UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

April 26, 2017 at 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.

1.	17-21107-D-7 MHK-1	LUNA DIVERSIFIED ENTERPRISES, INC.	MOTION TO QUASH 3-20-17 [5]

Final ruling:

An order granting a stipulation to vacate this motion to quash was entered on April 12, 2017. As a result the motion is removed from calendar. No appearance is necessary.

2. 14-25820-D-11 INTERNATIONAL MOTION FOR ENTRY OF DEFAULT
16-2108 MANUFACTURING GROUP, INC. DMC-3JUDGMENT
MCFARLAND V. RODIGO ET AL 3-16-17 [29]

Tentative ruling:

This is the application of the plaintiff, who is also the trustee in the underlying chapter 11 case in which this adversary proceeding is pending (the "trustee") for entry of a default judgment. The application was noticed pursuant to LBR 9014-1(f)(1) and no opposition has been filed. However, the court has the following concerns.

First, the proof of service is signed under oath only as to the declarant's age, citizenship, and status as not a party to this action, and not as to the facts of service, as required by 28 U.S.C. § 1746. The court will hear the matter as scheduled if the moving party has filed a corrected proof of service. Second, the moving party filed two sets of moving papers – two applications, two notices of hearing, and so on – that appear at first glance to be identical. Apparently for that reason, and likely also because both sets of moving papers bear the same docket control number, only a single application was calendared. The court has determined from a closer reading that the application filed first, DN 25, is against defendant Mark Rodigo and the second application, DN 29, is against defendant Irene Rodigo. The court sees no reason a single application would not have sufficed, and therefore proposes to treat the two applications as one. The proofs of service are clear that both sets of moving papers were served on both defendants and the court is prepared to address the applications in a single order and a single judgment.

On a related note, the applications appear to seek separate judgments against the defendants in the amount of $364,137.82 each, whereas the plaintiff's complaint seeks a single judgment for $364,137.82 against both defendants. Finally, the application requests entry of a default judgment "on account of the first through fourth claims for relief in the Complaint" (Mot., DN 29, at 2:7), whereas the moving papers support entry of a judgment on the first and second claims for relief but not the third or fourth. The first and second claims for relief are for avoidance and recovery of actual fraudulent transfers and the third and fourth are for avoidance and recovery of constructive fraudulent transfers. The moving papers, including the supporting declaration, address only the elements of actual fraudulent transfers. Thus, assuming a corrected proof of service is filed, the court will grant the application as to both defendants in the single amount of $364,137.82 on the plaintiff's first and second claims for relief.

The court will hear the matter.

3. 17-21422-D-7 MATTHEW CARPENTER — AMENDED MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
3-22-17 [20]

4. 16-22230-D-7 NORMAN/CHERI RYAN — CONTINUED OBJECTION TO HOMESTEAD EXEMPTION
MPD-3
12-22-16 [50]

Final ruling:

This is the trustee's objection to the debtors' claim of a homestead exemption. By order dated April 12, 2017, the court granted the trustee's motion to approve a global compromise by which this objection to exemption was resolved. Pursuant to the terms of the order, the objection is overruled as moot. No appearance is necessary.

5. 16-28238-D-7 ALI ASGHAR — MOTION TO COMPEL ABANDONMENT
FF-1
3-27-17 [14]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the debtor's motion to compel the trustee to abandon property and the debtor has demonstrated the property to be abandoned is of inconsequential value to the estate. Accordingly, the motion will be granted and the property that is the subject of the motion will be deemed abandoned by minute order. No appearance is necessary.

6. 10-42050-D-7 VINCENT/MALANIE SINGH — MOTION TO DISMISS ADVERSARY PROCEEDING
12-2360
BURKART V. NARAYAN
3-17-17 [146]

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 dismiss adv. proc. no. 12-2360 is supported by the record. As such the court will grant the motion by minute order. No appearance is necessary.

7. 17-20060-D-7 AARON QUINTANA
KAZ-1
U.S. BANK TRUST, N.A. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-17-17 [29]

Final ruling:

This matter is resolved without oral argument. This is U.S. Bank Trust, N.A.'s motion for relief from automatic stay. The court 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 the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

8. 16-28280-D-7 SUSAN BERGESEN
AP-1
CITIMORTGAGE, INC. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-24-17 [16]

9. 17-21383-D-7 AVETIS NAZARYAN

MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
3-2-17 [5]

10. 15-29890-D-7 GRAIL SEMICONDUCTOR
MPD-1
MITCHELL NEWDELMAN VS.

