

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

August 12, 2015 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.	13-30317-D-7	JAMES COREY	MOTION FOR COMPENSATION FOR
	JRR-4		JOHN R. ROBERTS, TRUSTEE'S
			ATTORNEY
			7-14-15 [188]

Tentative ruling:

This is the motion of John R. Roberts, a Professional Corporation ("Counsel"), for compensation as counsel for the trustee. Specifically, Counsel seeks approval of fees and costs incurred in a fraudulent conveyance action against a third party. No party-in-interest has filed opposition. The court, however, having reviewed Counsel's time records in the exercise of its independent duty to review the application for reasonableness (see In re Eliapo, 298 B.R. 392, 404-05 (9th Cir. BAP 2003)), has two concerns. First, Counsel has billed for his own time, at \$300 per hour, for services secretarial in nature, and therefore, not compensable. See Sousa v. Miguel, 32 F.3d 1370, 1374 (9th Cir. 1994). These services included drafting and filing proofs of service (on 10/7/2013 and 4/3/2014) and calendaring dates and deadlines (on 10/7/2013, 10/16/2013, 4/3/2014, 4/21/2014, 8/25/2014, and 9/29/2014). Counsel also billed for a letter directing a process server to serve a subpoena and for reviewing a communication from the process server that the subpoena had been served (0.4 hours each). The court will disallow Counsel's fees for this time, a

total of 3.2 hours, \$960.

Second, the court finds that in some instances, Counsel's time charged exceeds a reasonable amount of time for the task performed. For example, Counsel billed 0.5 hours (on 10/1/2013) for drafting an adversary cover sheet. He billed 0.6 hours (on 12/16/2013) for drafting a declaration stating only: "I am the Plaintiff in the above-entitled adversary proceeding. On December 2, 2013 I sent the attached letter to Defendant to schedule a meet and confer and to date have received no response." For the letter, which consisted of two sentences,¹ Counsel had earlier billed 0.5 hours. Similarly, the court finds excessive the amount of time Counsel billed for preparing a request for judicial notice (1.8 hours on 10/9/2014), for drafting a motion and related documents to amend the complaint (1.9 hours on 3/5/2014), and for drafting the amended complaint (0.7 hours on 4/2/2014).² Finally, Counsel billed 0.2 each (on 4/6/2014 and 4/21/2014) to review orders for which no charge should have been made. The court will disallow these last two charges, a total of \$120, and will allow 50% of the other charges described in this paragraph, disallowing 3.0 hours, or \$900.

The trustee has requested \$24,060 in fees and \$1,446.47 in expenses, for a total of \$25,506.47. The court will deduct \$1,980 and allow the remainder, \$23,526.47. As to that amount, 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 in part and allow compensation in the total amount of \$23,526.47.

The court will hear the matter.

1 "Dear Ms. Edwards: The Bankruptcy Court has ordered that we meet and confer prior to the Status Conference scheduled for December 19, 2013. Since you did not provide a telephone number on the Answer you filed with the Court, please telephone my office to set up a mutually convenient time for a telephonic meet and confer. Thank you."

2 The amended complaint did nothing more than insert the underlined words into this sentence: "That this is an action under 11 U.S.C. §§ 547, 548 and 550(a) and California Civil Code §§ 3439 - 3439.12 to recover an interest in property transferred pursuant to an avoidable transaction."

2. 13-30317-D-7 JAMES COREY
JRR-5

MOTION FOR COMPENSATION FOR
JOHN R. ROBERTS, TRUSTEE'S
ATTORNEY
7-14-15 [193]

Tentative ruling:

This is the motion of John R. Roberts, a Professional Corporation ("Counsel"), for compensation as counsel for the trustee. Specifically, Counsel seeks approval of fees and costs incurred in an action to deny the debtor's discharge. No party-in-interest has filed opposition. The court, however, having reviewed Counsel's time records in the exercise of its independent duty to review the application for reasonableness (see In re Eliapo, 298 B.R. 392, 404-05 (9th Cir. BAP 2003)), has two concerns. First, Counsel has billed for his own time, at \$300 per hour, for services secretarial in nature, and therefore, not compensable. See Sousa v. Miguel, 32 F.3d 1370, 1374 (9th Cir. 1994). These services included serving

documents and drafting and filing proofs of service (on 11/6/2013, 12/17/2013, 3/4/2014, 6/2/2014, 4/1/2015, and 4/13/2015) and calendaring dates and deadlines (on 4/1/2014, 9/29/2014, 11/3/2014, 2/23/2015, and 5/4/2015). Counsel also billed for delivering documents to the bankruptcy court (on 4/27/2015). The court will disallow Counsel's fees for this time, a total of 6.3 hours, \$1,890.

