

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
LAND PAVING COMPANY,)	CASE NO. BK87-82050
)	
DEBTOR)	A95-8068
)	
ADDCO NEBRASKA, INC.,)	
)	CH. 11
Plaintiff)	
vs.)	
)	
LAND PAVING COMPANY,)	
ANTHONY E. DOMBROWSKI,)	
BRUCE E. SCHREINER, and)	
STEVEN F. SOMMERS,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on May 6, 1996, on Defendant Bruce E. Schreiner's Motion for Summary Judgment. Appearances: William Biggs, Attorney for Land Paving Company (debtor); D.C. Bradford, Attorney for Steven F. Sommers (Sommers); Robert Bothe/Matthew McGrory, Attorneys for ADDCO Nebraska, Inc. (ADDCO); and Robert Ginn, Attorney for Bruce E. Schreiner (Schreiner). This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A), (E), (M), and (O).

A. Background

The debtor, Land Paving Company, a Nebraska corporation, filed a petition for relief under Chapter 11 of the Bankruptcy Code on July 20, 1987 after an involuntary Chapter 7 order for relief was entered. The debtor ceased operating its asphalt contracting business in 1986, and sold all of its operating assets early in the bankruptcy case. The remaining asset of the bankruptcy estate is a percentage ownership interest in patents and disclosure documents for certain potentially useful commercial products that were invented by a shareholder and the founder of the debtor, Anthony E. Dombrowski [hereinafter this ownership interest in patents and disclosure documents shall be referred to as "the inventions"]. The debtor has valued its interest in the inventions in its schedules and in the operating

reports filed in the bankruptcy case at \$2,820,000.00. The debtor has not proposed a Chapter 11 plan of reorganization in this case, but a shareholder of the debtor, Bruce E. Schreiner, has a Chapter 11 plan of reorganization pending, but not yet confirmed.

ADDCO Nebraska, Inc. (ADDCO) filed this adversary proceeding on August 31, 1995. In the complaint, ADDCO alleges that it is the nominee of the assignee of claims and proofs of claims from the various union interests who initiated the involuntary Chapter 7 petition against the debtor (the Contractors, Laborers, Teamsters & Engineers Health and Welfare, Pension Funds, Laborers Local Union No. 571). The complaint seeks relief pursuant to 11 U.S.C. §§ 105, 363, 542, 549 and 1104 and 28 U.S.C. § 2201(a). The defendants are the debtor; Anthony E. Dombrowski, officer and shareholder of the debtor; Bruce E. Schreiner, shareholder of the debtor, interest holder in the inventions, and former accountant of the debtor; and Steven F. Sommers, interest holder in the inventions and former shareholder of the debtor.

B. Motion for Summary Judgment

Schreiner filed a Motion for Summary Judgment which alleges that ADDCO lacks standing under 11 U.S.C. §§ 542 and 549 because exclusive authority to bring causes of action pursuant to those sections is reserved for the trustee or the debtor-in-possession. The motion also alleges that no material issue of fact exists because the Agreements (which shall be discussed in Discussion D(3)(c)) contain conditions precedent which do not cause the debtor's ownership interests in the inventions to be transferred until a plan of reorganization has been approved and either all approved creditors of the bankruptcy estate are paid in full, or the case is dismissed.

C. Decision

1. That portion of the motion for summary judgment alleging that there is no material issue of fact is overruled. At a minimum, there is a material issue of fact concerning whether the debtor's ownership interest in the inventions have been transferred post petition.

2. That portion of the motion for summary judgment alleging ADDCO's lack of standing is sustained. ADDCO is not a creditor or interested party and has no right to be a party plaintiff. However, ADDCO's lack of standing does not cause dismissal of the adversary proceeding. Any other interested party may intervene as plaintiff and prosecute this case on behalf of the estate. Such interested party must intervene by August 15, 1996, or this adversary proceeding will be dismissed.

3. ADDCO shall provide a copy of this memorandum to all creditors.

4. If any interested party files prior to August 15, 1996, a motion to convert this case to Chapter 7, or requests the appointment of a Chapter 11 trustee, the adversary proceeding shall remain open pending a decision on such motion.

