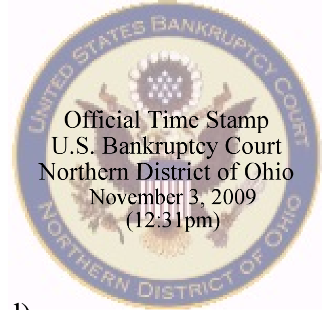
NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| In re: | ) | Case No. 05-93363 |
| | ) | (Jointly Administered) |
| THE AUSTIN COMPANY, *et al.*, | ) | |
| | ) | Chapter 11 |
| Debtors. | ) | |
| | ) | Judge Pat E. Morgenstern-Clarren |
| | ) | |
| MARK A. ROBERTS as Liquidating Trustee of TAC LIQUIDATING TRUST, successor to THE AUSTIN COMPANY, *et al.*, | ) | Adversary Proceeding No. 08-1130 |
| Plaintiffs, | ) | |
| v. | ) | **MEMORANDUM OF OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT** |
| AAC DESIGNERS BUILDERS, INC.,dba AUSTIN AECOM, *et al.*, | ) | |
| Defendants. | ) | |

Plaintiff Mark A. Roberts, Liquidating Trustee of TAC Liquidating Trust, successor to debtor The Austin Company and affiliated debtors (the trustee), filed an amended complaint against defendant AAC Designers Builders, Inc. (AAC). The trustee moves for summary judgment against AAC on counts IV, V, VI, VII, and XII of that complaint, which AAC opposes.[1] AAC, in turn, moves for summary judgment against the trustee on counts I-VII, X, and XIII, which the trustee opposes.[2] For the reasons stated below, both motions are denied.

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[1] Docket 96, 97, 99, 100, 105, 107, 108.

[2] Docket 98, 101, 103, 104, 109.

## JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (E), (F), (H) and (O).

## UNDISPUTED FACTS

The Austin Company (Austin or debtor) and related entities Austin Holdings, Inc. and RB of PA, Inc. (collectively, debtors) performed architectural, engineering, design-build, and construction management services. The debtors filed chapter 11 petitions on October 14, 2005.[3] Before the bankruptcy filing, Austin sold several of its divisions to AAC. That sale and related transfers are the focus of this adversary proceeding.

### The Sale Process

The debtors began to market their businesses for sale in 2004. They hired FMI Corporation as their finder and exclusive representative for this purpose; FMI reviewed the debtors' business and financial information and prepared an offering memorandum which was sent to potentially interested parties. At some point, AECOM Technology Corporation (AECOM parent), the direct or indirect parent of AAC and Austin-AECOM, expressed an interest in acquiring all or some portion of the debtors and their businesses. Ultimately, AECOM parent created a subsidiary, AAC, which acquired Austin operations in Schaumburg, Illinois; Kalamazoo, Michigan; and Houston, Texas[4] pursuant to an asset purchase agreement (APA).

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[3] The cases were filed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. All references to the bankruptcy code, therefore, are to the pre-BAPCA code.

[4] Amended Complaint at ¶ 22, docket 84; Answer at ¶ 22, docket 85.

The APA was subject to the condition that AAC "shall have received from FMI Corporation a solvency opinion and a fairness opinion, in forms satisfactory to Buyer, related to the solvency of Seller after giving effect to the Transaction and the fairness of the consideration to Seller and its shareholders."[5] FMI provided negative opinion letters on January 3, 2005, but later modified them.

**The Asset Purchase Agreement**

Under the APA, Austin agreed to "sell, convey, assign, transfer, and deliver" to AAC all of the purchased assets and AAC agreed to pay $6,500,000.00 and to assume certain liabilities associated with the operations which it purchased. The purchased assets included the accounts receivable arising out of the operations after December 31, 2004 and all of Austin's (and its parent's) rights and interests arising under or in connection with any contracts. Under § 6.5, Austin agreed that if it received payments relating to the purchased assets or business after the closing date, it would remit them to AAC within five business days. The transaction closed on January 21, 2005.

**The Robins Contract**

Austin and the United States government were parties to a contract which related to a construction project at the Robins Air Force Base in Georgia (the Robins contract). The contract and Austin's right to receive payments under it were included in the sale transaction.

These are the relevant APA provisions[6] regarding the Robins contract and contract payments:

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[5] Declaration of Glenn Hobratschk, exh. B at Art. IV, 4.12, docket 100.

[6] *Id.* at exh. B, D, and E.

> Section 2.4 - which states that execution, delivery, and performance under the agreement will not require the consent, approval, order or authorization of any third-party, but specifically excludes the Robins contract.
>
> Section 2.10 - which states that the consent or approval of any party to a contract is not required in connection with the transaction, but expressly excepts the Robins contract.
>
> Sections 4.16 and 5.9 - which state that the buyer and seller shall have entered into a cooperation agreement for the performance of the Robins contract.
>
> Section 6.7 - which states that the rights and obligations under certain contracts, including the Robins contract, may not be assignable to the buyer and requires Austin and Austin Holdings, Inc. "to use commercially reasonable efforts" to obtain the consent to assignment from all third parties having rights under those contracts. If consents are not obtained and a contract is terminated by a third party, Austin and Austin Holdings, Inc. "shall deliver to the Buyer any amount of money refunded to [them] by such third party within five (5) business days of receipt of such refund." Austin and Austin Holdings also "agree to indemnify Buyer for any losses incurred due to the non-transferability of such contracts, unless [they] are otherwise able to provide Buyer, in its sole judgment, substantially all of the benefits to be derived under such contract."

