Dated: August 10 2007

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 03-39184
	)	
Gerlinger, Inc.,	)	Chapter 11
	)	
Debtor(s).	)	Adv. Pro. No. 05-3407
	)	
Wayne Walker, Trustee,	)	Hon. Mary Ann Whipple
	)	
Plaintiff(s),	)	
	)	
v.	)	
	)	
Motivation Consultants, Inc.,	)	
	)	
Defendant(s).	)	

MEMORANDUM OF DECISION AND ORDER

This adversary proceeding is before the court on the parties' cross motions for summary judgment. Plaintiff Wayne Walker ("Plaintiff") is the Trustee of the Liquidating Trust established under Debtor Gerlinger, Inc's ("Gerlinger") confirmed Chapter 11 plan. He seeks judgment for $67,506.44 against Defendant Motivation Consultants, Inc. ("Motivation") for alleged unauthorized post-petition transfers to be avoided under 11 U.S.C. § 549(a) and recovered under 11 U.S.C. § 550(a)(1).

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to recover transfers of property of the estate are avoidance actions that this court may hear and decide as core proceedings. 28 U.S.C. § 157(b)(1) and (b)(2)(A) and (O). For the reasons that follow, Plaintiff's motion for summary judgment will be granted in part and denied in part and Defendant's motion for summary judgment will be denied.

Facts

Unless otherwise stated, the following facts are not in dispute. They are taken from the record in this adversary proceeding, except that the court also takes judicial notice of its docket and the contents of the case record in the underlying Chapter 11 case *In Gerlinger, Inc.*, Case No. 03-39184 in this court, pursuant to Plaintiff's unopposed request [Doc. #20, p.6]; the issues raised in this adversary proceeding are inseparably intertwined with the issues in the main case. *Nantucket Investors II v. California Fed. Bank (In re Indian Palms Assoc., Ltd.)*, 61 F.3d 197, 204 (3d Cir. 1995).

Gerlinger was a floor coverings wholesaler and distributor. As part of its marketing and customer loyalty programs, Gerlinger's customers accumulated points based on their purchases from the company. These points could then be used toward participating in trips sponsored by Gerlinger. Motivation is in the travel incentive program business and Gerlinger had contracted with Motivation for a number of years to plan and operate its customer incentive trips.

The contract involved in this adversary proceeding was entered into between Gerlinger and Motivation on December 3, 2002. [Doc. #19, Affidavit of J. Enos Gleason, Ex. A and B]. The contract provided that Motivation would plan and operate for Gerlinger's representatives and customers a trip to Disney World in Orlando, Florida, plus a Disney cruise, to occur from February 19-26, 2004. The contract outlined the land and sea trip specifications as well as the services Motivation would provide. Gerlinger's obligation under the contract was to work with its customers accumulating point totals for generating trip participants and to pay for the trip. Section II of the contract outlined trip cost on a per participant basis, Section III of the contract generally described payment arrangements and Section IV addressed cancellation issues. Section III stated that "[a] payment schedule for all trips has been established," without therein specifying what that schedule is, and that "[a] final progress payment for the balance shall be paid on December 22, 2003." The general provisions of Section V of the contract included an integration clause and a provision

specifying that "no change shall be made unless they [sic] are in writing and signed by both parties." This type of trip and the contract in general were similar in all material respects to other travel incentive programs Motivation operated not only for Gerlinger but for other like clients.

Enos Gleason, an officer and one of the owners of Motivation, states that it requires full prepayment for its travel incentive programs. [*Id.*, ¶ 5]. Although the contract document did not contain a specific progress payment schedule for the Disney trip, Gleason set out a payment plan covering the Disney trip and four other planned travel programs by letter dated January 29, 2003, to Gary J. Garris, President and CEO of Gerlinger. [Plf. Ex. 2]. The payment plan called for 48 weekly payments of $14,000 starting in February, 2003, and then a final invoice for each trip. The spreadsheet attached to Gleason's January 29 letter showed the total cost of the Disney trip at $182,289.60. Plaintiff has submitted twelve Gerlinger checks for payments to Motivation dated 2/3/03, 2/7/03, 2/14/03, 2/20/03, 2/28/03, 3/7/03, 3/13/03, 3/21/03, 3/28/03, 4/403, and 4/10/03, showing that the parties immediately commenced payments under this plan. [Plf. Ex. 4]. Each check is for the amount of $14,000, and some of them include "payment coupons" stating that it is one of a series of 48 payments. The last check in the series, dated April 10, 2003, is accompanied by a "payment coupon" stating that it is Payment # 10 of 48. Gleason states generally that Motivation "in turn, disbursed funds to a variety of vendors on Gerlinger's behalf." [Gleason Aff. ¶ 8]. The record lacks any detail about when, how, in what amounts and to whom such disbursements were made, including specifically for the Disney trip.

But Gerlinger was on its slide into bankruptcy in 2003. In a letter to Garris dated August 1, 2003, Gleason wrote that "I received this morning via voice mail your request for deposit and projected cost information for your five current incentive travel programs." [Plf. Ex. 6]. At that point, Gleason notes, eight weekly progress payments totaling $112,000 had not been made by Gerlinger. Instead, Gleason suggests, larger weekly payments of $18,000 should be made starting on September 1, 2003, and only one actual payment due for another trip scheduled for September 2003 would be made in August. The spreadsheet attached to Gleason's August 1 letter shows that the total cost for the Disney trip at that point was $159,503.40, of which $24,456.85 of the total trip cost had been paid by Gerlinger to date. For the Disney trip Gleason stated that an additional $24,000 would be applied from the total progress payments in each of September 2003 through January 2004, with the projected final amount of $39,046.655 due in February 2004.

Gerlinger failed to meet Motivation's revised payment schedule. On October 9, 2003, Gleason wrote Garris a letter assuming a decrease in the Disney trip participation numbers and costs. [Plf. Ex. 7]. The spreadsheet attached to Gleason's October 9 letter showed the total reduced Disney trip cost of $100,582.88, of which the same $24,456.85 in total payments as referenced in the August 1 letter had been received at that point. The October 9 letter conveyed a sense of urgency about the situation, noting that "[w]e are at a point now with both Disney and Renaissance that they are threatening cancellation if the progress payments are not resumed."

As Gleason acknowledges, by "November of 2003, Gerlinger was in breach of the contract for the Disney Cruise Trip because it had not made all of the progress payments called for by the payment schedule." [Gleason Aff. ¶9]. It is not clear to which payment schedule that statement refers. Another letter from Gleason to Garris dated October 22, 2003, explains that Motivation is at the end of its rope on the payment issue for the Disney trip, stating that "only token payments" had been made on the program and that "[w]e have exhausted our favors from all of the suppliers involved." [Plf. Ex. 9]. The "money situation" for the Disney trip is set forth in detail in the body of the letter. By that date, Gerlinger should have paid over $70,000 of the trip cost and had only paid the $24,456.85 amount. Gleason specified that there was a "COD invoice #3193 attached" for $45,823.77, with the final balance of $30,120.26 due on December 15 at the latest. Sounding the payment alarm again, Gleason informed Garris in closing that failure to meet these obligations would result in harsh cancellation penalties and severe problems for all.

Gerlinger filed its petition for relief under Chapter 11 of the Bankruptcy Code on November 13, 2003. Immediately prior to filing its petition, Gerlinger entered into an Asset Purchase Agreement dated November 12, 2003, with CDC Distributors, Inc. ("CDC"). [Plf. Ex. 29]. CDC agreed to buy Gerlinger's assets, subject to certain exclusions including cash, for a total maximum purchase price of $3.6 million. In turn the purchase price was subject to adjustments for variations from specified targets for accounts receivable and inventory and there was a one year claims reserve holdback of $100,000. The Asset Purchase Agreement required Gerlinger to file a Chapter 11 case and the sale of assets was conditioned on bankruptcy court approval. Either party was permitted under the Asset Purchase Agreement to terminate their obligations thereunder if closing had not occurred by December 31, 2003, nearly two months before the Disney trip was planned to occur in 2004. [*Id.* ¶ 15(d)(iii)].

