UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

January 4, 2017 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

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1. 16-27201-D-7 JEREMIAH ALTON — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 11-18-16 [12]
SANTANDER CONSUMER USA, INC.
VS.

Final ruling:

This matter is resolved without oral argument. This is Santander Consumer USA, Inc.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

2. 16-26603-D-7 RAYMOND MARTINEZ — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 11-28-16 [15]
WELLS FARGO BANK, N.A. VS.

Final ruling:

This matter is resolved without oral argument. This is Wells Fargo Bank, N.A.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

3. 16-25719-D-7 SOMBOUN SAYASANE — MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
HMS-1 — 11-21-16 [23]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to extend deadline to file a complaint objecting to discharge of the debtor is supported by the record. As such the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

4. 16-27620-D-7 JULIE LINCOLN — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
11-30-16 [11]

5. 12-27228-D-7 SUZANA MARTIN — MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.
CRW-1 — 12-2-16 [35]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

6. 14-25148-D-11 MF-39 — HENRY TOSTA — MOTION TO ENFORCE JOINT PLAN OF REORGANIZATION 12-7-16 [650]

7. 14-30655-D-7 HCS-3 — PAUL/REBECCA FORE — MOTION FOR COMPENSATION BY THE LAW OFFICE OF HERUM/CRABTREE/SUNTAG FOR DANA A. SUNTAG, TRUSTEE'S ATTORNEY(S) 12-7-16 [37]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

8. 16-27672-D-12 — DAVID LIND — STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION 11-18-16 [1]

9. 15-28774-D-7 SSA-4 — OTASHE GOLDEN — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH SOUND INPATIENT PHYSICIANS MEDICAL GROUP, INC. 12-2-16 [57]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.

10. 16-26077-D-7 KENNETH/SHERRIL DENNY — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 11-28-16 [19]

WELLS FARGO BANK, N.A. VS.

Final ruling:

This matter is resolved without oral argument. This is Wells Fargo Bank, N.A.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

11. 10-24778-D-7 SASKIA DE VRIES — MOTION TO AVOID LIEN OF UNIFUND CCR PARTNERS
CAH-2 — 12-1-16 [19]

Final ruling:

This is the debtor's motion to avoid a judicial lien held by Unifund CCR Partners ("Unifund"). The motion will be denied for the following reasons. First, the moving papers are signed by an attorney who is not the debtor's attorney of record in this case and no substitution of attorneys or formal notice of association of counsel has been filed, as required by LBR 2017-1 (see subdivisions (h) and (j)). Thus, the attorney who signed the moving papers is not permitted to appear in the case. LBR 2017-1(b)(1).

Second, the moving party failed to serve Unifund in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving party served Unifund (1) through the attorney who obtained its abstract of judgment; and (2) by certified mail to the attention of an officer, managing or general agent, or agent for service of process. The first method was insufficient because there is no evidence the attorney is authorized to receive service of process on behalf of Unifund in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004(b)(3) and 9014(b). See In re Villar, 317 B.R. 88, 93 (9th Cir. BAP 2004). The second method was insufficient because service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution, such as Unifund, must be by first-class mail, not certified mail. Compare Fed. R. Bankr. P. 7004(b)(3) and preamble to 7004(b) with 7004(h).

As a result of these procedural defects, the motion will be denied by minute order. No appearance is necessary.

12. 16-27383-D-7 UST-1 — LUCERIO ANTONIO — MOTION FOR DENIAL OF DISCHARGE OF DEBTOR UNDER 11 U.S.C. SECTION 727(A) 12-1-16 [14]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for denial of discharge of debtor under 11 U.S.C. Section 727(a) is supported by the record. As such the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

13. 11-22685-D-7 SCB-2 — BLUE RIBBON STAIRS, INC. — MOTION FOR COMPENSATION BY THE LAW OFFICE OF SCHNEWEIS-COE & BAKKEN, LLP FOR LORIS L. BAKKEN, TRUSTEE'S ATTORNEY(S) 12-6-16 [1309]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

14. 15-29890-D-7 DNL-11 — GRAIL SEMICONDUCTOR — OBJECTION TO CLAIM OF DONALD STERN, CLAIM NUMBER 36 11-21-16 [540]

Tentative ruling:

This is the trustee's objection to the claim of Donald Stern ("Stern"), Claim No. 36 on the court's claims register. Stern has filed opposition. The claim is for $72,053.01 in fees and expenses allegedly due under a pre-petition consulting agreement between Stern and the debtor, Grail Semiconductor, Inc. A copy of the agreement is attached to the proof of claim, along with an explanation of the components of the claim amount. The court intends to overrule the objection at this time because the trustee has failed to submit sufficient admissible evidence establishing its factual allegations and demonstrating that she is entitled to the relief requested, as required by LBR 9014-1(d)(7).

