

O

1
2
3
4
5
6
7
8 **United States District Court**
9 **Central District of California**

10
11 IN RE KENNY G. ENTERPRISES, LLC,
12 Debtor.

Case No. 8:14-cv-00246-ODW

Bankruptcy Case No. 8:11-bk-24750-TA

13 THOMAS H. CASEY,
14 Plaintiff/Appellee,

Adversary Case No. 8:13-ap-01271-TA

15 v.

AMENDED ORDER REVERSING

16 DOUGLAS ROTENBERG; TUONG-VY
17 TON,

AND REMANDING

BANKRUPTCY COURT'S

18 Defendants/Appellants.

DECISION

19 **I. INTRODUCTION**

20 The Bankruptcy Code, found in Title XI of the United States Code, provides a
21 bankruptcy trustee with a panoply of powers to discharge her statutory duties to
22 administer the estate. These powers include the ability to challenge certain alleged
23 fraudulent transfers so that the trustee can bring the property back into the estate for
24 the benefit of outstanding creditors. But these powers have their limits.

25 Congress codified one such avoidance provision at 11 U.S.C. § 544(b). The
26 section provides that “the trustee may avoid any transfer of an interest of the debtor in
27 property or any obligation incurred by the debtor that is voidable under applicable law
28 by a creditor holding an unsecured claim” § 544(b)(1). Generally, this section

1 means that a trustee may assert standing on behalf of an existing unsecured creditor to
2 invoke state law to set aside a fraudulent transfer. But whether Congress intended
3 § 544(b) to apply to transfers occurring after the filing of a bankruptcy petition is a
4 divisive, very unsettled issue nationwide given Congress’s apparent silence on the
5 section’s temporal limits.

6 The bankruptcy court in this case found that the Trustee, Appellee Thomas H.
7 Casey, could employ the section to avoid a postpetition transfer. But after interpreting
8 the statute consistent with relevant legislative history, existing case law, and general
9 bankruptcy principles, the Court finds that § 544(b) only applies to prepetition
10 transfers. The Court consequently **REVERSES** the bankruptcy court’s decision and
11 **REMANDS** for further proceedings consistent with this decision.

12 **II. FACTUAL BACKGROUND**

13 In this highly unique situation, the Trustee seeks to set aside an alleged
14 fraudulent transfer—the sale of a residential property formerly part of the bankruptcy
15 estate—that occurred both postpetition and postconversion.

16 *1. Kenny G. Enterprises files a voluntary Chapter 11 petition*

17 On October 24, 2011, Kenny G. Enterprises, LLC—a Nevada limited-liability
18 company (“Debtor”)—filed a voluntary Chapter 11 petition in the United States
19 Bankruptcy Court for the Central District of California. *In re Kenny G. Enters.*,
20 No. 8:11-bk-24750-TA (Bankr. C.D. Cal. pet. filed Oct. 24, 2011); (Excerpt of Record
21 (“ER”) 0475–481). The Debtor disclosed its property located at 10 Horseshoe Court
22 in Hillsborough, California (“Hillsborough Property”) as one of its assets valued at
23 \$1.2 million. (ER 0507.)

24 The Debtor subsequently filed a Plan of Reorganization. (ER 0520–33.) The
25 Plan provided that the Debtor would continue to use the Hillsborough Property as
26 residential rental property to provide income for the Chapter 11 estate. (ER 0529.)
27 Further, confirmation of the Plan would vest all property of the estate in the Debtor.

28 ///

1 (ER 0530.) On January 9, 2013, the bankruptcy court confirmed the Plan of
2 Reorganization. (ER 0534–39.)

3 2. *Debtor sells Hillsborough Property to Appellants*

4 On or around March 26, 2013, Appellants Douglas Rotenberg and Toung-Vy
5 Ton (“Rotenbergs” or “Appellants”) purchased the Hillsborough Property for
6 \$3,156,000.00—a price that admittedly “far exceed[ed] the value of the property
7 based on the documents filed in the Debtor’s bankruptcy proceeding.” (ER 0047.) A
8 grant deed was recorded in the San Mateo County Recorder’s Office, which
9 transferred the Hillsborough Property from the Debtor to the Rotenbergs. (ER 0034,
10 at ¶ 30.)

