No. ________

In The

Supreme Court of the United States

EQUITABLE TRANSITIONS, INC.,

Petitioner,

v.

DELL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. In *Sherwood Partners, Inc. v. Lycos, Inc.* ("*Sherwood*"), the Ninth Circuit ruled that California's preference avoidance statute, part of its assignment for the benefit of creditors law, was preempted by 11 U.S.C. § 547. Should *Sherwood* be overruled as inconsistent with this Court's preemption jurisprudence?

B. *Sherwood* held that the California law was preempted by 11 U.S.C. § 547, in part, because it interferes with an "ideal" of the Bankruptcy Code: equitable distribution of a debtor's assets among his creditors. All voluntary assignments for the benefit of creditors meet this standard. Does *Sherwood*'s holding therefore indicate that all such laws are preempted and, if so, is this holding reconcilable with this Court's opinions?

C. Can federal bankruptcy law and state voluntary assignment systems peacefully coexist or does the former so occupy the field as to preempt the latter?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are in the case caption. There is no parent or publicly held company which owns 10% or more of Equitable Transitions, Inc. ("ETI").

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari before judgment to review a decision of a panel of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

Petitioner is unaware of any published citation for the order disposing of the appeal below. Petitioner has included a copy of this order in the attached Appendix at p. 1.

JURISDICTION

On February 28, 2011, ETI filed its opening brief in the Ninth Circuit. In the brief, ETI requested that the Ninth Circuit review and overrule its decision in *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005) ("*Sherwood*"). *Sherwood* ruled that California Code of Civil Procedure ("CCP") § 1800, the provision of California's assignment for the benefit of creditors law that authorizes preference recovery, was preempted by 11 U.S.C. § 547 of the Bankruptcy Code (the "Code"). As this case concerns preferential transfers that ETI seeks to recover, ETI's appeal can only succeed if *Sherwood* is overruled. ETI recognized that Ninth Circuit law prohibited one panel from overruling a past panel; overruling of a panel decision can only be accomplished through en banc review.

Spinelli v. Gaughan, 12 F.3d 853, 858, n. 1 (9th Cir. 1993). Hence, ETI represented that it would be filing a petition for en banc review, which it did on March 25, 2011.

On May 17, 2011, the Ninth Circuit indicated that no judge had expressed an interest in reviewing the case en banc and that hence, the request for en banc review was denied. On June 30, 2011, Dell filed an unopposed motion to dismiss the appeal as moot. On September 12, 2011, the Ninth Circuit granted the motion and dismissed the appeal. On October 4, 2011, the Ninth Circuit entered a formal mandate, pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, stating that the September 12, 2011 order took effect on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Under 28 U.S.C. § 1254(1), this Court may grant a petition for a writ of certiorari to review any case "before or after rendition of judgment or decree."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

California Code of Civil Procedure § 1800, set out in full in the attached Appendix at pp. 16-26.

11 U.S.C. § 547, set out in full in the attached Appendix at pp. 9-15.

STATEMENT OF THE CASE

On November 14, 2008, Brash Entertainment, LLC ("Brash"), as assignor, executed a general assignment for the benefit of creditors in favor of ETI, as assignee, pursuant to California Code of Civil Procedure ("CCP") §§ 493.010, *et seq*. (the "Assignment"). (Excerpts of the Record Below ["ER"] at p. 16). Pursuant to the Assignment, Brash conveyed to Appellant all of Brash's property including every right, claim and interest of Brash. (ER at p. 16).

Between August 16, 2008 and November 14, 2008, Brash made one or more transfers in the approximate amount of $81,586.89 (collectively, the "Preferential Transfers") directly to or for the benefit of Dell. Additionally, in the four years preceding the Assignment, Brash transferred to Appellee the sum of no less than $2,880,000 (collectively, the "Fraudulent Transfers.") (ER at p. 17).

The Preferential Transfers in question are subject to avoidance pursuant to CCP § 1800(b) because 1) Appellee was a creditor at the time of the Preferential Transfers; 2) the Preferential Transfers were to, or for the benefit of Appellee, and for or on account of antecedent debt owing by Brash to Appellee; 3) the Preferential Transfers were effected while Brash was insolvent, as that term is defined in CCP § 1800(a)(1); 4) the Preferential Transfers occurred within ninety days of the assignment; and 5) the Preferential Transfers enabled Defendant to receive more than another creditor of the same class. (ER at p. 17).

On November 13, 2009, Equitable Transitions, Inc. ("Appellant" and/or "ETI") filed a Complaint in California state court against Dell, Inc. ("Appellee" and/or "Dell") alleging two causes of action: 1) pursuant to CCP § 1800, recovery of the certain preferential transfers and; 2) pursuant to California Civil Code ("CC") §§ 3439 *et seq*., recovery of certain fraudulent transfers (the "Action"). (ER at pp. 15-18). On December 8, 2009, Dell filed a Notice of Removal of the Action to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1441(b). (ER at pp. 10-12). The district court had subject matter jurisdiction to rule on the action below pursuant to 28 U.S.C. § 1332 because the controversy exceeds $75,000, exclusive of interest and costs, and is between citizens of different states. To wit, the amount in controversy, exclusive of interest and costs, is $81,586.89. (ER at p. 29).

On December 17, 2009, Dell filed a Motion to Dismiss the Action pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). (ER at p. 33, docket entry #11). Dell argued that ETI's First Cause of Action should be dismissed because CCP § 1800 was ruled by this Court to be preempted in *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005) ("*Sherwood*") and hence ETI failed to state a claim. Dell also argued that ETI's Second Cause of Action failed to state a claim because it did not satisfy either the heightened pleading standards of FRCP 9(b) or the regular pleading standards announced by this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

On January 6, 2010, ETI opposed Dell's Motion to Dismiss. (ER at p. 33, docket entry #15). ETI notified the Court of its intention to dismiss the Second Cause of Action should the Court grant ETI leave to amend. ETI argued further that *Sherwood* was wrongly decided and that subsequent authority had rejected the case. ETI recognized that the District Court was likely bound by *Sherwood* and that, in that case, ETI likely had "no alternative besides asking an appellate court to reconsider or overrule *Sherwood Partners*." Petitioner believes that the Fraudulent Transfers are subject to avoidance pursuant to California Civil Code §§ 3439.34, *et seq*. but voluntarily dismissed this cause of action.

On February 2, 2010 the District Court granted Dell's Motion to Dismiss holding that it was bound by *Sherwood*. Appendix at pp. 2-6. The District Court stated that it was unsure whether ETI's Complaint could be "saved by amendment" but nevertheless granted ETI leave to file an amended Complaint within thirty days. (ER at p. 8). ETI declined to do so, instead filing a Notice of Appeal on February 10, 2010. (ER at p. 34, docket entry #20).

On February 23, 2010, the Ninth Circuit issued an Order stating that 1) ETI had failed to pay filing and docketing fees and; 2) stating that the District Court's order "did not dispose of the action as to all claims and all parties." The Ninth Circuit ordered

ETI to, within twenty-one days of the Order, pay the outstanding fees due and either move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction. On March 5, 2010, ETI paid the required docketing fees. (ER at p. 34, docket entry #23). ETI neither moved for voluntary dismissal of the appeal nor filed a show cause memorandum and hence, pursuant to Ninth Circuit Rule 42-1, on June 2, 2010, the Ninth Circuit dismissed the Appeal. (ER at p. 34, docket entry #24).

Subsequently, ETI requested that the district court clarify the finality of the dismissal. On July 6, 2010, the district court issued a minute order ordering the case dismissed with prejudice. (Appendix at pp. 7-8). Armed with a final order, ETI filed a new notice of appeal on July 26, 2010. (ER at p. 1). On February 28, 2011, ETI filed its opening brief. On March 25, 2011, ETI filed a petition for en banc review.

On May 17, 2011, the Ninth Circuit indicated that no judge had expressed an interest in reviewing the case en banc and hence that the request for en banc review was denied. On June 30, 2011, Dell filed an unopposed motion to dismiss the appeal as moot. On September 12, 2011, the Ninth Circuit granted the motion and ordered the appeal dismissed. (Appendix at p. 1). On October 4, 2011, the Ninth Circuit entered a formal mandate, pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, stating that the September 12, 2011 order took effect on that date.

ARGUMENT

A WRIT OF CERTIORARI IS NECESSARY TO RESOLVE A CONFLICT BETWEEN THIS COURT AND THE NINTH CIRCUIT

The relevant consideration for purposes of certiorari is contained in Supreme Court Rule 10(c) – which provides that one reason that the Court considers in determining whether to grant certiorari review is that "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court."

Somewhat unusually, both considerations apply to the present appeal. In *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005) ("*Sherwood*"), the Ninth Circuit held that California Code of Civil Procedure ("CCP") § 1800 is preempted by federal law. CCP § 1800 is a part of California's voluntary assignment for the benefit of creditors ("ABCs" and/or "voluntary assignments") law. Specifically, CCP § 1800 empowers an assignee the power to avoid certain preferential transfers. CCP § 1800 is "by design, virtually identical to the bankruptcy code's preferential transfer statute [§ 547(b)]."[1] *Sherwood*, *supra*, 394 F.3d at 1207 (Nelson, J. dissenting).

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[1] *Sherwood* was decided before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCA) amended § 547. Under both CCP § 1800 and § 547 pre-BAPCA, a

(Continued on following page)

Sherwood held CCP § 1800 preempted based primarily on a misreading of the relevant authority and an improper conflation between distinct goals underlying Chapter 7 of the Bankruptcy Code (the "Code"). The core rationale for the *Sherwood* holding concerned what that court identified as the two "ideals" underlying Chapter 7 of the Code: a "fresh start" for a debtor through a discharge of debts and the equitable distribution of a debtor's assets among creditors. *Sherwood*, 394 F.3d at 1203. The *Sherwood* court observed that parallel state insolvency systems adopting discharge schemes had been repeatedly held preempted by the Code. The court extended this logic to parallel state insolvency systems which affected the second "ideal," the equitable distribution goal. This extension was an unwarranted overreach that contradicts existing authority, misapprehends critical distinctions between these two "ideals," and threatens

transferee could defend against recovery under the "ordinary course of business" defense provided Defendant can prove up three elements: 1) that the transfer was "in payment of a debt incurred by the debtor in the ordinary course of business"; 2) that the transfer itself "was made in the ordinary course of business" and; 3) that the transfer was made "according to ordinary business terms." Former 11 U.S.C. § 547(c)(1). BAPCA amended this provision so that the defense can now be established by proving up the first element and proving *either* the second or the third element of the "ordinary course of business" defense. BAPCA also added minimum dollar amounts for preference actions. Petitioner does not believe that these changes affect the viability of *Sherwood* in any meaningful way and hence will not address them further herein.

the existence of all state assignments for the benefit of creditors.