Gerlinger filed with its voluntary petition on November 13, 2003, its complete schedules of assets and creditors as well as its statement of affairs, showing that the filing was planned and not of an emergency nature. [Doc. #9, Case. No. 03-39184]. Garris signed the filing documents and schedules. On an Attachment to its Schedule B of personal property, Gerlinger included details of its accounts receivable, which were $2,293,208 less certain adjustments including one for $162,232 for "Money Held for Trip Promotion Accounts." [*Id.,* p.15 of 238]. The only creditor listed on its Schedule D-Creditors Holding Secured Claims is National City Bank, owed $3,078,232 secured in real estate, inventory, chattel paper, accounts, equipment, and general intangibles. Motivation is not listed as a creditor on the Gerlinger schedules or creditor matrix. Nor does the December 2002 contract for the Disney Trip appear on Gerlinger's Schedule G-Executory Contracts and Unexpired Leases. However, under Statement of Financial Affairs Question 14-Property Held for Another Person, the following appears under the heading Name and Address of Owner:

> Gerlinger Inc. Dealer Points
> Administered by
> Motivation Consultants, Inc.
> [Address]

The Description and Value of Property is described as:

> Dealer Earned Point Trip Account
> Approximate Value:
> $162,232.89

The Location of Property is described as Gerlinger's Holland, Ohio premises. Also, its attached Check Register showing payments in the 90 days before the commencement of the case in response to Question 3 includes Check 62013 dated October 9, 2003, payable to Motivation in the amount of $15,219.18 for an invoice dated October 9, 2003, and check 62081 dated October 17, 2003, payable to Motivation in the amount of $21,101.36 for an invoice dated October 17, 2003. The purposes of these payments are not shown on the record and they are not included in Plaintiff's complaint, likely because the confirmed plan of liquidation supported by the eventual Unsecured Creditors' Committee waived all non-insider preference causes of action.

Gerlinger also filed on November 13, 2003, an expedited motion seeking authority to use cash collateral and enter into a post-petition financing agreement with National City Bank so as to provide

sufficient financing to continue operations until the CDC sale could be considered and consummated if approved by the court. [Doc. #5, Case No. 03-39184]. Along with the cash collateral and financing motion, Gerlinger filed an expedited motion seeking authority to pay pre-petition wages, taxes and benefits for its 77 employees, subject to the priority limits of 11 U.S.C. § 507(a)(3) as then in effect.

After an emergency hearing, on November 17, 2003, the court entered an Interim Consent Order Granting Authority for Use of Cash Collateral and Post-Petition Financing ("First Cash Collateral Order"). [Doc. #14, Case No. 03-39184]. The First Cash Collateral Order provided borrowing and cash collateral authority through December 6, 2003. It permitted use of cash collateral only in conformity with an attached projected budget, and such other expenses as may be agreed upon by Debtor and National City Bank in writing as necessary to continuation of the business. [*Id.*, ¶5]. The First Cash Collateral Order further specified that "The Debtor... shall not sell, use or lease any property of the Debtor or the estate other than in the ordinary course of business, absent court approval." [*Id.*, ¶21]. Exhibit F to the First Cash Collateral Order was captioned "Budget Detail" and listed categories of disbursements for four weeks ending December 6, 2003. The only payees identified by name on Exhibit F were UPS and the US Trustee. The permitted categories of disbursements included employee salaries and benefits. Along with the financing motion, the court entered on November 17, 2003, a separate order authorizing the payment of pre-petition wages and benefits to employees as requested in Gerlinger's separate motion. [Doc. #13, Case. No. 03-39184].

As the authority extended under the First Cash Collateral Order expired on December 6, 2003, the court held a further hearing on December 5, 2003, on the use of National City Bank's cash collateral and post-petition financing. [Doc. #39, Case No. 03-39184]. As a result of this hearing, the court entered the Second Interim Consent Order Granting Authority for Use of Cash Collateral and Post-Petition Financing ("Second Cash Collateral Order"). [Doc. #41, Case No. 03-39184]. The substantive terms of the Second Cash Collateral Order were the same as the substantive terms of the First Cash Collateral Order, including paragraphs 5 and 21 described above. The cash collateral authority granted extended through January 7, 2004. The Budget Detail was attached as Exhibit A to the Second Cash Collateral Order. The first page of Exhibit A reconciled the budgeted to actual experience for the four weeks under the First Cash Collateral Order. The second page of Exhibit A included categories of disbursements for the four weeks ending December 13, 2003, through January

3, 2004. The categories were the same as Exhibit F to the First Cash Collateral Order save for what is now viewed as one significant difference: a line item category was added for and labeled as "Promotional expenses." The budgeted amounts for "Promotional expenses" were $15,000 per week for each of four weeks, concluding the week ending January 3, 2004. Motivation is not identified by name, but Motivation points to this line item as court authorization for Gerlinger to pay the balance due for the Disney trip.

Debtor's attorney and the newly engaged attorney for the Unsecured Creditors' Committee were not aware of the identity of the payee or the intended use of the funds to pay for a Disney trip scheduled for February 2004. [Aff. of Vaughan Hoblet, ¶¶9,10, and Aff. of Matthew Gensburg]. Attorney for Debtor was not even aware of Gerlinger's December 2002 contract with Motivation for the Disney trip and understood that all of the projected disbursements on Exhibits F and A to the First and Second Cash Collateral Orders, respectively, were for current business operating expenses necessary to keep the business going prior to the sale to CDC, as he represented to the court.

Gleason sent Garris another letter dated December 5, 2003, referencing a meeting between Motivation representatives and Garris that apparently occurred on December 2, 2003, at Gerlinger's offices in the midst of the early stages of the Chapter 11 case. The letter describes the cancellation penalties that *Motivation* would incur from Disney, at that point in the amount of $405 per person, escalating to full cost as of December 19, 2003. [Plf Ex. 13]. By December 18, 2003, however, Gleason wrote Garris again, acknowledging this time that it had received "the first of the fifteen thousand dollar weekly payments and understand that payments two and three will be in our hands prior to Christmas Eve and the final payment the following week. " [Plf. Ex. 23].

After the Second Cash Collateral Order was entered on December 5, 2003, Gerlinger paid Motivation with four checks: Check No. 62576 dated December 11, 2003, in the amount of $15,000; Check No. 62639 dated December 19, 2003, in the amount of $15,000; Check No. 62652 dated December 23, 2003, in the amount of $15,000; and Check No. 62719 in the amount of $21,506.44. [Plf. Ex. 24]. The fourth check exceeded the cash collateral budget amount and was issued in response to Gleason's December 18, 2003, letter with an accompanying invoice for $6,506.44, reporting that the "$60,000 in payments do not quite cover the entire program cost." [Plf. Ex. 23]. These checks (collectively "the Payments") represent the four transfers that Plaintiff now seeks to avoid and recover. Gleason states that "[a]fter receiving the funds necessary to pay for the Disney

Cruise Trip, Motivation Consultants sent payment to the Disney Company and to other vendors to cover trip costs." [Gleason Aff. ¶11]. The record again lacks any detail about when, how, in what amounts and to whom such disbursements were made.