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ORDER THE AUTOMATIC STAY DOES NOT APPLY
3-1-17 [579]

11. 15-29890-D-7 GRAIL SEMICONDUCTOR CONTINUED MOTION FOR CONTEMPT
16-2088 DNL-6 1-18-17 [180]
CARELLO V. STERN ET AL

12. 15-29890-D-7 GRAIL SEMICONDUCTOR CONTINUED MOTION FOR SUMMARY
16-2088 DNL-9 JUDGMENT
CARELLO V. STERN ET AL 2-24-17 [266]

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment against defendants Donald Stern ("Stern"), Billion Hope International, Ltd. ("BHI"), and MOM OS, LLC ("MOM") (collectively, the "defendants"). Mr. Stern filed a declaration in opposition, the trustee filed a reply, and Mr. Stern filed another declaration, along with some exhibits. On April 18, 2017, Mr. Stern filed opposition.[1] Neither BHI nor MOM has filed opposition.[2] For the following reasons, as to Mr. Stern, the motion will be granted as to two of the trustee's claims and denied as to two. As to BHI and MOM, the court will submit this ruling as its findings of fact and conclusions of law to the district court, with the recommendation that the motion be granted as against BHI on the trustee's constructive fraudulent transfer and turnover claims and denied on the preference claim, and as against MOM, that the motion be granted as to both the trustee's § 550(a) claim and her turnover claim (in limited amounts).

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Mr. Stern has filed several proofs of claim in the underlying bankruptcy case. Accordingly, the court has authority to enter a final judgment on the trustee's claims against him. Neither BHI nor MOM has filed a proof of claim or otherwise participated in the parent case or this adversary proceeding, except that each has filed an answer to the trustee's amended complaint. In those answers, BHI and MOM stated they do not consent to entry of final orders or judgments by a bankruptcy judge. Accordingly, as to BHI and MOM, the court does not have authority to enter a final judgment, and if this tentative ruling is adopted by the court as final, it will constitute the court's proposed findings of fact and conclusions of law to be presented to the district court.

Summary judgment is appropriate when there exists "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Supreme Court discussed the standards for summary judgment in a

trilogy of cases: Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. Anderson, 477 U.S. at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories, and any affidavits. Celotex at 323. To demonstrate the presence or absence of a genuine dispute, a party must cite to specific materials in the record, or submit an affidavit or declaration by a competent witness based on personal knowledge. See Fed. R. Civ. P. 56(c)(1), (4). Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Anderson, 477 U.S. at 252. Once the moving party has met its initial burden, the non-moving party must show specific facts demonstrating the existence of genuine issues of fact for trial. Id. at 256.

I. The Preference Claim

By her amended complaint in this proceeding, the trustee seeks, first, to avoid and recover as a preference, pursuant to §§ 547(b) and 550(a) of the Bankruptcy Code,[3] a transfer of $2.75 million [4] from funds of the debtor into an account of Mr. Stern and BHI at The Hongkong and Shanghai Banking Corporation Ltd. (the "Hong Kong bank account"), made on October 14, 2015, roughly ten weeks before the debtor, Grail Semiconductor, commenced this bankruptcy case as a chapter 11 case. The trustee seeks to avoid and recover the entire amount of the transfer as against Mr. Stern and BHI. The court concludes the trustee has made a prima facie case that, as to Mr. Stern, the transfer was a preference; as to BHI, the trustee has not made a prima facie case because she has not demonstrated the payment was on account of an antecedent debt owed by the debtor to BHI.

In a ruling on the trustee's earlier motion for a preliminary injunction against Mr. Stern and BHI, which appears in the court's civil minutes filed January 4, 2017, DN 174, the court made extensive findings and conclusions on the trustee's preference claim, ruling the trustee was likely to prevail on that claim. The court adopts herein that portion of the January 4, 2017 ruling pertaining to the likelihood of success on the merits, section I. Mr. Stern's opposition to the present motion consists of an 11-page declaration by him and a one-page declaration with two exhibits. As the trustee points out, the 11-page declaration is signed by Mr. Stern with these words: "I declare under the laws of the United States of America that the foregoing is true and correct" (Stern Decl., DN 294 ("Decl."), at 11:22-23) and without the requisite "under penalty of perjury." See 28 U.S.C. § 1746.

However, even if Mr. Stern had included those words, the declaration would be unavailing. It consists virtually entirely of opinions and conclusions that are unsupported by any admissible evidence. Mr. Stern provides a rather extensive recital of his version of the history of the debtor company and his contributions to it. Assuming without deciding that this history is accurate, it is simply not relevant to the trustee's claims in this adversary proceeding. Mr. Stern misunderstands the issue of "value" as it relates to whether a transfer was a preference. The question is not whether the transfer was made in exchange for value previously given by the recipient to the debtor; it is whether the recipient either (1) gave new value to the debtor at or about the same time as the transfer was made to the recipient (§ 547(c)(1)); or (2) gave new value to the debtor after the transfer was made to the recipient. § 547(c)(4).