A related cooperation agreement dated January 21, 2005 acknowledges that a novation of the Robins contract will not occur until after the asset purchase transaction had closed; that novation requires the consent of the government and execution by all parties of a novation agreement; that "the assets necessary for [Austin] to perform under the Contract will have been transferred to the exclusive control of [AAC];" and that "to comply with the terms of the Contract, [AAC] will have to perform in [Austin's] place under the Contract using the Purchased Assets."[7]

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[7] *Id.* at exh. F.

The cooperation agreement provides further that in the period before the novation:

> (1) AAC will, without disturbing Austin's contractual relationship with the government, "provide all necessary personnel, facilities, equipment, materials, supplies, and services, and do all things reasonably necessary to perform and provide the contract work under the Contract."
>
> (2) AAC will prepare and process invoices on behalf of Austin and Austin would invoice the government.
>
> (3) "With respect to amounts remitted by the Government to [Austin] for work performed after Closing," Austin "was to remit such amounts to Buyer promptly, but in no less that 5 days, upon receipt by [Austin]."

The agreement also states that the parties are "acting independently and as independent contractors with the full power and authority and responsibility to select means, methods and manner of performing services" in carrying out the agreement. The agreement states further that it is "not intended to be contrary to, or inconsistent with, any of the terms of the [Robins Contract], or applicable regulations or statutes."

After the transaction closed, AAC performed under the Robins contract and received payment for that work from Austin. Austin made five payments to AAC in the total amount of $8,947,422.72 in the 90-day period before the debtors' bankruptcy filings, some part of which related to the Robins contract.[8] After the filings and before the government consented to novation of the contract on November 30, 2005, Austin made two payments to AAC under the APA in the total amount of $2,823,032.08. Some part of the payment related to the Robins contract.[9]

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[8] Joint pretrial statement at ¶ 5, docket 18.

[9] Declaration of M. Glenn Hobratschk at ¶ 34, docket 100.

**SUMMARY JUDGMENT**

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986). The movant must initially demonstrate the absence of any genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. At that point, the burden is on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion "by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves . . . ." *Id.* at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing summary judgment. *Hanover Ins. Co. v. Am. Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment is granted only when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (internal citations and quotation marks omitted).

The fact that the parties have filed cross-motions for summary judgment does not alter this analysis. "In evaluating each party's motion, the court must view all the facts and inferences in the light most favorable to the nonmoving party." *Relford v. Lexington-Fayette Urban County Gov't*, 390 F.3d 452, 457 (6th Cir. 2004). To the extent that there are genuine issues of material fact, summary judgment must be denied.

## DISCUSSION

## I. THE TRUSTEE'S MOTION

The trustee moves for summary judgment on counts IV, V, VI, and VII which seek to avoid and recover payments which AAC received after the asset purchase agreement closed and before the parties signed the novation agreement. The trustee also moves for summary judgment on count XII which requests disallowance of AAC's claims.

### Counts IV and V
### [seeking to avoid and recover transfers made in the 90 days before the bankruptcy filing]

Bankruptcy code § 547 provides that the trustee may avoid a transfer of an interest of the debtor in property:

> (b)(1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made–
>
> > (A) on or within 90 days before the date of the filing of the petition;. . .
>
> (5) that enables such creditor to receive more than such creditor would receive if–
>
> > (A) the case were a case under chapter 7 of this title;
> >
> > (B) the transfer had not been made; and
> >
> > (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The trustee has the burden of proof. 11 U.S.C. § 547(g).

The trustee argues that the transfers were made within the required period on account of the antecedent debt reflected in the APA, that Austin was insolvent at the time, and that the transfers enabled AAC to receive more than it would otherwise have been entitled to if the transfers had not been made. AAC responds that Austin is not entitled to summary judgment because Austin did not have an interest in the funds at the time that Austin transferred them to AAC, the payments were not made on account of an antecedent debt, and there is a genuine factual dispute as to whether Austin was insolvent when the transfers were made. AAC also opposes summary judgment based on these defenses: the transfers were made in the ordinary course of business; AAC provided contemporaneous exchange for new value; and AAC provided new value.

**Did the transfers involve an interest of the debtor in property?**

Under § 547(b), the challenged transfer must have been a "transfer of an interest of the debtor in property[.]" 11 U.S.C. § 547(b). This requirement is best understood as referring "'to that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings.'" *Chase Manhattan Mortgage Corp. v. Shapiro (In re Lee)*, 530 F.3d 458, 464 (6th Cir. 2008) (quoting *Begier v. Internal Revenue Serv.*, 496 U.S. 53, 58 (1990)).