In the meantime proceedings in the Chapter 11 case focused on sale of Gerlinger's assets to CDC under the pre-petition Asset Purchase Agreement. Gerlinger had initially filed on November 18, 2003, a motion to approve the sale to CDC with other interested buyers permitted to bid for the assets subject to a proposed $100,000 break up fee payable to CDC. [Doc. #21, Case No. 03-39184]. On December 17, 2003, after the appointment of the Unsecured Creditors' Committee, Debtor filed a motion to modify the original sale motion. [Doc. #55, Case No. 03-39184]. Asserting that no other potential buyers had come forward, Gerlinger and the Unsecured Creditors' Committee agreed that "the best and highest price for the assets will be achieved through a sale to CDC under the APA...on or before December 30, 2003." [*Id.*, ¶ 4, p.4]. Furthermore, Gerlinger, the Unsecured Creditors' Committee and National City Bank agreed to and proposed a "carve out" from the purchase price in the total amount of $325,000, $170,000 for administrative expenses and $155,000 for the unsecured creditors. [*Id.*, ¶ 5, p.4]. The court entered an order that same day authorizing notice of the modified sale proposal to all creditors and parties in interest and setting a further hearing on the sale for December 23, 2003. After a hearing held on December 23, 2003, the court approved the sale to CDC as set forth in the December 17, 2003, motion to modify, including the negotiated carve outs. [Doc. #68, Case No. 03-39184]. Although no report of sale was ever filed with the court as required by Fed. R. Bankr. P. 6004(f)(1), the sale of Gerlinger's assets to CDC closed on January 2, 2004. [Plf. Ex. 30]. After adjustments to price in accordance with the Asset Purchase Agreement and other minor deductions for taxes, the net sales proceeds were $2,078,820. [*Id.*]. The net proceeds were distributed as follows: $100,00 to the CDC Claims reserve, $170,000 to the estate administration escrow, $155,000 to the unsecured creditors' carve out and $1,653,820 to National City Bank. With the closing of the sale transaction, Debtor withdrew the cash collateral motion on January 7, 2004. [Doc. #80, Case No. 03-39184]. No further or final order was ever entered on the cash collateral motion.

The Disney trip and cruise paid for by Gerlinger and conducted by Motivation occurred in February, 2004, [Gleason Aff. ¶12], although there was no more Gerlinger business by that time as a result of the sale of its assets to CDC on January 2, 2004. Insiders Garris and former Gerlinger

Vice- President, CEO and Secretary Steven Lagrou both went to work for CDC and attended the trip for CDC and its new customers. [Futcher Aff. ¶ 14]. The record does not show when the agreement was made for Garris and LaGrou to go to work for CDC or the terms of their employment.

In early 2005 Gerlinger filed a plan of liquidation and various amended disclosure statements to wind up the estate. The second amended disclosure statement was approved for dissemination to creditors on March 2, 2005. [Doc. #291, Case No. 03-39184]. The plan was confirmed on April 20, 2005. [Doc. #306, Case No. 03-39184]. The plan provided for the creation of a Liquidation Trust to which all of Gerlinger's remaining assets, including preserved causes of action, were transferred on the effective date of the plan, and which would then distribute Gerlinger's remaining assets in accordance with the plan. Plaintiff was appointed as the Trustee of the Liquidating Trust established under the plan. The cause of action against Motivation was specifically identified in the approved disclosure statement. [Doc. #289, § V.C.2, Case No. 03-39184].

The second amended disclosure statement reported that Debtor had cash on hand of approximately $120,000 at December 31, 2004. [Doc. #291, p.2, Case No. 03-39184]. There were unsecured claims of approximately $3.9 million and an approximate distribution to them of 1% estimated. [*Id.* at p. 2-3]. The second amended disclosure statement does not explain disposition of the $155,000 "carved out" of the proceeds of the sale of assets to CDC for unsecured creditors, ordered to be deposited in an escrow account and then distributed to unsecured creditors pursuant to a confirmed plan, [Doc. #68, ¶ D, Case No. 03-39184; Plf. Ex 30]; that $155,000 amount would have predicted a 3.9% dividend to unsecured creditors.[1]

Plaintiff in his capacity as Trustee of the Liquidating Trust created under the confirmed plan filed his complaint against Motivation under 11 U.S.C. §§ 549(a) and 550(a). Count I of the

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[1] Although not disclosed in the approved disclosure statement, Debtor's monthly financial reports [Doc. ## 271, 285, 301, Case No 03-39184] show that starting in November, 2004, the $155,000 in escrowed funds started to be disbursed by Debtor in contradiction of the court's December 23, 2003, order [Doc. #68, ¶D, Case No. 03-39184] authorizing the sale. Distributions of nearly $40,000 of the $155,000 carve out were made, other than to unsecured creditors pursuant to a confirmed plan, for professional fees and for United States Trustee's fees. They may also have been used to pay an administrative expense claim of CDC Distributors. The record does not show what if any communications were made to unsecured creditors about use of the escrowed funds for administrative expenses contrary to the court's December 23, 2003, court order.

adversary complaint seeks to avoid the Payments to Motivation as unauthorized post-petition transfers under § 549(a). Count II of the adversary complaint seeks to recover the value of the avoided transfers in the amount of $66,500 from Motivation as the initial transferee under § 550(a).

Law and Analysis

I. Summary Judgment Standard and Record

Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [she] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

When as here parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that all parties simultaneously argue that there are no genuine factual issues does not necessarily establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Fed. R. Civ. P. 56 does not automatically entitle the opposing party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

II. Avoidance of Transfers Under Section 549

Plaintiff seeks to avoid the Payments as unauthorized post-petition transfers pursuant to 11 U.S.C.

§ 549(a), which provides:

> (a) Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate–
>
> (1) made after the commencement of the case; and
>
> (2) (A) that is authorized only under §303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

Three elements underpin the Trustee's claim for avoidance of the Payments under § 549(a). First, property of the bankruptcy estate must have been transferred. Second, the allegedly unauthorized transfers must have occurred after commencement of the case. Third, the transfer must not have been otherwise authorized by the court or the Bankruptcy Code. *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.),* 930 F.2d 458, 465 (6th Cir. 1991). Of these three elements of proof, the only one now in dispute[2] is whether the Payments were authorized by the court or by any provision of the Bankruptcy Code. Motivation has the burden of proof of the validity of the transfers. Fed.R.Bankr.P. 6001.

A. Were the Payments Authorized by the Bankruptcy Code?

Motivation asserts that the Payments were authorized under Title 11 because they were made in the "ordinary course of [Debtor's] business" operations after commencement of the Chapter 11 case, pursuant to the authority conferred by 11 U.S.C. §363(c)(1), as follows:

> If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or hearing.

See also 11 U.S.C. §§ 1107, 1108.

Motivation asserts that it had a long course of business with Gerlinger in which it operated similar marketing trips for Gerlinger's customers, and has also submitted evidence that such trips are common practice in the flooring wholesale and distribution business. None of these facts are disputed, leading

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[2] Debtor asserts in passing that the property transferred was National City Bank's cash collateral and therefore not recoverable by the Trustee. [Doc. #18, p.5]. This argument is not clearly articulated as being asserted in connection with the first element of avoidance under § 549. To the extent it is intended to address this first element, the argument lacks merit. "Property in which a creditor has a security interest in [sic] has long been considered property of the estate." *OHC Liquidation Trust v. Discover Re (In re Oakwood Home Corp.)*, 342 B.R. 59, 67 (Bankr. D. Del. 2006). The court construes this argument as directed to the point that the estate was not damaged by the transfer.

Motivation to analyze at great length the so-called horizontal and vertical legal tests for ordinary course of business transactions protected from avoidance under § 549. Motivation's analysis overlooks one salient undisputed fact: the payments to Motivation are post-petition payments on pre-petition debt, not post-petition payments on post-petition debt to which the horizontal and vertical tests for ordinary course of business apply. The body of case law cited by Motivation devoted to analyzing whether transactions constitute the ordinary course of business and thus fall within the safe harbor of § 363 for purposes of § 549(a) avoidance actions all involve post-petition transactions, that is post-petition payment of debts incurred post-petition.