11 The title company handling the transfer then deposited \$1,897,126.22 of the
12 sale proceeds into Debtor’s bank account on the day the transaction closed. (*Id.* ¶ 47.)
13 That same day, the Debtor wired \$1,714,900 to Freedom Investment, Corp., which the
14 Trustee alleges is just a shell company formed 21 days earlier by the Debtor’s
15 managing member, Kenneth Ghabrib. (*Id.* at ¶¶ 49–50, 52–55.) The Property was the
16 only income-generating asset in the Chapter 11 estate. (*Id.* at ¶ 27.)

17 3. *Bankruptcy court converts the case to Chapter 7*

18 On August 14, 2013, the bankruptcy court converted the case from Chapter 11
19 bankruptcy to Chapter 7. (ER 0540–42.) The court also issued a temporary
20 restraining order preventing the Debtor or those people acting in concert with it from
21 distributing any property to anyone other than the Trustee. (ER 0541.) The
22 bankruptcy court further ordered that the Debtor immediately transfer any funds from
23 the Hillsborough Property sale to the Trustee. (*Id.*)

24 4. *Trustee files suit against Appellants seeking to set aside transfer*

25 On August 21, 2013, the Trustee filed an adversary proceeding in the
26 bankruptcy court seeking to set aside the Hillsborough Property sale as a fraudulent

27 ///

28 ///

1 transfer.¹ (ER 0019–30.) On October 4, 2013, the Trustee amended his Complaint,
2 endeavoring to avoid the transfer under California Civil Code section 3439.04 and
3 asserting standing to pursue the claim on behalf of an existing, unsecured creditor
4 under 11 U.S.C. § 544(b).

5 On November 6, 2013, the Rotenbergs moved to dismiss the Amended
6 Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)
7 and Federal Rule of Bankruptcy 7012(b). (ER 0041–257.) They argued, among other
8 things, that the Trustee could not void the Hillsborough Property sale, because 11
9 U.S.C. § 544(b) does not apply to postpetition transfers.

10 On February 10, 2014, the bankruptcy court denied the motion with prejudice.
11 (ER 0347–58.) In its tentative ruling, the court recognized that the “majority rule
12 appears to be that section 544(a) and (b) powers are limited and may not be used by a
13 trustee to avoid a post-petition transfer.” (ER 0354.) But the court also noted
14 authority on the other side of the split in which courts have held that a trustee could
15 avoid a postpetition transfer under § 544. (ER 0354–55.)

16 The court ultimately interpreted § 544(b) as applying to both pre- and
17 postpetition transfers for three main reasons: (1) § 549—the section specifically
18 dealing with postpetition transfers—is confined to “property of the estate,” so a trustee
19 cannot use that section for property that has reverted in the debtor postconfirmation;
20 (2) a narrow reading of § 544(b) would render a trustee “largely powerless to deal
21 with post-confirmation misbehavior”; and (3) even measured by § 544’s narrow
22 statute of limitations, the Trustee timely brought the adversary proceeding.
23 (ER 0356.) The court further observed that since a single trustee could sue to avoid
24 the transfer under state law, “it is hard to make sense of a rule that would hold that the
25 trustee, who is the representative of all creditors, should be powerless to likewise sue.”

26
27 ¹ Note that whether the Hillsborough Property sale actually involved fraud is not at issue in this
28 appeal, as Appellants challenge the bankruptcy court’s denial of their motion to dismiss on § 544(b)
grounds. The Court thus assumes that the sale was fraudulent such that one must determine whether
the Trustee may assert standing on behalf of an existing unsecured creditor under § 544(b).

1 (*Id.*) The court concluded that it preferred to believe that “for every wrong there is a
2 remedy.” (*Id.*)

3 5. *Rotenbergs appeal to this Court*

4 On February 18, 2014, the Rotenbergs filed a Notice of Appeal in the
5 bankruptcy court. (ER 0359–75.) Two days later, they moved for leave to file an
6 interlocutory appeal before this Court under Bankruptcy Rules 8001(b) and 8003.
7 (ECF No. 1.) On March 6, 2014, the Court granted Appellants leave to appeal,
8 confining the appeal to the issue of whether 11 U.S.C. § 544(b) applies to postpetition
9 transfers.

