bankruptcy case, and bankruptcy law thus does not apply.

More importantly, this Court is not in a position to second-guess the well-reasoned opinions of the California Court of Appeals, which reject federal preemption of Section 1800. To the extent Melee believes that Section 1800 cannot peacefully coexist with federal bankruptcy law, that

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[50] Specifically, Melee relies on the following cases, all of which interpret federal bankruptcy law: *In re Kiwi Int'l Airlines, Inc.*, 344 F.3d 311 (3d Cir. 2003); *In the Matter of Superior Toy & Mfg. Co., Inc.*, 78 F.3d 1169 (7th Cir. 1996); *In re MMR Holding Corp.*, 203 B.R. 605 (Bankr. M.D. La. 1996); *In re The Leisure Corp.*, 234 B.R. 916 (9th Cir. B.A.P. 1999); *In re LCO Enterprises*, 12 F.3d 938 (9th Cir. 1993). As explained herein, the Court finds that federal bankruptcy law is inapplicable to this case.

[51] *See Haberbush*, 43 Cal. Rptr. 3d at 817-18 ("First, it is undisputed that Congress intended, in general, to permit the coexistence of state laws governing voluntary assignments for the benefit of creditors. . . . Indeed, the Bankruptcy Code expressly makes state law on voidable transfers available to the bankruptcy trustee.").

claim should be presented in the first instance to a court in California, not in Delaware, as our Courts have a high regard for *stare decisis*, and are not in a position to rule in a manner that is plainly contradictory to settled California law.[52]

3. Melee did not Create "New Value" under Section 1800

In the alternative, Melee argues that the Court should grant summary judgment on its behalf because, under CCCP § 180, Ventura has continued to receive new value from the assignment. Specifically, Melee submits that Ventura continued to use the films/programs under the contract from February 20, 2006, the assignment date, until at least March 20, 2006.

[52] This Court addressed a similar request in *Shea v. Matassa*, 2006 WL 258312 (Del. Super. Ct. Jan. 10, 2006), *aff'd*, 918 A.2d 1090 (Del. Feb. 1, 2007). In *Shea*, the plaintiffs argued that this Court should institute a dram shop act despite Supreme Court decisions to the contrary and inaction by the State Legislature. This Court refused to do so on *stare decisis* grounds:

> [D]espite the plaintiffs' effort to persuade this Court that *stare decisis* must yield to correct a case wrongly decided – in short, despite all the facts and law available to me – I cannot conclude that it is within the power of a trial court to create a new common law cause of action that contradicts a directly applicable Supreme Court case. . . . Nothing that Plaintiffs have argued either expressly or impliedly abdicates the Delaware Supreme Court's singular authority to overrule its prior cases or exempts lower courts from generally applicable principles of *stare decisis.* To find otherwise would be a dangerous usurpation, not only of State Supreme Court authority, but also of the legitimate right of elected legislatures to create causes of action by statute.

Melee contends that it created new value by allowing Ventura to use its films/programs, thereby providing a complete defense to Spector's claim.[53]

Under CCCP § 1800, the assignee may not recover a preferential payment if the transfer was intended by the assignor and creditor to "be a contemporaneous exchange for new value" and was "in fact a substantially contemporaneous exchange."[54] CCCP § 1800(a)(5) defines new value:

> "New value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to the transferee in a transaction that is neither void nor voidable by the assignor or the assignee under any applicable law, but does not include an obligation substituted for an existing obligation.[55]

The "new value" defense prevents the assignee from recovering what would otherwise be a preferential payment because "unsecured creditors are not harmed by a pre-petition transfer from the debtor's estate if the estate is replenished by an infusion that is at least roughly of equal value," thereby preserving the equality of distribution of assets.[56] As a result, only where

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Id. at *5. Similarly, the Court rejects Melee's suggestion that this Court should find that federal law preempts California law. Accepting such an interpretation would require this Court to abandon "all the facts and law available to [this Court]" and usurp the role of California courts that have already rejected the preemption argument.

[53] The Court notes that Spector does not attempt to respond to this defense in its opposition brief.

[54] CCCP § 1800(c)(1).

[55] *Id.* § 1800(a)(5).

there is an "infusion of value into the estate of the debtor-transferor" will "new value" serve as a defense.[57]

Because of the similarity between Section 1800 and federal bankruptcy law, California Courts have interpreted "new value" analogously with that of the Bankruptcy Code.[58] Applying federal interpretations of "new value," the California Court of Appeals in *Angeles* explained the rationale behind permitting a bankruptcy trustee, like an assignee in a voluntary assignment case, to recover preferential payments:

> "The first objective is to encourage creditors to continue extending credit to financially troubled entities while discouraging a panic-stricken race to the courthouse . . . . Another related objective of this section is to promote equality of treatment among creditors.". . . These purposes inform the objective of the exemption provisions requiring new value: unsecured creditors are not harmed by a prepetition transfer from the debtor's estate if the estate is replenished by an infusion that is at least roughly of equal value. "In such a situation, the creditor pool would not be harmed to the extent of the offset and the fundamental goal of equality of distribution would be preserved."[59]

As a result, California Courts have permitted a party to invoke the new value defense only where creditors have access to more of the debtor's assets.

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[56] *Angeles*, 32 Cal. Rptr. 2d at 665.

[57] *Id.* at 666.

[58] *Id.* at 663.