The primary case upon which Motivation relies that involves a cause of action under § 549 is such a case. *Vision Metals, Inc. v. SMS DEMAG, Inc. (In re Vision Metals, Inc.)*, 325 B.R. 138 (Bankr. D. Del. 2005). Vision Metals filed its Chapter 11 bankruptcy petition on November 13, 2000. The post-petition payment of $72,128 in dispute in the adversary proceeding was made pursuant to a contract for maintenance of machinery entered into post-petition in March 2001, not pre-petition, and which was not approved by the bankruptcy court. Applying the horizontal and vertical tests developed by courts to assess ordinariness in a variety of legal contexts, the bankruptcy court held that the transfers were within the ordinary course of business under§ 363 and thus unavoidable under § 549. *See also In re Dave Noake, Inc*., 45 B.R. 555 (Bankr. D. Vt. 1984)(portion of post-petition payment for vehicle storage charges incurred pre-petition avoidable while portion for storage charges incurred post-petition not avoidable under § 549); *In re Dant & Russell*, 853 F.2d 700 (9th Cir. 1988)(court applies horizontal and vertical dimension test to real property leases entered into by debtor post-petition).

In material contrast, Gerlinger's debt to Motivation was incurred pre-petition and not post-petition. The post-petition payments to Motivation were indisputably based on a written pre-petition executory contract for Motivation's organization of the Disney trip entered into on December 3, 2002, nearly a year before commencement of the Chapter 11 case. Debtor commenced making payments on that contact in early 2003 pursuant to the parties' separate agreement on terms of payment. Gerlinger's contract with Motivation was not assumed under 11 U.S.C. § 365(a). Motivation's argument runs afoul of the fundamental bankruptcy principle that the Bankruptcy Code does not generally authorize post-petition payment of pre-petition unsecured claims as being in the ordinary course of business. *Chattanooga Wholesale Antiques, Inc*., 930 F.2d at 464; *Clark v. First State Bank (In re White Beauty View, Inc.)*, 70 B.R. 90, 92-93 (Bankr. M.D. Pa. 1987); *In re Dave Noake, Inc*., 45 B.R. at 556; *Rochez Bros., Inc. v. Sears Ecological Applications Co., Inc. (In Re Rochez Bros., Inc)*, 326 B.R. 579, 585-86

(Bankr. W.D. Pa. 2005); *Sholer v. Carmichael (In re PKR, P.C.)*, 220 B.R. 114, 119 (10th Cir. B.A.P. 1998); *Scharffenberger v. Billmire (In re Allegheny Health, Education and Research Foundation)*, 313 B.R. 673, 677-78 (Bankr. W.D. Pa. 2004); *see In re Quality Interiors*, 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991).

Given the fact that the transfers in issue were post-petition payments of pre-petition indebtedness, Motivation's presentation of the undisputed facts that promotional and marketing trips like the Disney trip were a routine part of both Gerlinger's business and in the industry are immaterial. They establish the "horizontal dimension" test of ordinariness that becomes a relevant inquiry only if the transfers are post-petition payments on post-petition debts. There is no genuine issue of material fact under § 363 insofar as granting Plaintiff's motion for summary judgment and denying Motivation's motion for summary judgment on this point.

If, however, the court is wrong and these are material facts, Motivation has not independently established its own entitlement to summary judgment. Plaintiff points to facts in the record that create a genuine issue of fact as to whether the ordinary course of business standard is otherwise satisfied in this case. These facts tend to show that there was nothing ordinary or consistent with past practice as between the parties about the manner in which the Payments occurred and property of the estate was used in this case. As Gleason admitted in his affidavit, by the time Gerlinger commenced bankruptcy, it was in breach of the Motivation contract. The routine payment arrangement that had been established between the parties in January 2003 had not been met by Gerlinger since early April 2003. Other of the planned promotional trips had been cancelled. Motivation's efforts to establish a revised pre-petition payment arrangement in August 2003 failed. By Gleason's own admission in his October 22, 2003, letter, Gerlinger should have paid over $70,000 of the Disney trip cost and had only paid $24,456.85 of it by then. Motivation's string of increasingly strident pre-petition and post-petition written communications to insider Garris show that the arrangements and the payment provisions for this trip were anything but routine and ordinary as between the parties such that the routine expectations of other creditors would not likewise be tested by the transaction and these payments. Moreover, Gerlinger and Garris knew from the minute this case was commenced that all of Gerlinger's business assets were being sold and that the Disney trip being paid for would occur after that sale when Gerlinger had no ongoing business to reorganize or customers to support. *See In re Roth American, Inc*., 975 F.2d 949, 954 (3d Cir. 1992)(some transactions so extraordinary such as due to their very nature or size that they cannot be in the ordinary course of business); *Dobin v. Presidential Fin. Corp. (In re Cybridge Corp.)*, 304 B.R. 681, 686 (Bankr.

D.N.J. 2004)(same). These points create genuine issues of material fact regarding the ordinariness of the Payments and, in the context of the test commonly applied by other courts, the vertical dimension as to the ordinary expectations of other creditors. *See Cohen v. KDC Financial Services, Inc. (In re Miller Mining, Inc)*, 219 B.R. 219, 223 (Bankr. N.D. Ohio 1998)("the postpetition transfer to KDC fails the vertical dimension test because a hypothetical creditor could not reasonably expect a debtor-in-possession or a Trustee to make a postpetition payment on a prepetition debt to a secured creditor"). In looking at the parties' motions independently as the court is required to do, if Plaintiff is not entitled to summary judgment on the element of authorization under Title 11, neither is Motivation due to genuine issues of material fact regarding the vertical dimension test.

As § 363 is the only provision of the Bankruptcy Code to which Motivation points, it has failed to show any genuine issues of material fact demonstrating that the Payments were made in the ordinary course of business and thus authorized under Title 11.

B. Did the Court Authorize the Payments?

Motivation also asserts that the court authorized the payments in the interim Second Cash Collateral Order. The facts relevant to determination of this issue as to both motions for summary judgment are not in dispute, as they are shown by the face of the Second Cash Collateral Order and the docket and record of the underlying Chapter 11 case. Specifically, Motivation contends that the inclusion of the line item labeled only "Promotional expenses" for four $15,000 weekly payments in the budget attached as Exhibit A to the Second Cash Collateral Order constitutes court approval of the Payments.[3] The court disagrees as a matter of law that this bare line item in a cash collateral budget with a secured creditor constitutes court approval of more than $60,000 in post-petition payments on pre-petition debt for a Disney trip to occur after the sale of Gerlinger's business assets was intended to be consummated.

The authorization to use National City Bank's cash collateral up to specified amounts for

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The Payments totaled $66,506.44, exceeding by $6,506.44 the alleged court approval for transfer of $60,000 in the budget attached as Exhibit A to the Second Cash Collateral Order. Thus, there is no conceivable circumstance shown under which $6,506.44 of the Payments can be said to have been approved by the court. This is a separate basis for granting partial summary judgment to Plaintiff and denying summary judgment to Motivation with respect to avoidance of the Payments to the extent of $6,506.44.

various general categories of expenses is not the same as independent approval of the validity of the underlying expenses in the budget to the extent otherwise necessary under the Bankruptcy Code and Bankruptcy Rules. *See In re Kmart Corp.*, Case No. 02 B 02474, Adv. Nos. 04 A 00126, 2006 Bankr. LEXIS 542, *43-*44 (Bankr. N.D. Ill. April 11, 2006)(in § 549 adversary proceedings, DIP financing order contains no separate and independent authorization for so-called critical vendor payments). The legal fallacy of Motivation's argument is shown by comparison to the manner in which pre-petition wages and employee benefits were treated. The budgets appended to both the First and Second Cash Collateral Orders also included line items for employee salaries, employee benefits, insurance and related payroll taxes. Significantly, however, authorization to pay post-petition the pre-petition wages and benefits owed to employees was obtained independently of the cash collateral orders by a separate motion to the court [Doc. #6, Case. No. 03-39184] and an order separate from the cash collateral orders entered after notice and a hearing [Doc. #13, Case No. 03-39184]. As directed by the court at the hearing on the motion to pay pre-petition emergency wages [Doc. #12, Case No. 03-39184], Gerlinger subsequently filed a list identifying by name the employees to be paid along with the amount of pre-petition wages that were authorized to be paid to each under the court's separate order [Doc. #20, Case No. 03- 39184]. The authorization in the First and Second Cash Collateral Orders to use National City Bank's cash collateral, as required by 11 U.S.C. § 363(c)(2,) to pay pre-petition wages was insufficient to authorize the payment of those wages to the extent they were pre-petition debts. Likewise, the authorization in the Second Cash Collateral Order to use National City Bank's cash collateral to pay an unnamed entity $60,000 in unidentified "Promotional expenses" that were due on an undisclosed pre-petition contract for a trip to Disney World to occur after the sale of all debtor's business assets was insufficient to authorize the payment of those expenses.