At least fifteen states have preference avoidance statutes similar to California's, including fellow Ninth Circuit state Arizona (see Ariz. Rev. Stat. § 44-1041), New York (N.Y. Debt. & Cred. Law § 15 (6-a), Ohio (Ohio Rev. Code Ann. §§ 1313.56 & .58), and Texas (Tex. Bus. & Com. Code § 23.09). More generally, assignments for the benefit of creditors exist in either statutory or common law form in every state in the union. Robert Richards and Nancy Ross, *Practical Issues in Assignments for the Benefit of Creditors*, 17 Am. Bankr. Inst. L. Rev. 5, 31, n. 2 (2009). State voluntary assignments "provide debtors with an efficient, inexpensive way to liquidate their remaining assets equitably among their creditors." *Ready Fixtures Co. v. Stevens Cabinets*, 448 F.Supp.2d 787 (W.D. Wis. 2007) ("*Stevens*"). Without voluntary assignments, the bankruptcy courts would be deluged with filings, overwhelming the system and sapping its effectiveness.

Because the *Sherwood* decision threatens the existence of all of these systems and risks the elimination of critical non-bankruptcy alternatives, preemption of CCP § 1800 constitutes an important federal question. *Sherwood* was wrongly decided; it conflicts with and misreads this Court's decisions and has and will have a severely negative impact on state voluntary assignment schemes. The present appeal turns entirely on whether *Sherwood* is applied, as the appeal deals with an ABC and an attempt by an assignee to exercise the preference avoidance provision of CCP § 1800. Hence, ETI respectfully requests that this Court grant its petition for writ of certiorari to reconsider and overrule *Sherwood*.

I. SHERWOOD WAS WRONGLY DECIDED; SUBSEQUENT PRECEDENT RIGHTLY CRITICIZED THE CASE AS LACKING IN BOTH DECISIONAL AUTHORITY AND LOGICAL SUPPORT

A. *Sherwood* and Judge Nelson's Dissent

In *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1206 (9th Cir. 2005), the Ninth Circuit held that CCP § 1800, the state preference portion of its assignment for the benefit of creditors statutes, was preempted by the federal bankruptcy code (the "Code").

In *Sherwood*, the debtor made a voluntary assignment for the benefit of creditors to Sherwood Partners, Inc. ("Sherwood Partners"). Sherwood Partners closed the debtor and brought an action under CCP § 1800 to recover a $1 million preference from a creditor. The creditor removed the case to federal district court and moved to dismiss arguing that the Code preempted CCP § 1800. The district court disagreed and granted Sherwood Partners' motion for summary judgment. The creditor appealed. *Sherwood*, 394 F.3d at 1200.

"Congress has the constitutional power to preempt state law . . . and may do so either expressly

– through clear statutory language – or implicitly." *Whistler Investments Inc. v. Depository Trust & Clearing Corp.*, 539 F.3d 1159, 1164 (9th Cir. 2008) (citation omitted). There are two types of implied preemption: field preemption and conflict preemption. Field preemption occurs "where the federal regulation is sufficiently comprehensive to leave no room for supplementary state regulation." *Hillsborough County, Fla. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). Conflict preemption exists when (1) "'compliance with both federal and state regulations is a physical impossibility,'" or (2) "when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citations omitted). Hence, *Sherwood* stated that the question of whether CCP § 1800 was preempted turned on "whether it is merely another creditor rights provision of the kind that is tolerated by the Bankruptcy Code, or whether it gives the state assignee powers that are within the heartland of bankruptcy administration." *Sherwood*, 394 F.3d at 1201.

Sherwood Partners unsuccessfully argued that 11 U.S.C. § 544(b) incorporated CCP § 1800 into the Code. The court distinguished the trustee's powers under § 544(b)[2] from those accorded assignees under CCP § 1800. In contrast to § 544(b), CCP § 1800

[2] Unless specifically noted, all section references are to Title 11 of the United States Code.

grants only general assignees – rather than individual unsecured creditors – the power to set aside preferential transfers. Thus, CCP § 1800 gives the general assignee "new avoidance powers by virtue of his position." *Id*. at 1202. The court further stated that the term "creditor" as used in § 544(b) could not be fairly read to encompass representatives of creditors and that the term "custodians," which includes general assignees, was not included in § 544(b)'s avoidance power. Accordingly, the court held that § 544(b) does not incorporate CCP § 1800.

The court next addressed whether CCP § 1800 could "peaceably coexist with the federal bankruptcy scheme." *Id*. at 1202. To make this determination, the court analyzed whether CCP § 1800 was consistent with the "essential goals and purposes" of the Code. *Id*. The court identified two "ideals" fundamental to Chapter 7: a "fresh start" for a debtor through discharge and the equitable distribution of a debtor's assets among creditors. *Id*. at 1203. As to the first ideal, a myriad of Supreme Court cases have held that state statutes purporting to give debtors a discharge of debts are clearly preempted, even if the statute in question is "compatible with (or identical to) the federal discharge statute." *Id.* at 1203 (citing *Pobreslo v. Boyd Co.*, 287 U.S. 518, 525, 53 S.Ct. 262, 77 L.Ed. 469 (1933) ("*Pobreslo*"); *Stellwagen v. Clum*, 245 U.S. 605, 615-616, 38 S.Ct. 215, 62 L.Ed. 507 (1918) ("*Stellwagen*"); and *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265-266, 49 S.Ct. 108, 73 L.Ed. 318 (1929) ("*Pinkus*")).

As to the second ideal, *Sherwood* held that the same underlying considerations supporting preemption of state discharge laws support a preemption holding as to state laws which "implicate . . . equitable distribution." *Id.* The Code promotes the equitable distribution of a debtor's assets, the court explained, because the bankruptcy system brings all creditors and the debtor together into a single claims adjudication preventing a "mutually destructive feeding frenzy by creditors." *Id*. at 1203 (citation omitted). The *Sherwood* court reasoned that CCP § 1800 interferes with this equitable distribution "ideal" in several respects.

According to *Sherwood*, CCP § 1800 defeats the trustee's ability to recover a transfer avoided by the general assignee. *Id*. at 1204. Additionally, the federal avoidance power "may be exercised only under the supervision of the federal courts" and the trustee authorized to exercise the federal avoidance power is "appointed and supervised by the United States Trustee . . . " rather than an assignee "hand-picked by the Debtor, as was Sherwood. . . ." *Id*. The court further found significant that state assignments "affect the incentives of various parties as to whether they wish to avail themselves of federal bankruptcy law." *Id*. at 1205. Thus, CCP § 1800 gives assignees avoidance powers "beyond those that may be exercised by individual creditors" and "trench[es] too close upon the exercise of the federal bankruptcy power." *Id*. As a result, the court ruled that CCP § 1800 was "inconsistent with the enactment and operation of the federal bankruptcy system and is therefore preempted." *Id*. at 1206.

Judge Nelson filed a vigorous dissent. Judge Nelson pointed out, first, that incentives which affect a debtor's decision to enter into bankruptcy exist in any state insolvency scheme. Taken to its logical conclusion, the majority's position would lead to preemption of all state-law insolvency schemes, despite such schemes originating in English common law "as an alternative to formal bankruptcy proceedings." *Id*. at 1206 (Nelson, J., dissenting).

Judge Nelson further pointed out that this Court has upheld a state voluntary assignment scheme stating that "it is apparent that Congress intended that such voluntary assignments . . . should be regarded as not inconsistent with the purposes of the federal act." *Id*. at 1207 (quoting *Pobreslo v. Boyd Co.*, 287 U.S. 518, 526, 53 S.Ct. 262, 77 L.Ed. 469 (1933)) ("*Pobreslo*"). The *Pobreslo* Court explicitly held that voluntary assignments peaceably coexist with the bankruptcy system by acting "quite in harmony with the purposes of the Federal Act . . . to protect creditors against each other and go to assure equality of distribution unaffected by any requirement or condition in respect of discharge." *Id*. (quoting *Pobreslo*, 287 U.S. at 562). As a result, the Court held that state laws providing for a discharge of debts are preempted, but Judge Nelson noted that it "has never held that state laws that regulate the distribution of assets in a voluntary assignment might face the same fate." *Id*.

Judge Nelson also disputed the relevance of the majority's argument that exercise of the avoidance power under CCP § 1800 made it impossible for the trustee to recover the same sum. The dissent noted that CCP § 1800 is "by design, virtually identical to the bankruptcy code's preferential transfer statute [§ 547(b)]." *Id*. at 1207. Since the same transfer could be avoided under either system, Judge Nelson doubted that CCP § 1800 actually interfered with the goal of equitable distribution of a debtor's assets among creditors. *Id*. at 1208. Further, the Code explicitly incorporates voluntary assignments through provisions such as 11 U.S.C. § 543(d)(2). *Id*. at 1207. Finally, Judge Nelson pointed out that voluntary assignments and the federal system had peacefully coexisted for many years without interfering with the equitable distribution goal. *Id*. at 1208.

B. *Sherwood* was Rightly Rejected by California state courts and a Wisconsin District Court

Sherwood set off a storm of criticism. Two intermediate California courts rejected *Sherwood* entirely. The first case to disapprove of *Sherwood* was a California state appellate case, *Haberbush v. Charles & Dorothy Cummins Family Limited Partnership*, 139 Cal.App.4th 1630, 1633, 43 Cal.Rptr.3d 814 (2nd Dist. 2006) ("*Haberbush*"). In *Haberbush*, Carolyn's Country Pies, Inc. ("Carolyn's") entered into a voluntary general assignment for the benefit of creditors pursuant to CCP § 493.010 with David R. Haberbush ("Mr.

Haberbush") as assignee. Mr. Haberbush brought three separate suits against Carolyn's creditors (the "Creditors") pursuant to CCP § 1800 to avoid and recover payments made to these creditors as preferential transfers. Judgments were rendered in Mr. Haberbush's favor in all cases, appeals followed, and the appeals were consolidated by the Court of Appeal.

The *Haberbush* court noted first that *Sherwood* was not controlling because "[d]ecisions of the lower federal courts on federal questions are persuasive but not binding on state courts." *Id*. at 1635, n. 16 (citation omitted). *Haberbush* then rejected *Sherwood* on five separate substantive grounds.

First, *Haberbush* found it "undisputed" that Congress intended to allow the peaceful coexistence of the Code with state laws permitting ABCs. *Id*. at 1637. And, as the *Sherwood* dissent pointed out, one such state law was expressly upheld in *Pobreslo*. *Id*. (Nelson, J., dissenting) (citing *Pobreslo*, 287 U.S. at 526). Moreover, an earlier Supreme Court case, *Stellwagen v. Clum* (1918) 245 U.S. 605, 615, 38 S.Ct. 215, 62 L.Ed. 507 ("*Stellwagen*") expressly held an Ohio statute permitting a receiver to administer assets for the benefit of creditors "not opposed to the policy of the bankruptcy law or in contravention of the rules and principles established by it with a view to the fair distribution of the assets of the insolvent." *Haberbush* reiterated that § 544(b) authorizes the bankruptcy trustee to take advantage of such state laws.