10 The Court timely received all briefs and took the appeal under submission. The
11 Court now reverses and remands the bankruptcy court’s decision.

12 **III. APPELLATE JURISDICTION**

13 The Court has jurisdiction to hear this bankruptcy-court appeal under 28 U.S.C.
14 § 158(a) and Federal Rule of Bankruptcy Procedure 8001(b).

15 **IV. LEGAL STANDARD**

16 In reviewing a bankruptcy court’s decision, a district court reviews legal
17 determinations de novo. *In re Olshan*, 356 F.3d 1078, 1083 (9th Cir. 2004). This
18 means that the court reviews the legal issues involved “independently and without
19 deference.” *In re JTS Corp.*, 617 F.3d 1102, 1109 (9th Cir. 2010). But the district
20 court must accept factual findings unless clearly erroneous, that is, the court must be
21 “left with the definite and firm conviction that a mistake has been committed.” *Id.* at
22 1109 (internal quotation marks omitted); Fed. R. Bankr. P. 8013.

23 **V. DISCUSSION**

24 The Court granted the Rotenbergs leave to file an interlocutory appeal on one
25 issue, which ultimately serves as a threshold to the Trustee bringing his fraudulent-
26 transfer action: whether § 544(b) applies to postpetition transfers.

27 The Rotenbergs argue that § 544 is limited by its own terms to only prepetition
28 transfers. They contends that neither § 544(a) nor § 544(b) provide for the avoidance

1 of postpetition transfers, as the sections only speak of transfers with respect to
2 “property of the debtor” and not “property of the estate.” They aver that had Congress
3 intended for § 544(b) to address postpetition transfers, it would have included
4 language consistent with that intent. The omission of any reference to postpetition
5 transfers, Appellants urge, should be understood as a purposeful exclusion under the
6 doctrine of *expresio unius est exclusion alterius*. Further, they assert that had
7 Congress designed § 544(b) to apply to postpetition transfers, it would have included
8 a statute of limitations keyed to the date of the transfer as it did in § 549—a section
9 which explicitly addresses postpetition transfers. Instead, the Rotenbergs argue, by
10 triggering the statute of limitations as of the commencement of the case or the
11 appointment of the trustee, the implication is that the transfer has already occurred by
12 the time the debtor files the petition.

13 Appellants also point out that it is well settled that a trustee has no standing
14 generally to sue third parties on behalf of the estate’s creditors but can only assert
15 claims held by the debtor estate itself. Contrary to the bankruptcy court’s observation,
16 they contend that the trustee is not authorized to pursue every action a creditor may
17 pursue. Finally, the fact that a trustee may have no other recourse should not allow
18 expansion of the trustee’s statutory powers beyond their statutory scope, particularly
19 where courts have historically limited the trustee’s reach.

20 While the Rotenbergs contend that the clear majority of courts have interpreted
21 § 544(b) as applying only to postpetition transfers, the Trustee argues that there is
22 only one published opinion that squarely is on point with the unique facts of this case
23 involving an alleged fraudulent transfer that occurred postconfirmation and
24 preconversion: *In re Seminole Walls & Ceilings Corp.*, 446 B.R. 572 (Bankr. M.D.
25 Fla. 2011). The Trustee asserts that as in *Seminole Walls & Ceilings Corp.*, since he
26 cannot avail himself of §§ 548 and 549’s avoidance powers, he is only left with
27 § 544(b) and applicable state law. The Trustee also contends that the Rotenbergs are
28 attempting to insert a temporal limitation into § 544(b) that is not supported by the

1 statute's language and legal precedent. Rather, he argues that the construction of
2 § 544(b)'s plain language is that if a creditor of the debtor who existed at the time of
3 the transfer could void a transfer, the trustee may also void the transfer under
4 applicable state law.

5 **A. Statutory interpretation**

6 While § 544(b)'s plain language is ambiguous as to when the statute applies,
7 the context in which Congress enacted the section as well as relevant legislative
8 history strongly suggest that Congress only intended § 544(b) to apply to prepetition
9 transfers.