The legal point is also made by analogizing to another common feature of cash collateral budgets and proceedings, although the expenses involved are not necessarily all pre-petition in origin. Most cash collateral orders and budgets, although not these [Doc. ##14, 41, ¶ 13, Case No 03-39184], include line items and amounts for professional fees. The payment of fees and costs for professionals employed by debtors or authorized committees requires court approval under 11 U.S.C. § 330 after notice and a hearing. Adopting Motivation's position would mean that the mere inclusion of line items for such categories of expenses in interim cash collateral budgets and orders would

amount to court authorization of such payments in complete derogation of the Bankruptcy Code and Bankruptcy Rules as well as of nearly three decades of practice thereunder.

In short, post-petition payment of pre-petition obligations in a Chapter 11 case outside the confines of a confirmed plan of reorganization requires court approval conferred after fair and complete disclosure to the court and all parties in interest of the material circumstances of the payments upon notice and a hearing. *Cf. In re Kmart Corp.*, 2006 Bankr. LEXIS 542 (if invalid, even that court order may not be sufficient to insulate payments from avoidance). The authorization to use cash collateral represented by the Second Cash Collateral Order under § 363(c)(2) fails this standard insofar as the budget line for "Promotional expenses;" the court finds that there was no notice of the proposed payments. Motivation does not point to any facts that demonstrate otherwise so as to create a genuine issue of fact regarding notice of the Payments to creditors.

Even Debtor's counsel, and later counsel for the Unsecured Creditors' Committee, lacked contemporary knowledge of and information about Gerlinger's pre-petition contract with Motivation, the breached status of the contract, the identity of the payee and the purpose of the $60,000 in "Promotional expenses" as payment for a trip to Disney World to occur two months after the cessation of Gerlinger's business. Except for the general reference to the cause of action against Motivation in the disclosure statement in 2005, these material facts were never disclosed on the court record until this adversary proceeding arose.

The legal bottom line that required separate court approval of the Payments to Motivation circles back to the same reason that the Payments were not authorized under Title 11: as post-petition payments on pre-petition debt, they were outside the ordinary course of business under § 363(c)(1). Section 363(b)(1) requires notice and a hearing for use of property of the estate outside the ordinary course of business. Rule 2002(a)(2) of the Federal Rules of Bankruptcy Procedure requires 20 days notice by mail of a proposed use, sale or lease of property of the estate other than in the ordinary course of business unless the court orders otherwise. Paragraph 21 of both the First and Second Cash Collateral Orders implemented these provisions: "The Debtor shall operate its business in a responsible manner and shall not sell, use or lease any property of the Debtor or the estate other than in the ordinary course of business, absent Court approval." [Doc. ##14 and 41, Case No. 03-39184]. This paragraph confirms that the interim cash collateral orders themselves did not effect approval of any use of property of the estate outside the ordinary course of business. Where the only

information in the court record was a bare line item for "Promotional expenses" in an interim cash collateral budget prepared by Gerlinger's insiders (soon to be employed by the asset purchaser whose customers took the Disney trip) attached only to an order submitted to the court, no notice of or a hearing on a use of property of the estate outside the ordinary course of business occurred as required by both the Bankruptcy Code and the Bankruptcy Rules. As a result, no court approval of such use occurred under § 363(b)(1). There are no genuine issues of material fact on the question of court approval. Plaintiff is entitled to partial summary judgment on this issue as a matter of law, while Motivation's motion must be denied.

In the absence of either authorization under Title 11 or court approval, Plaintiff is entitled to summary judgment in his favor on Count I of his complaint seeking avoidance of the transfers under § 549(a). Motivation has failed to establish either a genuine issue of fact material to the validity of the transfers or that it is entitled to judgment as a matter of law. Its summary judgment motion will therefore be denied as to Count I of the complaint.

II. Recovery of the Transfers Under Section 550(a)

Once a transfer has been avoided, it may be recovered if necessary pursuant to 11 U.S.C. § 550 captioned "Liability of transferee of avoided transfer." Count II of the adversary complaint seeks to recover the value of the avoided transfers from Motivation under 11 U.S.C. § 550(a). Plaintiff's complaint avers that the amount of $66,506.44 may be recovered from Motivation as either (i) the initial transferee of the Payments of the entity for whose benefit they were made or (ii) an immediate or mediate transferee of an initial transferee. Section 550(a) provides as follows:

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

Avoidance of the transfers effected by the Payments under § 549(a) and recovery of their value from Motivation under § 550(a) are two different and independent remedies. *See Suhar v. Burns (In re Burns*), 322 F.3d 421, 427-29 (6th Cir. 2003); *Taunt v. Hurtado (In re Hurtado)*, 342 F.3d 528, 532 (6th Cir. 2003). A transfer must be avoided, as the court has determined above is appropriate, before

it can be recovered if necessary. *In re Burns*, 322 F.3d at 427 n.3.

The complaint avers that Motivation is either an initial transferee from whom the Payments may be recovered or an immediate or mediate transferee. "An initial transferee is one who receives money from a person or entity ... in bankruptcy, and has dominion over the funds. A mediate or immediate transferee is simply one who takes in a later transfer down the chain of title or possession." *First Nat'l Bank of Barnesville v. Raforth (In re Baker & Getty Fin. Servs., Inc.)*, 974 F.2d 712, 722 (6th Cir. 1992). Plaintiff has submitted the four post-petition Gerlinger checks by which the Payments were made, with Motivation as the payee on each check. Motivation does not dispute that it received and cashed the four checks from Gerlinger post-petition. [Doc. #19, Gleason Aff., ¶ 10]. As the direct recipient of the funds from the bankruptcy debtor pursuant to the checks, Motivation appears to be the initial transferee. Despite the averment in his complaint Plaintiff presents no evidence that would identify Motivation as an immediate or mediate transferee from another person as the initial transferee. Thus, the recoverability of the avoided transfers from Motivation must be analyzed under § 550(a)(1).

A. "Mere Conduit"

Because Motivation received the Payments directly from Gerlinger, it seems self-evident that it is an initial transferee liable to Plaintiff for the avoided transfers. However, the Sixth Circuit requires an initial transferee to have "dominion and control " over the funds in order to be an "initial transferee" under § 550. *In re Baker & Getty*, 974 F.2d at 712; *In re Hurtado,* 342 F.3d at 533. Motivation variously argues in its memoranda of law that it was a "mere conduit" of the Payments from Gerlinger and that it has an "earmarking defense." As the Sixth Circuit observed in *In re Hurtado*, these arguments are the proverbial two sides of the same coin; in essence they attack whether the transferee ever acquired sufficient dominion and control over the funds to be a statutory initial transferee. *In re Hurtado*, 342 F.3d at 534 n. 2; *cf. Universal Serv. Admin. Co. v. Post-Confirmation Comm. (In re Incomnet, Inc.)*, 463 F.3d 1064, 1073 n. 8 (9th Cir. 2006); *but cf. Peoples Bank and Trust Co. v. Burns*, Case No. 02-5939, 95 Fed. Appx. 801, 2004 U.S. App. LEXIS 7553(6th Cir. Apr. 16, 2004)(where Trustee did not seek recovery of transfer under § 550(a), court "expands" earmarking doctrine to unauthorized post-petition transfers).