Thus, Mr. Stern's protests about the trustee's allegations, while understandable from his perspective, are not relevant here. Mr. Stern argues: "The Trustee now claims that Donald Stern has given Grail no value to Grail!!! If not for Donald Stern there would have been no trial, no jury verdict for $124 million dollars in favor of Grail, no settlement and no $55 million dollars. To say there is no value in the consulting agreement and now after five year[s] of work and to just void the agreement is beyond stupid." Decl. at 6:19-22. Accepting as true, for purposes of this motion only, Mr. Stern's testimony regarding the work he did and his conclusion that it led to the settlement, the problem is that all of the work was done prior to the date of the transfer at stake in this proceeding. As such, his testimony and conclusions do not support a finding that Mr. Stern either gave new value to the debtor contemporaneously with the challenged transfer or gave new value to the debtor after that transfer was made.[5]

Mr. Stern also attempts to shore up his theories, raised in response to the trustee's earlier preliminary injunction motion, that the debtor was not insolvent at the time of the transfer and that the transfer did not enable Mr. Stern to receive more than he would have received in a hypothetical chapter 7 liquidation. The court addressed these issues in its earlier ruling adopted herein, but will address Mr. Stern's more expansive analysis here. The court notes, to begin with, that there is a presumption in the trustee's favor that the debtor was insolvent when the transfer was made. § 547(f); In re Koubourlis, 869 F.2d 1319, 1322 (9th Cir. 1989). Thus, Mr. Stern must come forward with some evidence to rebut the presumption. Id.

Mr. Stern's solvency analysis centers on the proposition that the Mitsubishi settlement funds were sufficient to enable the debtor to settle all claims against it.

> Donald would have never agreed to settle if Hofer the CEO, Woods the CFO and Ret. Judge Gilbert a Director of Grail had not assured Donald that the settlement was enough to settle all claims and that bankruptcy was not necessary as discussed during the settlement conference. Hofer and Gilbert stated during the settlement that they had talked to many of the people and that with a little work together they would get everyone to agree to settle. As Brad Woods stated in his May 5, 2016 declaration to this court in section 7 lines 18-19:
>
> > "Certain creditors did agree to reduce their claims, albeit orally, and it was understood that further reductions would have to be made by other claimants. This resulted in the settlement of $55 million to be agreed upon."

Decl. at 6:22-7:4 (emphasis added). Mr. Stern has not suggested the Mitsubishi settlement would have enabled the debtor to pay off all its debts at their actual amounts. He has offered no authority for a definition of "insolvent," for purposes of § 547, as being unable to settle one's claims at compromised amounts, and the court is aware of none. In fact, Mr. Stern's analysis is tantamount to an admission that the debtor was insolvent, based on the traditional balance sheet test,[6] when the transfer was made.

Also on the question of solvency, in his April 18, 2017 opposition, Mr. Stern refers to alleged testimony by Judge Richard Gilbert that after the Mitsubishi settlement, "he was looking forward to paying a dividend to Grail's shareholders"

(Stern Opp., DN 325 ("April 18, 2017 Opp."), at 4:9-10) and to a declaration filed in the parent case last year in which Michael Burkart "describes in detail why many of the claims are invalid . . . ." Id. at 7:2. The trustee submitted the transcript of Judge Gilbert's deposition earlier in this adversary proceeding; thus, she apparently would not object to the court considering it. However, Mr. Stern has not cited the testimony by page number so the court might consider it in context, and in any event, the hope of returning a dividend to shareholders appears to be a matter of pure speculation. Mr. Burkart's testimony was given on information and belief and was not otherwise authenticated or supported; the declaration is thus inadmissible.

Finally, Mr. Stern refers to "[b]oth Gilbert and Woods confirm[ing] . . . in their declarations and depositions that Grail is and was solvent." Id. at 14:20-21. Mr. Stern has not provided citations to these declarations and depositions and the court is not required to dig through the record to find them. Even if such testimony were properly cited, however, the court would be hard-pressed to find it anything but highly speculative and contrary to the evidence cited above that the debtor's "solvency" depended entirely on speculative settlements and concessions by creditors. Mr. Stern's characterization of all of this testimony carries no weight as regards this motion.

Moving on to the "greater amount test," Mr. Stern begins by setting forth at some length his own priority scheme; that is, the order in which, in his opinion, various claims should be paid. As with his value analysis, Mr. Stern's priorities are simply not relevant here. The issue is whether the transfer enabled him to receive more than he would have received had the transfer not been made, had the debtor been liquidated in a hypothetical chapter 7 case, and had Mr. Stern received payment "to the extent provided by the provisions of [Title 11]." § 547(b)(5)(C). The priorities that matter here are the Code's priorities, not those Mr. Stern would find fair. In making the analysis, the court is to consider whether the transfer enabled Mr. Stern to receive more than he would have received if the transfer had not been made and he had instead received only what other creditors in his class would have received in a hypothetical chapter 7 case. Alvarado v. Walsh (In re LCO Enters.), 12 F.3d 938, 941 (9th Cir. 1993). Mr. Stern's personal priorities notwithstanding, his claims are general unsecured claims.

As a general proposition, unless the hypothetical chapter 7 case would have resulted in a 100% distribution to general unsecured creditors, a general unsecured creditor who receives a pre-petition transfer in any amount inevitably receives more through that transfer than he would have received if the transfer had not been made and he had instead received payment through the hypothetical chapter 7 case, on a pro rata basis with the other members of his class. This is because the pre-petition transfer resulted in him receiving that payment plus his pro rata share of the hypothetical chapter 7 distribution. That is, the creditor who receives a pre-petition transfer and a distribution through the chapter 7 has necessarily received more than the creditors in the same class who receive distributions only through the chapter 7.