Property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "[I]f the debtor transfers property that would not have been available for distribution to [its] creditors in a bankruptcy proceeding, the policy behind the avoidance power is not implicated." *Begier,* 496 U.S. at 58. "[A] voidable preference necessarily depletes the debtor's estate; without such a depletion, there cannot be a voidable preference." *McLemore v. Third Nat'l Bank in Nashville (In re*

*Montgomery)*, 983 F.2d 1389, 1394 (6th Cir. 1993). Under Sixth Circuit law, "the degree of control a debtor exercises over the property transferred is the principle determinant of whether the debtor has 'an interest' in the property such that the transfer can be avoided under § 547(b)." *MBNA Am. Bank, N.A. v. Meoli (In re Wells)*, 561 F.3d 633, 635 (6th Cir. 2009).

AAC's theory is that Austin was merely a conduit for the transfer of funds, having given up its interest in the Robins contract and the contract payments. The trustee, on the other hand, argues that the funds still belonged to Austin. "In the so-called true conduit cases, courts have held that property merely passing through the debtor is not property of the estate, that the Debtor arguably never acquires either bare legal or equitable title, but simply a possessory interest." *Weiner v. A.G. Minzer Supply Corp. (In re UDI Corp.)*, 301 B.R. 104, 111 (Bankr. D. Mass. 2003) (internal quotation marks and citations omitted). In such cases, courts apply state law to determine whether the debtor's interest was simply possessory. *Morehead v. State Farm Mut. Auto. Ins. Co. (In re Morehead)*, 249 F.3d 445, 447-48 (6th Cir. 2001) (stating that what constitutes an interest in property is determined by state law); *Id.* Ohio law applies in this case.[10]

The basic question is whether Austin exercised sufficient control over the funds before transferring them to AAC, such that Austin had an interest in the property. AAC offers three different legal characterizations of Austin's role to support its position that Austin acted as a conduit, rather than as the owner, of the funds: (1) trustee; (2) constructive trustee; and (3) bailee.

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[10] Asset Purchase Agreement at Art. IX, 9.9; Cooperation Agreement at ¶ 12. The Sixth Circuit cases cited as dispositive by the parties do not in fact control. *See Taunt v. Hurtado (In re Hurtado)*, 342 F.3d 528 (6th Cir. 2003) (relied on by the trustee); *Lyon v. Contech Constr. Prods., Inc. (In re Computrex, Inc.),* 403 F.3d 807 (6th Cir. 2005) (relied on by AAC). They do, however, show that the critical inquiry is whether the debtor exercised dominion and control over the funds.

AAC relies on the terms of the APA and cooperation agreement to support its position that Austin acted as a conduit. The court's objective in construing those documents is to give effect to the intention of the parties to the agreements. *Rosepark Props., Ltd. v. Buess*, 855 N.E.2d 140, 147 (Ohio Ct. App. 2006) (citing *Aultman Hosp. Assn. v. Cmty. Mut. Ins. Co.*, 544 N.E.2d 920 (Ohio 1989)). "The intent of the parties to a contract is presumed to reside in the language which they chose to employ in the agreement." *Kelly v Med. Life Ins. Co.*, 509 N.E.2d 411, syllabus ¶ 1 (Ohio 1987). The interpretation of an unambiguous contract is a matter of law. *Pavlovich v. Nat'l City Bank*, 435 F.3d 560, 565 (6th Cir. 2006) (citing *Long Beach Ass'n, Inc. v. Jones*, 697 N.E.2d 208, 209-10 (Ohio 1998)). When a contract is unambiguous, the court may not consider extrinsic or parol evidence. *Beverly v. Parilla*, 848 N.E. 2d 881, 886 (Ohio Ct. App. 2006). The court finds that the relevant documents are not ambiguous with respect to the issues raised by the cross-motions.

**Express Trust**

AAC argues that the asset purchase and cooperation agreements created an express trust in AAC's favor because AAC purchased the Robins contract and owned the contract payments. Under this theory, Austin merely received the contract payments as an accommodation to AAC to permit it to begin work and be paid on the contract. Under Ohio law, "a trust is the right, enforceable in equity, to the beneficial enjoyment of property, the legal title to which is in another." *Ulmer v. Fulton*, 195 N.E. 557, 564 (Ohio 1935). "To create an express trust in Ohio, there must be a manifestation of intent to create a trust, there must be created a trust corpus, and there must be a fiduciary relationship between the trustee and the beneficiary." *Indiana Lumbermens Mut. Ins. Co. v. Constr. Alternatives, Inc. (In re Constr. Alternatives, Inc.)*, 2 F.3d 670, 677 (6th Cir. 1993) (citing *Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.,* 382

N.E.2d 1155, 1158 (Ohio 1978)). In other words:

> to constitute an express trust there must be an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created, accompanied with an intention to create a trust, followed by an actual conveyance or transfer of lawful, definite property or estate or interest, made by a person capable of making a transfer thereof, for a definite term, vesting the legal title presently in a person capable of holding it, to hold as trustee for the benefit of a cestui que trust or purpose to which the trust fund is to be applied; or a retention of title by the owner under circumstances which clearly and unequivocally disclose an intent to hold for the use of another.