10 *1. Plain language of § 544(b)*

11 In interpreting a statute, a court's role is to ascertain Congress's intent in
12 drafting the statute. *Flint v. State of Cal.*, 594 F. Supp. 443, 447 (E.D. Cal. 1984).
13 The starting point for statutory interpretation is always the existing statutory text.
14 *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004). When the statute's words are clear, the
15 sole function of the court is to enforce it according to its terms unless it would lead to
16 "absurd" results. *Id.*

17 Section 544(b) provides in relevant part,

18 Except as provided in paragraph (2), the trustee may avoid any transfer of
19 an interest of the debtor in property or any obligation incurred by the
20 debtor that is voidable under applicable law by a creditor holding an
21 unsecured claim that is allowable under section 502 of this title or that is
22 not allowable only under section 502(e) of this title. . . .

23 The phrase "an interest of the debtor" is crucial to understanding § 544(b)'s
24 scope. The Bankruptcy Code provides that the filing of a petition creates an estate
25 consisting of "all legal or equitable interests of the debtor in property as of the
26 commencement of the case." 11 U.S.C. § 541(a)(1). Postpetition, all property that
27 used to be the debtor's property then transmutes into "property of the estate." But
28 after a bankruptcy court confirms a reorganization plan, the property of the estate

1 reverts in the debtor, thereby making the property again property of the debtor. 11
2 U.S.C. § 1141(b) (“Except as otherwise provided in the plan or the order confirming
3 the plan, the confirmation of a plan vests all of the property of the estate in the
4 debtor.”). Section 544(b) therefore can only potentially apply to transfers that occur
5 either prepetition or postconfirmation.

6 Since the Hillsborough Property sale occurred postconfirmation, the residence
7 had reverted in the Debtor and was no longer “property of the estate.” This is why the
8 Trustee may not employ § 549 to avoid the transfer. *See* § 549 (only permitting a
9 trustee to avoid “a transfer of property of the estate”).

10 Congress included no explicit temporal limitation within § 544(b) that would
11 suggest whether it could apply to transfers occurring after the filing of a bankruptcy
12 petition. Congress simply affirmatively stated that a trustee may avoid a transfer “of
13 an interest in property of the debtor” that is avoidable under applicable state law.² But
14 Congress’s reference to “a creditor holding an unsecured claim” suggests that at some
15 triggering point there already exists a secured creditor who holds a claim under state
16 fraudulent-transfer law. The Legislature also referenced the debtor’s actions in the
17 past tense by using the word “incurred,” which could potentially mean that the debtor
18 has made the alleged fraudulent transfer in the past—the past most likely being before
19 filing a bankruptcy petition. This timing ambiguity therefore does not render § 544(b)
20 clear on when a trustee gains and loses her ability to assert avoidance claims on behalf

21 ///

23 ² The “applicable state law” here is California Civil Code section 3439.04, which provides in part,
24 A transfer made or obligation incurred by a debtor is fraudulent as to a creditor,
25 whether the creditor’s claim arose before or after the transfer was made or the
26 obligation was incurred, if the debtor made the transfer or incurred the obligation . . .
27 [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.
28 Cal. Civ. Code § 3439.04(a)(1). But whether this section actually applies to this action is beyond the
scope of this appeal. It is only important for present purposes to determine whether the Trustee may
properly assert standing on behalf of an existing secured creditor under § 544(b) to then bring a
claim under Civil Code section 3934.04. In essence, § 544(b) serves solely as a conduit for
importing state fraudulent-transfer law into the Bankruptcy Code.

1 of existing unsecured creditors. The Court must accordingly open the rest of its
2 statutory-construction toolbox to resolve this issue.

3 2. *Interpretation vis-à-vis other avoidance sections*

4 The Ninth Circuit has made clear that in interpreting a statute, a court must
5 consider more than simply the statute in isolation; rather, a court must derive context
6 from the relevant statutory provisions and read them as a whole.” *In re Rufener*
7 *Constr., Inc.*, 53 F.3d 1064, 1067 (9th Cir. 1995).