Thus, the question here is not what Mr. Stern received on October 14, 2015, as compared with what other creditors in the same class are likely to receive through this case; it is what he received on October 14, 2015 plus what he will receive through this case, as compared with what general unsecured creditors who did not receive pre-petition payments will receive through the case.

This analysis requires that in determining the amount that the transfer

> "enables [the] creditor to receive," 11 U.S.C. § 547(b)(5), such creditor must be charged with the value of what was transferred *plus* any additional amount that he would be entitled to receive from a Chapter 7 liquidation. The net result is that, as long as the distribution in bankruptcy is less than one-hundred percent, any payment "on account" to an unsecured creditor during the preference period will enable that creditor to receive more than he would have received in liquidation had the payment not been made.

In re Lewis W. Shurtleff, Inc., 778 F.2d 1416, 1421 (9th Cir. 1985), citing Palmer Clay Products Co. v. Brown, 297 U.S. 227, 229 (1935). For example, "[w]here the creditor's claim is $10,000, the payment on account [the pre-petition payment] $1000, and the distribution in bankruptcy 50%, the creditor to whom the payment on account is made receives $5500, while another creditor to whom the same amount was owing and no payment on account was made will receive only $5000." Lewis W. Shurtleff, Inc., at 1421, quoting Palmer Clay Products, at 229; see also Estate of Love v. First Interstate Bank (In re Love), 155 B.R. 225, 232 (Bankr. D. Mont. 1993).

Mr. Stern calculates his total claims, including the claim on account of which he received the $2.75 million payment, at something over $9 million. If he had not received that payment, he would receive on account of his $9 million in claims the same pro rata distribution other general unsecured creditors will receive. But as a result of the $2.75 million payment, he has already received 30% of the total of his claims. If the payment is not avoided and returned to the estate, it would necessarily elevate his total receipts on his claims to 30% more than the other members of his class will receive – the ones who did not receive pre-petition payments. Whether the court considers the roughly $50 million in claims that have been filed in this case or the total assets and liabilities scheduled by Mr. Burkart on the debtor's schedules, $11,596,812 and $18,744,843, respectively, there is, at this stage, no foreseeable scenario in which this case will result in a 100% distribution on general unsecured claims. Further, the court has no reason to believe a hypothetical liquidation of the debtor's assets as of the petition date would have been 100%. As a result, the trustee has made a prima facie showing on the "greater amount" test and Mr. Stern has not rebutted it.

Mr. Stern has submitted a list of the claims filed in this case, with his opinion as to whether each one is valid or invalid. He has added brief remarks for each, apparently to explain his opinions.[7] He has also submitted a one-page analysis in which he concludes "[t]here is $1,071,138 in valid claims without taking any of Don's [Stern's] claims into consideration. Don's valid claims total at least $5,313,548" (Stern's Ex. A, DN 309, p. 3), not including the contested $2.75 million.[8] He includes an analysis of what he believes are the estate's valid claims against others, including law firms, a litigation finance company, a former director of the debtor, and a former officer. He concludes, "[t]he estate has approximately $3,000,000. That is enough to cover the valid claims – excluding Don's – and still leave some money to pay Sedgwick [a litigation finance company] and Woods [a former officer] if necessary." Id.

Mr. Stern's analysis of the claims against the estate and the estate's claims against others is general, conclusory, and unsupported by admissible evidence other than his opinions. The court recognizes that his opinions are based on an apparently extensive knowledge of the debtor, the claims against it, and its claims against others. However, his opinions are far too vague and conclusory for the court to afford them much weight, if any.

The court is aware that in addition to the "valid/invalid" list, Mr. Stern, between April 18 and April 20, 2017, also filed some 28 objections to claims in the parent case.[9] The objections were not filed in opposition to this motion and were not, apparently, served on the trustee; thus, the court need not consider them. At this stage, the claims are presumptively valid (Fed. R. Bankr. P. 3001(f)) and the claimants have had no opportunity to respond to the objections. The court has, however, considered the objections to the extent of determining them to be based largely on Mr. Stern's opinions and conclusions, with documents attached to some of them (but not all) that are hearsay and unauthenticated. The court notes also that between the "valid/invalid" list Mr. Stern filed March 23, 2017 and the version of the same list he filed April 18, 2017, Mr. Stern changed eight of the claims from valid to invalid, which by itself casts doubt on the reliability of his conclusions. Finally, his conclusion that of more than $50 million in claims filed, only $546,338 are valid (not including Mr. Stern's) is self-serving and seems almost per se not credible.

In addition, Mr. Stern's conclusion that "[t]he trustee need not sue [the law firms] in order to deny their claims" but can simply deny them represents a misunderstanding of the claims objection process and thereby improperly discounts the substantial administrative expenses that would inevitably be incurred in challenging claims against the estate (as well as pursuing claims of the estate against others). In short, Mr. Stern's "evidence," to the extent, if any, it is admissible at all, is entitled to very little weight and is far from sufficient to overcome the conclusion that the $2.75 million transfer enabled him to receive more than he would have received if the transfer had not been made and he had received payment only through a hypothetical chapter 7.

Finally, Mr. Stern has expanded his argument, originally made in opposition to the trustee's preliminary injunction motion, that the $2.75 million transfer was made in the ordinary course of business.