In support of Motivation's legal argument, Gleason states twice in his affidavit that, upon receipt of pre-petition payments from Gerlinger, Motivation "in turn, disbursed funds to a variety of

vendors on Gerlinger's behalf..." [Doc. #19, Gleason Aff., ¶ 8] and again upon receipt of the Payments post-petition Motivation "sent payment to the Disney Company and to other vendors to cover trip costs" [*Id.* ¶ 11]. Moreover, Gleason states that its ultimate cost to complete the trip package was $68,911.08, more than it was paid post-petition. [*Id.*].

The court finds that these undisputed statements are not sufficient to conclude that Motivation lacked dominion and control over the funds as a matter of law. Counsel argues in Motivation's memorandum [Doc. #18, p. 13] that the "Defendant in this case used 100% of the post-petition payments it received (and more) to pay" trip vendors. This argument exaggerates the actual testimony. Paragraphs 8 and 10 of the Gleason Affidavit state only that Motivation disbursed funds to vendors. Perhaps pointedly, perhaps not, Gleason does not state that all of the funds received from Gerlinger, including the Payments, were actually paid over to vendors, and the amounts, dates and payments to vendors are not identified. Motivation is clearly not a charitable institution; the record is devoid of how Motivation was compensated for its efforts and whether it compensated itself for out-of-pocket expenses such as long distance phone calls and copying charges. [*See* Doc. #19, Affidavit of J. Enos Gleason, Ex. A, Section IV.A.]. The record lacks other material details such as what account(s) the funds were deposited into (*e.g.* into a separate escrow account or into Motivation's general accounts) and how long they remained in those accounts. The lean factual record on this issue in this case contrasts with the developed factual records in other cases examining whether circumstances demonstrated that a recipient exercised dominion and control over avoided transfers. *See, e.g, Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 891-92 (7th Cir. 1988); *In re Baker & Getty*, 974 F.2d at 712; *In re Hurtado*, 342 F.3d at 535; *Bailey v. Big Sky Motors (In re Ogden)*, 314 F.3d 1190, 1204 (10th Cir. 2002); *In re Incomnet*, 463 F.3d at 1071-75; *Andreini & Co. v. Pony Express Delivery Services, Inc.*, 440 F.3d 1296 (11th Cir. 2006). The record is insufficient to enable the court to determine one way or another whether Motivation obtained sufficient dominion and control over the Payments to be an initial transferee under the statute. The court cannot determine from the record whether Motivation obtained legal title to the funds and the ability to use them as it saw fit, such that it was "free to invest the whole [amount] in lottery tickets or uranium stocks," *In re Hurtado,* 342 F.3d at 535(quoting *Bonded Fin. Servs.*, 838 F.2d at 893-94), or whether "the payment[s] merely slipped through [Defendant's] hands to another party," *Morris v. Sampson Travel Agency, Inc. (In re U.S. Interactive, Inc.)*, 321 B.R. 388, 396 (Bankr. D.

Del. 2005)("mere conduit defense" applied by court after trial to services of travel agency and meeting planner similar to Motivation).

Plaintiff has shown that Motivation was the direct recipient of the Payments and Motivation states that it disbursed funds to vendors after receiving the Payments. There are genuine issues of material fact whether Motivation was an initial transferee from whom Plaintiff may recover the avoided transfers. *See Wheeling Pittsburgh Steel Co. v. Keystone Metals Trading (In re Wheeling Pittsburgh Steel)*, 360 B.R. 649, 652-53 (Bankr. N.D. Ohio 2006); *Argus Mgmt. Group v. GAB Robins, Inc. (In re CVEO Corp.)*, 327 B.R. 210, 217 (Bankr. D. Del. 2005). These issues of material fact and the insufficiency of the record preclude the court from granting either party's motion for summary judgment as to recovery of the transfers under § 550(a).

B. Credit for Consideration to the Estate

Motivation asserts that it is entitled to a "credit" for any consideration it provided against the property of the estate that it received and that would otherwise be recoverable by Plaintiff, and that it in fact provided consideration to Gerlinger exceeding the Payments. The court finds both factual and legal problems with this argument.

From the standpoint of the proposition of law stated, Motivation does not identify and the court cannot find statutory support for such a defense. Motivation cites four cases as persuasive authority for this broad proposition [Doc. #18, p.11], none of which the court believes support it to the extent argued. Two of the cases have been pointedly and, in this court's view, properly, criticized.

The first case Motivation cites is *Henderson v. Andrews (In re Perry County Foods, Inc.)*, 313 B.R. 875 (Bankr. N.D. Ala. 2004). The transfers at issue in *Perry County Foods* were sales of assets alleged to be fraudulent transfers effected for insufficient consideration, not payments of cash as in this case where there is no dispute over market value. Thus, the broad statement therein that "the case law interpretation of this provision limits what the trustee may recover to the property's value less any consideration received by the debtor for the property transferred," *id.* at 912-13, must be applied in that context and is irrelevant where cash in payment of an invoice is transferred.

To the same effect is the second case Motivation relies upon, *Hirsch v. Steinberg (In re Colonial Realty Co.)*, 226 B.R. 513 (Bankr. D. Conn. 1998). The *Colonial Realty Co.* case is the primary citation for the proposition in the *Perry County Foods* case, and the transfer at issue in *Colonial Realty Co.* was a sale of stock, not the payment of cash to a creditor. Other cases citing

Colonial Realty Co. for this broad proposition likewise involve sale or transfer of tangible personal property of uncertain or disputable value for insufficient consideration, not payment of cash. *See also Moglia v. Universal Auto, Inc. (In re First Nat'l Parts Exchange, Inc.)*, Case No. 98 C 5915, 2000 U.S. Dist. LEXIS 10420 (N.D. Ill. July 18, 2000)(sale of spark plugs for allegedly insufficient consideration); *Dobin v. Hill (In re Hill)*, 342 B.R. 183 (Bankr. D.N.J. 2006)(transfer of property in divorce settlement as fraudulent transfer); *Joseph v. Madray (In re Brun)*, 360 B.R. 669 (Bankr. C.D. Cal. 2007)(fraudulent transfer of real estate); *see Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Resources, Inc.)*, 354 F.3d 1246 (10th Cir. 2004)(in case involving sale of stock, purported *Colonial Realty* rule of damages under § 550(a) is distinguished, criticized and limited to situations where the property transferred decreased in value after the transfer).

The third case cited by Motivation, *Lowe v. Sheinfeld, Maley & Kay, P.C. (In re Saunders)*, 155 B.R. 405 (Bankr. W.D. Tex. 1993) , involves a secured creditor as transferee and defendant, not an unsecured creditor like Motivation, and was in any event reversed by the Fifth Circuit.

The fourth and arguably most significant case cited by Motivation, *Dobin v. Presidential Financial Corp (In re Cybridge Corp.)*, 304 B.R. 681 (Bankr. D.N.J. 2004), *aff'd* 312 B.R. 262 (D.N.J. 2004), for the proposition that a creditor is entitled to a "credit" against recovery for consideration it provided to a debtor is likewise inapposite. To the extent *In re Cybridge Corp*. stands for the broad proposition of law advanced by Motivation, which is debatable, the court does not find it persuasive authority. Moreover, the facts of *In re Cybridge Corp.* are distinguishable from the facts of this case.

The basic principle for which *In re Cybridge Corp.* properly stands in this court's view is that if the transferee has returned to the estate the property that it received, then the transferee has no further liability. *In re Cybridge Corp*. involved the transferee's unauthorized collection of debtor's post-petition receivables, *i.e.* cash just as this case involves transfer of cash. Analogizing to tangible personal property, the court noted that if a debtor-in possession transferred a car to an employee post-petition and the employee gave the car back, there would be no liability and no need for the lawsuit. Ditto then, in the *In re Cybridge Corp.* court's view when cash is involved: if the transferee returns to the estate the cash transferred without authorization, then there is no cause of action. The court has no quibble with this logical proposition in the abstract sense.