8 The first part of section 544 provides,

9 (a) The trustee shall have, *as of the commencement of the case*, and
10 without regard to any knowledge of the trustee or of any creditor, the
11 rights and powers of, or may avoid any transfer of property of the debtor
12 or any obligation incurred by the debtor that is voidable by--

13 (1) a creditor that extends credit to the debtor at the time of the
14 commencement of the case, and that obtains, at such time and with
15 respect to such credit, a judicial lien on all property on which a creditor
16 on a simple contract could have obtained such a judicial lien, whether or
17 not such a creditor exists;

18 (2) a creditor that extends credit to the debtor at the time of the
19 commencement of the case, and obtains, at such time and with respect to
20 such credit, an execution against the debtor that is returned unsatisfied at
21 such time, whether or not such a creditor exists; or

22 (3) a bona fide purchaser of real property, other than fixtures, from the
23 debtor, against whom applicable law permits such transfer to be
24 perfected, that obtains the status of a bona fide purchaser and has
25 perfected such transfer at the time of the commencement of the case,
26 whether or not such a purchaser exists.

27 11 U.S.C. § 544(a) (emphasis added). These “strong-arm powers” allow a trustee to
28 assert avoidance claims held by hypothetical creditors or bona fide purchasers. *See In*

1 *re Weisman*, 5 F.3d 417, 420 (9th Cir. 1993). Congress’s inclusion of the phrase “as
2 of the commencement of the case” strongly suggests that it only meant § 544 to apply
3 to prepetition transfers. Since the trustee has these powers at petition filing, the
4 transfer must necessarily have already occurred.

5 Moreover, since the strong-arm powers exist at the commencement of the case,
6 and since § 544(a) is limited to “any transfer of property of the debtor,” these powers
7 could only ever apply to prepetition transfers. Therefore, by referring to transfers of
8 “property of the debtor,” Congress necessarily understood the transfer to be the
9 debtor’s own property, i.e., not property of the estate. For the transfer to relate to the
10 debtor’s own property, and for the statutory lien created by § 544(a) to exist as of the
11 commencement of the case, the only possible way for that to occur is via a prepetition
12 transfer.

13 While Congress certainly could have included two subsections within § 544 that
14 included different temporal limitations, it would be a rather strange drafting result. It
15 would be most logical for both subsections (a) and (b) to apply to only prepetition
16 transfers because if one subsection were to apply to postpetition transfers, Congress
17 would have set out that subsection on its own. This is especially true since Congress
18 specifically included a section titled “Postpetition transactions” which provides that a
19 “trustee may avoid a transfer of property of the estate . . . that occurs after the
20 commencement of the case.” 11 U.S.C. § 549(a). Thus, since Congress already
21 drafted a section explicitly dealing with postpetition transactions, Congress
22 presumably would have included other postpetition avoidance provisions within that
23 same section. That Congress left subsection (b) together with subsection (a)—the
24 subsection dealing only with prepetition transactions—bespeaks Congress’s
25 understanding that subsection (b) necessarily solely applies to prepetition transfers as
26 well.

27 The fact that Congress specifically included a section dealing with postpetition
28 transactions suggests that it solely intended for that section to govern transfers

1 occurring after the filing of a bankruptcy petition. Section 549’s breadth undergirds
2 that conclusion. It generally applies to allow a trustee to set aside any postpetition
3 transfer of estate property that is not authorized by the Bankruptcy Code or a
4 bankruptcy court. Congress did not narrowly draft § 549 in such a way that it would
5 be reasonable to think that it only applies to some postpetition transactions, leaving
6 room for other sections to fill the gap. Rather, the fact that Congress used such
7 sweeping language demonstrates that Congress envisioned § 549 as the sole tool for
8 avoiding postpetition transfers.

9 Also telling are the differences between the statutes of limitations applicable to
10 §§ 544 and 549. Section 546 provides the limitations period for a § 544 action:

11 An action or proceeding under section 544 . . . may not be commenced
12 after the earlier of--

13 (1) the later of--

14 (A) 2 years after the entry of the order for relief; or

15 (B) 1 year after the appointment or election of the first trustee under
16 section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or
17 such election occurs before the expiration of the period specified in
18 subparagraph (A); or

19 (2) the time the case is closed or dismissed.