> If the payment of legal consulting services is not a normal course of business of ligation [sic] then all ligation [sic] awards are subject to avoidance and no lawyers or experts should ever be paid! If the law allows that lawyer's and not their experts to be paid up front of all other outstanding company expenses then it is unfair to the company and favors lawyers over all others. Niro's retainer agreement and Stern consulting agreement together were approved by the board of Director of Grail requiring that Stern be available (i.e. a consultant) to the lawyers for the express purpose of supporting the legal process. Stern's consultant [agreement] is part of legal business of ligating [sic] the case.

Decl. at 9:15-22.

The court's ruling on the preliminary injunction motion included, in the section adopted herein, an extensive discussion of the circumstances under which the $2.75 million transfer was made, along with the court's conclusion, based on the record at that time, that there was nothing ordinary about the transfer. Mr. Stern's opinion that payments to consultants assisting attorneys in litigation should be considered as much a part of the "ordinary course of business" of litigation as the attorney's fees does not support a contrary conclusion. Mr. Stern has offered no authority for the proposition, essential to his argument, that litigation after a debtor has ceased operations, with no prospect of resuming such, at a time when everyone is aware the debtor is not able to pay all its creditors

without significant concessions on their part, constitutes the ordinary course of business of any company. Thus, and as further set forth at length in the court's earlier ruling, the $2.75 million payment to Mr. Stern was not made in the ordinary course of business.

Therefore, the court concludes the trustee has made a prima facie case that there is no genuine dispute as to any material fact concerning her preference claim and the trustee is entitled to judgment as a matter of law. That is to say, the trier of fact could not reasonably find for Mr. Stern on the preference claim. Because the transfer will be avoided, and as MOM has submitted no opposition, the trustee is also entitled to judgment on her § 550(a)(2) claim against MOM, as a transferee of initial transferee Stern, limited to $400,000, the total amount transferred to MOM.

II. The Actual Fraudulent Transfer Claims

Next, the trustee seeks summary judgment on her actual fraudulent transfer claims against Mr. Stern and BHI under § 548(a)(1)(A) and California's version of the Uniform Fraudulent Transfer Act, Cal. Civ. Code §§ 3439 - 3439.14. Under both, a bankruptcy trustee may avoid a transfer made within a particular time period if the transfer was made by the debtor with the actual intent to hinder, delay, or defraud any of its creditors. § 548(a)(1)(A); Cal. Civ. Code § 3439.04(a)(1). The trustee refers to the "badges of fraud" from which the court may infer fraudulent intent to hinder, delay, or defraud creditors (see Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 805-06 (9th Cir. 1994)), and concludes, "[t]he confluence of the $1.9 million Mishcon judgment, the unresolved $2.1 million lien claim of the Schwartz Predecessors, the Debtor's insolvency in excess of $7 million, the special relationship between Raymond Niro and his client, and the insider status of [Mr. Stern] as a Director, are conclusive evidence of intent to defraud." Trustee's Memo., DN 268 ("Memo."), at 6:10-14. The trustee does not specify whose intent she is referring to.

The focus of the inquiry, for purposes of an actual fraudulent transfer, is on the intent of the transferor; that is, the intent of the debtor. Thus, "Plaintiff may avoid a transfer of the debtor in property, if the debtor made such transfer with actual intent to hinder, delay, or defraud a creditor." Diamond v. Empire Partners, Inc. (In re Empire Land, LLC), 2016 Bankr. LEXIS 1088, *24 (Bankr. C.D. Cal. 2016), citing § 548(a)(1)(A); Cal Civ. Code § 3439.04(a)(1). "[T]he relevant 'fraudulent intent' in a fraudulent transfer action is the transferor's fraudulent intent--not the defendant transferee's." Pioneer Liquidating Corp., 211 B.R. 704, 714 (S.D. Cal. 1997). "The focus is on the intent of the transferor." Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 235 (9th Cir. BAP 2007); see also Plotkin v. Pomona Valley Imports (In re Cohen), 199 B.R. 709, 716 (9th Cir. BAP 1996) ["The focus in the inquiry into actual intent is on the state of mind of the debtor."]; Empire Land, LLC, 2016 Bankr. LEXIS 1088 at *24; Weil v. United States (In re Tag Entm't Corp.), 2016 Bankr. LEXIS 982, *42 (Bankr. C.D. Cal. 2016). The trustee offers no analysis of the debtor's intent when the transfer was made.

There is an exception to this general rule. "Generally, the party attacking the transfer must show the debtor/transferor acted with actual intent to hinder, delay, or defraud when engaging in the transfer. However, in cases where the transferee controls or is in a position to control the debtor/transferor's disposition of its property, then the transferee's intent can be imputed to the debtor/transferor." Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 339 (Bankr. N.D. Cal. 2009), citing Acequia,

Inc., 34 F.3d 800, at 806, in turn quoting In re Roco Corp., 701 F.2d 978, 984 (1st Cir. 1983) ["We may impute any fraudulent intent of [the transferee] to the transferor [the debtor] because, as the company's president, director, and sole shareholder, he was in a position to control the disposition of its property."].