D. Discussion

1. Standard for Summary Judgment

The standard for a motion for summary judgment under Bankruptcy Rule 7056(c) and Federal Rule 56(c) provides in part as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c); FED. R. CIV. P. 56(c) (emphasis added).

The burden is on the moving party to show that no genuine dispute exists on a material fact, City of Mount Pleasant, Iowa v. Association Elec. Coop., Inc., 838 F.2d 268, 273 (8th Cir. 1988), and once this burden is met, the non-moving party must show that there is genuine dispute over a material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). When evaluating the motion, inferences drawn from the underlying facts are to be decided in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1976).

"[T]he burden on the moving party may be discharged by "showing" ... that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. In addition, a failure by the non-moving party to submit evidence to support its claims will result in summary judgment being entered against him. Metro N. State Bank v. Gaskin, 34 F.3d 589 (8th Cir. 1994) (refusing to overturn the entry of summary judgments by a district court where non-moving party failed to submit evidence in support of its claim). The non-moving party must present significant probative evidence supporting its case. Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990).

2. Standing of ADDCO

a. ADDCO's Status as a Party In Interest

Since the adversary proceeding was initiated, the union interests have terminated ADDCO's authority as nominee of their claims, and ADDCO has returned the claims that had been assigned to

the union interests. ADDCO is, therefore, not a creditor of the estate nor a party in interest. ADDCO has represented that "The Graham Companies" (Graham), a creditor of the estate, intends to move for leave of court to be substituted for ADDCO as plaintiff and to prosecute this action on behalf of all creditors. As of the date of this Memorandum, no such action to substitute Graham for ADDCO has occurred.

Federal Rule of Civil Procedure 17(a), applicable to adversary proceedings through Bankruptcy Rule 7017, provides that "[e]very action shall be prosecuted in name of the real party in interest," but the rule also provides that the failure of a party in interest to be joined does not cause an adversary proceeding to be dismissed:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest.

FED. R. BANKR. P. 7017; FED. R. CIV. P. 17(a).

Any party in interest may intervene as plaintiff by August 15, 1996.

b. Standing of Creditor to File Adversary Proceeding Pursuant to 11 U.S.C. §§ 542 & 549

Neither ADDCO nor any other party in interest has standing to file or prosecute the adversary proceeding without court permission. The Code, at 11 U.S.C. §§ 542(a) and 549 does not authorize creditors to bring adversary proceedings on behalf of the estate. Section 542, the provision for turning over property to the estate, provides:

[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell or lease..., shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a).

Section 549 specifically limits an avoidance action to the trustee: "the trustee may avoid a transfer of property of the estate -- (1) that occurs after the commencement of the case; and (2) ... (B) that is not authorized under this title or by the court." 11 U.S.C. § 549(a). In Chapter 11 cases, debtors-in-possession are granted the authority to execute all of the duties and functions of a trustee (with limited exceptions not relevant here), and therefore, the term "trustee" in Sections 542(a) and 549 should be interpreted to include a debtor-in-possession. See 11 U.S.C. § 1107(a).

In a Chapter 11 case, a creditor "may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). An adversary proceeding raised pursuant to Section 542 or Section 549 does not constitute a "case" under Chapter 11, but Chapter 5 of the Bankruptcy Code "appl[ies] in a case" under Chapter 11. 11 U.S.C. § 103(a). Thus, the issue of whether any party in interest may initiate an adversary proceeding under Sections 542 and 549 is left ambiguous under the Bankruptcy Code.

The Eighth Circuit has discussed whether a creditor has standing under 11 U.S.C. § 544, which, like Section 549, limits the right to bring a cause of action to the trustee by stating: "The trustee shall have" the right to avoid a transfer. In Saline State Bank v. Mahloch, the Eighth Circuit noted that limiting the right to invoke Section 544 to the trustee/debtor-in-possession was justified for the following reasons:

- (1) general creditors otherwise would hinder plans to reorganize under chapter 11;
- (2) one group of unsecured creditors might benefit to the detriment of other unsecured creditors as a result of piecemeal litigation; and
- (3) the various motions and cross claims that would inevitably ensue might create needless confusion and inconvenience for all involved.