Secondly, *Haberbush* argued that *Sherwood* "reaches too far" in suggesting that any state statute which affects the "ideal" of equitable distribution is preempted. *Id*. at 1637. *Haberbush* pointed to *Pobreslo* and *Stellwagen* as cases in which this Court upheld state voluntary assignment statutes against preemption challenges despite these statutes' impact on the "ideal" of equitable distribution. *Haberbush* thus rejected the idea that statutes that "implicate" the Code's goal of equitable distribution are necessarily preempted by federal law. *Id*. at 1638.

Thirdly, *Haberbush* rejected *Sherwood*'s conclusion that preemption of CCP § 1800 is appropriate because that law gives the assignee greater powers than those exercised by individual unsecured creditors. *Haberbush* endorsed Judge Nelson's argument that this criterion for preemption would necessarily call into question all state voluntary assignment statutes, not merely those which grant the assignee the power to avoid preferential transfers. *Id*. at 1638. *Pobreslo* and *Stellwagen* compel the conclusion that this result would be inconsistent with this Court's jurisprudence. For the same reason, *Haberbush* rejected *Sherwood*'s argument that voluntary assignment laws alter incentives for parties to avail themselves of federal bankruptcy law. The *Haberbush* court conceded that these incentives were affected by state voluntary assignment laws, but, noted that, this is true of all voluntary assignments, whether or not they grant an assignee avoidance powers. *Id*. at 1639.

Fourth, *Haberbush* agreed with Judge Nelson's reasoning concerning the argument that recovery of a preferential transfer by a state court assignee would prevent recovery of the same sum by the bankruptcy trustee. The *Haberbush* court concurred that this result buttressed rather than detracted from the goal of equitable distribution. *Id*. at 1639. After all, the court reasoned, § 547(b) and CCP § 1800 are "virtually identical" and hence treat transactions in the same way and with the same results. *Id*. (quoting *Sherwood*, 394 F.3d at 1207 (Nelson, J., dissenting)).

Finally, *Haberbush* adopted Judge Nelson's reasoning that state law should not be held preempted unless Congress specifically so states or "the nature of the regulated subject matter permits no other conclusion." *Id*. at 1640 (quoting *Sherwood*, 394 F.3d at 1208 (Nelson, J., dissenting) (citation omitted)). *Haberbush* held that no such conclusion was justified as to CCP § 1800:

> Voluntary assignments and the bankruptcy system have co-existed since the inception of bankruptcy law, and state laws regulating the rights and obligations of debtors or their assignees and creditors are often expressly incorporated in bankruptcy law . . . Congress has not indicated that voluntary assignments generally or preferential transfer avoidance laws specifically are to be preempted . . . Under these circumstances, we can discern no persuasive reason to conclude that California's "less stigmatic, and less costly, voluntary assignment scheme" . . . – which, like the federal bankruptcy system,

> serves to ensure equality of distribution of a debtor's assets – "stands as an obstacle to the accomplishment . . . of the full purposes and objectives" of the federal bankruptcy system. *Haberbush*, 139 Cal.App.4th at 1640 (citations omitted).

For all of these reasons, the *Haberbush* court rejected *Sherwood* and held that CCP § 1800 was not preempted by the Code. *Id*. Five months later, another California appellate court fully adopted the *Haberbush* analysis and rejected *Sherwood*'s holding that federal law preempts CCP § 1800. *Credit Managers Ass'n of California v. Countrywide Home Loans, Inc.*, 144 Cal.App.4th 590, 50 Cal.Rptr.3d 259 (4th Dist. 2006) (review denied, Jan. 24, 2007).

One year later, a Wisconsin federal district court analyzed the effect of *Sherwood*'s analysis on Wisconsin's insolvency preference statute. *Ready Fixtures Co. v. Stevens Cabinets*, 488 F.Supp.2d 787 (W.D. Wis. 2007) ("*Stevens*"). In *Stevens*, the court addressed Defendant Stevens Cabinets' argument that Wisconsin Statute § 128.07, that state's insolvency preference statute, was preempted by § 547 of the Code. Defendant argued that the Wisconsin law was distinguishable from § 547 on two grounds, demonstrating a conflict: 1) the Wisconsin Statute had a four month period for recovery of preferences rather than the three month period of § 547(b); and 2) the Wisconsin statute lacked any exemptions or defenses available to a creditor in receipt of a fraudulent transfer while § 547 contains several.

The *Stevens* court noted that these distinctions were relevant to the court's analysis only "insofar as they reveal a fundamental conflict" between § 547(b) and state law. *Id*. at 790. The court rejected the claim that *Sherwood* was persuasive as to preemption. *Id*. Although it conceded that the Wisconsin law and CCP § 1800 were "similar," the court noted that the "problems with the *Sherwood* decision are manifold." *Id*. (citations omitted). *Sherwood* "erred" by overstating the importance of equitable distribution in relation to discharge. Although Congress "surely intended" that the Code meet the goal of equitable distribution, "the focus of the code is on debtors, not creditors. . . . The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Id*. at 791 (quoting *Marrama v. Citizens Bank of Massachusetts*, 503 U.S. 181, 127 S.Ct. 1105, 1107, 166 L.Ed.2d 956 (2007) (citation omitted)).

The court also noted the long, peaceful coexistence of the Code and state insolvency proceedings. In furtherance of this point, the *Stevens* court cited the federal fraudulent transfer avoidance provision of § 548 and the Code's recognition of "parallel state remedies under the Uniform Fraudulent Transfer Act" which are incorporated for the trustee by § 544(b). *Id*. at 791. *Stevens* also defended the value of the Wisconsin law, characterizing it as "an efficient, inexpensive way to liquidate . . . assets equitably. . . ." *Id*. The court found the fact that Wisconsin receivers had "slightly more power to recover fraudulent transfers" insufficient to prevent the equitable distribution of a debtor's assets promoted by the Code. A contrary result, the court argued, "would force insolvent debtors always to file for bankruptcy, even when simpler, less expensive state proceedings are available to them." *Id*.

Additionally, *Stevens* pointed out that the *Pobreslo* Court, had already held that there was no preemptive conflict between federal law and Wisconsin Statute § 128.06, the voluntary assignment provisions of Wisconsin law. *Id*. (citing *Pobreslo*, 287 U.S. at 525-526). Although the *Pobreslo* Court addressed § 128.06 rather than § 128.07, the *Stevens* court found that it was "clear" that the Court had looked at the entirety of § 128 and determined that the statute was "wholly consistent with the goals of the bankruptcy code." *Id*. Accordingly, the court ruled that Wisconsin Statute § 128.07 was not in conflict with the Code and hence not subject to preemption. *Id*.

Judge Nelson's dissent, together with the *Haberbush* and *Stevens* critiques of *Sherwood* are persuasive, and this Court should recognize the value of these critiques and take this opportunity to overturn *Sherwood* as wrongly decided.

II. *SHERWOOD* CONFLICTS WITH SUPREME COURT AUTHORITY

A. *Sherwood* Conflicts with Long-Standing Supreme Court Precedent

As stated previously, *Sherwood* recognized two primary "ideals" of Chapter 7: 1) providing the debtor with a "fresh start" through discharge of debts; and 2) equitable distribution of assets among creditors. *Sherwood*, 394 F.3d at 1203. It is well established that state laws that "purport" to give "debtors a discharge of their debts are preempted." *Id*. *Sherwood* extends this analysis further than this Court has gone, however, by applying it to CCP § 1800, arguing that the fact that this law affects the equitable distribution goal suggests the law should be preempted. This holding is undermined by examining the three primary cases that *Sherwood* references: *Stellwagen*, 245 U.S. at 605, *Pinkus*, 278 U.S. at 265-266, and *Pobreslo*, 287 U.S. at 525.

In *Stellwagen*, a secured creditor sought turnover of lumber and a balance due on an open account from a "trustee in bankruptcy" appointed by an Ohio state law. The trustee refused, arguing that the security interest in the property was a voidable preference under Ohio law. The secured creditor countered that the Ohio voidable preference law was preempted by the federal Bankruptcy Act. The *Stellwagen* Court disagreed, holding that the "statute is not opposed to the policy of the bankruptcy law or in contravention of the rules and principles established by it with a view to the fair distribution of the assets of the insolvent." *Stellwagen*, 245 U.S. at 615. The Court explained that preemption applied only to state laws in direct conflict with federal law. *Id*. And, although the *Stellwagen* Court acknowledged that state discharge laws were preempted, the statutes under consideration lacked a discharge provision. *Id*. at 617. The Court placed great emphasis on this point, holding that the lack of a discharge provision meant that the Ohio laws were not subject to preemption. *Id*. Although equitable distribution was part of the Code's design, "a main purpose of the act" was to "aid the unfortunate debtor by giving him a fresh start in life. . . ." *Id*. The *Stellwagen* Court further observed that the Court's authority to that point had laid "great stress upon this feature of the law" because discharge is "of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life." *Id*. (citations omitted). As a discharge provision was "wholly wanting" in the Ohio statutes, however, the statutes were not preempted by the Code. *Id*. In *Sherwood*, the court unsuccessfully attempted to distinguish *Stellwagen*. There, the majority argued that there was no conflict between its ruling and *Stellwagen* because the preferential transfer avoidance power exercised "was one that could have been exercised by any creditor." *Sherwood*, 394 F.3d at 1205. This reading of the Ohio law is accurate but incomplete. It is true that any individual creditor could exercise the power to recover a voidable preference, however doing so would have resulted in the commencement of an involuntary insolvency proceeding. *Stellwagen*, 245 U.S. at 609 n. 1 (quoting then-operative Ohio Statute § 6343). Such a proceeding required appointment of a receiver who was tasked with taking control of all of the debtor's assets and distributing those assets among the debtor's creditors "for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands. . . ." *Id*. Ironically, this result would end up mirroring the federal scheme through the legislative endorsement, in § 544(b)(1), of *Moore v. Bay*, 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 1133 (1931). Like the Ohio statutes at issue in *Stellwagen*, § 544(b)(1) permits the bankruptcy trustee to exercise the avoidance power of an individual creditor under state law but distributes the recovery among creditors of the bankruptcy estate. Consequently, the Ohio statutes and § 544(b)(1) lead to the same outcome and *Sherwood*'s rationale for distinguishing *Stellwagen* is unpersuasive.