The problem is that in applying this common sense principle to the record , the court in *In*

re Cybridge Corp. tortured the facts and created problematic precedent subject to overly broad interpretation such as is being advanced by Motivation. The defendant lender collected post-petition receivables from debtor's customers and advanced to the debtor additional unauthorized post-petition loans. The problem is that the "cash" collected from debtor's customers was not in fact returned to the debtor. The collections and the loans were independent business transactions. There was no "payback" to the debtor and the lender was not "transferring cash back" to debtor. It was extending new (unauthorized) credit on which interest was being charged to the debtor-in-possession.

The bankruptcy court's decision in *In re Cybridge Corp.*, which was affirmed by the district court on appeal adopting the same tortured view of the facts, has been characterized by one commentator as attributable to the "unstrained quality of mercy" where the defendant had no statutory defense to avoidance under § 549(a) or recovery under § 550(a). David Gray Carlson, *Bankruptcy's Acephalous Moment: Postpetition Transfers Under the Bankruptcy Code*, 21 Bankr. Dev. J. 113, 166, n. 267 (2004). Moreover, it is aptly noted by Professor Carlson that this decision could have the effect of gutting the well established law of unauthorized post-petition loans, *id.*, saved perhaps only by footnote 8 in the opinion acknowledging that "[a] credit might not be appropriate in all circumstances." *In re Cybridge Corp.*, 304 B.R. at 692, n.8.

Contrary to its protestations, the manner in which the bankruptcy court in *In re Cybridge Corp.* characterized the facts effectively created a new value defense akin to 11 U.S.C. § 547(c)(4) or a form of post-petition setoff right akin to the express setoff right limited to pre-petition transactions under 11 U.S.C. § 553. But Congress chose not to include such broad defenses in § 549 for avoidance of unauthorized post-petition transfers or in § 550 for recovery from initial transferees. Congress protected a transferee's contribution of value to the estate in very specific and limited circumstances in §§ 549(b),(c) and 550(b),(e)(1). Those specific statutory protections do not apply in this case. Thus, to the extent that *In re Cybridge Corp.* stands for the broad proposition cited by Motivation that a transferee is entitled to a "credit" for whatever consideration the debtor received from it, the court thinks it is wrong. To the extent *In re Cybridge Corp.* stands for the narrow proposition that if a transferee returned to the estate the same property it received, then there is no cause of action, the court agrees with it. However, this is not that case.

From the factual standpoint in this case, even if *In re Cybridge Corp*. stands for the broader principle cited by Motivation, there is no genuine dispute of fact that Gerlinger as debtor-in-

possession received no consideration *from Motivation* for the Payments.[4] The Disney trip and cruise were taken after all of Gerlinger's assets were sold to CDC, by its former customers then CDC's customers and by its former employees then CDC employees. Motivation did not "return" anything to Gerlinger, let alone cash.

For the foregoing reasons, the court finds that Plaintiff is entitled to partial summary judgment on Motivation's purported defense that it is entitled to a credit against the avoided Payments for funds Gleason's affidavit states it paid out to trip suppliers. As pointed out above, Gleason's affidavit does not specifically state the actual amount Motivation paid out to vendors. In this context, however, that is not a material fact.

C. No Damage to the Estate

Motivation argues in its initial memorandum that the estate was not diminished by the Payments and thus Plaintiff as the successor to the estate was not damaged. [Doc. # 18, pp. 5 (¶4), 7, 12]. *See In re Rochez Bros.*, 326 B.R. at 588 (quoting *In re Centennial Textiles, Inc*., 220 B.R. 165, 176 (Bankr. S.D.N.Y. 1998)("Section 550(a) is intended to restore the [Debtor's bankruptcy] estate to the financial condition it would have enjoyed if the transfer had not occurred.")). The alleged factual grounds for this argument are various. The primary factual assertion seems to be that the Payments were from National City Bank's cash collateral, the Payments therefore did not diminish property of the estate available to pay unsecured creditors and administrative expenses and the Payments therefore cannot recovered by Plaintiff because they were and/or are subject to National City Bank's security interest. Alternatively, in its reply memorandum Motivation argues, based on an Affidavit of CDC chief financial officer Alan Futcher, [Doc. #22], that had the Payments not been made CDC would have decreased the asset purchase price by the amount of the Payments due to the debt owed to customers represented by the promotional points former Gerlinger customers used toward the cost of the trip.

The legal foundations upon which these factual arguments rest are not clearly articulated, falling under the general rubric "no damage." There are three potential legal knotholes into which

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[4] Motivation also argues that the estate was not actually damaged and that CDC advanced consideration to Gerlinger in exchange for the transfers. While these arguments are not clearly articulated by Motivation or responded to by Plaintiff, they are different than the argument that Motivation provided consideration to the estate and is therefore entitled to a "credit" for it.

these factual pegs, if established by the record, might arguably fit: (1) no damage as a component of Plaintiff's standing; (2) Plaintiff's recovery must be "for the benefit of the estate" under § 550(a) and no "benefit to the estate" will inure from any recovery of the Payments, *cf., e.g., Weiss v. Peoples Savings Bank (In re Three Partners, Inc.)*, 199 B.R. 230 (Bankr. D. Mass. 1995)(if unauthorized post-petition transfers received by bank were made out of its pre-petition collateral and would be returned to it if avoided, they may not be recovered due to no benefit to the estate); or (3) the estate received the amount of the payments back through the CDC sale and recovery of the Payments would thus effect a double satisfaction of Plaintiff's claim in violation of § 550(d), *see In re Cybridge Corp*., 312 B.R. at 268-69, 270-71(district court decision on appeal).

The present factual record does not establish a "no damage" defense under any of the legal labels that might arguably apply. All three legal positions depend at least in part on the status of National City Bank's claim and whether it was paid. The Second Cash Collateral Order supports that the Payments were made from National City Bank's cash collateral. However, there are other facts of record that tend to show that National City Bank had and has no claim on the Payments as its collateral if the property is recovered by Plaintiff. The First and Second Cash Collateral Orders establish Gerlinger's debt to National City Bank as in excess of $3 million. [Doc. ## 14, 41, ¶¶ G,H]. The CDC sale settlement statement shows that $1,653,820 was distributed out of the sale proceeds to National City Bank. [Plf. Ex. 30]. The claims register in Case No. 03-39184 shows, however, that National City Bank did not file a proof of claim. The confirmed plan makes no provision for any payment to National City Bank. Cash was excluded from the CDC sale, [Plf. Ex. 29, §2], but Debtor withdrew the cash collateral motion on January 7, 2004, [Doc. #80, Case No. 03-39184], indicating that National City Bank claimed no interest remaining in Gerlinger's cash on hand and thus could claim no security interest in the Payments if recovered. Gerlinger's filed monthly financial reports show that it retained and spent from cash on hand after the closing, as well as from the negotiated amounts received at closing as "carve outs" for administrative expenses, which was exceeded, and for unsecured creditors. Nevertheless, given the amount determined as owing to National City Bank in the First and Second Cash Collateral Orders, the court cannot determine whether National City Bank retained any interest in the Payments such that the "estate" was not damaged when they were made. The status of National City Bank's recovery and its position with respect to the Payments as its collateral should be simple enough to determine. It is not, however, part of or clear from the

record as it stands such that the court can make a finding of fact that "the funds retained by the Debtor would have been subject to National City Bank's security interest and would not have inured in any way to the benefit of the estate" as argued by Motivation. [Doc. # 18, p.12].

The same issue arises with respect to the argument that CDC would have reduced the purchase price if the Disney trip did not occur and the promotional points had not been expended. [*See* Plf. Ex. 29, ¶ 4]. Based on the negotiated carve outs, any such reduction would appear to have reduced only National CityBank's proceeds at closing. Again, the impact on National City Bank's interests of such a reduction and the cash available to the estate is unclear at best and speculative at worst, as Plaintiff argues.