834 F.2d 690, 694 (8th Cir. 1987) (citations omitted).

Mahloch recognized that while the right to bring a cause of action was limited to trustees/debtors-in-possession, that right was not absolute, and creditors who believed that the debtor-in-possession had failed to take the requisite action demanded by Section 544 had several options available, including the right to request permission from the bankruptcy court to bring an adversary proceeding in place of the debtor-in-possession or trustee:

If a creditor is dissatisfied with lack of action on the part of the debtor-in-

possession, the creditor may move to replace the debtor-in-possession with a Chapter 11 trustee; or to convert the Chapter 11 case to one under Chapter 7; move to dismiss the Chapter 11 case; or petition the court to compel the debtor-in-possession to act or to gain court permission to institute the action itself.

Id. at 695 (quotation omitted); Nebraska State Bank v. Jones, 846 F.2d 477, 478 (8th Cir. 1988).

One bankruptcy court analyzed the standing issue under Section 542 with logic similar to that used in Mahloch. In Price v. Gaslowitz (In re Price), a debtor wanted to bring a turnover action under Section 542(a) in the place of the Chapter 7 trustee, and the bankruptcy court followed the analysis of the Fifth Circuit Court of Appeals in another Chapter 11 case, where the circuit court determined that a creditors committee could sue in place of the corporation-debtor. 173 B.R. 434, 440 (Bankr. N.D. Ga. 1994) (discussing Louisiana World Exposition v. Federal Ins. Co., 858 F.2d 233, 247 (1988), reh'g denied 864 F.2d 1147 (5th Cir. 1989)). Price held that the debtor has standing to bring a turnover action when the following circumstances are met:

- (1) the claim is colorable,
- (2) the debtor-in-possession [or trustee] has refused unjustifiably to pursue the claim, and
- (3) the [party in interest] is granted leave to sue from the bankruptcy court.

173 B.R. at 440 (quoting Louisiana World Exposition, 832 F.2d at 247).

In City of Farmers Branch v. Pointer (In re Pointer), the Fifth Circuit Court of Appeals determined whether a creditor had standing under Section 549(a) to bring an adversary proceeding. 952 F.2d 82 (5th Cir.), cert. denied, Pointer v. Carrollton-Farmers Branch Indep. Sch. Dist., 505 U.S. 1222, 112 S. Ct. 3035, 120 L. Ed. 2d 904 (1992). Pointer noted that the plain language of the Bankruptcy Code bars any party, other than the trustee or debtor-in-possession from bringing a cause of action under Section 549, but added that a creditor could bring the action on behalf of the trustee or debtor-in-possession if the bankruptcy court authorized the action and if the circumstances warranted that the creditor be granted standing. Id. at 87-89.

Several other courts have concurred that parties, other than trustees or debtors-in-possession, have standing or can obtain standing to recover under the Bankruptcy Code provisions that limit causes of actions to the trustee. Unsecured Creditors Comm. of

Debtor STN Enters., Inc. v. Noyes (In re STN Enters., Inc.), 779 F.2d 901 (2d Cir. 1985) (holding that § 1103(c)(5) and § 1109(b) imply a qualified right for creditors' committees to initiate a suit with the approval of the bankruptcy court after a debtor unjustifiably refuses to act); Equitable Gas Co. v. Equibank, N.A. (In re McKeesport Steel Castings Co.), 799 F.2d 91, 94 (3d Cir. 1986) (holding that creditor had standing under provision limiting cause of action to trustee (§ 506(c)) when trustee refuses to act); Unsecured Creditors Comm. v. Noyles (In re STN Enters., Inc.), 73 B.R. 470, 487 n. 22 (Bankr. D. Vt. 1987) (listing additional cases (decision of bankruptcy court after remand from circuit court)).

Based on the facts referred to below and the case law concerning creditors prosecuting actions on behalf of the estate, any interested party may prosecute this action under Sections 542 and 549 because the following requirements have been satisfied: the debtor-in-possession refuses to bring the action; the allegations in the complaint are colorable; and the adversary proceeding may benefit the estate and will not confer an undue advantage to one creditor.