20 11 U.S.C. § 546(a). This means that the statute of limitations begins to run when the
21 debtor files a bankruptcy petition. *In re IRFM, Inc.*, 65 F.3d 778, 780 (9th Cir. 1995).
22 But § 549 has its own statute of limitations, which is keyed to the date of the
23 transaction sought to be avoided: “An action or proceeding under this section may not
24 be commenced after the earlier of . . . two years after the date of the transfer sought to
25 be avoided; or . . . the time the case is closed or dismissed.” 11 U.S.C. § 549(d). As
26 one bankruptcy court remarked, “Were section 544(b) meant to apply to post-petition
27 transfers, it would have made little sense to limit the trustee to recovering those
28 transfers, avoidable under non-bankruptcy law, which were made only within two

1 years from the time of the trustee’s appointment.” *In re Sattler’s, Inc.*, 73 B.R. 780,
2 790–91 (Bankr. S.D.N.Y. 1987). Rather, a “statute of limitations such as that
3 contained in section 549 and linked to the making of the transfer would necessarily
4 have been provided.” *Id.*

5 This reasoning is persuasive in discerning Congress’s intent—notwithstanding
6 the bankruptcy court’s reasoning that “just because the limitation is tighter when
7 measured from the petition[,] this is hardly a reason to conclude the cause of action
8 does not arise at all.” (ER 356.) If Congress understood § 544(b) to apply to
9 postpetition transactions, then there would be no reason for it to link its statute of
10 limitations to the filing of the petition. The fact that Congress did in fact establish
11 such a limitations period strongly suggests that Congress understood the filing of the
12 petition as a cut off for potential actionable transfers. This result does not
13 unnecessarily hamper the trustee’s avoidance powers; that is not the Court’s goal.
14 Instead, the objective is to determine Congress’s intent using whatever statutory clues
15 it left behind. This indication provides cogent proof that Congress intended for all of
16 § 544 to apply only to prepetition transfers.

17 3. *Legislative history*

18 The Court has delved into the Bankruptcy Code’s labyrinthine legislative
19 history in search of some indication that Congress understood § 544(b) to apply
20 postpetition. Yet the Court has not unearthed anything that would speak to
21 Congress’s understanding of the section’s temporal application. *See* H.R. Rep. 95-
22 595, 370, 1978 U.S.C.C.A.N. 5963, 6326 (noting that Congress derived § 544(b) from
23 former § 70e and that the section follows the Supreme Court’s decision in *Moore v.*
24 *Bay*, 284 U.S. 4 (1931)—a case not relevant to this appeal); S. Rep. 95-989, 85, 1978
25 U.S.C.C.A.N. 5787, 5871 (same); *see also* *Buffum v. Peter Barceloux Co.*, 289 U.S.
26 227, 231 n.1 (1933) (setting forth the full text of prior § 70e).

27 But the legislative history relating to § 549 reveals that Congress recognized
28 that section as solely governing the province of postpetition transfers. Both the Senate

1 and House reports state that the section “permits the trustee to avoid transfers of
2 property that occur after the commencement of the case.” S. Rep. 95-989, 90, 1978
3 U.S.C.C.A.N. 5787, 5876; H.R. Rep. 95-595, 375, 1978 U.S.C.C.A.N. 5963, 6331.

4 The statutory construction, context in which § 544 appears in the Bankruptcy
5 Code, and legislative history all strongly suggest that Congress intended § 544(b) to
6 only apply to prepetition transfers.

7 **B. Existing § 544(b) case law**

8 The bankruptcy court recognized that the “majority rule appears to be that
9 section 544(a) and (b) powers are limited and may not be used by a trustee to avoid a
10 post-petition transfer.” (ER 0354 (citing 5-544 Collier on Bankruptcy § 544.01 (16th
11 ed.) (“Avoidance of postpetition transfers is governed by section 549.”)).)

12 The Rotenbergs cite many cases generally dealing with a trustee attempting to
13 set aside fraudulent transfers via § 544. But as the Trustee correctly notes, many of
14 these cases are distinguishable due to the unique factual position of this case: a
15 transfer that occurred postconfirmation so that the Hillsborough Property revested in
16 the Debtor and ceased being property of the estate.

