UNITED STATES BANKRUPTCY APPELLATE PANEL

FOR THE FIRST CIRCUIT

BAP No. 97-006

IN RE NEPONSET RIVER PAPER COMPANY,
f/k/a PATRIOT PAPER CORPORATION
Debtor

STEPHEN S. GRAY, Trustee
Plaintiff/Appellee

v.

CAMP DRESSER & McKEE, INC.
Defendant/Appellant

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
[Hon. Carol J. Kenner, Bankruptcy Judge]

Before

VOTOLATO, Chief Judge and GOODMAN and VAUGHN,
Bankruptcy Judges

Joel Lewin, with whom Christopher W. Morog and Hinkley, Allen & Snyder, Boston, Massachusetts, were on brief for Appellant.

Harold B. Murphy, with whom Charles A. Dale, III, William T. Harrington and Hanify & King, P.C., Boston, Massachusetts, were on brief for Appellees.

February 25, 1998

VOTOLATO, Chief Judge.

This appeal is from an order of the bankruptcy court avoiding a $530,000 pre-petition payment to a creditor, Camp Dresser & McKee, as a preferential transfer, pursuant to 11 U.S.C. § 547(b). For the reasons discussed below, the decision of the bankruptcy judge and the order appealed from are affirmed.

The identification and roles of the parties and counsel are more complex *and dispositive* than the facts or legal issues, so we begin by listing the player roster:[1]

> Patriot Paper Corporation (**Patriot**), owner/operator of a paper mill located in Hyde Park, Massachusetts.
>
> Camp, Dresser & McKee (**CDM**), contractor hired in 1991 by Patriot to design and build a water treatment system.
>
> Invescorp, Inc. (**Invescorp**), 91% owner of Patriot, and a wholly owned American subsidiary of Tembec, Inc. (**Tembec**), a Canadian company.
>
> Pierre Monahan (**Monahan**), CEO and Chairman of Patriot, President of Invescorp, and Vice-President of Corporate Development at Tembec.
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> Susan Kalitsis (**Kalitsis**), Patriot's controller.
>
> Jim Manzi (**Manzi**), partner at the law firm of Varet, Marcus & Fink (**VMF**), counsel for Patriot, Invescorp and Tembec.

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[1] As will be evident later, an item of concern in the bankruptcy court was who was acting on behalf of whom, and when.

. **FACTS**

In 1991, CDM and Patriot Paper Corporation contracted for the construction of a water treatment system as part of a de-inking facility at Patriot's facility. The de-inking facility was to be funded by a $37.5 million Massachusetts Industrial Revenue Bond, backed by National Westminster Bank of New York (NatWest), and a $7.5 million revolving credit line from NatWest.[2]

Not far into the project Patriot was in serious financial trouble, with no remaining funds under the industrial revenue bond, and only a minimal amount in the NatWest revolving credit account. On December 3, 1992, NatWest agreed to loan Patriot additional funding up to $6.6 million to pay overdue balances under the CDM contract, conditioned upon Invescorp and/or Tembec also making a cash infusion for working capital. As part of the transaction, Invescorp and Patriot entered into a Working Capital Agreement whereby Invescorp deposited $4 million into a Bank of Boston account, to be used by Patriot as "Working Capital Loans" upon approval of Invescorp. Exhibit No. 9, sec. 2. The Agreement also provided that NatWest would be entitled to any funds remaining in the Bank of Boston account if Patriot defaulted.

With events happening in rapid succession, CDM informed Patriot by letter dated January 15, 1993, that if its $1.3 million arrearage was not paid by January 22, work on the project would stop. On January 25, 1993, a $100,000 payment was made to CDM in

[2] The cost of the waste water treatment plant was estimated at $7 million.

exchange for its promise to continue to work through January 29. On January 27, Patriot met with NatWest in an effort to make available funds from the $6.6 million loan account, but NatWest refused and confirmed its intention to declare a default unless Patriot paid the interest on its prior loan, due February 1st.

When it became apparent that Patriot would default, Tembec transferred the remaining $1,257,000 from Invescorp's Bank of Boston account to VMF's clients' account. At about that time, Patriot's controller, Susan Kalitsis, met with Monahan and Manzi to discuss the disposition of these funds, which were recorded in Patriot's February financial statement as an obligation owed to Invescorp. On February 3, at Kalitsis' instruction, disbursements were made which included seven checks issued to Patriot's creditors. From this group, checks in the amount of $230,000 to CDM and $50,000 to CAFA (financial consultants) were written but never cashed. In addition, a $100,000 check was cut to VMF for legal services that was delivered and cashed, and $409,000 was wired to Patriot's account, with which Kalitsis paid several other Patriot creditors.