*Ulmer*, 195 N.E. at 564. The parties to a trust include (1) a settlor, who creates the trust by providing the trust property; (2) a trustee, who receives the property and holds legal title to it; and (3) a beneficiary for whose benefit the equitable interest in the property is held. *Id.*

AAC's trust theory is not supported by the evidence. An express trust requires an explicit declaration of trust, or circumstances which clearly show that a trust was intended to be created. The controlling documents here do not contain the requisite declaration of trust. Moreover, AAC has not cited to any other evidence which would create a genuine issue of material fact on that issue. The debtor did not, therefore, hold the funds for AAC under an express trust.

**Constructive Trust**

AAC also argues that Austin held the funds in constructive trust for the benefit of AAC. The Ohio Supreme Court has defined a constructive trust as:

> A trust by operation of law which arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice.

*Ferguson v. Owens*, 459 N.E.2d 1293, 1295 (Ohio 1984) (citation and quotation marks omitted). A constructive trust may be imposed "where it is against the principles of equity that the property be retained by a certain person even though the property was acquired without fraud." *Id.* A constructive trust can only be imposed if the claimant can trace the funds "from the time of the wrongful deprivation of the relevant assets to the specific property over which the constructive trust should be placed." *Estate of Cowling v. Estate of Cowling*, 847 N.E.2d 405, 412 (Ohio 2006).

AAC argues that a constructive trust arose by operation of Ohio law to protect its purchase of the Robins contract and the receivables, and to prevent unjust enrichment. AAC also argues that Austin assigned the receivables to it, with the law imposing a constructive trust on those funds. The trustee responds: (1) the remedy of constructive trust is not available unless there is a prepetition judgment imposing it; (2) the constructive trust theory depends on an absolute assignment of the Robins contract and receivables, and the facts contradict any finding of an absolute assignment; and (3) Austin commingled the payments in its consolidated cash management system, which prevents tracing.

The transfer of contract rights is addressed under the laws related to assignments. *See* 9 *Corbin on Contracts* § 47.1 (2009) (noting that "[t]he transfer of a contract right is not a contract. It is called an *assignment*.") (emphasis in original). Under Ohio law, "[a]n assignment is a transfer to another of all or part of one's property in exchange for valuable consideration." *Hsu v. Parker*, 688 N.E.2d 1099, 1101 (Ohio Ct. App. 1996) (citations omitted). No particular words are required to create an assignment. "Rather, '[a]ny word or transaction which shows an intention on the one side to assign and on the other to receive, if there is a valuable consideration, will operate [to create an assignment]'." *Id.* (quoting *Grogan Chrysler-Plymouth, Inc. v.*

*Gottfried*, 392 N.E.2d 1283, 1286 (Ohio Ct. App. 1978)) (alteration in original). Money due and to become due under an existing contract may be the subject of an assignment. *Gen. Excavator Co. v. Judkins*, 190 N.E. 389, 391 (Ohio 1934); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 321(1) (1981) ("Except as otherwise provided by statute, an assignment of a right to payment expected to arise out of an existing employment or other continuing business relationship is effective in the same way as an assignment of an existing right.").

"A vested right in the assigned property is required to confer a complete and present right on the assignee." *W. Broad Chiropractic v. Am. Family Ins.*, 912 N.E.2d 1093, 1095-96 (Ohio 2009). Under Ohio law:

> It is necessary . . . to constitute an assignment, either in law or equity, that there should be such an actual or constructive appropriation of the subject matter assigned, as to confer a complete and *present* right on the assignee, even when the circumstances do not admit of its immediate exercise. *A covenant on the part of the debtor, to apply a particular fund in payment of the debt as soon as he receives it, will not operate as an assignment*, for it does not give the covenantee a right to the funds, save *through the covenantor*, and looks to a future act on his part as the means of rendering it effectual.

*Christmas's Adm'r v. Griswold*, 8 Ohio St. 558, 563-64 (Ohio 1858) (emphasis in original; citation and quotation marks omitted). *See* RESTATEMENT (SECOND) OF CONTRACTS § 330(1) (1981) ("A contract to make a future assignment of a right or to transfer proceeds to be received in the future by the promisor, is not an assignment.").

Under appropriate circumstances, Ohio law imposes a constructive trust in favor of an assignee on assigned funds which have been collected by an assignor. *Olympic Title Ins. Co. v. Fifth Third Bank*, Nos. 19324, 19319, 2002 WL 31398652, at *3 (Ohio Ct. App. Oct. 25, 2002) ("In general, when A owes money to B and B assigns that indebtedness to C, A's subsequent payment of the debt to B does not extinguish C's rights as an assignee, because B holds A's

payment of the debt in constructive trust for C's benefit."). The constructive trust is imposed to enforce the assignee's property right in the assigned property. *See Pittsburg, C., C. & St. L. Ry. Co. v. Volkert*, 50 N.E. 924, 925–26 (Ohio 1898) (noting that an assignment gives "the assignee a property right in the thing assigned,—a right which is cognizable by and enforceable in a court of equity.").