Second, the court finds that in some instances, Counsel's time charged exceeds a reasonable amount of time for the task performed. For example, Counsel billed 0.8 hours (on 12/12/2013) for drafting a three-sentence application to continue a status conference and a one-sentence order ¹ and 0.6 hours (on 4/1/2015) for drafting a one-sentence request for judicial notice.² Finally, Counsel billed 0.2, 0.4, and 0.3 (on 12/15/2014, 5/26/2015, and 6/1/2015) to review a notice, minutes, and judgment for which no charge should have been made. The court will disallow these last three charges, a total of \$270, and will allow 50% of the other charges described in this paragraph, disallowing 0.7 hours, or \$210.

The trustee has requested \$20,415 in fees and \$601.75 in expenses, for a total of \$21,016.75. The court will deduct \$2,370 and allow the remainder, \$18,656.75. As to that amount, 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 in part and allow compensation in the total amount of \$18,656.75.

The court will hear the matter.

1 The application read: "1. The Status Conference in the above entitled adversary proceeding is currently scheduled to take place on January 2, 2014 at 10:00 a.m. 2. I will be out of town that day and will not be available to attend the Status Conference in this matter. Wherefore, I request that the Status Conference be continued to January 16, 2014 at 10:00 a.m., which is the next available date." The order read: "It is hereby ordered that the Status Conference now set for January 2, 2014 at 10:00 a.m. is continued to January 16, 2014 at 10:00 a.m."

2 The request read: "Plaintiff, John R. Robert, under the provisions of Evidence Code Sections 452 and 453, requests that the court take judicial notice of: 1. Judgment After Trial in the United States Bankruptcy Court, Eastern District of California, Adversary Proceeding Number 13-2308-D, John R. Roberts, Trustee v. Cyndy M. Edwards entered on December 4, 2014, a copy of which is attached hereto as Exhibit 'A'."

3. 13-30317-D-7 JAMES COREY
JRR-6

MOTION TO RELEASE FUNDS FROM
BLOCKED ACCOUNT AND PAY SECURED
LIENHOLDERS
7-14-15 [198]

Final ruling:

The court finds that a hearing will not be helpful and is not necessary. The matter is resolved without oral argument. This is the trustee's motion to pay the following lienholders from the blocked proceeds of sale of the property securing their claims: the Franchise Tax Board, \$3,545.42; the Internal Revenue Service, \$5,034.54; Dan Howe, \$3,421.09; and Tracy and Cathy Wilburn, \$6,281.70. The first two of these, the Franchise Tax Board and the IRS, hold tax liens; the latter two,

Dan Howe and the Wilburns, hold judgment liens. The debtor has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted.

By order filed March 26, 2015, the court approved the sale of real property of the estate located in Blairsdon, Plumas County, California. The court authorized the payment of property taxes and certain liens out of escrow, the remaining proceeds to be blocked pending further court order. The court ordered that the sale would be free and clear of certain other liens, including the four listed above, although those liens would attach to the sale proceeds. The proceeds attributable to the judgment lien of a fifth creditor, Kim Kalbaugh, were also blocked. However, Mr. Kalbaugh previously filed his own motion, which was granted, and he has been paid \$94,241.58 from the sale proceeds.

The debtor does not object to the payments to the Franchise Tax Board, the IRS, or Dan Howe, but only to the payment to Tracy and Cathy Wilburn. (The debtor also asks that the payment to Kim Kalbaugh be postponed; however, as already indicated, the court has previously granted Kalbaugh's request for release of the funds securing his claim, with a detailed ruling and over the debtor's opposition, and those funds have been released to Kalbaugh.) With respect to the Wilburns, the debtor points to his pending appeal of the state court's judgment in their favor, a judgment the debtor says is "the subject of [a] bona fide dispute[]." Debtor's Obj., filed July 28, 2015 ("Obj."), at 2:7. He states the appeal is proceeding "as expeditiously as possible" (Obj. at 4:23-24) according to applicable rules, with the parties in the process of obtaining a "settled statement."¹ He adds that he is an aggrieved party "because his rights and interests were injuriously affected by" the judgment (Obj. at 3:12-13), that his "interests are immediate and pecuniary" (*id.* at 3:13), and that the appeal has "a high probability of being successful." Obj. at 5:12.² The debtor requests that the funds continue to be blocked pending the outcome of the appeal, which he expects will take less than 120 days. Ninth Circuit law does not support the debtor's position.

In Marciano v. Chapnick (In re Marciano), 708 F.3d 1123 (9th Cir. 2013), the court held that an appeal from an unstayed non-default state court judgment does not create a bona fide dispute that would preclude a creditor from filing an involuntary petition against a debtor under § 303(b)(1) of the Bankruptcy Code. 708 F.3d at 1128. The court noted that "[u]nder California law, these judgments, in the absence of a stay pending appeal, were plainly not contingent as to liability or amount. Rather, the Petitioning Creditors were entitled to immediate payment of those claims in the amounts set by the superior court judgments. . . . The Petitioning Creditors thus had fully vested property interests in these claims under California law." *Id.* at 1127 (citations omitted, emphasis added). The court found that permitting a debtor to attempt to show a bona fide dispute as to a debt reduced to judgment would run counter to the principle of full faith and credit codified in 28 U.S.C. § 1738. "Such 'full faith and credit' would be of little consequence if a federal court treated a non-default unstayed state judgment differently than it would be treated in its state of origin. If the creditor is entitled to have the judgment treated as valid in the state courts, we see no reason why a bankruptcy court should be allowed to question the judgment." *Id.* at 1128.