The allegations made by ADDCO are colorable. As will be discussed under the Findings of Fact, there is an issue of whether the debtor's sole remaining asset and sole source of monies to pay creditors has been transferred by the estate to Schreiner or by Schreiner and by other defendants for valuable consideration. The Agreements to be discussed in Discussion D(3)(c) and the verification from the Patent Office that the debtor's interest in the inventions has been assigned in accordance with the Agreements create a question of fact regarding whether transfers of estate property have taken place post petition without notice or court approval.

This lawsuit may benefit the estate. The debtor concedes that the inventions may have zero value or may be worth multi-millions of dollars. Therefore, assuming for the moment that property of the estate has been transferred, recovering the debtor's interest in the inventions will at best benefit the estate by paying more to the unsecured creditors, and at worst, leave the estate in the status quo if the debtor's interest is worthless. As the last asset of the estate and the only source of income to pay unsecured creditors, the debtor's interest in the inventions must be protected. Schreiner argues that no transfers occurred because only "future interests" were transferred, but, arguably, future interests have value, and, arguably, are estate property.

There is evidence that the debtor does not want to prosecute this type of action. On the one hand, the debtor has suggested that it questions the economic value of the "patent points" in the invention, but, on the other hand, the debtor has suggested to this court for nine years in the bankruptcy case that the debtor's

interest in the inventions should be valued at a little more than \$ 2.8 million.

The transactions between and among insiders, with the silent acquiescence of the debtor, gives an appearance of a conflict of interest, at least vis-a-vis creditors. For example, a company related to Schreiner pays the debtor's attorney fees; Schreiner, not the debtor, filed a plan of reorganization on behalf of the debtor, in conformance with the Agreements; early in the bankruptcy case, Schreiner took an assignment from a judgment creditor, so he is also a creditor of this estate. Schreiner's attorney has represented that Schreiner is currently the corporate designee for the debtor. Schreiner also happens to be a beneficiary of the alleged transfers of the debtor's interests in the inventions; and Schreiner has already sold the "future rights" to the debtor's interest in the inventions for his own profit.

As discussed in Mahloch, the reasons for limiting causes of action to the trustee and not permitting creditors to have standing are not present in this case. The debtor has communicated that it will not pursue any action against the insiders, and since the insiders appear to control the debtor and the asset of the debtor, the debtor-in-possession's capability of performing its fiduciary responsibilities to the creditors of the estate is impaired. There is no trustee in this case, and denying an interested party standing would leave the creditors of the estate without any protection from the activities of the insiders of the debtor. Although a creditors committee was appointed, it is no longer active in this case. Since the debtor has refused to act, this litigation will not interfere with any other pending litigation to recover these purported transfers.

In conclusion, an intervenor party in interest may prosecute this action.

3. Material Issue of Fact

Schreiner has failed to show that no material issues of fact exist in this case. The evidence presented raises a question as to whether a transfer occurred which may be dealt with pursuant to Sections 542 and 549.

(a) The Agreements

ADDCO alleges that the debtor's ownership interest in the inventions were improperly transferred to the individual defendants through three agreements [hereinafter these agreements shall be designated as "Contract 1," "Supplement 1" and "Supplement 2" and shall be collectively referred to as "the Agreements"]. The parties agree that the ownership interests in the inventions on August 21, 1987, shortly after the order for relief was granted, were as follows:

<u>Party</u>	<u>Patent</u>	<u>Disclosure Documents</u>
Sommers	53.50%	55.00%
Schreiner	20.33%	21.67%
Debtor	23.67%	23.33%
Other	<u>2.50%</u>	<u>---</u>
	100%	100%

"Disclosure Documents" apparently represent rights to an invention prior to a final patent being issued.

Contract 1 is between Sommers and Schreiner and was executed on November 21, 1990. Contract 1 states that the former spouse of Dombrowski was awarded one half of Dombrowski's shares of stock in the debtor and "all patent rights assigned to Land Paving Company" pursuant to a Decree dated October 27, 1988 and filed in the District Court of Douglas County, Nebraska. According to Contract 1, Sommers purchased the former spouse's interests in the stock and the patent rights on November 19, 1990, and Contract 1 transfers those interests in stocks and patent rights from Sommers to Schreiner.