Thereafter, Monahan and Manzi negotiated with CDM and on February 12, 1993, CDM and Patriot signed an agreement which provided for a thirty-day standstill period in exchange for a $530,000 payment. CDM also agreed, subject to the parties resolving a dispute over expenses, to waive start-up costs if the project resumed by March 15, 1993. On Patriot's behalf, on February 10, 1993, Tembec transferred $250,000 into VMF's clients' account, per Monahan's order, and CDM on February 12 received a wire transfer from VMF's clients' account in the amount of $530,000.[3] For reasons not clear to the Panel, the project was never restarted.[4]

On March 17, 1993, Patriot filed a Chapter 11 case, on May 17, 1994, the case was converted to Chapter 7, and on January 29, 1996, the Chapter 7 trustee filed a complaint to avoid the $530,000 payment to CDM under 11 U.S.C. § 547(b). At trial, the parties stipulated that all the elements of a preferential transfer were present, except that the transferred funds were property of the estate, and as to this issue there was sharp disagreement. CDM also argued that the funds were earmarked or, in the alternative, that the transfer was a contemporaneous exchange for new value.

After a full-day trial on January 24, 1997, the bankruptcy judge ruled that the $530,000 paid to CDM was property of the estate and that the transfer was avoidable as preferential, under 11 U.S.C. § 547(b). CDM appeals, asserting *inter alia* that at all times the funds were in the possession, custody and control of either Tembec or Invescorp, and therefore not property of the estate.

II. STANDARD OF REVIEW

[3] This consisted of $280,000 on deposit in the VMF account (the two checks in the amounts of $230,000 and $50,000 that were never delivered to the payees and later voided) and the subsequent $250,000 Tembec deposit.

[4] The Standstill Agreement required Patriot to perform certain obligations prior to CDM restarting the project. We can only assume that these precedent conditions were not satisfied. *See* Exhibit No. 38.

Findings of fact made by a bankruptcy court may not be set aside unless clearly erroneous, giving due regard to the bankruptcy court's determination of credibility of witnesses and the weight accorded the testimony. Fed. R. Bankr. P. 8013; *Palmacci v. Umpierrez*, 121 F.3d 781 (1st Cir. 1997); *see generally* 19 James Wm. Moore, *Moore's Federal Practice* § 206.03 (3rd ed. 1997). Although supported by evidence, a finding is clearly erroneous when, after careful review, the reviewing court is left with the definite impression that a mistake has been made. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Where two views of the evidence are plausible, the trial court's preference cannot be clearly erroneous and may not be disturbed even where the appellate court would have held otherwise. *Williams v. Poulos*, 11 F.3d 271, 278 (1st Cir. 1993).

The clearly erroneous standard also applies to mixed questions of law and fact, except where the court's disposition is based upon mistaken legal principles, making the *de novo* standard applicable. *Williams*, 11 F.3d at 278. Conclusions of law are reviewed *de novo*, with no special deference to the bankruptcy court's determinations. *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir. 1994); *In re G.S.F. Corp.*, 938 F.2d 1467, 1474 (1st Cir. 1991).

III. <u>DISCUSSION</u>

A. AVOIDABLE PREFERENCE:

The Bankruptcy Code provides for avoidance of preferential transfers to insure orderly and fair distribution of assets, and to prevent pre-petition dismantling of the debtor's estate. 11 U.S.C.

§ 547; *e.g., In re Bohlen Enters., Ltd.*, 859 F.2d 561, 566 n.10 (8th Cir. 1988). A transfer is avoidable where the debtor's interest in property was transferred to or for the benefit of a creditor for or on account of an antecedent debt, while the debtor was insolvent or on or within 90 days before the date of filing bankruptcy, and such transfer enables the creditor to receive more than it would in Chapter 7 liquidation. 11 U.S.C. § 547(b); *In re Ralar Distribs., Inc.*, 4 F.3d 62, 65 (1st Cir. 1993); *In re Smith*, 966 F.2d 1527, 1530 (7th Cir.), *cert. dismissed*, 506 U.S. 1030 (1992).

The first issue we will address is whether the $530,000 transferred to CDM was property of the estate. Property of the estate is defined as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1), and absent federal authority, state law is controlling when determining the debtor's interest in property. *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992); *Ralar*, 4 F.3d at 67; *Smith*, 966 F.2d at 1530; *see also In re Kemp Pacific Fisheries, Inc.*, 16 F.3d 313, 315 (9th Cir. 1994).