The next case chronologically is *Pinkus*. In *Pinkus*, this Court ruled that an Arkansas law containing a discharge provision was preempted by the Code. *Pinkus*, 278 U.S. at 261. The Court reasoned that the Arkansas law differed from a common-law assignment for the benefit of creditors because it was, in essence an "insolvency" law which provided a complete insolvency system parallel to the Code. The

Court noted that the Arkansas law not only provided for a discharge of debts but also required the insolvent debtor to "surrender . . . all of his unexempt property . . . to be liquidated by a trustee for the payment of debts under the direction of the court." *Id*. at 264 (citations omitted). Moreover, the Arkansas law included a complete system for classifying creditors and the order of payment of said claims. *Id*. Thus, the Arkansas law "operate[d] within the field occupied by the Bankruptcy Act" and was in direct conflict with federal law. *Id*. The Court thus held that coexistence of the two laws would result in "intolerable inconsistencies and confusion." *Id*. at 265.

The Court rebuffed the Arkansas Supreme Court's assertion that the effect of the law was the same as the operation of a voluntary assignment noting that traditional voluntary assignments lack "conditions intended to secure the debtor's discharge." *Id*. at 266. The Court thus rejected the entirety of the Arkansas law, including provisions affecting distribution of assets of creditors, holding the Arkansas law preempted by the Code. In so doing, however, the Court expressly declined to extend its holding to assignments for the benefit of creditors generally. *Id*. at 268.

Finally, there is *Pobreslo*. In *Pobreslo*, this Court addressed a preemption challenge to a Wisconsin statute regulating voluntary assignments. Although the Wisconsin statute contained a discharge provision, the *Pobreslo* Court noted that in the case before it, the assignment did not implicate discharge. *Pobreslo*, 287 U.S. at 523. Moreover, in two prior state cases, the Wisconsin Supreme Court had held that that state's discharge provision was preempted by the Code. *Id*. at 523-525. In proceedings below, the Wisconsin Supreme Court reaffirmed this holding but held that the provisions of the Wisconsin law applying to voluntary assignments were "severable" from its discharge provisions. *Id*. at 524.

The Court affirmed. The Court distinguished *Pinkus* since that case arose under Arkansas' state insolvency law rather than its law governing voluntary assignments. *Id*. at 525. By contrast, the Wisconsin law authorized voluntary assignment irrespective of whether the assignor was solvent or insolvent and hence could not be properly characterized as an "insolvency" law. *Id*. at 526. Additionally, the Wisconsin law's discharge provisions were not invoked in *Pobreslo* and, in any case, were severable. *Id*. at 525.

Equally significant, the Arkansas law "not only governed discharge of the bankruptcy debtor, but imposed conditions which trammeled and made against equal distribution of his property." *Id*. The Wisconsin law operated differently because it permitted creditors to bring suit directly against the debtor and did not require them to stipulate to a debtor's discharge in order to participate in the estate's distribution. *Id*. Consequently, *Pobreslo* held that the Wisconsin law was "quite in harmony with the purposes of the federal act" as voluntary assignments under that law "serve to protect creditors against each other, and go to assure equality of distribution unaffected by any requirement or condition in respect of discharge." *Id*. at 526.

Finally, *Pobreslo* distinguished the Wisconsin law from the Arkansas law because the Arkansas law involved a "judicial winding up of an insolvent estate and the discharge of the debtor." *Id*. By contrast, the Wisconsin law concerned a voluntary assignment for which the "substantive rights . . . depend upon contract; the legislation merely governs the execution of the trusts on which the property is conveyed." The Court found this distinction critical, observing that "it is apparent that Congress intended that such voluntary assignments . . . should be regarded as not inconsistent with the purposes of the federal act." *Id*. (citations omitted).

Sherwood implicitly suggested that CCP § 1800 was distinguishable from the statutes analyzed in *Pobreslo* because the law grants an assignee "new avoidance powers by virtue of his position" as opposed to an individual unsecured creditor. *Sherwood*, 394 F.3d at 1202. This suggestion is incorrect. The statutes upheld in *Pobreslo* actually contained a preference avoidance power exercisable only by assignees:

> The assignee shall possess all the power necessary to institute any action or proceeding to set aside and avoid any levy, sale, mortgage, hypothecation, lien or other security made, given or executed contrary to the provisions of the preceding section [setting forth the elements of a preferential transfer]. If

> the assignee shall neglect for sixty days after the execution of the assignment to institute an action or proceeding as herein provided any creditor of the assignor who has duly proved his claim . . . may institute and prosecute to judgment any such action or proceeding in the name of the assignee and for his benefit, upon executing to the latter a bond. Wis. Stat. §§ 128.02, 128.03 (1929).

Hence, it is inaccurate to state that CCP § 1800 "goes further" than the Wisconsin statute approved in *Pobreslo* by "giving the state assignee entirely new powers that are not derived from contract and trust law." *Sherwood*, 394 F.3d at 1206. Indeed, the law explicitly gave state assignees a new power "by virtue of [their] position" – the exclusive power to bring a preference action within a specified time period. *Pobreslo* held that this law was "quite in harmony with the purposes of federal act" and that the law assured "equality of distribution" in its operation, conclusions directly in conflict with the *Sherwood* majority's reasoning concerning preemption of CCP § 1800. *Pobreslo*, 287 U.S. at 526.

Sherwood stated that *Stellwagen* "left open" the question as to whether state insolvency statutes not containing a discharge provision could "also be preempted." *Sherwood*, 394 F.3d at 1205. This is certainly true, but the *Pobreslo* decision appeared to close this door by finding voluntary assignments consistent with Congressional intent. *Pobreslo*, 287 U.S. at 526. Moreover, while *Pinkus*, *Sherwood* and

Pobreslo all held that state insolvency laws purporting to grant a debtor a discharge of debts were preempted, none of these cases held that voluntary assignments were preempted. Even the *Pinkus* Court, which overturned an Arkansas law which included provisions affecting the distribution of assets among creditors, explicitly declined to extend its holding to voluntary assignment laws lacking a discharge provision. *Pinkus*, 278 U.S. at 278. Moreover, the Arkansas law did not promote the equitable distribution of assets among creditors but "imposed conditions which trammeled and made against equal distribution of his property." *Pobreslo*, 287 U.S. at 525. The Arkansas law may thus be contrasted with CCP § 1800 which, because it is "virtually identical" to § 547, will generally lead to the same asset distribution. *Sherwood*, 394 F.3d at 1207 (Nelson, J. dissenting).

The above belies *Sherwood*'s claim that "[w]hat goes for state discharge provisions," namely, preemption, "also holds true for state statutes that implicate . . . equitable distribution." *Id*. at 1203. In fact, this Court has repeatedly distinguished between laws which purport to grant a discharge, which are preempted, and laws which affect the equitable distribution of a debtor's assets, which were specifically approved in both *Sherwood* and *Pobreslo*. And, as *Haberbush* points out, both *Sherwood* and *Pobreslo* expressly referred to the equitable distribution goal while upholding each state statute. *Haberbush*, 139 Cal.App.4th at 1638 (citing *Pobreslo*, 287 U.S. at 526; *Stellwagen*, 245 U.S. at 615). Thus, *Haberbush* rightly concluded that mere implication of the goal of equitable distribution is insufficient to "justify the conclusion that the state law 'stands as an obstacle' to that goal." *Id*. (citation omitted).

Furthermore, this Court's differing treatment of the goals of discharge and equitable distribution is logical; these goals are not equivalent. The preference avoidance power benefits creditors of a debtor generally while discharge benefits the debtor alone. Allowing individual states to grant a discharge could lead to abuses such as forum-shopping and result in "intolerable inconsistencies and confusion." *Pinkus*, 278 U.S. at 265. By contrast, as the *Sherwood* court conceded, voluntary assignments "have a venerable common-law pedigree, were upheld in *Pobreslo* and are specifically contemplated in the Bankruptcy Code." *Sherwood*, 394 F.3d at 1205 n. 8. State law discharge provisions share no comparable history.

In sum, *Sherwood*'s attempt to ground its holding this Court's preemption precedent is unpersuasive. In fact, the logic of *Sherwood*, *Pinkus* and *Pobreslo* suggest the contrary conclusion: state laws which implicate the goal of equitable distribution are not subject to preemption for that reason alone. As *Sherwood* contradicts existing Supreme Court precedent, this Court should take this opportunity to overturn *Sherwood* as wrongly decided.

B. *Sherwood* also Conflicts with a Subsequent Supreme Court Preemption Case

Not long after *Sherwood* was decided, this Court further narrowed the scope of the preemption doctrine. In *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005) ("*Bates*"), this Court addressed whether § 126v(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") preempted state law damage claims resulting from pesticide labeling. In *Bates*, twenty-nine Texas peanut farmers brought suit against a pesticide company when their crops were destroyed as a result of using a pesticide that had been registered with the Environmental Protection Agency. *Id*. at 435. The pesticide's labeling failed to warn the farmers that use of the pesticide in soils with high enough pH levels could stunt the growth of the peanuts grown in the soil. *Id*. After the farmers' crops were severely damaged, they brought suit against the manufacturer in Texas state court alleging state law claims under the Texas Deceptive Trade Practices-Consumer Protection Act. *Id*. The manufacturer responded by filing suit in federal court seeking a declaratory judgment that the framers' claims were preempted by FIFRA. *Id*.

This Court held that the Texas law was not preempted by FIFRA. *Id*. at 447-448. *Bates* clarified that the coexistence of state and federal law in "areas of traditional state regulation" was generally favored because the states "are independent sovereigns" and hence the Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Id*. at 449 (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)). As a result, this Court explained that, in "[i]n areas of traditional state regulation" courts must "assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest'" *Id*. at 449. (citation omitted). This Court explained further that, even if the pesticide company had "offered a plausible alternative reading" of the statute, the Court "would have a duty to accept the reading disfavoring pre-emption." *Id.* While state laws in direct conflict with FIFRA are preempted, laws that are "fully consistent with federal requirements" are not. *Id.* at 452.

Although *Bates* did not deal with the Code, it is clear that the case narrowed the scope of the preemption doctrine. Because it predated *Bates*, the *Sherwood* Court did not rely on or apply these principles. Had *Sherwood* applied these principles, the court would have likely reached a markedly different result. It is indisputable that ABCs are an "area[ ] of traditional state regulation." *Id.* at 449. ABCs "have their origins in English common law. . . ." *Sherwood*, 394 F.3d at 1206 (Nelson, J., dissenting) (citation omitted). The anti-preference component of some ABC statutory schemes date back to the 19th century. See, e.g., *Kellogg v. Root*, 23 F. 525 (C.C.W.D. Mich. 1885); accord *Dickson v. Baker*, 75 Minn. 168, 77 N.W. 820 (1899); *Moody v. Carroll*, 71 Tex. 143, 8 S.W. 510 (1888); *Batten v. Smith*, 62 Wis. 92, 22 N.W. 342 (1885). In fact, ABCs are "recognized by and incorporated in the federal bankruptcy code." *Sherwood*, 394

F.3d at 1207 (Nelson, J., dissenting) (citing 11 U.S.C. §§ 101(11)(B) and 543(d)(2)). Finally, as one commentator has pointed out, the very length of the *Sherwood* opinion belies a conclusion that Congressional intent to preempt CCP § 1800 is "clear and manifest." Anthony W. Austin & Scott K. Brown, *Has the Ninth Circuit Finally Seen the Light? The Latest Development in Bankruptcy Preemption*, 2009 Ann. Surv. Of Bankr. Law Part I § 13 (2009). Analyzing CCP § 1800 under the principles delineated in *Bates*, then, would likely lead to *Sherwood* being overruled.