Supplement 1, which is between Dombrowski, Sommers and Schreiner and was executed on September 11, 1991, provides that 15.35% of the debtor's ownership interests in the patents and the disclosure documents for the inventions, as assigned to Schreiner and Sommers in several covenants, are to be assigned to a new corporation (New Corp 2) in exchange for \$121,000 to be paid to Dombrowski individually. All of the covenants were executed post petition, and none of the covenants have been approved by this court, nor is there evidence that the debtor ever received the any of the money paid to Dombrowski.

Supplement 1 also provides that the assignments, as reflected in the covenants, are to take place "as soon as possible," but not before the debtor has paid all creditors listed on an attached exhibit, all taxes, and bankruptcy related costs and expenses, and not before the assignment/conveyance is approved by the bankruptcy court or the Chapter 11 case is dismissed. The union interests represented by ADDCO are not included on this exhibit. Schreiner admits that this is an oversight and that the intent of the attached exhibit is to provide that all "allowed" claims shall be paid before the Agreements are valid.

Supplement 1 also provides that Dombrowski and Schreiner are to propose a plan as shareholders and officers of the debtor, but that the proposed plan is to be in conformance with Supplement 1 and the covenants. In addition, Dombrowski is directed to use his position in and ownership of the debtor to advocate the adoption of a plan of reorganization that complies with Supplement 1.

Supplement 1 transfers the shares of another corporation (New Corp) to New Corp 2. New Corp is being organized for the purpose of handling the exclusive marketing rights to the inventions. In exchange, Schreiner is to convey all of his interests in the debtor to Dombrowski. Finally, Supplement 1 provides that a "future right" to an additional 8.32% of the debtor's ownership in the inventions shall be sold to capitalize New Corp and "The Drivers Alert Group" (the Group), a joint venture project of Schreiner's.

Supplement 2, which is between Dombrowski, Schreiner and Sommers and was executed on the same date as Supplement 1, modifies Supplement 1. This agreement provides that proceeds from the sale of the "future right" to 8.32% of the debtor's interest in the inventions is the property of Sommers, who retained a beneficial right to those proceeds when he transferred his interest in the inventions to Schreiner and when he invested in New Corp and the Group. Supplement 2 directs that those proceeds be treated as a loan from Sommers to New Corp and to the Group. Supplement 2 also provides that those proceeds shall be used to pay \$30,000 to Dombrowski and \$20,000 to Dombrowski's attorney. There is no explanation in Supplement 2 as to how Sommers became the sole beneficiary of the debtor's property, or why Dombrowski and his attorney are entitled to proceeds.

In addition, Supplement 2 states that thirty days after the date of Supplement 2, Schreiner and Sommers will cause the Group to assign a 5% ownership interest in the inventions and 5% of the shares in New Corp to Dombrowski. However, these transfers are to be placed in an escrow account, until Dombrowski completes transferring the debtor's ownership interests, pursuant to the covenants, to New Corp 2.

(b) ADDCO's Allegations

ADDCO's adversary complaint has raised the following counts against the defendants concerning the Agreements:

Count I: Improper Sale of Property Under 11 U.S.C. § 363. ADDCO alleges that the Agreements improperly sold property of the bankruptcy estate because the transfer of the debtor's ownership interests in the inventions was not in the ordinary course of business and notice and a hearing were not provided. ADDCO requests that the court void the Agreements to the extent the contracts have been effectuated.

Count II: Improper Obtaining of Credit Under 11 U.S.C. § 364. ADDCO alleges that the purported transfers pursuant to the Agreements were improperly used to obtain credit not in the ordinary course of the debtor's business and requests this court to void the Agreements

to the extent they have been effectuated to obtain unauthorized credit.

Count III: Turnover Pursuant to 11 U.S.C. § 542. ADDCO requests this court to cause the defendants to turnover the debtor's interests in the inventions to the bankruptcy estate to restore the debtor to the ownership position it held on the date of the petition.

Count IV: Avoidance of Post-Petition Transactions Under 11 U.S.C. § 549. ADDCO requests that this court avoid the purported transfers of the debtor's ownership interests in the inventions because said transfers were made post petition for inadequate consideration.