The are genuine issues of material fact as to the impact of the Payments on the National City Bank secured claim, the CDC consideration and ultimately the estate, and the legal arguments which they arguably establish are not otherwise sufficiently developed by either party such that the court can enter summary judgment in favor of Motivation based on the assertion that there was "no damage" to the estate resulting from the Payments.

D. General Equitable Defenses

Motivation lumps several legal arguments together under the kitchen sink rubric "equity." Motivation asserts its good faith as a complete defense, [*see* Doc. #5, Answer to Complaint, Tenth Defense, ¶14 ("Good faith")], and also argues an estoppel defense [*see* Doc. #5, Answer to Complaint, Ninth Defense, ¶13 ("doctrine of estoppel")] it variously describes in its motion and memoranda as equitable estoppel or judicial estoppel, which are separate common law principles.

Notwithstanding the willingness of some courts to look to general principles of "equity" and 11 U.S.C. § 105(a) in applying §550 and mitigating its sometimes "harsh" results , *see, e.g., In Re Cybridge, 312 B.R. at 260; Bakst v. Sawran (In re Sawran)*, 359 B.R. 348, 353-54 (Bankr. S.D. Fla. 2007), in this court's view it is not always possible to reconcile these specific statutory causes of action with broad principles of equity that Congress chose not to enact as defenses. *Meininger v. TMG Staffing Services, Inc (In re Cypress Restaurants of Georgia)*, 332 B.R. 60, 65-66 (Bankr. M.D. Fla. 2005); *In re DiBiase*, 270 B.R. 673, 688 n. 24 (Bankr W.D. Tex. 2001)(quoting *United States v. Smith*, 499 U.S. 160, 167 (1991)("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.")). The statutory protections Congress has provided to transferees are

limited. In particular, the circumstances in §§ 549 and 550 in which Congress expressly recognizes good faith as a defense do not apply in this case. There is thus no more generalized "good faith" defense under either section. *See ETS Payphones, Inc. v. AT&T Universal Card (In re PSA, Inc.)*, 335 B.R. 580, 585 (Bankr. D. Del. 2005); *In re Allegheny Health, Education and Research Foundation)*, 313 B.R. at 677-78. To the extent that Motivation asserts that it acted in "good faith" with respect to the Payments and that its "good faith' is a complete defense to Plaintiff's claims, the court disagrees as a matter of law. As it does not matter from a factual standpoint whether Motivation did or did not act in good faith, there is no genuine issue of material fact. Not only is Motivation not entitled to summary judgment insofar as its good faith affirmative defense, Plaintiff's motion for summary judgment is well taken as a matter of law on this issue.

Motivation's estoppel defenses stand on firmer legal footing than its alleged good faith defense. Notwithstanding the statutory basis of Plaintiff's claims, common law principles of equitable estoppel and judicial estoppel retain their viability in bankruptcy litigation. Christopher Klein, Lawrence Ponoroff and Sarah Borrey, *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 Am. Bankr. L.J. 839 (Fall, 2005)("It is fundamental that the Bankruptcy Code siliently presumes the continuing applicability of common law doctrines of preclusion and estoppel and mentions them only where modifying one of these rules."); *see In re Kmart Corp.*, 2006 Bankr. LEXIS 542 (applying judicial estoppel as a defense under § 549).

Equitable estoppel is an equitable doctrine invoked to avoid injustice in particular cases. *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 58 (1984). The Supreme Court describes that equitable estoppel applies in the following manner:

> If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does act...the first person is not entitled...to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired.

Id., citing *Restatement (Second) of Torts* § 894(1)(1979).

Motivation asserts that Plaintiff as the successor to Gerlinger is bound by the conduct of Gerlinger's agents in connection with the Payments. As formulated by the Supreme Court, the initial foundation for application of the doctrine, before determining reasonable reliance (which Plaintiff

disputes), is an intentional and definite misrepresentation of fact. The Gleason Affidavit does not, however, identify any definite misrepresentations of fact by specific Gerlinger representatives, let alone any intentional misrepresentations. Paragraph 9 is the only paragraph of Gleason's affidavit that arguably states misrepresentations of fact, as follows: "Representatives of Gerlinger, however, urged Motivation Consultants not to cancel the program *stating that cancellation would have a negative effect on the Company's goodwill and could harm the company's prospects for completing a proposed sale of its assets*." There is no showing that this representation is false. Further, Gleason states that "[w]e received assurances from Gerlinger that a budget calling for payment of the program costs had been approved by the Bankruptcy Court as promotional expenses. We were sent by fax a budget, approved by the Court, showing four, $15,000.00 weekly payments (in December of 2003) for this promotion." Again, there is no showing that this representation as seemingly carefully phrased by Gleason is untrue. This court did approve the budget document showing payment of four $15,000 weekly payments as "Promotional expenses." As explained at length above, however, court approval of the budget document in the Second Cash Collateral Order is not the same as authorizing the Payments for purposes of § 549(a)(2)(B). Even if these statements constitute definite misrepresentations of fact, the record lacks evidence from which the court could conclude that the misrepresentation(s) were intentionally made and that Motivation's reliance on them was reasonable under the circumstances, which include an apparent meeting with Gerlinger representatives at Gerlinger's premises shortly after the commencement of the Chapter 11 case. Motivation is not entitled to summary judgment on the grounds of equitable estoppel as an affirmative defense to Plaintiff's claim under § 550(a).

Whereas equitable estoppel focuses on reliance by the party asserting estoppel, judicial estoppel addresses whether a court has relied on a prior inconsistent position asserted by the party to be estopped or its successor. The doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)(quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8 (2000)). The Sixth Circuit applied judicial estoppel in the bankruptcy context in *Browning v. Levy*, 283 F.3d 761 (2002), identifying two elements to the defense. "The doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted

the contrary position 'either as a preliminary matter or as part of a final disposition.'" *Id.* at 775 (quoting *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990)).

Motivation asserts as the basis for judicial estoppel that first Gerlinger includes the Payments (up to $60,000) in the budget attached to the Second Cash Collateral Order and then Plaintiff as Gerlinger's successor turns around and attacks the propriety of the Payments in this adversary proceeding. The existing factual record does not establish that this is a proper case for application of judicial estoppel, as Motivation has failed to establish either element. It has not shown that Gerlinger representatives asserted any position under oath in the main case in connection with the Second Cash Collateral Order. Nor has it shown that the court "adopted" any position with respect to the Payments given the lack of notice and disclosure on the record about the background and nature of the payments. Motivation is not entitled to summary judgment on the grounds of judicial estoppel as an affirmative defense to Plaintiff's claims.

IT IS THEREFORE ORDERED that:

1. Defendant's Motion for Summary Judgment [Doc. #18] is DENIED.

2. Plaintiff's Cross Motion for Summary Judgment [Doc. # 20] is GRANTED in part and DENIED in part. Plaintiff is granted summary judgment in his favor on his claim under 11 U.S.C. § 549(a) and the transfers effected by the Payments are hereby avoided. Plaintiff is also granted summary judgment in his favor on Defendant's Fifth and Eleventh Defenses, construed by the court to be its credit/consideration argument, and Defendant's Tenth Defense of good faith. Plaintiff's motion is denied to the extent of his claim under 11 U.S.C. § 550.

3. Pursuant to Fed. R. Civ. P. 16(a), applicable to this adversary proceeding under Fed. R. Bankr. P. 7016, the court will hold a further pretrial conference at which it will address the manner in and schedule by which further proceedings consistent with this decision will be conducted. The pretrial conference will be held on **September 19, 2007, at 9:45 o'clock a.m.** Counsel may appear at the pretrial conference by telephone with 24 hours advance notice to chambers at (419) 213-5621 or to the courtroom deputy at (419)213-5610.