The trustee objects to the claim pursuant to § 502(b)(1) of the Bankruptcy Code on the grounds that "(a) the [debtor's] board of directors was not legally constituted when the Consulting Agreement was signed and purportedly approved; (b) the agreement is the product of self-dealing in breach of the Claimant's fiduciary duties to the Debtor; and (c) the Consulting Agreement is voidable pursuant to 11 U.S.C. Section 544 and California Civil Code Section 3439." Trustee's Obj., DN 540, at 2:15-19. In support of the objection, the trustee has submitted copies of what purport to be (1) the debtor's by-laws, (2) a complaint filed pre-petition in state court by Robert Stern and Henry Adams against the debtor and claimant Stern, and (3)

a pre-petition settlement agreement between Robert Stern and Stern which the trustee says partially resolved the differences between them. The trustee has submitted her own declaration in which she purports to authenticate the exhibits, although she does not indicate how she obtained them or how she comes to have personal knowledge of them. The trustee also testifies that "[t]he balance sheets in the tax returns filed on behalf of the Debtor reflect that during the period 2011 through 2014, a period during which Robert Stern contends Stern wrongfully controlled the company, the Debtor's liabilities exceeded the value of the Debtor's assets." Trustee's Decl., DN 542, at 2:23-27. This testimony is hearsay, is without foundation, and is not based on the declarant's personal knowledge; thus, it is inadmissible.

Most of the trustee's evidence is inadmissable and, thus, insufficient to overcome the prima facie validity afforded the claim by Fed. R. Bankr. P. 3001(f) or to demonstrate that the claim is unenforceable against the debtor and property of the debtor, as required by § 502(b)(1) of the Code. To the extent the trustee also objects to the claim under § 502(d), which is not clear, the trustee has on file a complaint in AP No. 16-2088 in which she seeks, among other things, disallowance of any potential claim of Stern on account of the consulting agreement. Thus, the trustee will not be prejudiced, so far as the court can tell, by the overruling of this objection.

For the reasons stated, the court intends to overrule the objection.

15.	15-29890-D-7 16-2088 CARELLO V. STERN ET AL	GRAIL SEMICONDUCTOR DNL-4	CONTINUED MOTION FOR PRELIMINARY INJUNCTION 11-16-16 [138]

Tentative ruling:

This is the motion of the plaintiff, Sheri L. Carello, who is also the chapter 7 trustee in the bankruptcy case in which this adversary proceeding is pending (the "trustee"), for a preliminary injunction against defendants Donald Stern ("Mr. Stern") and Billion Hope International, Ltd. ("BHI"). Mr. Stern and BHI, together with their co-defendants, Frank Bauder and MOM OS, LLC ("MOM"),[1] have filed opposition and the trustee has filed a reply.[2] For the following reasons, the court will grant the motion.

To begin with, the defendants have filed evidentiary objections to the declarations of Brad Woods and the trustee in support of the motion. Although the objections run for 9 and 23 pages, respectively, they are summary in nature with no analysis.[3] There is a column in which the defendants list their "contradictory facts," if any; however, the majority of the allegations in that column are themselves unsupported by any admissible evidence [4] or are nothing more than argument. In addition, the evidence the defendants themselves have submitted – the declarations of Mr. Stern and the defendants' current counsel and their exhibits – includes much that would be inadmissible under the rules of evidence. For that reason, and because the rules of evidence are more relaxed on a motion for a preliminary injunction than they would be at trial,[5] the court will overrule the objections for the purpose of considering this motion. The court notes, however, that it relies most heavily in this decision on evidence the truth of which the defendants do not challenge, although they may challenge it on technical grounds. (The court will provide examples below.) The court concludes that the evidence it relies on is supported by a sufficient foundation and sufficiently authenticated to make it appropriate for consideration on a motion for a preliminary injunction.