The court is not persuaded the exception applies here, where Mr. Stern was a director of the debtor but the day or the day after he caused the transfer to be made, two other directors deadlocked as to whether to allow the transfer and tabled the matter to allow for the appointment of a provisional director, presumably to break the tie. In other words, it does not appear Mr. Stern had sufficient control over the debtor at the time of the transfer that his intent should be imputed to the debtor. For this reason, as to the trustee's claims for avoidance and recovery of an actual fraudulent transfer, the motion will be denied.

III. The Constructive Fraudulent Transfer Claims

The trustee also seeks summary judgment on her constructive fraudulent transfer claims against Mr. Stern and BHI, under both bankruptcy and California law (§ 548(a)(1)(B); Cal. Civ. Code § 3439.04(a)(2)). The motion will be denied as to Mr. Stern because, as part of her case-in-chief, the trustee must demonstrate the debtor received less than a reasonably equivalent value in exchange for the transfer (§ 548(a)(1)(B)(i); § 3439.04(a)(2)), whereas the debtor received reasonably equivalent value in the form of the satisfaction of the debtor's debt to Mr. Stern under his Consulting Agreement. For purposes of the fraudulent transfer statutes, "value" includes "satisfaction . . . of a present or antecedent debt of the debtor . . . ." § 548(d)(2)(A); Cal. Civ. Code § 3439.03. "Under this definition [§ 548(d)(2)(A)], payment of a preexisting debt is value, and if the payment is dollar-for-dollar, full value is given. Therefore, to the extent a transfer constitutes repayment of the debtor's antecedent or present debt, the transfer is not constructively fraudulent." Official Comm. of Unsecured Creditors v. Hancock Park Capital II, L.P. (In the Fitness Holdings Int'l, Inc.), 714 F.3d 1141, 1145-46 (9th Cir. 2013). The same is true under Cal. Civ. Code § 3439.03. In re Prejean, 994 F.2d 706, 707, n.2 (9th Cir. 1993).

The trustee admits in her memorandum in support of this motion that certain elements of her preference claim "are not in dispute." Memo. at 4:20. Among those she acknowledges are not in dispute is that the transfer was made "for or on account of an antecedent debt owed by the debtor before [the] transfer was made." § 547(b)(2). Because this requirement often conflicts in a given fact situation with § 548(d)(2)(A) and Cal. Civ. Code § 3439.03, a transfer successfully challenged by a bankruptcy trustee is generally either a preference or a constructive fraudulent transfer, but not both. Here, however, the trustee seeks to have it both ways – she acknowledges that, for purposes of her preference claim, the $2.75 million payment was made in satisfaction of an antecedent debt, but she also seeks judgment on her constructive fraudulent transfer claim on the basis of "the Debtor's insolvency and non-receipt of reasonable value in exchange . . . ." Memo. at 6:25-26.

In support of her earlier preliminary injunction motion, the trustee claimed the Consulting Agreement between the debtor and Mr. Stern on which the $2.75 million transfer was based [10] was ratified after Mr. Stern's cousin, Robert Stern, claimed he had been wrongfully ousted from the debtor's board of directors. The trustee also claimed Mr. Stern waived his 5% claim at a board meeting in February of 2015. The trustee does not mention these allegations in connection with the present motion, but in any event, the trustee has not submitted sufficient admissible evidence to carry her burden of demonstrating the debt to Mr. Stern was not owed.[11] (The

trustee's analysis of the law and facts supporting this motion is less than exemplary.)

BHI, on the other hand, was owed no debt by the debtor – as far as the record reveals, that entity was a complete stranger to the debtor. Although the trustee has not addressed this issue, the court has no reason to believe the debtor received anything of value from BHI in exchange for the transfer. (Mr. Stern makes no such allegation.) As the court has already found that the trustee has met her burden of demonstrating the debtor was insolvent when the transfer was made, the trustee has satisfied both elements of her constructive fraudulent transfer claim against BHI, and the court will recommend to the district court that the motion be granted as to that claim.

IV. The Claim for Turnover

Finally, the trustee seeks summary judgment on her claim for turnover, as against Mr. Stern, BHI, and MOM. Section 542(a) provides that "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." Certainly, $2.75 million is not of inconsequential value or benefit, nor is the $400,000 MOM received as the transferee of Mr. Stern and BHI.

The trustee has not alleged the defendants, or any of them, remains in possession, custody, or control of the transferred funds. However, the Ninth Circuit has held that "§ 542(a) allows a turnover motion to be brought against the entity at any time during the pendency of the bankruptcy case, even if the entity no longer possesses or has custody or control over the property, at the time the motion is filed." Shapiro v. Henson, 739 F.3d 1198, 1200 (9th Cir. 2014). Thus, "during the case," as used in § 542(a), "means that the trustee may bring a motion for turnover against an entity who has possession of the property of the estate, or had possession of that property at some point during the bankruptcy case." Id. The trustee has submitted nothing with this motion to show the amount that remained in the possession, custody, or control of the defendants, or any of them, "during the case."