There is no basis in logic or policy to treat this case differently from Marciano. The Wilburns obtained a judgment of the Plumas County Superior Court following a two-day trial at which the debtor testified on his own behalf and at which he and the Wilburns' attorney both questioned other witnesses. At the conclusion of the trial, the court issued detailed findings, albeit verbally. That

is, the Wilburns' judgment is not a default judgment. The debtor filed a notice of appeal in April of 2013. He did not obtain a stay pending appeal. Thus, under California law, as cited by the Marciano court, the Wilburns have a claim that is "not contingent as to liability or amount" and which, under California law, they would be entitled to enforce immediately. See Marciano, 708 F.3d at 1127. In light of these fundamental principles, and in light of the policy of full faith and credit, the debtor's contention that the Wilburns should continue to be prevented from receiving the sale proceeds being held on account of their lien fails. If there were no bankruptcy case, the Wilburns would be entitled to enforce their judgment immediately, and would have been so entitled for over two years because the debtor failed to obtain a stay pending appeal. That the debtor's bankruptcy intervened is no basis on which to deny the Wilburns the proceeds of their enforceable claim.

The debtor attempts to cast the issue in terms of benefit or harm to the bankruptcy estate. He says if the judgment is reversed, "the estate will thus be enhanced and funding made available for any remaining creditors and the Debtor" (Obj. at 4:4-5), adding that "[t]he estate suffers no harm in waiting less than 120 days" (id. 5:26) for the appellate court's decision. The effect on the estate, unsecured creditors, and the debtor is not the issue here; the issue is the Wilburns' right to enforce their judgment. Accepting the debtor's position would mean denying the Wilburns this right, which, under Marciano and based on the principle of full faith and credit, this court has no authority to do.

For the reasons stated, the motion will be granted and the moving party is to submit an appropriate order. No appearance is necessary.

1 This is a document submitted to a California appellate court when there is no trial transcript. See Cal. Rules of Court, Rules 8.130(h), 8.137.

2 The debtor goes so far as to state that "[b]ecause the Debtor showed the Court that [the] appeal has merit, the Court Sua Sponte lifted the automatic stay to allow Debtor to pursue the . . . appeal[] pending outcome in the California Third Appellate District." Obj. at 2:12-14. That is not an accurate statement. This court did lift the automatic stay to allow the appeal to proceed. It made no determination, however, as to the merits of the appeal.

4.	15-25129-D-7	JENNIFER O'HALLORAN	MOTION FOR RELIEF FROM
	KAZ-1		AUTOMATIC STAY
	BANK OF AMERICA, N.A. VS.		7-15-15 [11]

Final ruling:

This matter is resolved without oral argument. This is Bank of America, 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.

5. 14-26632-D-7 PATRICIA SALOMON
14-2280 KHK-1
KAMARA V. SALOMON

MOTION FOR SUMMARY JUDGMENT
6-30-15 [29]

Final ruling:

This adversary proceeding has been dismissed by stipulated order entered August 7, 2015. As a result, the motion will be denied as moot by minute order. No appearance is necessary.

6. 15-24832-D-7 MICHAEL ROGERS

MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER
FEE
6-16-15 [5]

7. 14-29633-D-7 CORYON REDD
ASW-1
U.S. BANK, N.A. VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
7-2-15 [25]

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 debtor received his discharge on January 5, 2015 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

8. 15-20037-D-7 JASON SCOGGINS
15-2073 LCR-1
CHAMP SYSTEMS, INC. V.
SCOGGINS

MOTION TO DISMISS ADVERSARY
PROCEEDING
6-11-15 [12]

This matter will not be called before 10:30 a.m.

Tentative ruling:

This is the defendant's motion to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6), made applicable in this proceeding by Fed. R. Bankr. P. 7012(b), for lack of subject matter jurisdiction and for failure to state

a claim upon which relief can be granted. As alternative relief, the defendant asks the court to abstain from hearing certain of the plaintiff's claims. The plaintiff has filed opposition and the defendant has filed a reply. For the following reasons, the motion will be granted in part.

In ruling on a Rule 12(b)(6) motion, a court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" al-Kidd, 580 F.3d at 949, citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, (2009), in turn quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

By its complaint, the plaintiff seeks an award of compensatory damages in an amount to be proven at trial, a determination that the debt evidenced by the judgment is not dischargeable, pursuant to § 523(a)(4) and (6) of the Bankruptcy Code,^{1 2} and other relief, including both prohibitory and mandatory injunctive relief and an accounting. According to the complaint, the defendant worked for the plaintiff, which is a company in the information technology business, for eight and one-half years, during the last four of which the defendant planned his exit from the plaintiff company to start his own company, taking the plaintiff's trade secrets with him. The plaintiff alleges the defendant "us[ed] his management position to misappropriate [the plaintiff's] trade secrets consisting of the identities of [the plaintiff's] customers, their financial condition, their scope of service and pricing preferences, their IT network configurations, and their expansion plans, all of which defendant used to select, target and solicit [the plaintiff's] long term customers for defendant's new competing business." Plaintiff's Complaint, filed April 13, 2015 ("Compl."), at 3:6-11.