By her amended complaint in this proceeding, the trustee seeks to avoid and recover a transfer of some $2.75 million made, allegedly at Mr. Stern's direction, from funds of the debtor into an account of Mr. Stern and BHI at The Hongkong and Shanghai Banking Corporation Ltd. (the "Bank") on October 13, 2015, roughly ten weeks before the debtor, Grail Semiconductor, commenced this bankruptcy case as a chapter 11 case.[6] The court has previously issued in the trustee's favor a right to attach order and order for issuance of a writ of attachment against the funds in the account. The trustee now seeks a preliminary injunction enjoining Mr. Stern and BHI from disposing of any of the funds on deposit with the Bank and directing Mr. Stern and BHI to turn over the funds to the court or a receiver or to otherwise place the funds in a blocked account in a United States bank – an account from which the funds would be authorized to be disbursed only on further court order following trial or other resolution of this adversary proceeding.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008). The possibility of irreparable harm is insufficient; instead, the plaintiff must persuade the court that absent an injunction, irreparable harm is likely to occur. Id. at 22. "[A] stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." Alliance For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011).

I. Likelihood of Success on the Merits

As against Mr. Stern and BHI, the trustee seeks to avoid and recover the transfer as a preference and/or an actual and/or constructive fraudulent conveyance. As against MOM and Mr. Bauder, the trustee seeks to recover, under § 550 of the Bankruptcy Code, those portions of the transfer later transferred to them. As against all the defendants, the trustee seeks turnover of the transferred funds. The elements of the preference cause of action [7] are well-known to bankruptcy practitioners and there is no need to repeat them here. The court will therefore assess the facts likely to be demonstrated by the trustee in light of the relevant elements. Because the court finds the trustee is likely to prevail on her preference claim, the court need not reach her other claims.

There is no dispute that the transfer was made within one year prior to the debtor's bankruptcy filing and that it was made to an insider, Mr. Stern. There appears to be no dispute that the transfer was a transfer of an interest of the debtor in property and that it was made to or for the benefit of a creditor, namely Mr. Stern, on account of an antecedent debt, namely the debtor's obligation to Mr. Stern under a Consulting Agreement entered into in 2011. Thus, it appears to be undisputed that four of the six elements of an avoidable preference are present in this case.

Mr. Stern disputes in conclusory terms only the next element – that the debtor was insolvent when the transfer was made and the evidence strongly suggests the trustee will prevail on this point as well.[8] The debtor's schedules, signed and presumably prepared by the debtor's Chief Resolution Officer, whom Mr. Stern considers an "an esteemed bankruptcy trustee" (Opp. at 2:27), list assets totaling $11,596,812 and liabilities totaling $18,744,843. Mr. Burkart was careful to list the dates incurred for most of the liabilities; although some of those dates or time

periods refer to "2015" generally, it appears few, if any, of the debts were incurred between the date of the transfer to Mr. Stern and BHI, October 14, 2015, and the petition date, December 30, 2015. At the time of the transfer to Mr. Stern and BHI, the debtor still had remaining from the Mitsubishi settlement a large amount of money [9] – money the debtor no longer had by the time of the bankruptcy filing. However, the debtor also had corresponding debts in equivalent amounts. In other words, there is no reason to suppose the debtor's solvency status was any better on October 14, 2015 than it was on the date of the bankruptcy filing.

Finally, it appears likely the trustee will prevail on the final element – that the transfer enabled Mr. Stern to receive more than he would have received in a chapter 7 liquidation. It is undisputed that the transfer resulted in Mr. Stern receiving 100% of what he claims to have been owed on account of the "long-term incentives" portion of his compensation package under the Consulting Agreement. As the trustee points out, over $50 million in claims have been filed [10] and no one suggests the trustee will collect and distribute anywhere near that amount. Mr. Stern himself has filed claims totaling $6,558,044, allegedly on account of a portion of the base compensation and reimbursements of expenses he alleges are provided for in the Consulting Agreement, as well as compensation he claims under an earlier employment agreement. If the chapter 7 liquidation analysis is to be made based on all of Mr. Stern's claims, rather than just the "long-term incentives" compensation, the transfer enabled Mr. Stern to receive almost 30% of the total amount of his claims.[11] Either way – whether the transfer enabled Mr. Stern to receive 100% or only 30% of what he would have received in a chapter 7 liquidation, the court finds the trustee will likely be able to demonstrate the transfer enabled him to receive more than he otherwise would have received in a chapter 7 case.

Mr. Stern's only argument on the issue of the likelihood of success on the merits, as far as the preference claim is concerned (aside from generalities about solvency and the overstatement of other claims), is that the transfer was made in the ordinary course of business. See § 547(c)(2) of the Bankruptcy Code. Mr. Stern cites Wood v. Stratos Prod. Dev., LLC (In re Ahaza Sys.), 482 F.3d 1118 (9th Cir. 2007), and in particular the court's consideration of testimony regarding payments tied to specific dates or milestones in the life of a start-up company. See Opp., at 6:4-11. Mr. Stern finds it significant that, in the context of a start-up company, whose cash-flow in the beginning is likely to be tight, the court held that first-time transactions may qualify as ordinary-course transactions for purposes of § 547(c)(2). 482 F.3d at 1125.[12] The court simply finds the argument to be unpersuasive.