The court has, however, examined the bank statements the trustee filed in support of the earlier preliminary injunction motion, and finds that as of the petition date, December 30, 2015, there was $1,162,769.44 in the Hong Kong bank account, which the court finds to have been in the control of Mr. Stern and BHI. That amount remained in the account until January 14, 2016, when another $310,000 was withdrawn. There is no indication the balance in the account ever went back up to $1,162,769.44; thus, the court concludes that, during the case, Mr. Stern and BHI were in control of $1,162,769.44, and the trustee is entitled judgment for turnover against them for that amount.[12] The trustee submitted evidence in support of the earlier motion that $90,000 was transferred from the Hong Kong account to MOM on October 20, 2015, but no evidence as to how much remained in MOM's possession, custody, or control as of the petition date, December 30, 2015. There is evidence of another transfer out of the account to MOM, this one in the amount of $310,000, post-petition, on January 14, 2016. Thus, the court finds that, during the case, MOM was in possession, custody, or control of $310,000, and the court will grant the trustee's motion as against MOM on her turnover claim for that amount.[13]

Mr. Stern concludes his argument by charging the court with failing to hear the

issues concerning the Consulting Agreement, of prejudging the case without a trial, of finding him guilty until proven innocent, and of putting itself above the Fourth Amendment to the United States Constitution. He claims that if the trustee prevails, he will be left penniless and sitting in jail "as a reward for the 17 years of work he did for Grail protecting its shareholders." Decl. at 10:12-13. The court has some sympathy, as it is common for persons on the receiving end of preferences and fraudulent transfers to have trouble understanding why they are being ordered to return what they had managed to recover. Nevertheless, the bankruptcy laws (and state law as regards fraudulent transfers) are designed with a view to treating all creditors in a given class on an equal basis. Mr. Stern's conduct as regards the $2.75 million transfer plainly had the opposite effect. To the extent Mr. Stern's argument is intended as a good faith defense, (1) good faith is not a defense to a preference claim, only to a fraudulent transfer claim; and (2) the court has found in Mr. Stern's favor on the fraudulent transfer claims.

The court has found against BHI on the constructive fraudulent transfer claim. Although Mr. Stern, who is not an attorney, cannot represent BHI in this proceeding (or MOM or Mr. Bauder), it might be argued he and BHI are alter egos of each other. Thus, in the interest of thoroughness, the court will construe Mr. Stern's arguments as being made on behalf of BHI, as to good faith, and finds, based on the facts set forth in the third through seventh paragraphs of section II of the court's January 4, 2017 ruling, which paragraphs the court adopts herein, that Mr. Stern has not come forward with evidence showing the existence of genuine issues of fact for trial. "When the moving party has carried its [initial] burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (footnote omitted; citations omitted). "A genuine dispute arises if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003). A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." United Steel Workers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989).

For the reasons set forth above, the motion will be granted in part and judgment will be entered on the trustee's preference claim, as against Mr. Stern, and the court will recommend to the district court that judgment be entered on the constructive fraudulent transfer claim, as against BHI. As the transfer will be avoided, the trustee is also entitled to judgment against MOM under § 550(a) in the amount of $400,000 and the court will recommend that result to the district court. The trustee is also entitled to judgment for turnover, as against Mr. Stern and BHI, of the $1,162,769.44 remaining in the account as of the petition date, or its value, and as against MOM, of the $310,000 transferred to it after the petition date. Mr. Stern's request that the court replace the trustee and his request for sanctions against the trustee and her attorney are denied. Finally, Mr. Stern requests that "the order to arrest me by the US Marshals Service" and "the order to seize my Passport" (April 18, 2017 Opp. at 16:28, 17:2) be dismissed. The court is unaware of any such orders.

The court will hear the matter.

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1 This opposition was filed well past the 14-day deadline provided by the court's local rules (LBR 9014-1(f)(1)(B)) and noticed by the trustee in her notice of hearing on the motion, as that deadline was extended by the court's continuance of the hearing (id.). Thus, the court is not bound to consider it but will do

so because the motion is dispositive. In terms of local rules, however, the court advises Mr. Stern he is required to keep the court and the trustee apprised of his current address. Local District Court Rule 183(b), incorporated herein by LBR 1001-1(c). This requirement is generally viewed as requiring the inclusion of a physical or at least a mailing address on all documents filed with the court, yet Mr. Stern has included only a telephone number and email address on his documents filed in opposition to this motion. The court will require him to advise the court at the hearing whether his physical address is still the address in the Philippines his former counsel provided upon counsel's withdrawal from the case, and if not, what his current address is.

2 In his second declaration, Mr. Stern did request that "all motions against myself, [BHI], [MOM] and Frank Bauder be dismissed." Stern Decl., DN 307, at 1:22-23. This will be addressed briefly later in this ruling.

3 Unless otherwise indicated, all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

4 The sum actually deposited into the account was $2,749,981.60. The $18.40 difference apparently represented a wire transfer fee.

5 Mr. Stern alludes briefly to the debtor's Chief Resolution Officer, Michael Burkart, as having "worked with Donald Stern and many others for many months asking for documents and investing [sic] the history behind each claimant." Decl. at 10:27-11:1. Mr. Stern makes this statement not in support of any theory that he gave new value to the debtor after the transfer, but as support for his requested removal of the trustee (see below), but in any event, the statement is far too conclusory to support the theory that the assistance Mr. Stern provided to Mr. Burkart qualifies as new value for purposes of a defense to the preference claim.