17 For example, several courts have found that § 544(b) does not apply to
18 postpetition transactions, but the cases at issue only involved transfers that occurred
19 postpetition but preconfirmation, that is, the property was still part of the estate. *See,*
20 *e.g., In re Leonard*, 454 B.R. 444, 459 (Bankr. E.D. Mich. 2011) (“The Trustee’s
21 claims based on Michigan’s fraudulent transfer statutes are made through Bankruptcy
22 Code § 544(b)(1), and the Trustee’s avoidance power under that section are also
23 limited to pre-petition transfers.”); *In re Metro. Cosmetic Reconstructive Surgery P.A.*,
24 125 B.R. 556, 557 (Bankr. D. Minn. 1991); *In re Sattler’s, Inc.*, 73 B.R. 780, 790–91
25 (Bankr. S.D.N.Y. 1987) (finding that § 544(b) did not apply to postpetition transfers,
26 because Congress did not include a statute of limitations keyed to the transaction date
27 like it did in § 549).

28 ///

1 Other cases in which courts have limited § 544(b) to prepetition transfers are
2 unclear on whether the property had reverted in the debtor, i.e., whether the courts had
3 yet confirmed the reorganization plan. *See, e.g., In re Branam*, 247 B.R. 440, 444
4 (Bankr. E.D. Tenn. 2000); *In re Schneiderman*, 251 B.R. 757, 763 (Bankr. D.D.C.
5 2000) (“Congress specifically addressed postpetition transfers of property of the estate
6 in 11 U.S.C. § 549. It is likely that it would have similarly expressly addressed
7 postpetition transfers of property of the debtor had it wished such transfers to be
8 potentially avoidable by a trustee.”). Nonetheless, the courts’ reasoning in these cases
9 is persuasive albeit set against a different factual posture than this case.

10 There are cases factually on point with this case in which courts have similarly
11 limited § 544(b)’s reach to only transactions occurring before the filing of a
12 bankruptcy petition. *E.g., In re Troutman Enters., Inc.*, 356 B.R. 786, at *9–10
13 (B.A.P. 6th Cir. 2007); *In re Centennial Textiles, Inc.*, 227 B.R. 606, 610 (Bankr.
14 S.D.N.Y. 1998). But the limited analysis in these cases does not conclusively
15 establish one way or the other whether § 544(b) applies to postpetition transfers.

16 The Trustee relies heavily on the Bankruptcy Court for the Middle District of
17 Florida’s decision in *In re Seminole Walls & Ceilings Corp.* That case involved a
18 fraudulent transfer that, just like this case, occurred postpetition and postconfirmation.
19 446 B.R. at 592–93. But just like other cases cited above, this opinion provided no
20 analysis indicating why § 544(b) applied; the court just simply applied the section
21 without any discussion. *See id.* at 597 (applying Florida fraudulent-transfer law via
22 § 544(b)). Given the dearth of reasoning in *Seminole Walls & Ceiling Corp.*, the
23 Court is not persuaded that § 544(b) applies to postpetition transfers simply because
24 some courts have applied it that way. *See also In re Guillot*, 250 B.R. 570, 601–02
25 (Bankr. M.D. La. 2000) (finding that § 544(a) applied to postpetition transfers because
26 “§ 549 simply does not work to give the trustee any relief in this proceeding, but
27 § 544(a) does”).

28 ///

1 Distilling this rather spartan case law, the Court can discern only a few points
2 that have ungirded previous § 544(b) decisions. Courts finding that the section does
3 not apply to postpetition transfers have pointed to the statute of limitations in § 546
4 like this Court did above, finding that triggering the limitations period on the filing of
5 the petition bespeaks Congress’s intent to limit § 544 to prepetition transfers. And
6 courts applying § 544(b) to postpetition transfers do so out of frustration for the
7 trustee not having any other adequate remedy to set aside a postconfirmation
8 fraudulent transfer. Since Congress likely did not intend for courts to selectively
9 apply § 544(b) in a results-driven manner, the Court finds most persuasive the courts
10 that have limited § 544 to prepetition transfers.