> With the "ordinary course of business" exception, Congress aimed not to protect well-established financial relations, but rather to leave undisturbed normal financial relations, because [the exception] does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy. Together with the rule against preferential transfers, the ordinary course of business exception deters the "race to the courthouse" and enabl[es] the struggling debtor to continue operating its business. This animating policy concern is not erased simply because a debt is the parties' first transaction. Thus, as the BAP observed, it would be inconsistent with the purpose of the section for [the creditor] to be prevented from receiving the benefit of the ordinary course of business exception for otherwise routine transactions simply because [the creditor] never previously entered into a transaction with [the debtor].

Id. (citations omitted; internal quotation marks omitted).

The court is not called upon at this time to determine whether the transfer to Mr. Stern was an ordinary-course transaction, only to determine the likelihood of the trustee prevailing on the issue. That said, the court would find it very difficult to construe the transfer as such. Importantly, the debtor was well along in its "slide into bankruptcy" by the time the transfer was made. No one suggests the transfer was made in an effort to enable the struggling debtor to continue operating its business. Mr. Stern himself admits that, as early as the time he and the debtor entered into the Consulting Agreement, in August of 2011, the company was "essentially defunct" and "had no business operations other than the prosecution of the Mitsubishi case." Opp. at 4:19-20.

Mr. Stern refers to the Consulting Agreement as having been entered into "in the ordinary course of that specialized business" (id. at 4:20-21), meaning the litigation. But even if the prosecution of litigation can be construed as the "ordinary course" of a company's business, the facts, at least as developed at this stage, do not support the conclusion that the transfer, as opposed to the creation of the debt, was either "made in the ordinary course of business or financial affairs of the debtor and the transferee" or "made according to ordinary business terms," as required by § 547(c)(2). On the contrary, the transfer was made the same day a special meeting of the board of directors was held, which Mr. Stern attended, at which the board "had a full discussion" of Mr. Stern's claim for payment of the $2.75 million, considered a motion to make the payment (a motion seconded by Mr. Stern), and then deadlocked on the issue (with Mr. Stern abstaining) and "tabled" the matter "to allow for Director [Richard] Gilbert to petition a court of competent jurisdiction for the appointment of a provisional director under California Corporations Code Section 308." Trustee's Ex. B, p. 6. The board also requested the debtor's corporate counsel to research and report back to the board on the question whether Mr. Stern was legally permitted to second the motion. In the meantime, the board voted unanimously to direct the debtor's counsel in the Mitsubishi action, Raymond Niro, "to hold the remaining Mitsubishi lawsuit settlement funds in his client trust account until further Board resolution" (id.) and continued the meeting to November 2, 2015.

There is no doubt the transfer to Mr. Stern was made no later than October 14, 2015. It is doubtful the transfer had already been made by the time of the meeting, at 3:15 p.m. on the afternoon of October 14. According to the minutes of the meeting, Mr. Stern attended the meeting, and the discussion of whether to pay him the $2.75 million would have been unnecessary if the transfer had already been made. If the transfer was made after the meeting was concluded, it very much appears it was made in direct contravention of the board's tabling of the matter until November 2 and its direction that Mr. Niro hold the remaining settlement funds.[13] In short, whether the transfer took place before or after the meeting (and Mr. Stern does not clarify the matter), there was nothing "ordinary" about it. Nor was it "ordinary" that the transfer was made at Mr. Stern's direction into an account in a bank in Hong Kong – an account belonging to Mr. Stern and BHI, a company allegedly belonging to Mr. Stern and organized under the laws of the British Virgin Islands. These facts alone suggest an intention to make it difficult for the debtor or its creditors to access the funds if the board later voted not to approve the payment.

The minutes of the October 14 meeting also show that when the transfer was made, Mr. Stern and the other directors knew there were significant doubts as to the sufficiency of the remaining Mitsubishi proceeds to meet the debtor's liabilities. At the meeting – the meeting at which the board deadlocked on the issue of Mr.