Massachusetts law provides that property of a client may be held by a law firm but, upon request, must be returned. Mass. S.J.C. Rule 3:07, DR 9-102(B)(4); *see also Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 973 (1st Cir. 1993) (holding that when a law firm functions as a custodian, the property remains part of the debtor's estate). *E.g., In re U.S.A. Diversified Prods., Inc.*, 196 B.R. 801, 805-807 (N.D. Ind.), *aff'd,* 100 F.3d 53 (7th Cir. 1996); *Miller v. Kibler (In re Winters)*, 182 B.R. 26, 28 (Bankr. E.D. Ky. 1995). Also, the ability to exercise control over the property is sufficient to establish ownership. *Kemp*, 16 F.3d at 316 ("[d]iminution of the estate doctrine" looks to debtor's control over the transferred property to determine ownership;); *see also Coral Petroleum, Inc. v. Banque Paribas-London,* 797 F.2d 1351, 1358 (5th Cir. 1986) (the value of an asset belongs to the person who controls it).

At trial, Susan Kalitsis, the debtor's controller, and Jim Manzi, who at various times relevant to this proceeding served as counsel for the debtor, Invescorp, and Tembec, testified as to the disposition of funds deposited with VMF. Based upon the evidence before her, the bankruptcy judge made the following findings, which are unchallenged: 1) although Manzi served as counsel for Patriot, Invescorp, and Tembec at different junctures during the relevant times in this case, VMF at all times represented Patriot; 2) *only* Patriot was billed for and *only* Patriot paid VMF's legal fees; 3) Patriot's February 1993 financial statement referenced the $1,257,000 deposit in VMF's clients' account as an obligation to Invescorp; 4) Manzi and Monahan each played various roles in Patriot, Invescorp, and Tembec's activities, while Kalitsis worked solely for Patriot; 5) Manzi, Monahan, and Kalitsis collectively decided to disburse the funds in VMF's clients' account to Patriot's creditors; and 6) Patriot was solely liable for the outstanding balance owed to CDM.

CDM assigns numerous errors to the bankruptcy court's findings and conclusions, and while they all fail for lack of merit, we will address the following ones. CDM argues that the bankruptcy court erred in failing to consider Jim Manzi's testimony that he was counsel to all three entities and that the funds in the clients' account could only be disbursed with the approval of Tembec or Invescorp. The bankruptcy judge noted that Manzi was counsel to all three entities, however, she gave this contention little weight, notwithstanding Manzi's testimony. The judge was more impressed with the fact that only Patriot was billed and paid for the legal services rendered by VMF. (Appellant's Appendix No. 8, pp. 169-170). There is also the undisputed evidence that actual draws against the account were upon the specific instructions of Kalitsis, with no showing that Invescorp or Tembec ever exercised veto power (Appellant's Appendix No. 8, pp. 20-21, 25-31, 34-38, 82-83), or that Manzi and/or Monahan were acting exclusive of their respective roles as counsel to and officer of Patriot. As to control, the bankruptcy court's findings are supported by the evidence, and should not be disturbed. CDM also places undue emphasis on Kalitsis' testimony that "I don't have any control on those accounts," and that this protestation *ipso facto* calls for a conclusion other than that reached by the bankruptcy judge. Appellant's Appendix No. 8, p. 51. We disagree as there is plenty of evidence to support the finding that Patriot, through various representatives, managed and controlled the process of disbursing the funds in question.

CDM urges that the debtor's Certified Statements of Financial Affairs impeach Kalitsis' testimony, and that a different result was therefore required in the bankruptcy court. This argument fails because the $1,257,000 transfer from Investcorp's Bank Boston Account to VMF's clients' account was made during the last days of January, and in February, the transfer appeared in the debtor's financial statement as a debt owed to Invescorp. Also, included in the February financial statement are the disbursements made against this loan including those intended, but later voided, to CDM and CAFA. *See* Exhibit No. 3. Kalitsis explained the delay by pointing out that she was not informed of the transfer until the February 1 meeting with Manzi and Monahan. Appellant's Appendix No. 8, pp. 51-53. While this delay might be significant if Kalitsis was Patriot's sole representative, the evidence is to the contrary. The debtor's Chairman/CEO and Tembec's Vice-President was the same individual who unilaterally determined that the transfer of funds from the Bank of Boston account was in the best interest of the debtor, in order to remove them from NatWest's reach, once default was declared on February 1, 1993. Appellant's Appendix No. 8, pp. 52, 73, 81.