The defendant begins his motion with the proposition that "Counts One, Four, Five, Six, and Seven of the Complaint improperly assert prepetition, state law claims in violation of the automatic stay and/or the discharge injunction" Defendant's Motion, filed June 11, 2015 ("Mot."), at 4:11-12. (This adversary proceeding was filed before the defendant's discharge was entered; that is, while the automatic stay was still in effect. The discharge has since been entered.) The cited counts are those by which the plaintiff seeks an award of damages (Count One), injunctive relief (Four and Five), equitable relief in the form of a reasonable royalty (Six), and attorney's fees (Seven). In the two remaining counts, Counts Two and Three, the plaintiff seeks a determination of nondischargeability under § 523(a)(4) and (6).

The defendant's theory is incorrect. "The automatic stay does not apply to proceedings initiated against the debtor if the proceedings are initiated in the same bankruptcy court where the debtor's bankruptcy proceedings are pending." Snively v. Miller (In re Miller), 397 F.3d 726, 730 (9th Cir. 2005).³ A bankruptcy discharge, in turn, operates as an injunction against the continuation of an action to collect discharged debts only, not debts that are nondischargeable. § 524(a)(1) and (2). The fact that the debt at issue in this adversary proceeding has not yet been determined to be nondischargeable, and may ultimately be determined to be dischargeable, does not render the continuation of this adversary proceeding a violation of the discharge. If that were the case, either (1) all adversary proceedings seeking a determination of nondischargeability would come to a halt, and thereby be defeated, once the debtor's discharge is entered; or (2) the bankruptcy court would need to defer entry of a discharge in every case pending the conclusion

of all such adversary proceedings. This would be an absurd result.

The defendant next contends this court does not have subject matter jurisdiction over Counts One, Four, Five, Six, and Seven - the claims for an award of damages, injunctive relief, a reasonable royalty, and attorney's fees. The court disagrees. At least as to Count One, this court has original jurisdiction.⁴ The plaintiff's claims in Counts Four, Five, Six, and Seven are essentially remedies that do not require an independent jurisdictional basis.⁵ To the extent some additional jurisdictional "hook" is required, the court finds it in the doctrine of supplemental jurisdiction.⁶

However, although the court has jurisdiction, the court finds that those counts - Counts One, Four, Five, Six, and Seven; that is, all except the counts in which the plaintiff seeks a determination of nondischargeability - would be more appropriately determined by the state court, and thus, this court will exercise its discretion to abstain from hearing them. This will necessarily entail those counts going forward in state court. Accordingly, the court will grant the parties relief from stay to proceed to a determination of those counts in the state court and will stay this adversary proceeding pending such a determination, with the parties to return to this court for a determination of the dischargeability issues, over which this court has exclusive jurisdiction,⁷ in the event the plaintiff obtains a monetary award in the state court or some other award that would fall within the scope of a chapter 7 discharge. Enforcement of any state court judgment, except a judgment for injunctive relief, will be left to this court.

The following factors favor permissive abstention under 28 U.S.C. § 1334(c)(1) as to Counts One, Four, Five, Six, and Seven. The plaintiff and defendant are parties to a state court action which had been pending for 16 months before the defendant filed his chapter 7 petition. The parties had engaged in discovery and were just two and one-half months away from a trial date when the petition was filed. There is an additional defendant in the state court action, and according to the plaintiff, the defendant would be required to testify in that action as a witness even if this court were to decide to determine Counts One, Four, Five, Six, and Seven itself. The factual allegations underlying the plaintiff's complaint in this adversary proceeding raise issues of state law not bankruptcy law. Although this court has the power to award injunctive relief,⁸ the facts underlying the requested injunctive relief are, again, based on state law. Further, the request for injunctive relief deals with the defendant's post-petition conduct, which does not bear on whether his pre-petition debt to the plaintiff, if any, should be determined to be nondischargeable.

The plaintiff appears to have no objection to this relief, stating that:

in the interest [of] judicial economy and the expeditious and economical resolution of litigation, it may indeed be prudent for the court to abstain from trying [the plaintiff's] adversary complaint and to sua sponte lift the automatic stay solely for the purpose [of] trying the state law trade secret misappropriation and breach of employee duty of loyalty claims [in] state court, staying this adversary proceeding until judgment is entered below, and then, if [the plaintiff] is successful, permitting [the plaintiff] to return to this court to declare any state court damage award and injunctive and equitable relief non-dischargeable.