CONCLUSION

In *Sherwood*, the Ninth Circuit drastically overreached, effectively ruling that any assignment for the benefit of creditors' scheme is preempted by the Bankruptcy Code. Such assignments have a long historical pedigree, and are explicitly incorporated into the Code through 11 U.S.C. §§ 101(11)(B) and 543(d)(2). Moreover, these assignments serve a critical role in supplementing the bankruptcy system, both by avoiding preferential transfers that the bankruptcy system would not reach due to lack of filing or time restrictions, and by providing a necessary non-bankruptcy alternative. Yet, the effect of *Sherwood* is that state law voluntary assignments, some form of which exists in all fifty states, are apparently preempted by the Code. This ruling cannot be squared with this Court's jurisprudence characterizing state law voluntary assignments as "in harmony" with the Code and otherwise endorsing their existence. A writ of certiorari is thus appropriate so that this Court can review and overrule the erroneous *Sherwood* ruling. Petitioner respectfully requests that this Court grant it a writ of certiorari for this purpose.

Respectfully submitted,

HABERBUSH & ASSOCIATES, LLP
DAVID R. HABERBUSH, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUITABLE TRANSITIONS, INC., as Assignee for the Benefit of Creditors of Brash Entertainment Holdings LLC, f/k/a Brash Entertainment LLC, a California limited liability company, Plaintiff-Appellant, v. DELL INC., Defendant-Appellee.	No. 10-56181 D.C. No. 2:09-cv-08995-JHN Central District of California, Los Angeles ORDER (Filed Sep. 12, 2011)

Before: HAWKINS, CLIFTON, and IKUTA, Circuit Judges.

Appellee's unopposed motion to dismiss this appeal as moot is granted. *See Hulteen v. AT&T,* 498 F.3d 1001, 1009-10 (9th Cir. 2007).

DISMISSED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EQUITABLE TRANSITIONS, INC., as Assignee for the Benefit of Creditors of Brash Entertainment Holdings, LLC, fka, Brash Entertainment, LLC, a California limited liability company, Plaintiff, vs. DELL, and DOES 1-10, inclusive, Defendants.	Case No. 2:09-CV-08955-JHN-JCx **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT PREJUDICE** Judge: Honorable Jacqueline H. Nguyen

The matter is before the Court on Defendant Dell Marketing, L.P.'s ("Defendant") Motion to Dismiss, filed on December 17, 2009. The Court has considered the Motion, Plaintiff Equitable Transitions, Inc.'s ("Plantiff") Opposition, and Defendant's Reply filed in this matter. The Court deems this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for February 1, 2010 is removed from the Court's calendar. For the reasons stated below, the Court hereby GRANTS Defendant's Motion to Dismiss with leave to amend.

I.

Background

Plaintiff's Complaint sets forth the following:

Plaintiff is an assignee for the benefit of creditors of Brash Entertainment Holdings, LLC ("Brash"). On November 14, 2008, Brash executed a general assignment for the benefit of creditors in favor of Plaintiff. (Compl. ¶ 3.) Pursuant to this assignment, Brash conveyed to Plaintiff all of Brash's property and every right, claim, and interest of Brash. *Id.*

Between August 16 and November 14, 2008, Brash made one or more transfers ("Preferential Transfers") directly to or for the benefit of Defendant, a creditor of Brash, (Compl. ¶ 8-10.)

Plaintiff's Complaint asserted the following causes of action: (1) recovery of Preferential Transfers under California Code of Civil Procedure § 1800; and (2) recovery of constructive fraudulent transfers under California Civil Code § 3439 *et seq.*

II.

Discussion

A. Legal Standard to Dismiss

Rule 12(b)(6) permits a defendant to seek dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). All material factual allegations in the complaint are assumed to be true and construed in the light most favorable to the plaintiff. *Nursing Home Pension Fund, Local 144 v. Oracle Corp.,* 380 F.3d 1226, 1229 (9th Cir. 2004).

Denial of leave to amend is "improper unless it is clear that the complaint could not be saved by any amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.,* 416 F.3d 940, 946 (9th Cir. 2005). However, a court's discretion to deny leave to amend is decidedly broader where the plaintiff has previously filed an amended complaint. *Miller v. Yokohama Tire Corp.,* 358 F.3d 616, 622 (9th Cir. 2004).

B. Plaintiff's First Cause of Action

Assuming all material factual allegations in the Complaint are true, Plaintiff nevertheless has failed to state a claim for recovery of Preferential Transfers under California Code of Civil Procedure § 1800. In *Sherwood Partners, Inc. v. Lycos, Inc.,* the Ninth Circuit held that the Bankruptcy Code preempted California Code of Civil Procedure § 1800. *Sherwood Partners, Inc. v. Lycos, Inc.,* 394 F.3d 1198, 1206 (9th Cir. 2004). Accordingly, where a plaintiff assignee sued a defendant creditor under Section 1800 to recover a preferential transfer, the Ninth Circuit reversed the district court and remanded the case for dismissal of the complaint. *Id.*

Here, the facts are nearly identical to those in *Sherwood Partners.* Plaintiff, an assignee, is suing Defendant, a creditor, under Section 1800 to recover preferential transfers. In its Opposition, Plaintiff does not dispute this factual similarity. What Plaintiff does ask is that the Court disregard *Sherwood Partners,* asserting that "the *Sherwood Partners* case has NEVER been cited approvingly." (Opp'n at 2.)

First, Plaintiff's assertion is incorrect. Other courts have followed *Sherwood Partners. See, e.g., Viz Media LLC v. Steven M. Spector PC,* 2007 U.S. Dist. LEXIS 29442, at *11-13 (N.D. Cal. Apr. 10, 2007); *Burkart v. Coleman (In re Tippett),* 542 F.3d 684, 689 (9th Cir. 2008). Second, and more importantly, *Sherwood Partners* remains binding Ninth Circuit precedent. Accordingly, under *Sherwood Partners,* this Court finds that Plaintiff's first cause of action fails to state a claim upon which relief can be granted. The first cause of action is dismissed.

C. Plaintiff's Second Cause of Action

Plaintiff has agreed to dismissal of its second cause of action. As such, the Court does not need to address the merits. The second cause of action is dismissed.

III.

Conclusion

For the reasons stated, the Court hereby GRANTS Defendant's Motion to Dismiss. Plaintiff's Complaint contains very few facts. As such, it is unclear whether the Complaint could be saved by amendment. Moreover, Plaintiff has not filed an amended complaint previously. The Court therefore allows Plaintiff leave to amend the Complaint, consistent with this Order, within 30 days from the date of this Order.

Dated: February 2, 2010

/s/ Jacqueline H. Nguyen
Honorable Jacqueline H. Nguyen
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:09-cv-08995-JHN-JCx Date July 6, 2010

Title Equitable Transitions Inc v. Dell et al

Present: The Honorable JACQUELINE H. NGUYEN

Chris Silva for Alicia Mamer	Not Reported	N/A
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS) ORDER DISMISSING CASE WITH PREJUDICE

On February 2, 2010, this Court granted Defendant Dell's motion to dismiss [19]. Therein, the Court granted the plaintiff 30 days leave to amend the complaint.

A Notice of Appeal was filed on February 11, 2010 [20]. The Order dismissing the appeal was entered on June 2, 2010.

No amended complaint having been filed, the Court now **ORDERS** this case **DISMISSED WITH PREJUDICE**.

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Initials of Preparer CSI

United States Code Annotated

Title 11. Bankruptcy (Refs & Annos)

Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)

Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 547

§ 547. Preferences

Effective: April 1, 2010
Currentness

(a) In this section –

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(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; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(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.

(c) The trustee may not avoid under this section a transfer –

(1) to the extent that such transfer was –

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was –

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor –

(A) to the extent such security interest secures new value that was –

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of –

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $5,850[1].

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value

[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section –

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made –

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the non-avoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

West's Annotated California Codes

Code of Civil Procedure (Refs & Annos)

Part 3. Of Special Proceedings of a Civil Nature (Refs & Annos)

Title 11.7. Recovery of Preferences and Exempt Property in an Assignment for the Benefit of Creditors (Refs & Annos)

West's Ann.Cal.C.C.P. § 1800

§ 1800. Recovery of preferences

Effective: January 1, 2007 to June 30, 2012
Currentness

<Section operative until July 1, 2012.
See, also, section operative July 1, 2012.>

(a) As used in this section, the following terms have the following meanings:

(1) "Insolvent" means:

(A) With reference to a person other than a partnership, a financial condition such that the sum of the person's debts is greater than all of the person's property, at a fair valuation, exclusive of both of the following:

(i) Property transferred, concealed, or removed with intent to hinder, delay, or defraud the person's creditors.

(ii) Property that is exempt from property of the estate pursuant to the election of the person made pursuant to Section 1801.

(B) With reference to a partnership, financial condition such that the sum of the partnership's debts are greater than the aggregate of, at a fair valuation, both of the following:

(i) All of the partnership's property, exclusive of property of the kind specified in clause (i) of subparagraph (A).

(ii) The sum of the excess of the value of each general partner's separate property, exclusive of property of the kind specified in clause (ii) of subparagraph (A), over the partner's separate debts.

(2) "Inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease.

(3) "Insider" means:

(A) If the assignor is an individual, any of the following:

(i) A relative of the assignor or of a general partner of the assignor.

(ii) A partnership in which the assignor is a general partner.

(iii) A general partner of the assignor.

(iv) A corporation of which the assignor is a director, officer, or person in control.

(B) If the assignor is a corporation, any of the following:

(i) A director of the assignor.

(ii) An officer of the assignor.

(iii) A person in control of the assignor.

(iv) A partnership in which the assignor is a general partner.

(v) A general partner of the assignor.

(vi) A relative of a general partner, director, officer, or person in control of the assignor.

(C) If the assignor is a partnership, any of the following:

(i) A general partner in the assignor.

(ii) A relative of a general partner in, general partner of, or person in control of the assignor.

(iii) A partnership in which the assignor is a general partner.

(iv) A general partner of the assignor.

(v) A person in control of the assignor.

(D) An affiliate of the assignor or an insider of an affiliate as if the affiliate were the assignor.

(E) A managing agent of the assignor.

As used in this paragraph, the following terms have the following meanings:

"Relative" means an individual related by affinity or consanguinity within the third degree as determined by the common law, or an individual in a step or adoptive relationship within the third degree.