The terms of the asset purchase agreement and the cooperation agreement establish that Austin did not assign the contract or the receivables to AAC. Although they were assets included in the sale, the terms of the sale did not provide for an assignment of the contract or of Austin's right to receive payments under the contract. Neither document uses the term assignment in relation to the contract or the contract payments. To the contrary, the documents are written with the stated intention of preserving Austin's contractual relationship with the government and providing AAC payment for its services to Austin pending the government's consent to a novation.

For example, APA § 2.10 states that Austin's performance and consummation of the agreement with respect to the Robins contract requires the approval of the government. Austin promises to use commercially reasonable efforts to obtain that consent and to indemnify AAC for any losses it may incur due to non-transferability of the contract, unless it is otherwise able to provide AAC with substantially all of the benefits to be derived under the contract. Also of note is the fact that § 4.3 provides that Austin will give AAC all necessary documents of transfer as it might reasonably request, including assignments, and there has been no evidence that AAC requested an assignment with respect to the Robins contract or the payments under it or that any such assignment was provided. Similarly, the cooperation agreement provides that AAC agrees

"to provide certain services" to Austin through the date of execution by Austin, AAC, and the government of a novation agreement.

Read in this context, Austin's agreement to remit the Robins payments to AAC cannot be interpreted as an assignment of the contract payments because Austin did not confer any present right to the contract payments on AAC. Instead, the parties agreed that AAC would perform for Austin under the contract and that Austin would pay AAC for those services with the contract payments it received from the government. AAC did not receive a vested property right in the contract payments.

As Austin did not make a present assignment of its interest in the Robins contract payments, AAC's argument that a constructive trust arose by operation of Ohio law to protect its interest in the contract payments fails.[11]

**Bailment**

AAC also argues that the cooperation agreement created a bailment, with AAC acting as the bailor and Austin acting as the bailee for the contract payments. A bailment is "the delivery of goods or personal property by one person to another in trust for a particular purpose, with a contract, express or implied, that the property shall be returned once the purpose has been faithfully executed." *Collins v. Click Camera & Video, Inc.*, 621 N.E.2d 1294,1296 (Ohio Ct. App. 1993). A debtor as bailee lacks a property interest in the delivered property as it is the property of the principal bailor. *Lyon v. Contech Constr. Prods., Inc. (In re Computrex, Inc.)*, 403 F.3d 807, 812 (6th Cir. 2005).

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[11] This determination renders moot AAC's motion for leave to file an affidavit in support of its opposition to the trustee's motion as that motion related to AAC's constructive trust argument and its ability to trace the transfers. (Docket 110).

The undisputed evidence shows that Austin and AAC did not have a bailment relationship because AAC did not deliver the payments to Austin. Instead, Austin received the payments from the government under its contract; Austin was then required to pay AAC for its performance on Austin's behalf under the contract. That arrangement cannot accurately be described as a bailment.

* * *

In sum, Austin did not hold the transferred funds as a conduit for AAC under an express trust, a constructive trust, or a bailment for AAC's benefit. Because the funds were Austin's until the November 30, 2005 novation, the transfers were of an interest of the debtor in property.

**Were the transfers made on account of an antecedent debt?**

AAC next argues that the transfers were not made for or on account of an antecedent debt owed by the debtor before the transfers were made. "A debt is antecedent if it is incurred before the transfer in question." *In re Lee*, 530 F.3d at 464. Austin's obligation to make the payments to AAC arose under the terms of agreements which were in existence and binding as of January 21, 2005. The payments were, therefore, on account of the antecedent debt which arose under those agreements.

AAC's argument to the contrary relies on a footnote in *Lyon v. Contech Constr. Prods., Inc. (In re Computrex)*, 403 F.3d 807 (6th Cir. 2005). The debtor in that case paid its client's carriers as a disbursing agent and its only contractual obligation ran to its client. Additionally, the debtor did not owe a debt to its client prior to the transfers, because its client only had a contractual right to require the debtor to pay its carriers. Given that factual framework, the Sixth Circuit noted that "the transfers made by the Debtor to Contech's carriers were also not made on account of an antecedent debt owed on behalf of the Debtor." *Id.* at 810 n. 1. This case involves

very different facts. Austin did have a contract with AAC, the recipient of the transfers, and was contractually required to make the transfers to AAC. As a result, Austin made the disputed transfers on account of an antecedent debt.

**Was the debtor insolvent at the time of the transfers?**

Finally, AAC argues that there is a genuine issue of fact as to whether Austin was insolvent at the time the transfers were made. *See* 11 U.S.C. § 547(b)(3). Insolvent in this context means a "financial condition such that the sum of such entity's debts is greater than all such entity's property, at a fair valuation[.]" 11 U.S.C. § 101(32)(A). Under § 547(f), Austin is presumed to have been insolvent during the 90-day preference period. 11 U.S.C. § 547(f). As a consequence, AAC must come forward with evidence to meet or rebut the presumption. FED. R. EVID. 301. The burden of proof remains with the trustee, however, and "'[o]nce [AAC] comes forward with substantial evidence of solvency, the presumption vanishes and the [trustee] must come forward with sufficient evidence to meet [his] burden of proving insolvency.'" *Oakes v. Spalding (In re Oakes)*, No. 92-3935, 7 F.3d 234 at *2 (6th Cir. Sept. 3, 1993) (quoting *Sierra Steel, Inc. v. Totten Tubes, Inc. (In re Sierra Steel, Inc.)*, 96 B.R. 275, 277 (B.A.P. 9th Cir. 1989)).