Plaintiff's Opposition, filed July 28, 2015, at 24:18-27.

The defendant, however, does oppose the granting of relief from stay. In his reply to the plaintiff's opposition, he states that (1) the plaintiff's request for relief from stay is procedurally improper as it must be sought by way of a filed motion; and (2) "no cause exists to lift the automatic stay." Reply, at 12:22. As to the first of these, the plaintiff's request for relief from stay in its opposition to this motion was sufficient to provide notice to the defendant; a separate motion is not necessary. The latter argument is premised on the notion that the plaintiff's Counts Two and Three (the nondischargeability claims) should be tried in this court first, and if the plaintiff is unsuccessful, its state law claims will be discharged. "Thus, there is no reason to have two cases pending in two different courts, especially when the state court action may be rendered moot by this Court's ruling on [the plaintiff's] nondischargeability claims." Id. at 12:23-25.

The court agrees there is no reason to have cases proceeding simultaneously in two different courts, but disagrees as to which matters should be tried first. As discussed elsewhere in this decision, in no event does the court intend to dismiss the plaintiff's nondischargeability claims at this stage; thus, the defendant will have to litigate the matter in one court or the other. The facts underlying those claims involve purely state law governing misappropriation of trade secrets; thus, they are more appropriately tried by a state court. There is already an action pending in state court, which, as of August 22, 2015, will have been pending there for two years. The parties have already conducted discovery in the state court action and, at the time the defendant filed his bankruptcy petition, were just two and one-half months shy of their trial date. Finally, the defendant has a co-defendant in the state court action over whom this court would have no jurisdiction. The interests of both judicial economy and minimizing delay and expense to the parties are better served by allowing the state court action to proceed first.

Finally, the defendant contends the allegations of the plaintiff's complaint are too vague to state a claim upon which relief can be granted under either § 523(a)(4) or (6), stating that "[w]hen [the plaintiff's] specific allegations are boiled down to their essential parts, the only specific allegations allege that [certain customers of the plaintiff's] began conducting business with the [defendant's] New Business after [the defendant] left his employment with [the plaintiff]." Mot. at 10:20-22. The problem with the argument is that the court is to consider all the allegations of the complaint, not just what remains when they are "boiled down to their essential parts," and to consider them in the light most favorable to the non-moving party;⁹ here, the plaintiff.

The court has carefully reviewed the plaintiff's 44-page complaint, and while acknowledging that length alone is not determinative, finds it contains sufficient factual allegations to state a claim to relief, under both § 523(a)(4) and (6), that is plausible on its face. The complaint alleges in some detail that during his employment, the defendant came to know the plaintiff's trade secrets; that he developed relationships with IT contacts at the plaintiff's customer companies; that he told those contacts of his plans to quit working for the plaintiff and start his own IT business; that he asked at least one of the plaintiff's customers for her "thoughts" on his plans; that he thereafter stayed with the plaintiff for another four years; that he asked one customer to "hold off" on sending in a signed quote as he would swing by their office instead; that he provided his personal email address to at least one customer; that he waited for the economy to improve and until he could secure at least one more customer before resigning; that he resigned in the middle of a server upgrade project for one customer and completed the project through his new business; and that at least one email from the defendant to a

customer of the plaintiff, the day before the defendant resigned, included a statement that he "[d]idn't want to communicate this part over IM [presumably, instant messaging], since there's a couple folks here who could be scanning that stuff." Compl. at 9:8-10. In the same email, the defendant then allegedly told the customer he would be resigning from the plaintiff's company the next night and asked the customer to contact him via his personal email. The court finds these allegations to be sufficiently specific to plausibly state a claim to relief.

The defendant also complains that the complaint "fails to specifically identify any specific information, including any formula, pattern, compilation, device, method technique or process that [the defendant] misappropriated. . . . [The plaintiff] does not pinpoint any specific document, customer list, or tangible file that [the defendant] allegedly took or retained when he left [the plaintiff's] employment." Mot. at 11:17-21. On the contrary, the plaintiff alleges the defendant misappropriated its "customer identities, [its] customer pricing for such customers, financial information pertaining to such customers, and customers' upgrade and expansion plans." Compl. at 21:25-28. The complaint includes a detailed list of the information the plaintiff compiles on its customers, including their IT network configuration information, "passwords, LAN/WAN information and diagrams, Network Setup/Configuration information and diagrams, Hardware Spreadsheets, Audits and Inventory lists and schedules, and other trade secrets" *Id.* at 23:4-7.¹⁰ Whether the defendant misappropriated some or all of these items is a matter for another day; what is important here is that the allegations are sufficiently detailed to apprise the defendant of the particular misconduct alleged to enable him to "defend against the charge and not just deny that [he has] done anything wrong." *Johnson v. JP Morgan Chase Bank*, 395 B.R. 442, 446-47 (E.D. Cal. 2008), quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001).¹¹

The defendant next contends the complaint fails to allege sufficient facts to establish fraud, such as

(i) what are the circumstances surrounding the misrepresentations, (iii) what the specific representations were (i.e., the specific words used to convey the representation), (iv) when the specific representations were made, (v) where the specific representations were made, (vi) what are the specific contents of each written and verbal communication, or (vii) to whom at CSI were the specific representations made.