11 **C. Dealing with postconfirmation “misbehavior”**

12 The bankruptcy court observed that applying § 544(b) to only prepetition
13 transfers results in a “narrow reading . . . [that] renders the trustee after conversion
14 largely powerless to deal with post-confirmation misbehavior.” (ER 0356.) Other
15 courts have echoed this concern and used the apparent gap in trustee avoidance
16 powers to interpret § 544 as applying postpetition as well as prepetition. *See, e.g.,*
17 *Guillot*, 250 B.R. at 601–02.

18 Limiting § 544(b) to only prepetition transfers may take one arrow out of the
19 trustee’s quiver, but it does not leave a trustee “powerless to deal with post-
20 confirmation misbehavior.” Congress provided a trustee with a veritable arsenal of
21 avoidance powers in the Bankruptcy Code to deal with alleged fraudulent transfers.
22 *See* §§ 542–49. That these sections only apply at certain points in time is not
23 surprising—that is simply Congress’s intent. In fact, Congress specifically included a
24 section to deal with alleged estate-property fraudulent transfers that occur
25 postpetition—§ 549—though it does not apply postconfirmation when the property
26 then transmutes back into the debtor’s property.

27 Congress also vested bankruptcy courts with broad powers to enforce
28 reorganization plans, including the ability to direct the debtor or others to transfer

1 property as necessary to carry out the plan. 11 U.S.C. § 1142. Moreover, if the
2 bankruptcy court discovers that a debtor procured a reorganization plan by fraud, the
3 court may revoke the plan within 180 days and issue protective measures. *Id.* § 1144.

4 This case represents a Frank-Abagnale-esque transfer that escapes the trustee’s
5 reach under the Bankruptcy Code as Congress has currently written it. The transfer
6 occurred postpetition, so § 544(b) does not apply. It also occurred postconfirmation,
7 thereby evading § 549. The bankruptcy court never revoked the reorganization plan—
8 which also did not require bankruptcy-court approval for the sale of the Hillsborough
9 Property—so § 1144 provides no relief. Congress may well recognize the window it
10 has left open in a case like this one and enact a statute to close it. But until then, the
11 Court must apply the Bankruptcy Code uniformly and as Congress intended it.

12 **D. Limited trustee power**

13 Appellants also correctly point out that while a trustee’s powers under the
14 Bankruptcy Code are undoubtedly broad, they are not unlimited. Ever since the
15 Supreme Court’s decision in *Caplin v. Marine Midland Grace Trust Co. of N.Y.*, 406
16 U.S. 416 (1972), it has been “well settled that a bankruptcy trustee has no standing
17 generally to sue third parties on behalf of the estate’s creditors, but may only assert
18 claims held by the bankrupt corporation itself.” *Smith v. Arthur Andersen LLP*, 421
19 F.3d 989, 1002 (9th Cir. 2005) (internal quotation marks omitted) (noting that this
20 holding in *Caplin* still remains valid law under the current version of the Code).

21 Thus, while “a single creditor might be able to sue to avoid this post
22 confirmation transaction under state law” (*see* ER 0356), that does not necessarily
23 mean the trustee can likewise assert standing to challenge the transfer. The trustee
24 represents the bankruptcy estate—not its creditors—except where Congress
25 specifically vested the trustee with avoidance powers. As the Court has interpreted,
26 § 544 is an inch too short for the Trustee to reach the Hillsborough Property transfer.

27 ///

28 ///

1 **VI. CONCLUSION**

2 For the reasons discussed above, the Court finds that § 544(b) only applies to
3 prepetition transfers and accordingly that a trustee may not invoke § 544(b) to reach
4 postconfirmation transfers like the Hillsborough Property sale. The Court thus
5 **REVERSES** the bankruptcy court's decision and **REMANDS** for further proceedings
6 consistent with this Order. The Clerk of Court shall enter judgment accordingly as
7 required by Rule 8016(a) and close this case.

8 **IT IS SO ORDERED.**

9
10 June 24, 2014

11
12 

13 **OTIS D. WRIGHT, II**
14 **UNITED STATES DISTRICT JUDGE**