The trustee argues that AAC has not rebutted the presumption that Austin was insolvent. He cites evidence to support a finding that Austin was insolvent, and also challenges the report and findings of AAC's expert on this issue. AAC cites to the report and testimony of its expert reaching a contrary conclusion. This report also suggests that the opinions expressed by the trustee's expert are "flawed, erroneous, unsupported and unreliable."

The evidence presented shows that there is a genuine factual dispute regarding Austin's solvency at the time of the transfers which must be resolved at trial. Summary judgment on Counts IV and V in favor of the trustee may not be granted.

**Count VI**
**[avoidance of the transfers of the Robins contract payments which Austin made after the bankruptcy filing and before signing the novation agreement]**
**and**
**Count VII**
**[recovery of those transfers under 11 U.S.C. § 550]**

Bankruptcy code § 549 provides that:

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

11 U.S.C. § 549(a). The party asserting that the transfer is valid has the burden of proof. FED. R. BANKR. P. 6001.

The trustee argues that he is entitled to judgment because the transfers were made after the bankruptcy filing, without court approval, and without bankruptcy code authority. AAC opposes the motion, again arguing that the transfers did not involve estate property. The court has already found to the contrary.

Alternatively, AAC contends that the transfers were authorized by bankruptcy code § 363(c)(1) because they were ordinary course transfers made under the asset purchase and cooperation agreements.[12] Section 363(c)(1) states that:

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[12] AAC also argues that there is an issue of fact as to whether the purchased contracts were subject to administration, but fails to explain the relevance of that argument.

> If the business of the debtor is authorized to be operated under section . . . 1108 . . . of this title and unless the court orders otherwise, the trustee may enter into transactions . . . 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 a hearing.

11U.S.C. § 363(c)(1). Austin, as a debtor in possession, had the rights of a trustee under this section. 11 U.S.C. § 1107. Section 363(c)(1) permits a business to continue daily operations without having to obtain court approval for minor transactions, while at the same time protecting interested parties from the dissipation of estate assets. *Cohen v. KDC Fin. Servs., Inc. (In re Miller Mining, Inc.)*, 219 B.R. 219, 222 (Bankr. N.D. Ohio 1998). This section "applies on its face only to postpetition transactions." *Employee Transfer Corp. v. Grigsby (In re White Motor Corp.),* 831 F.2d 106, 112 (6th Cir. 1987).

Courts generally engage in a "a two-step inquiry for determining whether a transaction is in "the ordinary course of business;" a "horizontal dimension" test and a "vertical dimension" test." *In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992). The "horizontal test" considers whether "from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry." *Id.* at 953. And the "vertical test" "analyzes the transactions from the vantage point of a hypothetical creditor and [the inquiry is] whether the transaction subjects a creditor to economic risk of a nature different from those he accepted when he decided to extend credit." *Id.* at 953 (internal quotation marks and citation omitted).

The APA is a prepetition agreement, making it unlikely that these transfers fall within § 363(c)(1). In addition, the trustee cites to evidence that Austin made total payments of $2,823,032.08 to AAC following the chapter 11 filings and before the effective date of the novation "pursuant to Section 6.5 of the APA and/or the terms of the Cooperation Agreement;"

and that these disbursements were Austin's largest disbursements for the month of November 2005, accounting for more than one-third of its disbursements for the month. AAC, on the other hand, did not offer any evidence to support its claim that the payments were ordinary course. However, although the trustee's evidence suggests that Austin made some unauthorized postpetition transfers to AAC related to the Robins contract, he did not provide any evidence to establish the amount of the transfers that related to the Robins contract. Paragraph 6.5 is not limited to the Robins contract, so a statement that the payments were made under that provision does not necessarily correlate to payments made under the Robins contract. Absent such evidence, the trustee has not carried his initial burden and is not entitled to summary judgment on these counts.[13]

**Count XII**
**[disallowance of AAC claims under § 502(d)]**

Bankruptcy code § 502(d) provides for disallowance of the claim "of any entity from which property is recoverable under section . . . 550 . . . or that is a transferee of a transfer avoidable under section . . . 544 . . . 547, 548 [or] 549 . . . of this title[.]" 11 U.S.C. § 502(d). As the trustee's motion for summary judgment on his avoidance and recovery claims is denied, his motion to disallow AAC's claims on summary judgment is also denied.

## II. AAC'S MOTION

**Counts IV, V, VI, and VII**

AAC moves for summary judgment in its favor on counts IV, V, VI, and VII on the same basis that it opposed the trustee's motion; i.e. that Austin lacked a property interest in the Robins

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[13] Alternatively, the trustee's motion might be read to request judgment as to all postpetition payments made under the APA and cooperation agreement. In that case, the trustee's motion fails based on the absence of any evidence regarding the payments which *did not* relate to the Robins contract.

contract payments and that the transfers were not made on account of an antecedent debt. This part of AAC's motion is denied for the reasons already discussed.