An "affiliate" means a person that directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting securities of the assignor, or 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the assignor, excluding securities held in a fiduciary or agency capacity without sole discretionary power to vote, or held solely to secure a debt if the holder has not in fact exercised the power to vote, or a person who operates the business of the assignor under a lease or operating agreement or whose business is operated by the assignor under a lease or operating agreement.

(4) "Judicial lien" means a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

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

(6) "Receivable" means a right to payment, whether or not the right has been earned by performance.

(7) "Security agreement" means an agreement that creates or provides for a security interest.

(8) "Security interest" means a lien created by an agreement.

(9) "Statutory lien" means a lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include a security interest or judicial lien, whether or not the interest or lien is provided by or is dependent on a statute and whether or not the interest or lien is made fully effective by statute.

(10) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with property or with an interest in property, including retention of title as a security interest.

(b) Except as provided in subdivision (c), the assignee of any general assignment for the benefit of creditors, as defined in Section 493.010, may recover any transfer of property of the assignor that is all of the following:

(1) To or for the benefit of a creditor.

(2) For or on account of an antecedent debt owed by the assignor before the transfer was made.

(3) Made while the assignor was insolvent.

(4) Made on or within 90 days before the date of the making of the assignment or made between 90 days

and one year before the date of making the assignment if the creditor, at the time of the transfer, was an insider and had reasonable cause to believe the debtor was insolvent at the time of the transfer.

(5) Enables the creditor to receive more than another creditor of the same class.

(c) The assignee may not recover under this section a transfer as follows:

(1) To the extent that the transfer was both of the following:

(A) Intended by the assignor and the creditor to or for whose benefit the transfer was made to be a contemporaneous exchange for new value given to the assignor.

(B) In fact a substantially contemporaneous exchange.

(2) To the extent that the transfer was all of the following:

(A) In payment of a debt incurred in the ordinary course of business or financial affairs of the assignor and the transferee.

(B) Made in the ordinary course of business or financial affairs of the assignor and the transferee.

(C) Made according to ordinary business terms.

(3) Of a security interest in property acquired by the assignor that meets both of the following:

(A) To the extent the security interest secures new value that was all of the following:

(i) Given at or after the signing of a security agreement that contains a description of the property as collateral.

(ii) Given by or on behalf of the secured party under the agreement.

(iii) Given to enable the assignor to acquire the property.

(iv) In fact used by the assignor to acquire the property.

(B) That is perfected within 20 days after the security interest attaches.

(4) To or for the benefit of a creditor, to the extent that, after the transfer, the creditor gave new value to or for the benefit of the assignor that meets both of the following:

(A) Not secured by an otherwise unavoidable security interest.

(B) On account of which new value the assignor did not make an otherwise unavoidable transfer to or for the benefit of the creditor.

(5) Of a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all the transfers to the transferee caused a reduction, as of the date of the making of the assignment and to the prejudice of

other creditors holding unsecured claims, of any amount by which the debt secured by the security interest exceeded the value of all security interest for the debt on the later of the following:

(A) Ninety days before the date of the making of the assignment.

(B) The date on which new value was first given under the security agreement creating the security interest.

(6) That is the fixing of a statutory lien.

(7) That is payment to a claimant, as defined in Section 3085 of the Civil Code, in exchange for the claimant's waiver or release of any potential or asserted claim of lien, stop notice, or right to recover on a payment bond, or any combination thereof.

(8) To the extent that the transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of, the spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record, or a determination made in accordance with state or territorial law by a governmental unit, or property settlement agreement; but not to the extent that either of the following occurs:

(A) The debt is assigned to another entity voluntarily, by operation of law or otherwise, in which case the assignee may not recover that portion of the transfer that is assigned to the state or any political subdivision of the state pursuant to Part D of Title IV of the

Social Security Act (42 U.S.C. Sec. 601 et seq.) and passed on to the spouse, former spouse, or child of the debtor.

(B) The debt includes a liability designated as alimony, maintenance, or support, unless the liability is actually in the nature of alimony, maintenance, or support.

(d) An assignee of any general assignment for the benefit of creditors, as defined in Section 493.010, may avoid a transfer of property of the assignor transferred to secure reimbursement of a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the assignee under subdivision (b). The liability of the surety under the bond or obligation shall be discharged to the extent of the value of the property recovered by the assignee or the amount paid to the assignee.

(e)(1) For the purposes of this section:

(A) A transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of the property from the debtor, against whom applicable law permits the transfer to be perfected, cannot acquire an interest that is superior to the interest of the transferee.

(B) A transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3), a transfer is made at any of the following times:

(A) At the time the transfer takes effect between the transferor and the transferee, if the transfer is perfected at, or within 10 days after, the time, except as provided in subparagraph (B) of paragraph (3) of subdivision (c).

(B) At the time the transfer is perfected, if the transfer is perfected after the 10 days.

(C) Immediately before the date of making the assignment if the transfer is not perfected at the later of:

(i) The making of the assignment.

(ii) Ten days after the transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the assignor has acquired rights in the property transferred.

(f) For the purposes of this section, the assignor is presumed to have been insolvent on and during the 90 days immediately preceding the date of making the assignment.

(g) An action by an assignee under this section must be commenced within one year after making the assignment.

394 F.3d 1198

United States Court of Appeals,
Ninth Circuit.

SHERWOOD PARTNERS, INC.,
Assignee for the Benefit of Creditors of
International Thinklink Corporation,
Plaintiff-counter-defendant-Appellee,
v.
LYCOS, INC., a Delaware Corporation
aka Delaware Lycos, Inc.,
Defendant-counter-claimant-Appellant.

No. 03-55247. | Argued and Submitted June 8, 2004.
| Filed Jan. 12, 2005. | Rehearing and
Rehearing En Banc Denied March 1, 2005.

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Appeal from the United States District Court for the Central District of California; Gary A. Feess, District Judge, Presiding. D.C. No. CV-01-05403-GAF.

Before D.W. NELSON, Senior Circuit Judge, KOZINSKI and GRABER, Circuit Judges.

Opinion

Opinion by Judge KOZINSKI; Dissent by Judge D.W. NELSON.

KOZINSKI, Circuit Judge.

We consider whether the Bankruptcy Code preempts a state statute that gives an assignee selected by the debtor the power to void preferential transfers that could not be voided by an unsecured creditor.

Facts

Thinklink Corp., a unified messaging service provider, entered into an agreement with Lycos, which operates a network of web sites. Lycos agreed to promote Thinklink's messaging service on Lycos web sites exclusively for two years. Thinklink eventually defaulted on one of its payments; Lycos nevertheless continued to display links to Thinklink's messaging service. Lycos and Thinklink renegotiated their agreement, shortening the exclusivity period to 90 days and reducing Thinklink's remaining payments from over $17 million to $1 million plus stock. Thinklink delivered the $1 million but not the stock, and about two months later made a voluntary general assignment for the benefit of creditors to Sherwood Partners. Sherwood shut down Thinklink's business and sued Lycos in state court under Cal.Civ.Proc.Code § 1800 to recover the $1 million payment as a preferential transfer.[1] Lycos removed to federal court on diversity grounds and moved to dismiss, arguing that section 1800 was preempted by the Bankruptcy Code. The district court denied Lycos's motion and eventually granted summary judgment to Sherwood. Lycos appeals.

Discussion

Congress has broad authority to preempt state laws, but whether Congress has done so in a particular instance is a matter of congressional intent. This intent is most easily detected where the statute expressly preempts other laws, but preemption may also be inferred where it is clear from the statute and surrounding circumstances that Congress intended to occupy the field, leaving no room for state regulation. The Supreme Court, in *Pacific Gas & Electric Co. v.*

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[1] The statute provides that:

> [T]he assignee of any general assignment for the benefit of creditors . . . may recover any transfer of property of the assignor:
>
> (1) To or for the benefit of a creditor;
>
> (2) For or on account of an antecedent debt owed by the assignor before the transfer was made;
>
> (3) Made while the assignor was insolvent;
>
> (4) Made on or within 90 days before the date of the making of the assignment . . . ; and
>
> (5) That enables the creditor to receive more than another creditor of the same class.

Cal.Civ.Proc.Code § 1800(b).

State Energy Resources Conservation & Development Commission, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), summarized the contours of the field preemption doctrine:

> Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.'"

Id. at 203-04, 103 S.Ct. 1713 (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947))). "Even where Congress has not entirely displaced state regulation in a specific area," the Court continued, "state law is preempted . . . where [it] 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 204, 103 S.Ct. 1713 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).

There can be no doubt that federal bankruptcy law is "pervasive" and involves a federal interest "so dominant" as to "preclude enforcement of state laws on the same subject" – much like many other areas of congressional power listed in Article I, Section 8, of the Constitution, such as patents, copyrights, currency, national defense and immigration. The Bankruptcy Clause, which grants Congress the power to make bankruptcy laws, U.S. Const. art. I, § 8, cl. 4, stresses that such rules must be "uniform." Bankruptcy law occupies a full title of the United States Code. It provides a comprehensive system of rights, obligations and procedures, as well as a complex administrative machinery that includes a special system of federal courts and United States Trustees.

At the same time, federal law coexists peaceably with, and often expressly incorporates, state laws regulating the rights and obligations of debtors (or their assignees) and creditors. *See, e.g.,* 11 U.S.C. § 522(b)(2) (incorporating state personal exemptions to the bankruptcy estate); *id.* § 544(b) (making state law on voidable transfers available to the bankruptcy trustee); *id.* § 543(d)(2) (excusing some assignees for the benefit of creditors from compliance with property turnover requirements). In determining whether Cal.Civ.Proc.Code § 1800 is preempted, we must consider whether it is merely another creditor rights provision of the kind that is tolerated by the Bankruptcy Code, or whether it gives the state assignee powers that are within the heartland of bankruptcy administration.

Sherwood argues that the preference avoidance provisions of section 1800 are not only tolerated but specifically incorporated by the Bankruptcy Code through section 544(b), which allows a bankruptcy trustee to avoid any transfers voidable by unsecured creditors under "applicable law" (including state law).[2] Section 544(b), says Sherwood, "manifest[s] congressional intent not to preempt state statutes invalidating preferences. . . . Empowering bankruptcy trustees to so act *a fortiori* manifests a congressional intent that state statutes are valid and available to be used by a bankruptcy trustee." Reply Br. of Appellee at 30. The Supreme Court in *Stellwagen v. Clum,* 245 U.S. 605, 38 S.Ct. 215, 62 L.Ed. 507 (1918), in fact cited section 70e of the Bankruptcy Act of 1898, the precursor to section 544(b), in upholding a statute allowing assignees to void certain preferential transfers. *See id.* at 614, 618, 38 S.Ct. 215.

But the trustee's powers under section 544(b) are limited to those of unsecured creditors-such as the right of an individual unsecured creditor to set aside fraudulent conveyances under state law. *See, e.g., Decker v. Advantage Fund Ltd.,* 362 F.3d 593, 596 (9th Cir.2004) (involving a claim, under section 544(b), to avoid a transfer using California's Uniform

[2] Section 544(b) provides, in relevant part, that "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." 11 U.S.C. § 544(b).