[59] *Id.* at 665 (citations omitted).

For example, California Courts have held that a creditor's forbearance on enforcing a mechanic's lien is not new value to the debtor because "it does not enrich the estate of the debtor; it adds nothing to assets available to unsecured creditors in the event of a bankruptcy during the preference period."[60] In contrast, a creditor's release of a security interest in debtor's property does constitute new value because "the release of collateral in the debtor's estate results in an infusion of assets to that estate, available to creditors in the event a bankruptcy occurs within the preference period."[61]

In the instant case, both parties appear to agree that the payments Ventura made under the contract qualify as preferential payments.[62] Thus, if this Court determines that Melee created new value, Spector cannot recover the amounts paid to Melee for the benefit of Ventura's creditors. Conversely, if the Court finds that Melee did not create new value, Spector, as assignee, is entitled to recover those preferential payments and distribute them to Ventura's unsecured creditors. The issue, then, becomes whether Ventura's use of Melee's films/programs from February 20, 2006 to March

[60] *Id.* at 667.

[61] *Id.* at 666.

[62] Melee does not argue that the payments would not be preferential. Melee only contends that Spector cannot establish that Melee received more than other creditors in its same class under section 1800(b)(5). Similarly, Spector's brief in opposition also assumes that the payments to Melee are preferential.

20, 2006 created approximately $139,681.71 of new value for the assignee to distribute equitably to Ventura's creditors.

Melee urges this Court to adopt the holding in *In re Discovery Zone, Inc.*[63] because of its similarity to this case. In that case, Discovery Zone, Inc. ("DZ"), the debtor, entered into an agreement allowing it to use the trademark and proprietary recipes of Pizza Hut, Inc ("PHI"). During the insolvency period, DZ made preferential payments to PHI, which the trustee sought to recover.

On appeal, the District Court affirmed the Bankruptcy Court's holding that the "continued use of its [PHI's] trademarks, products and proprietary recipes without paying the monthly license fees under the Agreement constitutes new value."[64] Specifically, the Court noted that "the continued use of a creditor's property despite failing to make scheduled payments constitutes new value."[65] The Court further explained:

> As [DZ] was contractually bound to pay monthly royalty fees to PHI . . ., the continued use of PHI's property, namely their trademarks, without remuneration, constituted a transfer of new value. . . . Consequently, the creditor is permitted to setoff the preferential transfer in an amount equal to the new value, which here is approximately one hundred percent of the transfer.[66]

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[63] 2004 WL 2346002 (D. Del. Oct. 5, 2004).

[64] *Discovery Zone*, 2004 WL 2346002 at *1.

[65] *Id.*

In this case, Ventura's use of Melee's films/programs from February 20, 2006 through March 20, 2006 is similar to DZ's use of PHI's licenses without remuneration. In *Discovery Zone*, the debtor, DZ, used PHI's license and trademark to earn additional income without paying for the right to do so. Since DZ was infused with new assets (i.e., the income it received for selling PHI's products), the Court determined that PHI could use the new value defense to avoid having to disgorge those payments made during the preference period. In this instance, Ventura had the right to distribute Melee's films/programs under their agreement. After making a preferential transfer in February, 2006, Ventura voluntarily assigned its assets to Spector, one month before their distribution to creditors. Assuming that Ventura never paid Melee for the films/programs it sold from February 20, 2006 through March 20, 2006, Melee created new value during that period, entitling Melee to a set-off.[67]

While the *Discovery Zone* holding supports Melee's position, Melee has offered no evidence to support a conclusion, as a matter of law, that Ventura used Melee's rights to distribute the films/programs without paying

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[66] *Id.* at *2 (citations omitted).

[67] The Court notes that neither party has provided any evidence of any payments (or any lack of payments) from Ventura to Melee from February 20, 2006 through March 20, 2006, the assignment date.

for them. In *Discovery Zone*, the District Court determined that the preferential transfer amount was equal to the amount of new value created by PHI's licenses. Aside from a conclusory statement that Ventura used its programs from February 20, 2006 to at least March 20, 2006, Melee has not, at this juncture, offered any invoices, letters, or other exhibits to support its claim of new value. Nor has Melee provided any evidence that the parties to the contract intended for the payment of $139,681.87 to be a "contemporaneous exchange of new value" as required by Section 1800(c)(1)(A). Without this evidence, the Court cannot determine, as a matter of law, whether Melee created new value, whether both parties intended for the payment to be in exchange for new value, whether Ventura paid for the use of Melee's films/programs from February 20, 2006 through March 20, 2006, and to what extent, if any, Ventura's creditors deserve a set-off of the preferential payment of $139,681.71. Therefore, the existence of these genuine issues of material fact precludes summary judgment.

VI. Conclusion

For all the foregoing reasons, the Court concludes that the federal Bankruptcy Code does not preempt California Section 1800. With respect to Melee's claim that it created sufficient new value to set-off the amount of the preferential transfer, the Court finds that there are genuine issues of

material fact which preclude a finding, as a matter of law, (1) that Ventura continued to use the films/program agreement without paying Melee its share from February 20, 2006 through at least March 20, 2006; and (2) that Ventura's use of the films/programs created sufficient new value for Ventura's creditors that off set the amount of the preferential payment. Accordingly, Defendant's Motion to Dismiss the Complaint or, in the Alternative, for Summary Judgment, is **DENIED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

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