CDM highlights the fact that the February 12 transfer to CDM was not reflected in Patriot's financial statement. The bankruptcy judge ruled correctly that Kalitsis could not testify about Tembec's February 10 deposit of $250,000 and the February 12 transfer to CDM because she lacked first hand knowledge of these events. Appellant's Appendix No. 8, p. 78. In addition, there is no evidence that Pierre Monahan, in ordering these transactions, acted in any capacity other than as Patriot's Chairman/CEO.

Unlike the bankruptcy court, and not surprisingly, CDM places great weight on Manzi's testimony that Tembec and/or Invescorp controlled the disbursement of the funds in question. Appellant's Appendix No. 8, p. 86. We must, and do defer to the bankruptcy court's credibility determinations and assignment of weight to the evidence. We also agree that Manzi's testimony was not persuasive, and that the record does not otherwise support CDM's contention as to signatory authority on the account and/or identity of the client on VMF's account ledgers. Appellant's Appendix No. 8, pp. 90-91. Moreover, the record supports the bankruptcy court's finding that the interests of Patriot Paper, Invescorp and Tembec were the same (Appellant's Appendix No. 8, pp. 92, 109), and that there was no basis upon which to conclude that Invescorp or Tembec were directing the disbursements. Appellant's Appendix No. 8, p. 86.

CDM charges the bankruptcy court with error by failing to take into account Invescorp's letter to VMF dated January 29, confirming the transfer of the funds remaining in the Bank of Boston account. The letter was signed by Monahan, President of Invescorp and states, in part:

> You are to hold such funds, as our agent, and disburse the same from time to time upon instructions from us for the purposes contemplated in the Working Capital Agreement dated December 8, 1992, between Invescorp Inc. and Patriot Paper Corporation.
>
> The foregoing transfer is being made to facilitate payment of professional fees, payroll and other expenses to be incurred by Patriot Paper Corporation during the period in which financial restructuring proposals with

National Westminster Bank Plc are being developed and explored.

Exhibit No. 23. Contrary to the terms of this inter-entity self-serving proclamation, the funds were used to pay outstanding balances owed to Patriot's general creditors listed in a schedule prepared by Kalitsis, *prior* to meeting with Manzi and Monahan. Appellant's Appendix No. 8, pp. 26-27. Furthermore, using the funds to pay CDM was clearly inconsistent with the contention that the funds had to be used for working capital rather than capital expenditures.[5] The bankruptcy court's decision to discount the significance and/or force of this letter is supported by Tembec/Invescorp's silence when the debtor used the funds in a manner totally inconsistent with the terms of the letter. The bankruptcy judge's conclusion that the debtor controlled the disbursement of the funds in question should not be disturbed.

In summary, the bankruptcy judge's decision regarding Patriot's interest in the funds in question, and her conclusion that Patriot was represented by VMF, are supported by the evidence. So is her ruling that Patriot, through various representatives, controlled the disposition of the funds (which were recorded as a loan and used to pay creditors) consistent with the draws against the $4 million provided by Invescorp.

5 CDM argues that Invescorp and Patriot, as the parties to the Working Capital Agreement, had the right to modify the agreement to authorize the use of a portion of the $4,000,000 for capital expenditures, in light of NatWest's refusal to release funds under the $6,600,000 loan. To support Invescorp's contention as to control, there would have had to be a renegotiation of the Working Capital Agreement, and there is no such amendment.

B. EARMARKING DOCTRINE:

Earmarking, recognized by the First Circuit in *Kapela v. Newman*, 649 F.2d 887, 892 (1st Cir. 1981), is "entirely a court-made interpretation of the statutory requirement that a voidable preference must involve a 'transfer of an interest of the debtor in property.'" *Bohlen*, 859 F.2d at 565. The doctrine defeats the equitable considerations of the preference statute, and first arose in instances where a third-party guarantor paid a creditor during the preference period and which, if avoided, would result in double payment of the debt by the guarantor. *See, e.g., Nat'l Bank of Newport v. Nat'l Herkimer County Bank*, 225 U.S. 178 (1912); *Grubb v. General Contract Purchase Corp.*, 94 F.2d 70 (2d Cir. 1938).