Count V: Accounting and Declaratory Judgment . ADDCO alleges that the Agreements were not entitled to become effective under the terms of the Agreements until all creditors had been paid pursuant to a plan of reorganization and this court has approved the Agreements. Therefore, ADDCO requests that an independent party be appointed to conduct an accounting of the ownership interests in the inventions, that the court avoid all ownership interests in the inventions of the debtor that were transferred to other parties post petition, and that the court grant any other appropriate relief.

ADDCO alleges that the debtor has declined to take any action against the individual defendants in regard to the debtor's ownership interests in the inventions or to recover the alleged transfers of the ownership interests. The debtor argues that valuing the inventions is too difficult, and therefore, the debtor is permitting the majority owners of the inventions to market and/or sell the inventions. In the bankruptcy case, the attorney fees for the debtor are being paid by Sensory Electronics, Inc., and while Schreiner's interest in that company has not been disclosed, Schreiner is listed as the official representative of that company. Sensory Electronics, Inc. is also a beneficiary of post-petition assignments of the debtor's ownership interest in the inventions.

(c) The Fact Issues

The Agreements are vague and refer to covenants and other agreements not presently before this court. Contract 1 purports to transfer only Sommers' shares of stock and his interest in the former spouse's ownership interest in the inventions to Schreiner. The assignment between Schreiner and Sommers, alone, is not necessarily important to determine whether a transfer of the debtor's asset has occurred, but a question exists as to whether the former spouse was in fact granted an ownership interest in the

debtor's interest in the inventions to assign to Sommers. Also, if an interest was granted by the state court, there is a question of whether the transfer is void as a violation of the automatic stay.

The divorce decree is not in evidence, but it has been filed in the bankruptcy case. In that decree, it appears that the former spouse was only granted one-half of Dombrowski's interest in the ownership of the inventions, not one-half of the debtor's interest. Contract 1 erroneously states that the former spouse received one half of the debtor's interest. The only interest in the debtor granted to Dombrowski's former spouse was 50% of the shares of stock, which Schreiner purportedly now owns through Contract 1.

Schreiner's position is that the Agreements only confer "future rights" to the patent and that the Agreements will not be executed until all allowed claims are paid in full and the bankruptcy case is administered, and therefore, the transfers are not relevant to the bankruptcy proceedings. Schreiner argues that because the debtor was not involved in the Agreements and because these Agreements are only going to take effect after the contingencies occur, the Agreements have no bearing on the bankruptcy proceedings.

The most significant evidence that the transfers are not merely "future" transfers as argued by Schreiner are the documents from the Patent Office which show that the debtor's ownership interest in the patents have already been transferred in accordance with the Agreements. A letter from Schreiner to the Commissioner of Patents and Trademarks on July 5, 1990 requested that the following post-petition assignments be recorded:

1. October 2, 1987 Covenant from debtor and Dombrowski to Sommers granting Sommers a 4.5% interest in the patent.
2. September 24, 1990 transfer from Sommers to Midwest Pharmaceuticals Company, Inc., an Iowa Corporation, for a 4.5% interest in the patent.
3. December 1, 1987 covenant from Midwest Pharmaceutical Company, Inc. to Schreiner.
4. Assignment from Sommers to S&S Advertising, Inc. on May 23, 1988.
5. Assignment of 7% interest from Sommers to various individuals dated October 2, 1988.
6. Assignment from Schreiner conveying 15.33% interest to various assignees dated October 13, 1988.
7. Assignment from Sommers conveying 4.20% interest to various individuals dated October 21, 1988.

8. Assignment from S & S Advertising, Inc. to A.E. Van Wie dated December 17, 1988.
9. Assignment from Sommers to Schreiner dated September 11, 1980.
10. Assignment from Schreiner to Sensory Electronics, Inc., dated September 11, 1989.
11. Assignment from Sommers to R&R Trust dated October 12, 1989; and
12. Assignment from Sensory Electronics, Inc. to James L. Cannon dated May 10, 1990.

On March 13, 1989, Schreiner sent another letter to the Commissioner of Patents and Trademarks and caused the following conveyances to be recorded:

1. Covenant dated February 9, 1988, transferring 3% of debtor's ownership interest in inventions to Schreiner.
2. Covenant dated May 17, 1988, transferring 4.5% of debtor's ownership interest in inventions to Schreiner.
3. Covenant dated July [8], 1988, transferring 1% of debtor's ownership interest in inventions to Schreiner.