Mot. at 12:13-17 (emphasis omitted). However, the complaint does not include a claim for misrepresentation under § 523(a)(2). And although "circumstances indicating fraud" are an element of embezzlement, for purposes of § 523(a)(4),¹² which the plaintiff does allege, the defendant cites no authority for the proposition that the fraud must have been in the nature of misrepresentation.

Finally, the defendant claims the complaint fails to allege sufficient facts to state a claim for wilful and malicious conduct, as required for § 523(a)(6). Thus, according to the defendant, the plaintiff was required to include but failed to include "facts establishing that [the defendant] had the subjective motive to inflict injury or believed that injury was substantially certain to result from his own conduct" (Mot. at 13:19-21), as well as facts establishing that the defendant acted with malice. The court disagrees. Although fraud must be pled with particularity, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b), incorporated herein by Fed. R. Bankr. P. 7009. The court concludes that the plaintiff's allegations are sufficient to state a claim to relief.

For the reasons stated, the court will grant the motion in part and abstain from hearing Counts One, Four, Five, Six, and Seven of the plaintiff's complaint so they may be determined instead in the state court, the enforcement of any judgment or award, except of injunctive relief, to be reserved to this court. The parties may return to this court for a determination of the plaintiff's Counts Two and Three in the event the plaintiff is successful in state court. The court will grant the parties relief from stay to proceed in the state court and will stay this adversary proceeding pending a determination by the state court as to Counts One, Four, Five, Six, and Seven. Except as so specified, the motion will be denied. The court will hear the matter.

1 Unless otherwise indicated, all statutory references are to the Bankruptcy Code.

2 The (a)(4) claims allege embezzlement and larceny.

3 In his reply to the plaintiff's opposition, the defendant recognizes this general proposition, but contends that "to bring an adversary proceeding, there must be some basis under the Bankruptcy Code for the action" (Defendant's Reply, filed Aug. 5, 2015 ("Reply"), at 2:14-15), whereas there is no basis under the Code for the plaintiff's Counts One, Four, Five, Six, and Seven. The defendant cites In re Hodges, 83 B.R. 25, 26 (Bankr. N.D. Cal. 1988), which held, however, that "[s]ection 523(c) of the Code specifically calls for creditors to bring nondischargeability actions against the debtor. As a matter of law, then, a nondischargeability action can never violate the automatic stay." Id. at 26. That is all the plaintiff has done here - it has filed a nondischargeability action with, as discussed below, claims that are ancillary and pendent to the nondischargeability claims (Counts Four, Five, Six, and Seven), and of which the court therefore has supplemental jurisdiction, as well as a claim the court, under Ninth Circuit law, has original jurisdiction to determine (Count One). In short, the filing and prosecution of the plaintiff's complaint were not in violation of the stay.

4 Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 867-68 (9th Cir. 2005), quoting Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1016 (9th Cir. 1997) (the Ninth Circuit "[has] long held that 'the Bankruptcy Court has jurisdiction to enter a monetary judgment on a disputed state law claim in the course of making a determination that a debt is nondischargeable.'").

5 See Goldman v. Gerard (In re Gerard), 2014 Bankr. LEXIS 4948, *14 (9th Cir. BAP 2014), quoting In re American Hardwoods, 885 F.2d 621, 624 (9th Cir.1989) ("Subject matter jurisdiction and power are separate prerequisites to the court's capacity to act. Subject matter jurisdiction is the court's authority to entertain an action between the parties before it. Power under section 105 is the scope and forms of relief the court may order in an action in which it has jurisdiction.'").

6 See 28 U.S.C. § 1367(a); see also Battle Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124, 1135 (9th Cir. 2010); In re Eads, 135 B.R. 387, 393 (Bankr. E.D. Cal. 1991).

7 Sasson, 424 F.3d at 869.

8 See Fed. R. Bankr. P. 7065, incorporating Fed. R. Civ. P. 65.

9 Faulkner v. ADT Sec. Servs., 706 F.3d 1017, 1019 (9th Cir. 2013).

10 An even more detailed list appears in paragraph 67 of the complaint and Exhibit C to the complaint.

11 The court has reviewed the defendant's reply to the plaintiff's opposition and finds that the level of detail the defendant would like to see in the complaint is more akin to what might be developed in discovery than to what is necessary to state a claim to relief that is plausible on its face.

12 In re Littleton, 942 F.2d 551, 555 (9th Cir. 1991).

9. 15-24942-D-7 JESSICA MARTINEZ MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER
FEE
6-19-15 [5]

10. 15-20344-D-7 DIRK/MARIA CREWS MOTION TO SELL AND/OR MOTION
DNL-3 FOR COMPENSATION FOR COLDWELL
BANKER REAL ESTATE, BROKER(S)
7-15-15 [51]

11. 15-23344-D-7 ERIC THORSON MOTION TO COMPEL ABANDONMENT
DAO-1 7-13-15 [16]

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.