> According to this doctrine, "under certain circumstances, a transfer from a third party to a creditor of the debtor is not avoidable as a preference." *Titan Energy Corporation v. Central Oilfield Supply Co. of Logan, Ohio (In re Titan Energy Corp.)*, 82 B.R. 907, 909 (Bankr. S.D. Ohio 1988). "[W]here the only change is in the identity of the creditor, without a corresponding depletion of the bankruptcy estate, one policy underlying the power to avoid a preference has not been offended by the transfer." *Id.* For instance, "[i]f funds from a third party are specifically designated for transfer to a particular creditor and the debtor is either a mere conduit or uninvolved in the transfer, the funds are specifically said to be 'earmarked'." *Id.* at 909.

Geremia v. Fordson Assoc. (*In re International Club Enters., Inc.*), 109 B.R. 562, 566 (Bankr. D.R.I. 1990).

For earmarking to apply, the participation of three parties is required: the creditor who received the payment; a new creditor who provided funds to pay the original creditor; and the debtor. *Bohlen,* 859 F.2d at 565; *see also In re Kelton Motors, Inc.*, 97 F.3d 22, 28 (2nd Cir. 1996); *Smith*, 966 F.2d at 1533. Cornerstones of this doctrine are: (1) the absence of control by the debtor over the disposition of the funds; and (2) no diminution of the debtor's estate as a result of the transfer. *Kemp*, 16 F.3d at 316; *Smith*, 966 F.2d at 1533. The use of earmarked funds to pay an existing creditor simply results in a new debt replacing an old debt, and the fund available for debtor's general creditors remains unchanged. *Bohlen,* 859 F.2d at 565. Some courts have refused to extend this doctrine to situations where the money transferred to the old creditor was not based upon a guarantee or similar obligation. *See International Clubs*, 109 B.R. at 566-67.

Factors to be considered when determining whether a transfer satisfies the earmarking doctrine are: "(1) the existence of an agreement between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt, 2) performance of that agreement according to its terms, and 3) the transaction viewed as a whole (including the transfer in of the new funds and the transfer out to the old creditor) does not result in any diminution of the estate." *Bohlen*, 859 F.2d at 566 (footnote omitted).

In rejecting the application of the earmarking doctrine, the bankruptcy court determined that CDM failed to establish that any entity other than debtor exercised control over the borrowed funds, and underscored the absence of an agreement between Patriot and any other party regulating the use of the funds deposited with VMF. The record is devoid of evidence of an agreement between the debtor and Invescorp/Tembec relating to the use of the funds, and although the Working Capital Agreement referenced the use of the funds initially deposited in the Bank of Boston account, there is no evidence of a subsequent agreement after the funds were transferred to VMF. CDM's assertion that an oral agreement meets the legal standard is not relevant, since there is no credible evidence of a subsequent agreement in *any* form -- written or oral.

Additionally, the transfer clearly diminished the debtor's estate. Diminution of the estate occurs where the transfer reduces the pool of funds available to all, so that creditors in the same class do not receive as great a percentage as the preferred creditor. *Kemp*, 16 F.3d at 316; *Mandross v. Peoples Banking Co. (In re Hartley)*, 825 F.2d 1067, 1070 (6th Cir. 1987). The funds transferred to VMF's clients' account were disbursed by Kalitsis to several of the debtor's creditors who, in her estimation, constituted "hot items to be paid." Appellant's Appendix No. 8, p. 26: 24-25. Based on the record, but for the transfer, the funds in question would be available for distribution to creditors.

Finally, we do not agree that the bankruptcy judge erred in failing to separately consider the component parts of the $530,000 transfer, as urged by CDM. While an internal memo from Tembec stated that the February 10 deposit of $250,000 with VMF was for payment to CDM pursuant to the standstill agreement (Exhibit No. 37), Tembec was not liable for the debt to CDM and there is no agreement directing the use of the funds. The record supports the finding that Tembec's deposit into the VMF client account was a cash infusion by a parent company to a subsidiary in dire financial straits which, when transferred from the debtor’s account to CDM, diminished the debtor’s estate.

C. CONTEMPORANEOUS EXCHANGE FOR NEW VALUE:

The contemporaneous exchange exception to avoidance of a preferential transfer requires that the transfer was intended by both parties to be a transfer in consideration of new value and that, in fact, value was contemporaneously exchanged. 11 U.S.C. § 547(c)(1); *Pine Top Ins. Co. v. Bank of America Nat’l Trust & Sav. Ass’n*, 969 F.2d 321, 324 (7th Cir. 1992); *see generally* 1 Robert E. Ginsberg & Robert D. Martin, *Ginsberg & Martin on Bankruptcy*, § 8.03[B] (4th ed. 1997). The party asserting the exception has the burden of proof. 11 U.S.C. § 547(g).