The copies of the "United States Patent and Trademark Office Notice of Recordation of Assignment Document" verify that the titles to the inventions have been transferred as directed in Schreiner's two letters. It, therefore, appears that the debtor's assets have been transferred from the bankruptcy estate to Schreiner and Sommers pursuant to the Agreements and that those defendants have subsequently transferred the debtor's assets to other entities.

One of the documents accompanying Schreiner's letter to the Patent Office, which was signed on December 15, 1991, shows that Schreiner subsequently assigned a 15.6% interest in the inventions to various investors, who were granted a percentage of that interest, which was to be distributed through shares of stock in New Corp 2. Schreiner's affidavit in support of the motion for summary judgment states that he does not own or control shares in New Corp 2, but the documents submitted to the Patent Office indicate that Schreiner controls the certain shareholders' voting rights in New Corp 2, and that he has retained at least a .586% ownership interest in the patent through New Corp 2.

Schreiner entered into several agreements like the one discussed above, in which he transferred an interest in the patents in exchange for investments in New Corp 2. On December 29, 1991, Schreiner conveyed .90% to four more investors, where he retained

the right to vote their stock shares in New Corp. 2. On April 9, 1993, Schreiner executed another document, which was filed in the Patent Office, to transfer 3.701% "future interest in and to the said INVENTIONS." On June 9, 1995, Schreiner transferred .15% of the interest transferred in Supplement 1 to "S. Schreiner."

These documents also show that Schreiner received or became entitled to receive a considerable amount of money, in exchange for these "future interests."

Schreiner's contention that no "transfers," as that term is used in Sections 542 and 549, have occurred is questionable. Not only have present interests in the debtor's ownership interests in the inventions been transferred, as represented by the transfers of title filed in the Patent Office, but also, the so-called "future interests" are being transferred for value. Schreiner argues that these transfers are nothing for the bankruptcy court to consider because the contingencies contemplated in the Agreements have not occurred, and therefore, these transfers only represent "future promises" to act and are not presently valid. While it is true that the unsecured creditors have not yet been paid, and a plan has not been confirmed, it appears that the transfers through the Patent Office have already occurred and are arguably final acts. Therefore, a question exists as to whether the debtor, Schreiner, or others have conveyed estate property by effectuating the Agreements and obtaining control over the property during the bankruptcy case.

The debtor has not taken any action because it argues that there is no ascertainable value in these patents. Nonetheless, the defendants appear to be receiving large amounts of cash in exchange for selling promises to transfer the debtor's "future rights" in the inventions. The argument that Schreiner's and the other defendants' activities will not harm the bankruptcy estate because the Chapter 11 plan of reorganization is going to pay unsecured creditors in full before these "future rights" are executed raises several questions in addition to the probability that transfers may have already occurred.

For example, if the patents have no ascertainable value, how do the defendants know that all unsecured creditors will be paid in full? Should insiders be allowed to execute Agreements transferring the debtor's "future" interest in the invention and then actually carry out those Agreements by filings with the Patent Office before unsecured creditors are actually paid in full? Since, arguably, a future interest is an ownership interest with economic value, why is the "future interest" not property of the estate? The individual defendants are personally profiting from selling the "future rights." Why isn't the estate receiving such profits?

If the debtor's interest in the patents must be sold to pay unsecured creditors in full, how can those interests be sold at a fair price if the future ownership rights have already been "promised" to the individual defendants and their assignees?

If the patents have a value of \$2.8 million, how will all of the unsecured creditors be paid in full, given that the invention is subject to a security interest and unsecured creditors' claims exceed \$ 3 million?

All of the above-listed questions concern facts that are in dispute in this adversary proceeding. Summary judgment is denied.

Separate journal entry to be filed.

DATED: July 5, 1996

BY THE COURT:

Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

BIGGS, WILLIAM	344-3407
BRADFORD, D.C.	342-4202
BOTHE, ROBERT	341-0216
GINN, ROBERT	348-1111

Copies mailed by the Court to:

United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