Stern's $2.75 million payment, the board discussed the possibility of the debtor filing a bankruptcy proceeding and the board's intent "to enter into agreements with Mr. Niro and [the debtor's litigation financing company] to further negotiate in good faith a reduction of their respective fee claims" (Ex. B, p. 5), as well as "the need to appoint point persons to negotiate with the [debtor's] remaining creditors any claims they may have." Id. It was against this backdrop that the transfer to Mr. Stern was made. Again, there was nothing ordinary about it.[14]

For the reasons stated, the court finds the trustee is likely to prevail on the merits of his preference claim, and that factor weighs in favor of granting the motion. Having reached this conclusion, the court has no need to consider the merits of the trustee's fraudulent transfer or turnover claims.[15]

II. Likelihood of Irreparable Harm

Mr. Stern begins by citing authority from outside the Ninth Circuit for the proposition that a preliminary injunction should not issue where the plaintiff may be adequately compensated for her loss by monetary damages. However, the Ninth Circuit has expressly held a preliminary injunction may issue in fraudulent transfer actions and actions seeking other equitable relief. Rubin v. Pringle (In re Focus Media Inc.), 387 F.3d 1077, 1085 (9th Cir. 2004). "[W]hen the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the status quo pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested." Id., quoting United States ex rel. Rahman v. Oncology Assocs., 198 F.3d 489, 496 (4th Cir. 1999); see also Sharp v. Salyer (In re SK Foods, L.P.), 2010 U.S. Dist. LEXIS 136178, *16 (E.D. Cal. 2010) [citing Focus Media as supporting issuance of preliminary injunction in action alleging fraudulent transfers and preferences].

Next, Mr. Stern contends the trustee has not shown a likelihood of irreparable harm to the estate if a preliminary injunction is not issued. He claims the harm is "entirely theoretical" (Opp. at 13:15) because the funds in the account are already frozen and the trustee's concern is simply that "at some unknown time in the future, the accounts may become unfrozen." Id. at 13:16-17. He continues: "But even then, [the trustee] does not allege that the funds will be dissipated or that Mr. Stern will not have the ability to meet any judgment in the unlikely event [the] Court enters judgment against him." Id. at 13:17-29. The court disagrees with Mr. Stern's conclusions about the likelihood of harm to the estate.

The transfer of the funds to the Mr. Stern/BHI account in the first place, apparently made immediately after the board had voted, at a meeting attended by Mr. Stern, not to approve the payment at that time weighs against Mr. Stern in the analysis. His present argument and testimony about what transpired at the meeting hurts him more than it helps. He admits he was at the meeting and that the board deadlocked on the issue of the payment. Despite that deadlock, Mr. Stern insists the Consulting Agreement was valid and enforceable according to its terms and that no further vote on the payment was necessary. He claims Mr. Niro was also of that opinion. "It is true that, on October 14, the Board of Directors 'deadlocked' on whether to authorize payment to Stern. But the undisputed facts are that no further vote by the Board was necessary, because it had previously approved the Stern Consulting Agreement, and Niro believed the assignment to Stern of $2.75 million to be valid and proper." Opp. at 3:14-18. Phrased another way, "[t]he Board deadlocked on whether to take any action one way or another with respect to the transfer, so the Consulting Agreement stood, and the transfer was made." Id. at

8:27-28.

In other words, Mr. Stern relied on his own conclusion as to the legality and propriety of the transfer knowing full well the board had voted to table the issue to a later date and knowing the board had also voted to direct Mr. Niro to hold the remaining settlement funds in his client trust account "until further Board resolution." It is doubtful Mr. Niro was aware of that further vote – the trustee has submitted evidence, undisputed factually by Mr. Stern although challenged on evidentiary grounds, that Mr. Niro left the meeting before the motion was made to approve the payment to Mr. Stern. See Trustee's Ex. C. Thus, Mr. Stern's present argument suggests he took advantage of the fact that Mr. Niro had left the meeting early to persuade him to make the transfer despite the board's later vote.[16]

If that alone is not enough, however, Mr. Stern later transferred substantial amounts out of the account in the face of the debtor's then-corporate counsel's demand that he return the entire amount. On October 20, 2015, the debtor's then-corporate counsel, Timothy Charshaf, wrote (in a letter sent by email) to Mr. Niro and attorney John Oehmke, identified earlier in this litigation as having at one time represented Mr. Stern (see DN 27), stating he had discovered in Mr. Niro's accounting of payments made from the Mitsubishi proceeds a $2.75 million payment to Mr. Stern. Mr. Charshaf described in detail what had transpired at the October 14 board meeting with respect to that payment. He concluded that "[t]he [Mitsubishi] settlement funds belong to Grail and can only be disbursed pursuant to Grail's direction" (Trustee's Ex. C) and asked the parties to work toward the return of all of the money to Mr. Niro's trust account. On October 29, Mr. Charshaf wrote again to Mr. Oehmke, as counsel for Mr. Stern, "demanding" the return of the $2.75 million "wrongfully disbursed from Mr. Niro's account to your client after the October 14, 2015 Board of Directors meeting." Trustee's Ex. D. Mr. Charshaf referred to Mr. Stern's conduct in initiating the transfer in terms of Mr. Stern's fiduciary duties to minority shareholders and the corporation and suggested his conduct could be interpreted as "an intentional conversion of a substantial corporate asset for his own personal gain." Id.