Evidence presented in support of this defense comes from a single witness, Joseph T. LaMaure, Vice-President of CDM Engineers and Constructors (a subsidiary of CDM), who testified that the remobilization costs CDM agreed to waive if the project was restarted would range between $225,000 and $782,000. Appellant's Appendix No. 8, p. 143. The standstill agreement also provided that in exchange for “the sum of ... ($530,000) ... to be applied toward Invoice Nos. 7 and 8R,” CDM “agree[s] that prior to March 12, 1993 ... [to] take no action relating to (i) termination of the Contract ... and (ii) collection or attempted collection of amounts now or hereafter claimed to be due under the Contract.” Further, “if [CDM and debtor] reach agreement on or before March 12, 1993 with respect to payment of the amounts now or hereafter claimed to be due under the Contract, and Patriot authorizes [CDM] to resume work on or prior to March 15, 1993, that [CDM] shall resume [its] services under the Contract without any remobilization costs....” Exhibit No. 38. A subsequent agreement was never reached, the project was never resumed, there were no startup costs, and the bankruptcy court correctly rejected the defense.[6]

CDM argues that the standstill agreement constituted a renegotiation of the contract, that the conditional waiver of the remobilization costs represents new value, and that where new value has been contemporaneously exchanged as a result of the renegotiation of existing contract terms, avoidance is precluded. *See, e.g., In re Spada*, 903 F.2d 971, 975-976 (3rd Cir. 1990) (consolidation and modification of three loans into a single loan and agreement that only interest payments would be due during the first year, constitutes new value); *In re Marino*, 193 B.R. 907, 913-915 (9th Cir. BAP 1996), *aff’d*, 117 F.3d 1425 (9th Cir. 1997) (renegotiation of the terms of mortgage may support new value exception, if perfection of the security interest was contemporaneous).

CDM relies upon *In re George Rodman, Inc.*, 792 F.2d 125, 128 (10th Cir. 1986). In *Rodman*, the court held that the release of a lien on an oil well subsequent to payment of an antecedent debt constituted new value, even though by the time the adversary proceeding was filed, the well proved to be nonproductive. The intent of the parties was clear at the time of the renegotiation

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[6] CDM’s argument that the bankruptcy judge committed error by (inadvertently) referencing § 547(c)(3) when she was obviously dealing with § 547(c)(1), is borderline frivolous and needs no further attention.

and both held the belief that the oil well was active and would yield economic benefits.

CDM's reliance on *Rodman* is misplaced. In the instant case, waiver of the startup cost was conditioned upon the parties reaching an agreement, and resumption of the project. The value CDM allegedly stood to reap as a result of the standstill agreement was purely speculative, in that as it could only be realized upon the happening of future acts. *See, e.g., Spada*, 903 F.2d at 977 (rejection of exception where bank's agreement to subordinate mortgage was conditioned upon debtor obtaining financing to build a shopping center).

Most importantly, there is no evidence that the parties intended there to be a contemporaneous exchange for new value. Rather, the standstill agreement explicitly provides that the $530,000 was to be applied to past due invoices, evidencing a simple credit transaction. This is in direct contradiction of the purpose of the exception as articulated in the legislative history: "[t]he [contemporaneous exchange] exception is a simple one, excepting a transfer that is really not on account of an antecedent debt...." H.R. Rep. No. 595, 95th Cong., 1st Sess. 177, 377 (1977), *quoted in,* 5 *Collier on Bankruptcy*, ¶ 547.04[1][a] n. 7 (Lawrence P. King et al. eds., 15th ed. rev. 1997); *see also*, *Arnett v. Security Mutual Fin. (In re Arnett)*, 731 F.2d 358, 361 (6th Cir. 1984); *In re Wadsworth Bldg. Components, Inc.*, 711 F.2d 122, 124 (9th Cir. 1983).

IV. CONCLUSION

An important underlying policy of the Bankruptcy Code that creditors be treated equally, supports a strict construction of the statute avoiding preferential transfers. The evidence here does not overcome that equitable consideration and does not justify the preferred treatment of CDM's claim, to the disadvantage of all other creditors. Accordingly, the bankruptcy court's determinations that: (1) the $580,000 paid to CDM was property of the estate; and (2) the transfer was preferential and avoidable, pursuant to 11 U.S.C. § 547(b), is AFFIRMED.

SO ORDERED.

On this 25th day of February, 1998.