6 See § 101(32)(A); In re Koubourlis, 869 F.2d at1321; DC Media Capital, LLC v. Imagine Fulfillment Servs., LLC, 2014 Bankr. LEXIS 3369, *16 (9th Cir. BAP 2014).

7 His motivation for preparing the list was apparently the following language in the court's January 4, 2017 ruling, which he quotes in his April 18, 2017 opposition: "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." Mr. Stern states he has now "performed an analysis of all the claims on the Registrar for [the parent case] and specif[ied] which claims are invalid with supporting evidence." April 18, 2017 Opp., DN 325, at 3:25-26.

8 Mr. Stern has filed as an exhibit a declaration of Michael Burkart filed three months into the parent case, in which Mr. Burkart analyzed the various alleged misdeeds of the debtor's former director, Ronald Hofer. Mr. Stern claims the declaration supports his conclusion that the claims of Mr. Hofer and former officer Brad Woods should be disallowed. The allegations in Mr. Burkart's declaration are made on information and belief and are not otherwise authenticated or supported. The declaration is thus inadmissible.

9 On each, he listed a hearing date of April 26, 2017, which does not comply with the court's local rule regarding the amount of notice required to be given of objections to claims (LBR 3007-1(b)), and the objections are not accompanied by

notices of hearing or proofs of service. For these reasons, the objections will not be calendared.

10 The Consulting Agreement provided for a monthly salary to Mr. Stern, as well as a payment equal to 5% of the gross proceeds of the Mitsubishi litigation. The amount transferred to Mr. Stern in October of 2015, $2.75 million, is 5% of the gross Mitsubishi settlement amount, $55 million.

11 As indicated above, it is a part of the trustee's case-in-chief to demonstrate that the debtor did not receive a reasonably equivalent value in exchange for the transfer. § 548(a)(1)(B)(i); § 3439.04(a)(2).

12 To the extent the trustee argues that the amount remaining in Mr. Stern's control includes funds transferred to Digerati Limited, MOM, or Mr. Stern himself, in some other bank account or via some other entity, the court finds that insufficient evidence has been presented in this adversary proceeding to support that conclusion at this time.

13 The trustee's argument for her turnover claim is devoted primarily to Illinois rules and case law concerning an attorney's duties with respect to client funds held in a trust account. This is apparently in reference to an argument in the defendants' opposition to the preliminary injunction motion that attorney Raymond Niro, who received the $55 million in settlement funds from Mitsubishi, was required by the Illinois Rules of Professional Conduct to honor the Consulting Agreement between the debtor and Mr. Stern. The court does not agree with the defendants, and agrees with the trustee that the $2.75 million transferred out of Mr. Niro's trust account into the Hong Kong bank account, at Mr. Stern's instruction, were property of the debtor and, as of the petition date, property of the estate. Thus, the funds are subject to turnover under § 542(a) to the extent, as indicated above, they were in the possession, custody, or control of the defendants at some time during the case.

13.	16-27190-D-7 SCB-2	ANGELA TALENT	MOTION FOR COMPENSATION BY THE LAW OFFICE OF SCHNEWEIS-COE & BAKKEN, LLP FOR LOIS BAKKEN, TRUSTEE'S ATTORNEY(S) 3-24-17 [24]

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 GRAIL SEMICONDUCTOR
17-2047 DNL-2
CARELLO V. DIGERATI LIMITED

MOTION FOR RIGHT TO ATTACH ORDER AND ORDER FOR ISSUANCE OF WRIT OF ATTACHMENT
3-28-17 [26]

15. 10-50339-D-7 ELEFTHERIOS/PATRICIA
TAA-1 EFSTRATIS

MOTION FOR COMPENSATION FOR THOMAS A. ACEITUNO, CHAPTER 7 TRUSTEE
3-30-17 [443]

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 § 726. As such, the court will grant the motion by minute order. No appearance is necessary.

16. 17-22056-D-11 JAMES MCCLERNON

STATUS CONFERENCE RE: VOLUNTARY PETITION
3-29-17 [1]

17. 15-26465-D-7 SCOTT POMEROY
16-2250 LBG-201
ROBERTS V. SWEETLAND

MOTION TO RECONSIDER
4-6-17 [22]

18.	17-21671-D-7 KDS-6 HOMECOMING AT CREEKSIDE, LLC VS.	ROSHAWN INGRAM	MOTION FOR RELIEF FROM AUTOMATIC STAY 4-5-17 [9]
19.	17-20689-D-11 ET-8	MONUMENT SECURITY, INC.	MOTION TO USE CASH COLLATERAL 4-11-17 [89]
20.	15-29890-D-7 SLC-2	GRAIL SEMICONDUCTOR	MOTION TO SELL 3-31-17 [620]
21.	15-29890-D-7 16-2088 CARELLO V. STERN ET AL	GRAIL SEMICONDUCTOR	CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT 5-13-16 [22]