Fraudulent Transfer Act, Cal. Civ.Code § 3439.04). Similarly, the Ohio statute upheld in *Stellwagen,* unlike the California statute at issue here, gave court-appointed trustees only those avoidance powers already held by "[a]ny creditor or creditors." 245 U.S. at 611 n. 1, 38 S.Ct. 215 (quoting the statute).[3] By contrast, the power to set aside preferential transfers under California's section 1800 can be exercised only by general assignees, not by individual unsecured creditors. In other words, the assignee appointed pursuant to section 1800 is given new avoidance powers by virtue of his position.

To make *Stellwagen* and section 544(b) cover this case would require us to read the term "creditor" in section 544(b) as encompassing representatives of creditors such as Sherwood. We doubt that Congress had Sherwood in mind when describing unsecured creditors in section 544(b). The Bankruptcy Code defines "creditor," in relevant part, as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A). "Custodian" is a different concept, which includes receivers, trustees and "assignee[s] under a general assignment for the benefit

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[3] The state statute at issue in *Stellwagen* was not a true preference statute, like Cal.Civ.Proc.Code § 1800 and 11 U.S.C. § 547, in that it required that the transfer have been made in contemplation of insolvency or with an intent to defraud creditors, making it more akin to a fraudulent conveyance statute. This distinction does not make a difference for purposes of our analysis.

of the debtor's creditors." *Id.* § 101(11). In fact, Congress defined custodian using the word "creditor" in two places. *See id.* § 101(11)(B), (C). Custodians, instead of being by their nature creditors, stand in a certain fiduciary relation to creditors. But Congress did not mention custodians alongside creditors in section 544(b). We are therefore unable to read "creditor" in section 544(b) to include custodians. *See Dubis v. B.W. Supply* (*In re Delta Group*), 300 B.R. 918, 923-24 (Bankr.E.D.Wis.2003); 5 *Collier on Bankruptcy* ¶ 544.09[4], at 544-21 & n. 26 (Lawrence P. King et al. eds., 15th ed. rev.2004) ("creditor" in section 544(b) includes assignees or successors of the original creditor, but "[a]n assignee for the benefit of creditors . . . is not such a creditor"); *see also In re Komfo Prods. Corp.,* 247 F.Supp. 229, 237 (E.D.Pa.1965); Vern Countryman, *The Use of State Law in Bankruptcy Cases (Part II),* 47 N.Y.U. L.Rev. 631, 663 (1972) (if Congress intended "any creditor" in section 70e, the precursor to section 544(b), to mean "any representative of any creditor," "it would be desirable to amend [the statute] to say so"). *Contra Zimmerman v. Frem Corp.* (*In re Kenval Mktg. Corp.*), 69 B.R. 922, 929-31 (Bankr.E.D.Pa.1987).[4] Thus, section 544(b) of

[4] We note that the Supreme Court, frowning on extending the meaning of statutory terms for policy reasons, has recently declined to read "trustee" in 11 U.S.C. § 506(c) as including administrative claimants. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 14, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000). The Court reiterated that "when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Id.* at 6, 120 S.Ct. 1942 (quoting

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the Bankruptcy Code, and its partial incorporation of state transfer avoidance law, does not save the California statute from preemption.

The question remains whether the section 1800 assignee's special avoidance powers, though not expressly incorporated into the Bankruptcy Code by section 544(b), nevertheless can peaceably coexist with the federal bankruptcy scheme. To answer this question we must consider the essential goals and purposes of federal bankruptcy law, and then determine whether section 1800 is consistent with them.

It is generally agreed that chapter 7 of the Bankruptcy Code, which governs liquidations, embodies two ideals: (1) giving the individual debtor a fresh start, by giving him a discharge of most of his debts; and (2) equitably distributing a debtor's assets among competing creditors. *See Stellwagen,* 245 U.S. at 617, 38 S.Ct. 215. As the leading bankruptcy treatise explains, these two goals are separate and operate somewhat independently of each other:

> From the creditors' viewpoint, chapter 7 establishes the concept of *equitable distribution* among creditors of a debtor's resources which, in most cases, are insufficient to permit full payment to all. From the individual

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United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (quoting *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917))) (internal quotation marks omitted).

> debtor's vantage point, chapter 7 permits the honest debtor to obtain a new financial life through the *discharge* of unpaid debts. *Neither concept is dependent on the other.* Thus, in many chapter 7 cases, which may also be called "no-asset" cases, the debtor has no property realizable by creditors. Nevertheless, unless the debtor has committed [certain acts, he] is entitled to a full discharge and release from all debts except those rendered nondischargeable. . . . *The distribution to creditors is also not affected by whether or not the debtor obtains a discharge.* Should discharge be denied, and property exists in the chapter 7 estate available to creditors, distribution will occur.

1 *Collier on Bankruptcy* ¶ 1.03[2][a], at 1-22 (emphasis added) (footnotes omitted).

We know, because the Supreme Court has repeatedly told us, that state statutes that purport to perform the first of these functions, by giving debtors a discharge of their debts, are preempted. *See Int'l Shoe Co. v. Pinkus,* 278 U.S. 261, 265-66, 49 S.Ct. 108, 73 L.Ed. 318 (1929); *see also Pobreslo v. Joseph M. Boyd Co.,* 287 U.S. 518, 525, 53 S.Ct. 262, 77 L.Ed. 469 (1933); *Stellwagen,* 245 U.S. at 615-16, 38 S.Ct. 215. That the state discharge statute may be compatible with (or even identical to) the federal discharge statute makes no difference. Nor does it matter that a creditor may be able to opt out of the state insolvency proceeding by commencing an involuntary federal bankruptcy proceeding; indeed, according to *Stellwagen,* it does not even matter whether a federal bankruptcy act is in effect. *Id.* at 615, 38 S.Ct. 215 ("It is settled that a State may not pass an insolvency law which provides for a discharge of the debtor from his obligations, which shall have the effect of a bankruptcy discharge as to creditors in other States, and this although no general federal bankruptcy act is in effect."). Such state procedures are preempted simply because the ability to grant a discharge is "one of the principal requisites of a true bankruptcy law." *Id.* at 616, 38 S.Ct. 215.

What goes for state discharge provisions also holds true for state statutes that implicate the federal bankruptcy law's other major goal, namely equitable distribution. Bankruptcy law accomplishes equitable distribution through a distinctive form of collective proceeding. This is a unique contribution of the Bankruptcy Code that makes bankruptcy different from a collection of actions by individual creditors. In a world of individual actions, each creditor knows that if he waits too long, the debtor's assets will have been exhausted by the demands of the quicker creditors and he will recover nothing. The creditors race to the courthouse, all demanding immediate payment of their entire debt. Like piranhas, they make short work of the debtor, who might have survived to pay off more of his debts with a little bit of reorganization – or at least might have more equitably fed the slower piranhas. *See, e.g., In re Hoskins,* 102 F.3d 311, 316 (7th Cir.1996) (noting the Bankruptcy Code's purpose of "preventing a mutually destructive feeding frenzy by creditors"), *rev'd on other grounds, Assocs. Commercial Corp. v. Rash,* 520 U.S. 953, 965, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997); *In re Kish,* 41 B.R. 620, 624 (Bankr.E.D.Mich.1984) (describing the "piranha-like attacks of creditors"). *Don't see Piranha* (New World Pictures 1978). *But see Berger v. Piranha, Inc.* (*In re Piranha, Inc.*), 297 B.R. 78 (N.D.Tex.2003) (a case where the creditors got the Piranha).

Federal bankruptcy law seeks to avoid this scenario by "creat[ing] a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike." *MSR Exploration, Ltd. v. Meridian Oil, Inc.,* 74 F.3d 910, 914 (9th Cir.1996). The filing of a bankruptcy petition brings a bankruptcy estate into being and triggers an automatic stay, which prevents creditors from enforcing their claims, thus preserving the debtor's assets for ultimate distribution by the bankruptcy trustee. *See* 11 U.S.C. §§ 301-303, 362; *see also* 1 *Collier on Bankruptcy* ¶ 1.03[2][b], at 1-24 to 1-25.

One of the major powers the Code gives the trustee is the power to avoid preferential transfers.[5] The trustee is authorized to recover these sums for the use of the bankruptcy estate in making its

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[5] The trustee may avoid preferences either under 11 U.S.C. § 547(b) or under state law (as incorporated into the Bankruptcy Code by section 544(b)) to the extent such transfers could be voided by an unsecured creditor.

distribution to creditors. Of course, this power, like all others, may be exercised only under the supervision of the federal courts; and the trustee exercising those powers to liquidate a corporation is not hand-picked by the debtor, as was Sherwood, but appointed and supervised by the United States Trustee, an official of the Department of Justice, *see* 11 U.S.C. § 701, or elected by the creditors, *see id.* § 702, to ensure impartiality. Federal law protects creditors – particularly out-of-state creditors like Lycos – from the trustee's possible conflicts of interest and other possible sources of self-dealing, *see id.* § 327 (regulating what professionals a trustee may employ); *id.* § 328 (regulating the compensation of such professionals); Fed. R. Bankr.P.2014 (regulating employment of professionals), and generally provides extensive disclosure, *see* Fed. R. Bankr.P. 1007, 2016, 9019.

It is clear that if a state assignee under section 1800 recovers a preferential transfer and distributes its proceeds to creditors, this will preclude a federal trustee from recovering the same sum under the federal preference statute if a federal bankruptcy proceeding is begun. The creditor who disgorged the transfer cannot disgorge it twice; the creditors who later received the recovered money may be impossible to identify; and even if they can be identified, they may be gone or in financial difficulty themselves. The distribution of the recovered sum will then have been made by a state assignee subject to state procedures and substantive standards, rather than by the federal trustee subject to bankruptcy law's substantive standards and procedural protections.[6]

Sherwood points out that the creditor may be able to avoid this result by quickly filing an involuntary federal bankruptcy petition, which would have the effect of preempting the state proceedings. But this argument proves too much. The same would be true of a state statute that purported to give debtors a discharge: Creditors in that situation could presumably also avoid the effect of state law by bringing a federal petition. Yet the Supreme Court has stated unequivocally that such state statutes are preempted. *See* page 1203 *supra*.

In any event, the affected creditor (like Lycos) may not be able to run to federal court because in most cases (i.e., those where there are more than eleven creditors) at least three creditors are required to force the debtor into bankruptcy. 11 U.S.C. § 303(b)(1). And the action of the state assignee may diminish the likelihood that Lycos will be able to obtain the consent of other creditors. After all, if the state assignee

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[6] This is not a matter for federal concern when the assignee has no special avoidance rights. If individual unsecured creditors can sue to recover preferences under state law, the same powers are also available to a bankruptcy trustee under section 544(b); there is obviously no conflict then between federal law and state law giving those powers to an assignee. To the extent a state assignee, who is less procedurally constrained than a bankruptcy trustee, may be free to engage in self-dealing, he can do nothing more than individual creditors, who are free to engage in all the self-dealing they want.

succeeds in recovering the preferential transfer under state law, the other creditors may share in that bounty and might therefore have no interest in invoking the potentially more expensive and time-consuming federal processes.