12. 15-23746-D-7 GORDON BONES CONTINUED MOTION TO CONVERT
BLF-1 CASE TO CHAPTER 13
6-7-15 [17]
13. 15-23746-D-7 GORDON BONES CONTINUED AMENDED MOTION TO
BLF-2 COMPEL ABANDONMENT
6-25-15 [31]
14. 10-42050-D-7 VINCENT/MALANIE SINGH CONTINUED MOTION FOR SUMMARY
12-2312 HLC-1 JUDGMENT
BURKART V. BISESSAR 7-1-15 [183]

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendants, Padarath Bisessar and Vimla Bisessar (the "defendants"), in the amount of \$344,810.1 The defendants have filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part and the hearing will be continued for both parties to supplement the record.

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.

Here, the defendants were required by an earlier court order to file a motion to withdraw the reference by August 29, 2014 or be deemed to have consented to this

court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendants did not file a motion to withdraw the reference. Accordingly, the court finds that the defendants waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendants between August 19, 2008 and August 19, 2010, a total of \$344,810, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendants in the amount of \$344,810. In the alternative, to the extent the defendants assert an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendants totaling \$344,810 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendants' claim filed in the underlying case, Claim No. 71, pursuant to § 502(d), unless the defendants pay the estate the amount of the avoided transfers. The defendants have raised an affirmative defense; thus, a monetary judgment in the trustee's favor is not appropriate at this time nor is a judgment disallowing their claim. This leaves the trustee's request for the alternative relief.

The court has previously ordered in this and several related adversary proceedings as follows:

With respect to the plaintiff's claims for avoidance and recovery of actual fraudulent transfers under § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1), partial summary adjudication is appropriate and it is hereby determined, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that debtor Vincent Singh's operation of a Ponzi scheme with the requisite fraudulent intent is not genuinely in dispute and will be treated as established in these adversary proceedings.

Order, filed April 22, 2015 (the "Order"), at 2:8-16. It does not appear any further summary adjudication is necessary concerning the fact that Vincent Singh was running a Ponzi scheme. The sole remaining relief requested is a determination that the debtor made the payments to the defendants totaling \$344,810 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a

summary list of the payments the trustee contends were made by the debtor to the defendants; and (c) copies of the front and back sides of checks payable to the defendants on accounts of the debtor or one of his companies, copies of cashier's checks payable to the defendants, and copies of deposit slips bearing the names of the defendants.

Mr. McHale testifies that in his opinion, "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. The defendants state that they challenge Mr. McHale's qualifications and methodology under Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993), adding that they will file a motion to exclude his testimony and report. The defendants also state that "[t]he Trustee must still establish that each of the Payments made to Defendants were made in furtherance of the Ponzi scheme." Defendants' Opposition, filed July 23, 2015 ("Opp."), at 43:16-17.

A good portion of the defendants' opposition appears to be taken from an earlier motion - the motion that led to the Order. It appears the language just quoted may simply have been a holdover from that motion, as there is no other indication in the opposition that the defendants are seriously challenging the trustee's proof on this issue. In any event, the defendants' opposition leaves the court in no doubt that the payments made to them were made as part of the debtor's operation of the Ponzi scheme and in furtherance of that scheme. In fact, the defendants begin their opposition as follows: "The Defendants are victims of Vincent Singh. They invested more money in Singh's fraudulent scheme than they received from Vincent Singh." Opp. at 2:1-2. The defendants raise no serious argument, and have presented no evidence, that the payments they received were not made in furtherance of Singh's Ponzi. 2

Thus, the court will grant summary adjudication in favor of the trustee and against the defendants to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established that the payments made to the defendants were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors.

The only remaining question is the amount of the payments made to the defendants. The trustee requests a determination that Singh made payments to the defendants totaling \$344,810 in furtherance of the Ponzi scheme. Of that amount, the defendants admit they received payments totaling \$212,900, leaving \$131,910 in dispute. The defendants have submitted a list of the particular payments the trustee claims they received which the defendants dispute having received. The trustee has offered a reply as to all of them except a \$3,150 payment the defendants claim was a rent payment from their tenant and was unrelated to Vincent Singh.³ Resolution of the issues as to the disputed \$131,910 would require factual determinations and, as to some of the payments, an analysis as to whether the defendants were "transferees" from whom the trustee may recover under § 550.

The court finds that those determinations and that analysis are not necessary at this time because the defendants have submitted copies of bank records that, if supported by admissible evidence and if the defendants satisfy the "good faith" component of the defense at trial, would defeat the trustee's claims against them. The bank records purportedly represent the defendants' investments with Vincent Singh; they total \$628,750, an amount well in excess of the total of payments made to the defendants, as alleged by the trustee. If the court had admissible evidence

of those payments and if the defendants prove their good faith at trial, the court would conclude they were "net losers" in Singh's Ponzi scheme such that the trustee could not recover from them. In that situation, it would not be necessary for the court to determine whether the payments made to the defendants totaled \$344,810, as the trustee claims, or only \$212,900, as the defendants claim. Either way, the court would conclude the defendants were "net losers."