Despite those letters, substantial funds were transferred out of the Hong Kong account: $90,000 to MOM on October 20 and $100,000 to Mr. Stern on October 26. Then, despite the intervening bankruptcy filing on December 30, $310,000 was transferred to MOM on January 14, 2016, $100,000 to Mr. Stern on February 26, and $250,000 to Frank Bauder, a creditor and former director of the debtor (and a defendant opposing this motion), on February 26. These transfers were almost certainly made at Mr. Stern's direction; in any event, he does not suggest anyone else directed them.[17] Further, it appears the funds have been commingled with other funds of BHI.[18]

As already discussed, the court has, since then, issued a right to attach order in the trustee's favor. The trustee testifies she has employed special counsel in Hong Kong but understands Hong Kong might not enforce the order and if it did, it would be at great expense.[19] In addition, the trustee "understand[s] that the account . . . is currently administratively frozen, but [the Bank] contends it can lift the freeze at any time." S. Carello Decl., DN 141, at 7:17-18. In response to Mr. Stern's opposition, the trustee's counsel, Mr. Cunningham, testifies the Bank's counsel has told him the funds have been frozen. However, the Bank's counsel "(a) declined to disclose the amount that remains on deposit; (b) declined [Mr. Cunningham's] request for assurance that the freeze would remain in place absent an order of a court of competent jurisdiction; and (c) continued to dispute the jurisdiction of this Court's June 30, 2016 right to attach order." R. Cunningham

Decl., DN 160, at 3:23-26. Mr. Cunningham adds it is his understanding that since attachment is not a remedy in Hong Kong, the Hong Kong courts are not likely to enforce the right to attach order but are more likely to enforce an order granting this motion.

Given this testimony and Mr. Stern's decision to initiate the transfer out of this country in the first place in the face of the board's deadlock on the issue and to transfer funds out of the account in the face of the debtor's then-corporate counsel's demand for their return, the court is satisfied there is a likelihood of irreparable harm to the estate if a preliminary injunction is not issued.

III. Balance of the Equities

If the Hong Kong courts will not enforce the right to attach order and if Mr. Stern transfers the remaining funds out of the account, the estate may well be left with nothing but the prospect of more litigation. Mr. Stern cites nothing on the opposite side of the scale; that is, nothing suggesting any harm would come to him if the injunction is not issued. Instead, he argues in general terms that the trustee has not shown in detail what injury she would suffer in the absence of an injunction and has not shown a likelihood of success on the merits. Thus, he concludes, "there is no justification for interfering with Defendants' rights." Opp. at 14:9-10. The court finds to the contrary: that the equities heavily favor the trustee.

IV. The Public Interest

Here, again, Mr. Stern offers nothing but generalities. He contends that, while the protection of assets of a bankruptcy estate for creditors and the prevention of fraudulent transfers are in the public interest, those interests must be balanced against "the public's interest in the protection of private property rights and the prevention of abuse of this Court's process." Opp. at 14:16-17. Mr. Stern offers no particulars on his side of the scale. His opposition overall leaves the very strong impression Mr. Stern believes he was and is entitled to the compensation he alleges is represented by the transfer, and therefore, believes the trustee will not prevail on the merits. But his argument virtually ignores the elements of the trustee's preference claim and relies exclusively on a doubtful defense. In the meantime, Mr. Stern apparently simply wants to preserve his access to the funds in Hong Kong to the extent possible and to prevent the trustee from preserving those assets for the benefit of other creditors. Here again, the public interest favors the trustee.

In sum, the court is to evaluate the four Cottrell factors under a "sliding scale" approach: thus, "'serious questions going to the merits' and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Cottrell, 632 F.3d at1135. Here, the court has no trouble concluding that there are serious questions going to the merits. Further, the balance of the equities tips sharply in the trustee's favor. The latter two elements are satisfied as well, and the motion will be granted. The court will hear the matter.

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1 For the sake of simplicity, the court may on occasion in this decision refer to the opposing defendants collectively as "Mr. Stern." The opposition does not distinguish among their interests.