**Counts I, II, and III**
**[fraudulent transfers]**

Counts I, II, and III seek to avoid and recover the purchased assets and post-closing transfers, as well as any remaining obligations which Austin has under the APA, as constructively fraudulent transfers. Count I is based on § 548(a)(1)(B), Count II is based on § 544(b) and state law, and Count III requests recovery of avoided transfers under § 550.

Section 548(a)(1)(B) provides in relevant part that:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily–
>
> * * *
>
> (B)(I) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548(a)(1)(B). Under § 544(b)(1):

> (b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable

law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b)(1).

Sections 548(a)(1)(B) and 544(b)(1) and the applicable state laws[14] require the trustee to prove that the debtor did not receive "reasonably equivalent value" in exchange for the transfers. AAC argues that Austin must have received reasonably equivalent value because it sold the assets only after undertaking marketing efforts. The trustee counters that this is a factual issue which must be resolved at trial, contending that Austin was compelled to sell the assets to AAC at less than fair market value in order to survive. He maintains that the mere existence of a marketing process leading to a sale does not establish that Austin received reasonably equivalent value.

The term "reasonably equivalent value" is not defined by the bankruptcy code, nor is it defined by the state laws cited by the trustee. Because the parties do not differentiate among § 548, § 544(b), and applicable state law in making their arguments, the court will analyze their positions under § 548. This approach is reasonable "as many courts have concluded that the UFTA and section 548 are in pari materia, and that the same analysis applies under both laws." *Kaler v. Red River Commodities, Inc. (In re Sun Valley Prods., Inc.)*, 328 B.R. 147, 155 (Bankr. D. N.D. 2005). Any determination regarding "reasonably equivalent value" requires "analysis of whether: (1) value was given; (2) it was given in exchange for the transfer; and (3) what was transferred was reasonably equivalent to what was received." *Id.* at 156.

[14] The trustee identifies these as Ohio, California, Delaware, Illinois, Michigan, and Texas. Each of these jurisdictions has adopted the Uniform Fraudulent Transfer Act of 1984 (UFTA). *See* OHIO REV. CODE §§ 1336.01–1336.11; CAL. CIV. CODE §§ 3439-3439.12; DEL. CODE ANN. tit. 6 §§ 1301–1311; 740 ILL. COMP. STAT. 160/1–160/12; MICH. COMP. LAWS. ANN. §§ 566.31–566.43; TEX. BUS. & COMM. CODE ANN. §§ 24.001–24.013.

"Courts have rejected fixed mathematical formulae to determine whether an exchange of 'reasonably equivalent values' has occurred for purposes of section 548 in favor of analysis based upon the facts and circumstances of each particular case." *Staats v. Butterworth Props., Inc. (In re Humble)*, No. 00-3572, 19 Fed. Appx. 198, 200 (6th Cir. Aug. 20, 2001); *see also Lisle v. John Wiley & Sons, Inc. (In re Wilkinson)*, No. 05-5744 196 Fed. Appx. 337, 341 (6th Cir. Aug. 17, 2006). "'[T]he test used to determine whether a transfer was supported by reasonably equivalent value focuses on whether there is a reasonable equivalence between the value of the property surrendered and that which was received in exchange."' *Brennan v. Slone (In re Fisher)*, No. 07-3319, 296 Fed. Appx. 494, 501 (6th Cir. Oct. 10, 2008) (quoting *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 708 (6th Cir. 1999)).

Outside of the foreclosure context, the term "reasonably equivalent value" will "ordinarily [have] a meaning similar to fair market value[.]" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994).

> The market value of . . . a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property.

*Id.* at 537-38 (quoting Black's Law Dictionary 971 (6th ed. 1990)). However, other factors in addition to fair market value may also be considered, including the good faith of the parties, whether the transaction was arms-length, and the difference between the amount paid and fair market value. *Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.)*, 92 F.3d 139, 153 (3d Cir. 1996); *In re Sun Valley Prods., Inc.*, 328 B.R. at 156-57.

AAC cites to evidence that Austin conducted a marketing effort over several months; was assisted by FMI; identified and contacted potential purchasers; and ultimately sold the assets to AAC because no better deal was available. AAC argues that this was an arms-length transaction in which the market spoke. The consideration paid, therefore, equals fair market value, which AAC equates to reasonably equivalent value. AAC cites several cases in which courts considered sales by debtors who were in financial distress and argues that these opinions look to the amount paid regardless of the debtor's financial situation. *See for example, Abbott v. Eviciti*, No. IP 01-1802-C H/K, 2005 WL 1799438 (S.D. Ind. June 29, 2005); *In re Sun Valley Prods., Inc.*

The trustee counters that the sale price does not reflect fair market value because FMI's marketing efforts were flawed and Austin desperately needed cash. The trustee cites evidence to show that FMI's initial marketing efforts focused on a stock transaction rather than an asset sale; this strategy ultimately changed due to Austin's need for cash. Although FMI began at some point to tell potential buyers that Austin might consider an offer for one of its three operating business divisions (Austin, Ragnar Benson, Inc., or The Austin Company UK, Ltd.), FMI never separately marketed the offices which were ultimately sold to AAC and did not communicate the possibility of acquiring them separately to any potential buyer.