This points to yet another vice of the state proceedings: Once they are commenced, they will affect the incentives of various parties as to whether they wish to avail themselves of federal bankruptcy law. The creditor whose ox is being gored by the state assignee may have a new incentive to begin an involuntary federal proceeding; other creditors, for the reasons explained above, may have diminished incentives. The provisions of the Bankruptcy Code, including those that explicitly incorporate certain state laws (like voluntary assignments, or preference recovery provisions available to unsecured creditors) carefully delineate the circumstances under which federal bankruptcy proceedings are to be initiated. We do not believe Congress contemplated state laws that would sharpen or blunt the effect of those statutory incentives.[7]

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[7] *Perkins v. Petro Supply Co.* (*In re Rexplore Drilling, Inc.*), 971 F.2d 1219, 1222 (6th Cir.1992), for instance, is fully consistent with this approach. That case held that section 544(b) incorporates a state avoidance statute that defines preferences differently from the federal definition in section 547(b). This is hardly surprising; there would be no point in expressly incorporating state laws if such laws did not occasionally differ from federal law. State laws incorporated by section 544(b) are part of the incentive system Congress set up in the Bankruptcy Code;

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Stellwagen, on which Sherwood relies heavily, is not to the contrary. As noted above, *see* pages 1201-02 *supra,* the Supreme Court in *Stellwagen* did uphold a statute that allowed a state trustee to recover preferential transfers, but the preferential avoidance power the trustee exercised in that case was one that could have been exercised by any creditor. 245 U.S. at 611 n. 1, 38 S.Ct. 215. While the Court in *Stellwagen* reiterated that a state statute granting a discharge would definitely be preempted, it left open whether other state statutes dealing with the subject of insolvency may also be preempted. *Id.* at 616, 38 S.Ct. 215. We believe that statutes that give state assignees or trustees avoidance powers beyond those that may be exercised by individual creditors trench too close upon the exercise of the federal bankruptcy power.[8] Congress has thought carefully about how

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they cannot be said to undermine these incentives. State laws that give assignees additional avoidance powers are not part of that system.

[8] We do not, as the dissent claims, question the validity of voluntary assignments for the benefit of creditors, which have a venerable common-law pedigree, were upheld in *Pobreslo* and are specifically contemplated in the Bankruptcy Code. *See, e.g.,* 11 U.S.C. §§ 101(11)(B), 543(d)(2). The *Pobreslo* Court specifically noted that the voluntary assignment process it upheld did not create any new rights that did not already belong to the debtor or creditors:

> [T]he [state voluntary assignment] law merely governs the administration of trusts created by deeds like that in question, which do not differ substantially from those arising under common law assignments for the benefit of creditors. The substantive rights under

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collective insolvency proceedings are to be conducted and set both substantive standards and elaborate procedural protections to ensure a result that is fair to debtors and creditors alike. The exercise of the preference avoidance power by Sherwood under the authority of section 1800 is inconsistent with the enactment and operation of the federal bankruptcy system and is therefore preempted.

Conclusion

Because we hold that the California statute, Cal.Civ.Proc.Code § 1800, is preempted by the Bankruptcy Code, we remand to the district court for dismissal of the complaint.

REVERSED.

> such assignments depend upon contract; the legislation merely governs the execution of the trusts on which the property is conveyed. And as proceedings under any such assignment may be terminated upon petition of creditors filed within the time and in the manner prescribed by the federal Act . . . it is apparent that Congress intended that such voluntary assignments, unless so put aside, should be regarded as not inconsistent with the purposes of the federal Act.

Pobreslo, 287 U.S. at 526, 53 S.Ct. 262 (citation omitted). The statute we confront here goes further, giving the state assignee entirely new powers that are not derived from contract and trust law.

D.W. NELSON, Senior Circuit Judge, dissenting.

I respectfully dissent because I disagree with the majority's preemption analysis. The majority states that California Civil Procedure Code § 1800 is preempted by federal bankruptcy law. However, the reasoning by which the majority reaches this result would preempt any number of state laws governing voluntary assignments for the benefit of creditors because those laws have the effect of altering the incentives of various affected parties to initiate bankruptcy proceedings. Under the majority's reasoning, any state statutory scheme, including those governing voluntary assignments for the benefit of creditors, that "give[s] state assignees or trustees avoidance powers beyond those that may be exercised by individual creditors trench[es] too close upon the exercise of the federal bankruptcy power." Majority Op. at page 1205. State voluntary assignments, by definition, give the assignee more power than may be exercised by an individual creditor.[9] Because I believe that voluntary assignments for the benefit of

[9] The majority asserts that it does not question the validity of assignments for the benefit of creditors and that it invalidates section 1800 because it gives the state assignee new powers that are not derived from trust or contract law. Majority Op. at page 1205 n. 8. The state assignee, regardless of the powers granted by section 1800, distributes a debtor's assets among creditors and otherwise exercises powers on behalf of all creditors, thus exercising powers greater than any one creditor could exercise. I find it thus difficult to draw a line between the majority's arguments regarding section 1800 and problems with voluntary assignments, generally.

creditors and related state statutes are not preempted by federal bankruptcy law, I cannot join the majority opinion.

Voluntary assignments for the benefit of creditors have their origins in English common law, and exist as an alternative to formal bankruptcy proceedings. *See Credit Managers Ass'n v. Nat'l Indep. Bus. Alliance,* 162 Cal.App.3d 1166, 1169-70, 209 Cal.Rptr. 119 (1984). California's scheme requires that any assignment be for the benefit of all creditors, and does not allow preferences for any creditor or class of creditors. Cal.Civ.Proc.Code § 493.010(b)-(c). Creditors must be given notice and an opportunity to submit claims to the assignee. Cal.Civ.Proc.Code § 1802. These types of assignments are recognized by and incorporated in the federal bankruptcy code. *See, e.g.,* 11 U.S.C. § 101(11)(B) (defining "custodian" as, *inter alia,* "assignee under a general assignment for the benefit of the debtor's creditors"); § 543(d)(2) (excusing assignees appointed more than 120 days before the filing of a petition from turning debtor's property over to the trustee).

In *Pobreslo v. Boyd Co.,* the Supreme Court upheld a state scheme allowing voluntary assignment for the benefit of creditors, stating, "[I]t is apparent that Congress intended that such voluntary assignments . . . should be regarded as not inconsistent with the purposes of the federal Act." 287 U.S. 518, 526, 53 S.Ct. 262, 77 L.Ed. 469 (1933). When voluntary assignments contribute to bankruptcy's goal of equitable distribution, "quite in harmony with the purposes of the federal Act, the provisions of [state voluntary assignment laws] serve to protect creditors against each other and go to assure equality of distribution unaffected by any requirement or condition in respect of discharge." *Id.* Accordingly, the Supreme Court has held that state laws providing for discharge of debts are preempted by federal bankruptcy law, *see, e.g., Int'l Shoe Co. v. Pinkus,* 278 U.S. 261, 266, 49 S.Ct. 108, 73 L.Ed. 318 (1929), but has never suggested that state laws that regulate the distribution of assets in a voluntary assignment might face the same fate.

Yet the majority holds that section 1800 is preempted because it alters the incentives of creditors to initiate involuntary bankruptcy proceedings, thereby interfering with bankruptcy's goal of equitable distribution of a debtor's assets. The majority's concerns about section 1800 are not distinguishable from concerns about voluntary assignment provisions generally. *See, e.g.,* Majority Op. at pages 1203-05 (describing how state law interferes with the unique collective form of proceeding established by bankruptcy law; discussing use of "hand-picked" trustee in state proceedings). As the majority recognizes, Majority Op. at page 1205 n. 8, it is well established that there is a common-law right to make an assignment of property for the benefit of creditors. It is thus illogical that state laws that provide a forum for the equitable distribution of that property should be preempted by federal bankruptcy law.

The majority argues that if a preferential transfer is recovered by the assignee under section 1800, the same sum could not be recovered if a federal bankruptcy proceeding were initiated later. Majority Op. at pages 1204. But California's preference recovery provision is, by design, virtually identical to the bankruptcy code's preferential transfer statute. *See* 11 U.S.C. § 547(b), Cal. Civ. Proc. Code § 1800(b); *see also Angeles Electric Co. v. Superior Court,* 27 Cal.App.4th 426, 430-31, 32 Cal.Rptr.2d 660 (1994) (discussing intentional conformance of section 1800 with federal bankruptcy law). If the same transfer can be avoided in both the state and federal systems, how does the state system interfere with bankruptcy's goal of equitable distribution? Both the state and federal statutes serve to ensure equality of distribution and to deter the race to recover assets before insolvency. *See, e.g.,* H.R. Rep. 95-595, 177-78, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138; *see also Angeles Electric Co.,* 27 Cal.App.4th at 430-31, 32 Cal.Rptr.2d 660 (applying federal bankruptcy case law to interpret California statute). That California's voluntary assignment system has such a provision makes it more capable of effectuating the equality of distribution that is the aim of the bankruptcy law; it does not necessarily interfere with bankruptcy's goal of achieving equal distribution. The majority states that such state provisions are preempted because "they will affect the incentives of various parties as to whether they wish to avail themselves of federal bankruptcy law." Majority Op. at page 1205. The purposes of federal bankruptcy law – as the majority sees it – are to provide discharge of debt and equal distribution of assets to creditors. Majority Op. at page 1203. I fail to see how a preference recovery provision that assists in equal distribution interferes with either goal.

When the majority's reasoning is carried to its logical extension, it has the effect of pushing corporations threatened with insolvency from the less stigmatic, and less costly, voluntary assignment scheme into the world of federal bankruptcy. This should not have to be the case. I believe that both voluntary assignments and the bankruptcy system can "peaceably coexist" as twin mechanisms aimed at distributing the resources of an insolvent debtor. That voluntary assignments are incorporated into bankruptcy law, and that they have existed alongside bankruptcy law since its inception without causing an interference with the goal of equitable distribution, supports my conclusion that state voluntary assignments, and the laws that effectuate them, should not be preempted by bankruptcy law. "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). Here, Congress has not indicated that voluntary assignments, generally, or preferential transfer avoidance statutes, specifically, are to be preempted. Nor is the nature of the regulated activity – distribution of a debtor's assets – such that it is impossible to conclude that the state and federal schemes could not co-exist. The majority privileges federal bankruptcy law by suggesting that these collective proceedings are the only ones that Congress intended for the equitable distribution of debt to creditors. Because I am convinced that the two systems should co-exist, I respectfully DISSENT.