2 The trustee has submitted 270 pages of exhibits with her reply to the opposition. The defendants objected in advance to what they predicted would be "a plethora of documents and other evidence not provided in support of the motion." Defendants' Opp., DN 150 ("Opp."), at 2:5. The court finds it need not consider the reply exhibits or the reply declaration of the trustee's counsel, but for paragraph 11 of the declaration, discussed below, which the court finds to be an appropriate reply to the defendants' opposition and not new evidence that should have been submitted with the motion.

3 For example, they read "Fed. R. Evid. 602 - No personal knowledge," "Fed. R. Evid. 801, 802 - Hearsay," and so on.

4 For example, objection 20 to the trustee's declaration states under Contradictory Facts, "To the contrary, Stern believed [the] settlement funds were enough to meet the debtor's obligations." Defendants' Evid. Objs., DN 153 ("Evid. Objs."), ¶ 20. Mr. Stern makes no such statement in his declaration and in fact, the defendants state in their opposition with respect to the 5% that was due to another director, Ronald Hofer, under his consulting agreement with the debtor, that "at the time of settlement, Mr. Niro [the debtor's counsel] told him in no uncertain terms that, given the insufficiency of the proceeds to satisfy all claims, he was not being included." Opp. at 6:21-22 (emphasis added).

5 See Sharp v. SKMP Corp. (In re SK Foods, L.P.), 2011 Bankr. LEXIS 5651, *72-75 (Bankr. E.D. Cal. Oct. 11, 2011) and cases cited therein.

6 It appears from her declaration and Exhibit E in support of this motion the trustee now believes the transfer was made on October 14, 2015. The date of the transfer is significant, although not dispositive, as discussed below.

7 See § 547(b) of the Bankruptcy Code and Adams v. Anderson (In re Superior Stamp & Coin Co.), 223 F.3d 1004, 1007 (9th Cir. 2000).

8 Mr. Stern states in the Contradictory Facts section of his evidentiary objections, "The Debtor was not insolvent." Evid. Objs., ¶ 34. However, as seen in note 4, above, Mr. Stern's own opposition belies that conclusion. Mr. Stern also objects to the trustee's testimony that Brad Woods had told her the transfer was made while the debtor was insolvent. The testimony is, of course, hearsay. But the court reaches its conclusion based on the debtor's schedules, as follows, of which the court can and does take judicial notice.

9 For example, according to the debtor's amended statement of financial affairs, the debtor paid 1st Class Legal (IS) Limited $14,600,000 on October 16, 2015, two days after the transfer to Mr. Stern and BHI.

10 Mr. Stern objects that the claims are "grossly overstated" (Evid. Objs., ¶ 2) but does not suggest which ones or in what amounts and he offers no evidence.

11 Adding the $2.75 million "long-term incentives" claim to Mr. Stern's other claims brings the total to $9,308,044. The amount of the transfer, $2.75 million, is 29.5% of that total.

12 The applicability of the holding to the present case is questionable. Mr. Stern testifies he and his cousin incorporated the debtor as a start-up company in January of 2000, over 11 years before the Consulting Agreement was signed

and over 15 years before the transfer was made.

13 The minutes show Mr. Niro as having attended the meeting, but a subsequent letter from the debtor's corporate counsel to Mr. Niro and another attorney indicates Mr. Niro left the meeting before the motion was made to authorize the payment to Mr. Stern. The letter also states Mr. Stern attended the entire meeting.

14 In addition, it is undisputed that by October of 2015, there was pending litigation between or among the debtor, Mr. Stern, his cousin Robert Stern, and an individual named Ronald Hofer, who had also been made a board member. The existence of all of these disputes further lessens the credibility of the notion the transfer to Mr. Stern was made in the ordinary course of business or according to ordinary business terms.

15 The court will add the following, however. Concerning the trustee's fraudulent transfer claims, Stern argues that certain language in the Consulting Agreement operated to create a perfected assignment to Stern of an interest in the Mitsubishi proceeds. Stern has provided a very limited analysis, but in any event, the court has considered the cited language and finds it not even facially sufficient to create a perfected assignment of a portion of the proceeds.

16 Mr. Stern does not address the later vote – the one that Mr. Niro be directed to hold the remaining funds pending a further vote, although the trustee's evidence is that Mr. Stern was present at the entire meeting (Ex. C) and Mr. Stern does not deny that. His testimony is carefully worded and, in the court's view, weighs against him: "I was never formally notified that the Consulting Agreement with me was not valid and enforceable according to its terms. At no time did Grail ever give me notice that it did not intend to perform, whether lawful or otherwise. Moreover, no explanation was given to me as to why the matter was put to a vote of the Board on October 14, 2015." D. Stern Decl., DN 151, at 4:27-5:2. The court considers the board's votes on October 14 – to table the issue of the payment and request legal research on the matter and to direct Mr. Niro to hold the remaining funds – to have been formal notice that Mr. Stern ought not take matters into his own hands. The fact that he did so, together with his subsequent transfers, discussed below, suggests he would do so again.

17 Mr. Stern objects to the trustee's testimony identifying those transfers and to the Bank email confirming them, the trustee's Ex. E, on a variety of grounds, including lack of personal knowledge, hearsay, and, notably, under Fed. R. Evid. 403, unfair prejudice, confusion, misleading, and a "waste of time." He also objects that the Bank's email was "privileged and confidential" and "without any certified correct or verified corporate or banking documents" (Evid. Objs., ¶ 40), and he suggests Brad Woods "may have created this document just to attack Stern." ¶ 42. He adds that the email "does not support the transfers alleged in the foregoing paragraph" (¶ 41); however, the dates, amounts, and transferees are listed in the email. Mr. Stern does not suggest, let alone testify, that the transfers out of the Hong Kong account were not made. See Gonzalez v. Wells Fargo Bank, 2009 U.S. Dist. LEXIS 101036, *7 (N.D. Cal. 2009) [addressing evidentiary objections on motion for preliminary injunction: "[B]ecause Gonzalez does not suggest that any of the documents are anything other than what they purport to be, the court sees no reason to presume otherwise."].

18 In his evidentiary objections, Mr. Stern states, "Funds received by BHI from Niro were comingled [sic] with other funds as the BHI company had been in operation since Woods set it up in 2012." Evid. Objs., ¶ 38.

19 Mr. Stern objects to this testimony on the usual variety of evidence rules, drawing the unsupported conclusion that there is "[n]o reason Hong Kong would not recognize [the] order." Evid. Objs., ¶ 62. However, Fed. R. Civ. P. 44.1, incorporated herein by Fed. R. Bankr. P. 9017, permits the court, "[i]n determining foreign law, [to] consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Thus, the court considers the trustee's testimony, together with Mr. Cunningham's testimony, below, concerning his conversation with the Bank's lawyer.

16. 14-25816-D-11 DEEPAL WANNAKUWATTE — MOTION TO COMPEL ABANDONMENT
MAC-4 — 12-16-16 [1067]

17. 16-24321-D-12 PAUL SCHMIDT — MOTION TO EXTEND DEADLINE TO FILE CHAPTER 12 PLAN
DBL-5 — 12-14-16 [49]

Tentative ruling:

This is the debtor's motion for an extension of time to file a chapter 12 plan. The court intends to deny the motion for the following reasons. First, the second page of the notice of hearing, DN 53, is missing, so the court cannot determine whether the motion was noticed pursuant to LBR 9014-1(f)(1) or (f)(2). Further, the first page does not advise creditors of the address of the courthouse, so the court cannot determine whether creditors were provided that information, as required by LBR 9014-1(d)(3).

Perhaps more important, the moving party failed to serve Gary Johnson who, according to the debtor's Schedule E/F, holds the largest unsecured claim in this case, at $40,000. (The next largest claim, per the schedule, is for $28,500, and the remaining unsecured claims are all listed at $10,000 or less.) In fact, Gary Johnson was listed on the debtor's master address list by name only, without an address, and when the debtor added an address for Mr. Johnson when he filed his Schedule D two weeks later, he did not file an amended master address list. Thus, when the debtor used the PACER matrix for the service of this motion, Mr. Johnson was not included and was not served.

For the reasons stated, the court intends to deny the motion. The court will hear the matter.

18.	16-23223-D-11 HSM-3	SKYHIGH PROPERTY LLC	MOTION TO USE CASH COLLATERAL 12-20-16 [77]
19.	09-46625-D-7 DNL-6	VASCO/MICHELE DEMELLO	MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH VASCO DEMELLO AND MICHELE DEMELLO 12-14-16 [147]
20.	16-27349-D-11 SW-1	JACOB WINDING	MOTION FOR RELIEF FROM AUTOMATIC STAY 12-20-16 [47]
21.	16-21659-D-7 CDH-3	TRONG NGUYEN	CONTINUED MOTION TO ABANDON 11-30-16 [73]

Final ruling:

Pursuant to the notice of continued hearing filed by moving party the hearing on this motion is continued to February 1, 2017 at 10:00 a.m. No appearance is necessary on January 4, 2017.

22.	16-25165-D-7 RHG-1	JOB JOURNAL, LLC	MOTION TO COMPEL ABANDONMENT 12-14-16 [10]