The determination of "reasonably equivalent value" is a factual one which must take into consideration all of the relevant circumstances regarding Austin's sale of assets to AAC. The trustee has introduced evidence which, viewed in its most favorable light, supports his position that the marketing process was flawed as it related to the three offices which were sold. As AAC correctly notes, the fact that a financially distressed Austin needed a sale to generate funds does not automatically render the consideration which it received insufficient for these purposes.

However, given the parties' differing versions of the marketing efforts as they related to the offices that were sold, there is a factual issue as to whether the consideration which Austin received equates to reasonably equivalent value. Summary judgment may not be granted in light of this genuine issue of material fact.

**Count X**
**[unjust enrichment/breach of quasi-contract]**

AAC argues that this count relates solely to amounts which are due under the written agreements and fails as a matter of law because it duplicates count IX, which seeks to recover the same amounts under a breach of contract theory. This request is denied because the trustee is entitled to seek alternative forms of relief at this stage of the proceeding.

**Count XIII**

**[equitable subordination under § 510(c)]**

Bankruptcy code § 510(c) provides that a creditor's allowed claim may be equitably subordinated for purposes of distribution under certain circumstances. 11 U.S.C. § 510(c). The trustee must prove these elements by a preponderance of the evidence:

> (1) The claimant must have engaged in some type of inequitable conduct.
>
> (2) The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant.
>
> (3) Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy [Code].

*First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin., Servs., Inc.)*, 974 F.2d 712, 717-18 (6th Cir. 1992) (adopting the legal standard set out in *Benjamin v. Diamond (In re Mobil Steel Co.)*, 563 F.2d 692, 699-700 (5th Cir. 1977)); *see also Bayer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 744-45 (6th Cir. 2001). Satisfying this three-part

standard "does not mean that a court is *required* to equitably subordinate a claim, but rather that the court is *permitted* to take such action." *In re AutoStyle Plastics, Inc.*, 269 F.3d at 744 (emphasis in original).

The test is applied differently to insiders and non-insiders:

> The primary distinctions between subordinating the claims of insiders versus those of non-insiders lie in the severity of the misconduct required to be shown, and the degree to which the court will scrutinize the claimant's actions toward the debtor or its creditors. Where the claimant is a non-insider, egregious conduct must be proven with particularity. It is insufficient for the objectant in such cases merely to establish sharp dealing; rather, he must prove that the claimant is guilty of gross misconduct tantamount to 'fraud, overreaching, or spoilation to the detriment of others.' Where the claimant is an insider, his dealings with the debtor will be subjected to more exacting scrutiny.

*In re Baker & Getty Fin. Servs., Inc.,* 974 F.2d at 718 (quoting *Anaconda-Ericsson, Inc. v. Hessen (In re Teltronics Servs., Inc.)*, 29 B.R. 139, 169 (Bankr. E.D.N.Y. 1983)). As the trustee admits that AAC is not an insider, he is subject to this heightened standard. The trustee argues that AAC's conduct amounted to overreaching, defined in this context as "'that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties.'" *Wells v. Sleep (In re Michigan Mach. Tool Control Corp.)*, 381 B.R. 657, 674 (Bankr. E.D. Mich. 2008) (quoting *Black's Law Dictionary* 1104 (6th ed.1990)); *see also Black's Law Dictionary* 1136 (8th ed. 2007) (defining "overreaching" as "[t]he act or an instance of taking unfair commercial advantage of another, esp. by fraudulent means.").

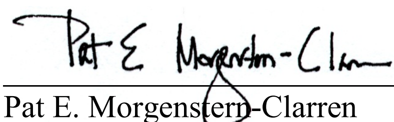
AAC argues that there is no evidence of anything close to gross misconduct tantamount to fraud. However, the trustee cites evidence that AECOM was initially interested in a stock purchase transaction, but ultimately decided to purchase only parts of the debtor's business.

Although there were multiple reasons that led to this decision, AAC realized that the sale had the potential to leave Austin's remaining business in a vulnerable position. Consequently, AAC requested fairness and insolvency opinions in connection with the closing based on its concern about a potential bankruptcy, although it is relatively unusual for a buyer to request such opinions. The solvency and fairness opinions were rendered by FMI, which had a conflict of interest because its fee was contingent on the closing of the deal. AAC was dissatisfied with an initial draft of the solvency opinion which was negative and asked FMI to change the opinion. FMI did so. Construing this evidence in the light most favorable to the trustee, he has shown that there is a genuine issue as to whether AAC engaged in the type of egregious conduct which would warrant equitable subordination of its claims. This count cannot, therefore, be resolved on summary judgment.

## **CONCLUSION**

For the reasons stated, the parties' motions for summary judgment are denied.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge