UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Bakersfield Federal Courthouse
510 19th Street, Second Floor
Bakersfield, California

PRE-HEARING DISPOSITIONS

DAY: **WEDNESDAY**
DATE: **FEBRUARY 3, 201**
CALENDAR: **10:30 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS**

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

ORAL ARGUMENT

For matters that are called, the court may determine in its discretion whether the resolution of such matter requires oral argument. *See Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); *accord* LBR 9014-1(h). When the court has published a tentative ruling for a matter that is called, the court shall not accept oral argument from any attorney appearing on such matter who is unfamiliar with such tentative ruling or its grounds.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. 12-11008-A-7 RAFAEL ALONSO
15-1044
GORSKI V. CAMACHO
PHILLIP GILLET/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
12-10-15 [44]

[This matter will be called subsequent to the hearing on the motion to dismiss, item no. 2.]

Tentative Ruling

In the event that neither party wishes to be heard with respect to the tentative ruling on the motion to dismiss, item no. 2 and do not need to be heard further with respect to the status conference, no appearance at the status conference is required and the court will issue the following civil minute order. If either party wishes to be heard on the tentative ruling or on the terms of the Civil Minute Order (below), counsel for each party shall appear. Not later than 4:00 p.m. counsel for the parties shall meet and confer by telephone or email as to the necessity of an appearance. If neither counsel appears, the court will assume that the following civil minute order is agreeable.

Civil Minute Order

IT IS ORDERED that the status conference is continued to April 6, 2016, at 10:30 a.m.

IT IS ALSO ORDERED that not later than 14 days before the continued status conference the parties shall file a joint status report.

IT IS FURTHER ORDERED that at the status conference on April 6, 2016, the court intends to bifurcate equitable tolling from the remainder of the action, issue a scheduling order with respect to that issue to allow discovery, and reserving discovery and trial of all other issues until resolution of the equitable tolling issue; parties wishing to oppose such an order on April 6, 2016, shall file opposition not later than 14 days before that hearing.

2. 12-11008-A-7 RAFAEL ALONSO
15-1044 DMG-3
GORSKI V. CAMACHO
D. GARDNER/Atty. for mv.
RESPONSIVE PLEADING

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
12-29-15 [46]

Tentative Ruling

Motion: Dismiss Third Amended Complaint under Rule 12(b)(6)
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied
Order: Civil minute order

Plaintiff Vincent Gorski, chapter 7 trustee in the underlying bankruptcy case of Rafael Alonso, has filed a fourth complaint against the defendant Alejandra Camacho (also known as Alejandra Alonso). This fourth complaint is entitled the Third Amended Complaint.

Like his prior amended complaint, the trustee's third amended complaint brings claims under §§ 548, 547, 544 (incorporating Cal. Civ. Code § 3439 et seq.), 550, and 549 of the Bankruptcy Code. Defendant Alejandra Camacho moves to dismiss the complaint in this adversary on the ground that these claims are time barred by the applicable statutes of limitations under § 546(a) and § 549(d) of the Code.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

DISCUSSION

At the November 4, 2015, hearing on the prior motion to dismiss the complaint, the court discussed the legal principles of equitable tolling and then applied them to the factual allegations in this

proceeding. *See* Civ. Mins. Hr'g on Mot. Dismiss, Nov. 4, 2015, ECF No. 35.

[*These sections from the prior civil minutes have been set forth below, in pertinent part, as they are applicable similarly to this hearing*]:

Equitable Tolling and Diligence

The petition in this case was filed on February 6, 2012. Claims brought under §§ 548, 547, 544 of the Code must be brought within 2 years after the earlier of the petition date (the order for relief in a voluntary case), or the time the case is closed or dismissed. § 546(a). The case has not been closed or dismissed, so the first period of time under § 546(a) is applicable in this case—two years after the petition date. (The court notes that statutory 1-year period under § 546(a)(1)(B) starting after appointment of the first trustee under section 702 is inapplicable to this case. That date occurred before the end of the 2-year period after the petition date, and between these two periods, the one ending later applies. *See* § 546(a)(1)(A)-(B). The trustee was appointed on April 4, 2012 after the first meeting of creditors, § 702(d), and one year after that date was April 2, 2013.)

As to the § 549 claim, the postpetition transfer by check occurred on February 9, 2012. Two years after this date is February 9, 2014. . . .

Absent a reason to delay the running of the statute, the second amended complaint on its face is time barred by the applicable statutes of limitation of §§ 546(a) and 549(d). And since the claim under § 550 depends on the validity of the avoidance claims, it too fails if the other claims fail under the statutes of limitation.

However, equitable tolling, if applicable, delays the running of a federal statute of limitations. "Under the equitable tolling doctrine, where a party remains in ignorance of [a wrong] without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. As a general rule, [t]his equitable doctrine is read into every federal statute of limitation." *In re United Ins. Mgmt., Inc.*, 14 F.3d 1380, 1384-85 (9th Cir. 1994) (alterations in original) (citations omitted) (internal quotation marks omitted).

However, a prerequisite to the application of this doctrine is the plaintiff's diligence. "[W]hen application of equitable tolling turns on the plaintiff's diligence in discovering a cause of action, courts may hold, as a matter of law, that the doctrine does not apply." *Id.* at 1385.

The Ninth Circuit has applied the concept of diligence specifically to the context of a chapter 7 trustee's invocation of the equitable tolling doctrine:

"Because a chapter 7 trustee has a statutory obligation to "investigate the financial affairs of the debtor[, ...] collect and reduce to money the property of the estate ..., and close such estate as expeditiously as is compatible with the best interests of parties

in interest," 11 U.S.C. §§ 704(1), (4), equitable tolling's requirement of diligence is particularly acute in the bankruptcy context. Included within a trustee's statutory obligations are the duty to examine the debtor's books and records, *see In re Island Amusement, Inc.*, 74 B.R. 18, 20 (Bankr.D.P.R.1987), and to investigate and litigate potential lawsuits that might be brought on behalf of the debtor, *see Mele v. First Colony Life Ins. Co.*, 127 B.R. 82, 86 (D.D.C.1991). Failure to perform these duties expeditiously subjects the trustee to removal, *see Island Amusement*, 74 B.R. at 20, forfeiture of fees, *see Estes & Hoyt v. Crake (In re Riverside-Linden Inv. Co.)*, 925 F.2d 320, 322 (9th Cir.1991), or liability for damages, *see Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339, 1357 (9th Cir.1983).
Id. at 1386 (9th Cir. 1994).

In the case *In re United Ins. Mgmt., Inc.*, the court further held that "[t]he failure to perform these duties also nullifies the trustee's ability to invoke the doctrine of equitable tolling. *Id.*

. . . .

Thus, as discussed by the Ninth Circuit in *In re United Ins. Mgmt., Inc.*, the trustee's duties extend beyond reviewing documents provided by a debtor. Further, the trustee is to expeditiously undertake his duties.

The diligence required before equitable tolling may be applied extends to the time period *after* the trustee discovers the fraud or the transfers. The Ninth Circuit Bankruptcy Appellate Panel, in the case *In re Hosseinpour-Esfahani*, considered whether the trustee's lack of diligence after discovering the claim precluded application of the equitable tolling doctrine. *In re Hosseinpour-Esfahani*, 198 B.R. 574, 579 (B.A.P. 9th Cir. 1996). "The issue before the Panel is whether the bankruptcy court abused its discretion in refusing to apply the doctrine of equitable tolling when the trustee was dilatory *after* discovering the existence of a claim." *Id.* In this case, the court upheld the bankruptcy court's refusal to apply equitable tolling because the trustee had waited three months after discovering the basis for the claim to commence an avoidance action. *Id.* at 579-80. The panel further held that "[d]espite the trustee's alleged diligence in discovering the alleged fraud before the statute of limitations lapsed, we cannot conclude that this obviates the need for the trustee to act diligently and in a timely manner once he has this knowledge." *Id.*at 579.

. . . .

Without diligence, both before discovery, and after discovery, the equitable tolling doctrine will not apply.

<u>Additional Principles of Equitable Tolling</u>

Going forward in this litigation, the court will apply not only the above principles of equitable tolling discussed at the prior hearing, but also the more updated test for equitable tolling applied in *Akers v. Mattei (In re Dugger)*, Nos. SC-11-1052, 05-00024-LA7, 2012 WL 2086562, at *7-9 (B.A.P. 9th Cir. June 8, 2012). This unpublished BAP case clarifies the two, conjunctive elements necessary for invoking equitable tolling of a federal statute of limitation.

The *Dugger* cases held: "In short, the modern burden of proof to invoke equitable tolling requires that Trustee show *both* [1] due diligence and [2] the presence of extraordinary circumstances. Contrary to Trustee's position, extraordinary circumstances are not an "alternative" ground for relief; their existence is a mandatory element . . . ." *Id.* at *8.

The *Dugger* case further set forth Ninth Circuit precedent that disfavors equitable tolling and directs that it be rarely used to toll statutes of limitation:

"The two-year limitations period in § 546(a)(1) is subject to equitable tolling. *Ernst & Young v. Matsumoto (In re United Ins. Mgmt., Inc. v. Ernst & Young),* 14 F.3d 1380, 1384 (9th Cir.1994). However, the case law of this circuit instructs that equitable tolling is rarely applied and disfavored. "The threshold for obtaining equitable tolling is very high,"*Townsend v. Knowles,* 562 F.3d 1200, 1205 (9th Cir.2009). Equitable tolling is "unavailable in most cases." *Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir.1999).*See Cal. Franchise Tax Bd. v. Kendall (In re Jones),* 657 F.3d 921, 926 (9th Cir.2011) (holding that equitable tolling is applied "only sparingly" because "Congress must be presumed to draft limitations periods in light of equitable tolling principles which generally apply to statutes of limitations."). Indeed, in cautioning against unjustified tolling of statutes of limitation, the Ninth Circuit has warned, "We should not trivialize the statute of limitations by promiscuous application of tolling doctrines."*Santa Maria v. P. Bell,* 202 F.3d 1170, 1179 (9th Cir.2000) (quoting *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 453 (7th Cir.1990))."

Id. at *7.

Lastly, the court adheres to the general principle that a party may not appeal to equity to toll a statute of limitations if that party has not acted in an equitable manner—e.g., by acting diligently in preserving its rights. *In re Hosseinpour-Esfahani*, 198 B.R. 574, 579 (B.A.P. 9th Cir. 1996).

The Trustee's Third Amended Complaint

Preliminarily, the court notes that the equitable tolling doctrine applies to both § 546(a) and § 549(d). *See In re Olsen*, 36 F.3d 71 (9th Cir. 1994); *In re United Ins. Mgmt., Inc.*, 14 F.3d 1380, 1384-85 (9th Cir. 1994); *In re Hosseinpour-Esfahani*, 198 B.R. 574 (B.A.P. 9th Cir. 1996).

The unique procedural posture and standards of a Rule 12(b)(6) motion directs the court's ruling on this matter and its conclusion that the litigation should proceed. In this Rule 12(b)(6) context, the court accepts all factual allegations of the trustee's complaint as true and construes them, *along with all reasonable inferences drawn from them*, in the light most favorable to the non-moving party.

Because all reasonable inferences drawn from the facts are to be construed in the trustee's favor as the non-movant, the court will deny the motion. From the complaint's factual allegations, it *could be inferred*, for example, that the debtor concealed the factual basis for the transfers and misrepresented facts about the transfers (or failed to disclose such facts in the face of a duty to disclose) to

the trustee. It is unclear, though, how this alleged concealment directly affected the delay in the trustee's filing this action and how long it was effective to prevent discovery of the facts necessary to bring this action. But it is only appropriate to draw these inferences about the effect of the alleged concealment in the light most favorable to the trustee at this stage of the proceeding.

It also *could be inferred* that the trustee's delay in bringing the initial complaint (i.e., the complaint was filed in April 14, 2015) as to transfers of which he discovered in May - June 2014 resulted from such things as the complexity of transfers (between various non-debtor parties) and the potentially legitimate explanations for the transfers (such as that the defendant was cashing checks for the debtor and delivering the cash to the debtor). *See* 3d Am. Compl. ¶¶ 70-72. Such an inference, if proven, could support a conclusion that the trustee's knowledge of the *amounts* transferred between *nondebtor third parties* did not equate to a discovery of the transfers as *the debtor's* fraudulent transfers. But such inferences and conclusions are decidedly one-sided in this Rule 12(b)(6) context and the result of a construction of the facts and inferences in the light most favorable to the trustee. Whether such inferences are warranted will depend on further factual development at a later stage of this proceeding.

At summary judgment or trial, the parties may choose to present evidence of the material facts relevant to the trustee's delay after learning of the transfers; the trustee's knowledge about the transfers and reasonable beliefs relating to such knowledge; and the trustee's "extraordinary circumstance" that prevented him from filing the complaint much sooner. Further, the parties may offer relevant and material facts regarding the trustee's diligence before his alleged discovery and the actual date of the trustee's discovery. At such time, the parties may make argument to the court regarding which inferences are warranted based on the evidence relevant to equitable tolling—a different standard from construing the facts and inferences only in the light most favorable to the non-movant.

The court believes that the issue of equitable tolling will likely remain an important and material one for the parties to address as the case proceeds.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

The defendant Alejandra Camacho's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure has been presented to the court. Having reviewed the motion and papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing,

IT IS ORDERED that the motion is denied. The defendant Alejandra Camacho's answer shall be served within 21 days after entry of the order on this motion.

IT IS FURTHER ORDERED that the parties shall not enlarge time without order of this court and, if the defendant fails to respond within the time specified herein, the plaintiff shall forthwith and without delay seek to enter the default of the defendant.

3. 12-11008-A-7 RAFAEL ALONSO
15-1049
GORSKI V. ANGULO
PHILLIP GILLET/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
12-10-15 [44]

[This matter will be called subsequent to the hearing on the motion to dismiss, item no. 4.]

Tentative Ruling

In the event that neither party wishes to be heard with respect to the tentative ruling on the motion to dismiss, item no. 4 and do not need to be heard further with respect to the status conference, no appearance at the status conference is required and the court will issue the following civil minute order. If either party wishes to be heard on the tentative ruling or on the terms of the Civil Minute Order (below), counsel for each party shall appear. Not later than 4:00 p.m. counsel for the parties shall meet and confer by telephone or email as to the necessity of an appearance. If neither counsel appears, the court will assume that the following civil minute order is agreeable.

Civil Minute Order

IT IS ORDERED that the status conference is continued to April 6, 2016, at 10:30 a.m.

IT IS ALSO ORDERED that not later than 14 days before the continued status conference the parties shall file a joint status report.

IT IS FURTHER ORDERED that at the status conference on April 6, 2016, the court intends to bifurcate equitable tolling from the remainder of the action, issue a scheduling order with respect to that issue to allow discovery, and reserving discovery and trial of all other issues until resolution of the equitable tolling issue; parties wishing to oppose such an order on April 6, 2016, shall file opposition not later than 14 days before that hearing.

4. 12-11008-A-7 RAFAEL ALONSO
15-1049 DMG-3
GORSKI V. ANGULO
D. GARDNER/Atty. for mv.
RESPONSIVE PLEADING

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
12-29-15 [46]

Tentative Ruling

Motion: Dismiss Third Amended Complaint under Rule 12(b)(6)
Notice: LBR 9014-1(f)(2); no written opposition required
Disposition: Denied
Order: Civil minute order

Plaintiff Vincent Gorski, chapter 7 trustee in the underlying bankruptcy case of Rafael Alonso, has filed a fourth complaint against the defendant Jenny Angulo ("Defendant"). This fourth complaint is entitled the Third Amended Complaint.

Like his prior amended complaint, the trustee's third amended complaint brings claims under §§ 548, 547, 544 (incorporating Cal. Civ. Code § 3439 et seq.), 550, and 549 of the Bankruptcy Code. Defendant Alejandra Camacho moves to dismiss the complaint in this adversary on the ground that these claims are time barred by the applicable statutes of limitations under § 546(a) and § 549(d) of the Code.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

DISCUSSION

At the November 4, 2015, hearing on the prior motion to dismiss the complaint, the court discussed the legal principles of equitable tolling and then applied them to the factual allegations in this

proceeding. *See* Civ. Mins. Hr'g on Mot. Dismiss, Nov. 4, 2015, ECF No. 34.

[*These sections from the prior civil minutes have been set forth below, in pertinent part, as they are applicable similarly to this hearing*]:

Equitable Tolling and Diligence

The petition in this case was filed on February 6, 2012. Claims brought under §§ 548, 547, 544 of the Code must be brought within 2 years after the earlier of the petition date (the order for relief in a voluntary case), or the time the case is closed or dismissed. § 546(a). The case has not been closed or dismissed, so the first period of time under § 546(a) is applicable in this case—two years after the petition date. (The court notes that statutory 1-year period under § 546(a)(1)(B) starting after appointment of the first trustee under section 702 is inapplicable to this case. That date occurred before the end of the 2-year period after the petition date, and between these two periods, the one ending later applies. *See* § 546(a)(1)(A)-(B). The trustee was appointed on April 4, 2012 after the first meeting of creditors, § 702(d), and one year after that date was April 2, 2013.)

As to the § 549 claim, the postpetition transfers have not been described or given a date. Assuming the postpetition transfer was approximately 1 month after the petition date, March 1, 2012, the statute of limitations would have expired on March 1, 2014.

Absent a reason to delay the running of the statute, the second amended complaint on its face is time barred by the applicable statutes of limitation of § 546(a) and, possibly, § 549(d). And since the claim under § 550 depends on the validity of the avoidance claims, it too fails if the other claims fail under the statutes of limitation.

However, equitable tolling, if applicable, delays the running of a federal statute of limitations. "Under the equitable tolling doctrine, where a party remains in ignorance of [a wrong] without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. As a general rule, [t]his equitable doctrine is read into every federal statute of limitation." *In re United Ins. Mgmt., Inc.*, 14 F.3d 1380, 1384-85 (9th Cir. 1994) (alterations in original) (citations omitted) (internal quotation marks omitted).

However, a prerequisite to the application of this doctrine is the plaintiff's diligence. "[W]hen application of equitable tolling turns on the plaintiff's diligence in discovering a cause of action, courts may hold, as a matter of law, that the doctrine does not apply." *Id.* at 1385.

The Ninth Circuit has applied the concept of diligence specifically to the context of a chapter 7 trustee's invocation of the equitable tolling doctrine:

"Because a chapter 7 trustee has a statutory obligation to "investigate the financial affairs of the debtor[, ...] collect and

reduce to money the property of the estate ..., and close such estate as expeditiously as is compatible with the best interests of parties in interest," 11 U.S.C. §§ 704(1), (4), equitable tolling's requirement of diligence is particularly acute in the bankruptcy context. Included within a trustee's statutory obligations are the duty to examine the debtor's books and records, *see In re Island Amusement, Inc.*, 74 B.R. 18, 20 (Bankr.D.P.R.1987), and to investigate and litigate potential lawsuits that might be brought on behalf of the debtor, *see Mele v. First Colony Life Ins. Co.*, 127 B.R. 82, 86 (D.D.C.1991). Failure to perform these duties expeditiously subjects the trustee to removal, *see Island Amusement*, 74 B.R. at 20, forfeiture of fees, *see Estes & Hoyt v. Crake (In re Riverside-Linden Inv. Co.)*, 925 F.2d 320, 322 (9th Cir.1991), or liability for damages, *see Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339, 1357 (9th Cir.1983).
Id. at 1386 (9th Cir. 1994).

In the case *In re United Ins. Mgmt., Inc.*, the court further held that "[t]he failure to perform these duties also nullifies the trustee's ability to invoke the doctrine of equitable tolling. *Id.*

. . . .

Thus, as discussed by the Ninth Circuit in *In re United Ins. Mgmt., Inc.*, the trustee's duties extend beyond reviewing documents provided by a debtor. Further, the trustee is to expeditiously undertake his duties.

The diligence required before equitable tolling may be applied extends to the time period *after* the trustee discovers the fraud or the transfers. The Ninth Circuit Bankruptcy Appellate Panel, in the case *In re Hosseinpour-Esfahani*, considered whether the trustee's lack of diligence after discovering the claim precluded application of the equitable tolling doctrine. *In re Hosseinpour-Esfahani*, 198 B.R. 574, 579 (B.A.P. 9th Cir. 1996). "The issue before the Panel is whether the bankruptcy court abused its discretion in refusing to apply the doctrine of equitable tolling when the trustee was dilatory *after* discovering the existence of a claim." *Id.* In this case, the court upheld the bankruptcy court's refusal to apply equitable tolling because the trustee had waited three months after discovering the basis for the claim to commence an avoidance action. *Id.* at 579-80. The panel further held that "[d]espite the trustee's alleged diligence in discovering the alleged fraud before the statute of limitations lapsed, we cannot conclude that this obviates the need for the trustee to act diligently and in a timely manner once he has this knowledge." *Id.*at 579.

. . . .

Without diligence, both before discovery, and after discovery, the equitable tolling doctrine will not apply.

Additional Principles of Equitable Tolling

Going forward in this litigation, the court will apply not only the above principles of equitable tolling discussed at the prior hearing, but also the more updated test for equitable tolling applied in *Akers v. Mattei (In re Dugger)*, Nos. SC-11-1052, 05-00024-LA7, 2012 WL 2086562, at *7-9 (B.A.P. 9th Cir. June 8, 2012). This unpublished BAP

case clarifies the two, conjunctive elements necessary for invoking equitable tolling of a federal statute of limitation.

The *Dugger* cases held: "In short, the modern burden of proof to invoke equitable tolling requires that Trustee show *both* [1] due diligence and [2] the presence of extraordinary circumstances. Contrary to Trustee's position, extraordinary circumstances are not an "alternative" ground for relief; their existence is a mandatory element . . . ." *Id.* at *8.

The *Dugger* case further set forth Ninth Circuit precedent that disfavors equitable tolling and directs that it be rarely used to toll statutes of limitation:

"The two-year limitations period in § 546(a)(1) is subject to equitable tolling. *Ernst & Young v. Matsumoto (In re United Ins. Mgmt., Inc. v. Ernst & Young),* 14 F.3d 1380, 1384 (9th Cir.1994). However, the case law of this circuit instructs that equitable tolling is rarely applied and disfavored. "The threshold for obtaining equitable tolling is very high,"*Townsend v. Knowles,* 562 F.3d 1200, 1205 (9th Cir.2009). Equitable tolling is "unavailable in most cases." *Miles v. Prunty,* 187 F.3d 1104, 1107 (9th Cir.1999).*See Cal. Franchise Tax Bd. v. Kendall (In re Jones),* 657 F.3d 921, 926 (9th Cir.2011) (holding that equitable tolling is applied "only sparingly" because "Congress must be presumed to draft limitations periods in light of equitable tolling principles which generally apply to statutes of limitations."). Indeed, in cautioning against unjustified tolling of statutes of limitation, the Ninth Circuit has warned, "We should not trivialize the statute of limitations by promiscuous application of tolling doctrines."*Santa Maria v. P. Bell,* 202 F.3d 1170, 1179 (9th Cir.2000) (quoting *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 453 (7th Cir.1990))."

Id. at *7.

Lastly, the court adheres to the general principle that a party may not appeal to equity to toll a statute of limitations if that party has not acted in an equitable manner—e.g., by acting diligently in preserving its rights. *In re Hosseinpour-Esfahani*, 198 B.R. 574, 579 (B.A.P. 9th Cir. 1996).

The Trustee's Third Amended Complaint

Preliminarily, the court notes that the equitable tolling doctrine applies to both § 546(a) and § 549(d). *See In re Olsen*, 36 F.3d 71 (9th Cir. 1994); *In re United Ins. Mgmt., Inc.*, 14 F.3d 1380, 1384-85 (9th Cir. 1994); *In re Hosseinpour-Esfahani*, 198 B.R. 574 (B.A.P. 9th Cir. 1996).

The unique procedural posture and standards of a Rule 12(b)(6) motion directs the court's ruling on this matter and its conclusion that the litigation should proceed. In this Rule 12(b)(6) context, the court accepts all factual allegations of the trustee's complaint as true and construes them, *along with all reasonable inferences drawn from them*, in the light most favorable to the non-moving party.

Because all reasonable inferences drawn from the facts are to be construed in the trustee's favor as the non-movant, the court will deny the motion. From the complaint's factual allegations, it *could be inferred*, for example, that the debtor concealed the factual basis

for the transfers and misrepresented facts about the transfers (or failed to disclose such facts in the face of a duty to disclose) to the trustee. It is unclear, though, how this alleged concealment directly affected the delay in the trustee's filing this action and how long it was effective to prevent discovery of the facts necessary to bring this action. But it is only appropriate to draw these inferences about the effect of the alleged concealment in the light most favorable to the trustee at this stage of the proceeding.

It also *could be inferred* that the trustee's delay in bringing the initial complaint (i.e., the complaint was filed in April 14, 2015) as to transfers of which he discovered in May - June 2014 resulted from such things as the complexity of transfers (the transfers were between various non-debtor parties except for the 2010 International Truck) and the potentially legitimate explanations for the transfers (such as that the defendant was cashing checks for the debtor and delivering the cash to the debtor). *See* 3d Am. Compl. ¶¶ 73-75. Such an inference, if proven, could support a conclusion that the trustee's knowledge of the *amounts* transferred between *nondebtor third parties* did not equate to discovery of the transfers as *the debtor's* fraudulent transfers. But such inferences and conclusions are decidedly one-sided in this Rule 12(b)(6) context and the result of a construction of the facts and inferences in the light most favorable to the trustee. Whether such inferences are warranted will depend on further factual development at a later stage of this proceeding.

At summary judgment or trial, the parties may choose to present evidence of the material facts relevant to the trustee's delay after learning of the transfers; the trustee's knowledge about the transfers and reasonable beliefs relating to such knowledge; and the trustee's "extraordinary circumstance" that prevented him from filing the complaint sooner. Further, the parties may offer relevant and material facts regarding the trustee's diligence before his alleged discovery and the actual date of the trustee's discovery. At such time, the parties may make argument to the court regarding which inferences are warranted based on the evidence relevant to equitable tolling—a different standard from construing the facts and inferences only in the light most favorable to the non-movant.

The court believes that the issue of equitable tolling will likely remain an important and material one for the parties to address as the case proceeds.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

The defendant Jenny Angulo's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure has been presented to the court. Having reviewed the motion and papers filed in support and opposition to it, and having heard the arguments of counsel, if any, and good cause appearing,

IT IS ORDERED that the motion is denied. The defendant Jenny Angulo's answer shall be served within 21 days after entry of the order on this motion.

IT IS FURTHER ORDERED that the parties shall not enlarge time without order of this court and, if the defendant fails to respond within the

time specified herein, the plaintiff shall forthwith and without delay seek to enter the default of the defendant.

5. 12-11008-A-7 RAFAEL ALONSO
15-1050
GORSKI V. MELENDEZ
PHILLIP GILLET/Atty. for pl.

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
9-28-15 [22]

Final Ruling

On November 4, 2015, the court dismissed the First Amended Complaint with 21 days leave to amend. The plaintiff did not file a Second Amended Complaint. The adversary proceeding is dismissed and the status conference concluded.

6. 15-11835-A-7 JAMES/JAMIE CANNON
15-1139
PARKER V. CANNON ET AL
LISA HOLDER/Atty. for pl.

STATUS CONFERENCE RE: COMPLAINT
11-16-15 [1]

Final Ruling

The matter is continued to April 6, 2016, at 10:30 a.m. to allow the plaintiff to prove up the default. In the event a judgment or dismissal is in the file, no appearance is necessary. If a judgment or dismissal is not in the file, not later than 14 days before the continued status conference the plaintiff shall file a status report.