The trustee has categorized the defendants' bank records in his reply under the heading of "Irrelevant Arguments" for several reasons. First, he points out that the court has already determined it will not consider affirmative defenses in the context of a summary judgment motion but only at trial. As the monies the defendants invested with Singh support the "for value" component of their "in good faith and for value" defense, they pertain to an affirmative defense. Second the trustee complains that "Defendants have carefully included information about all payments made by them to Vincent Singh, but have not included any payments to them before August 20, 2008." Reply, at 10:23-25. This may be a red herring, because the trustee has referred in his motion to "additional payments to Defendants outside the two year period before the Petition Date" that the trustee discovered during his investigation (Mot. at 9, n.1); added to the \$344,810 the trustee seeks to recover, those additional payments bring the total to \$544,666 (see Trustee's Ex. 2), less than the total the defendants contend they invested.

Third, the trustee claims the defendants' evidence does not prove the money they paid to Singh actually came from them. In fact, the defendants' purported bank records have not been properly authenticated. The defendants state in their opposition that "[t]rue and correct copies of the documents evidencing the Payments" they made to Singh are submitted as exhibits; however, the opposition is not signed under oath, as required for the court to consider it as evidence. See Fed. R. Evid. 603, incorporated herein by Fed. R. Bankr. P. 9017.4 However, even if it were, the defendants' statement that the exhibits are true and correct copies of the documents evidencing the payments does not constitute sufficient authentication of the documents. The defendants did sign a declaration, which they filed as an attachment to their opposition, in which they testify under oath that "[they] have not recovered sums that equal the amount [they] invested in the investment scheme and [they] are net loser[s]." Opp., at 51:10-11. However, that statement is too conclusory to prove the defendants' assertion and they do not purport to authenticate the bank records in any way. As the court will give the trustee an opportunity to supplement his evidentiary record, the court also will allow the defendants to supplement theirs.

To the extent of the payments the defendants demonstrate by admissible evidence they invested with Singh, the court's determination in the Order will apply to those payments:

With respect to the defendants' defenses under Bankruptcy Code § 548(c) and Cal. Civ. Code § 3439.08(a) to the plaintiff's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code § 548 (a) (1) (A) and Cal. Civ. Code § 3439.04(a) (1), partial summary adjudication is appropriate and it is hereby determined, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that the following facts are not genuinely in dispute and will be treated as established in these adversary: that the defendants acquired restitution claims against debtor Vincent Singh proceedings at the time they made their investments; that those claims were proportionately reduced by the payments they received from him; and that the satisfaction of their

claims for restitution constituted reasonably equivalent value for the payments they received, up to the total amount of their investments with Vincent Singh.

Order, at 3:4-19.

The trustee takes issue with this statement in the defendants' opposition: "The Court has found that Defendants did not know of the fraud at the time of the Investments, and the Trustee is prohibited from litigating that issue." Opp. at 43:20-21. In the trustee's view, "the Court has not found that Defendants did not know of the fraud at the time of the Investments, and the Trustee is not prohibited from litigating that issue." Reply at 11:9-11. The defendants are correct: the issue is foreclosed by the court's ruling on the earlier motion and by the language in the Order just quoted.

The trustee made an attempt in his opposition to that motion to demonstrate that the defendants were not innocent investors. He argued that 1) the underlying contracts between the defendants and Vincent Singh, as evidenced by the promissory notes, called for usurious interest, and thus, were illegal and unenforceable; and (2) the transactions were part of a conspiracy to evade taxes, and were illegal and unenforceable for that reason as well. Thus, the trustee claimed, "he has presented evidence from which the Court can infer that [the defendants] were not innocent." Opp. at 35:3-4. The court rejected both of the trustee's theories, finding instead that he had not alleged, and had not produced any evidence to demonstrate, that the defendants actually knew about Vincent Singh's fraudulent scheme at the time they made their investments. The court held:

Given (1) the conclusive evidence that Vincent Singh was operating a Ponzi scheme, (2) the trustee's position that "all payments from and to investors . . . which were for 'investment' purposes were payments in furtherance of the Ponzi scheme" (McHale Decl., at 2:23-26), and (3) the trustee's failure to submit any evidence that any defendant had actual knowledge of the fraudulent scheme, the court concludes that the defendants acquired restitution claims against Vincent Singh at the time they made their investments, that those claims were proportionately reduced by the payments they received from him, and that the satisfaction of their claims for restitution constituted reasonably equivalent value for the payments they received. The trustee has failed to demonstrate that a genuine issue of fact as to any of these findings and conclusions remains to be tried.

Memorandum Decision, filed April 22, 2015, at 34:16-35:12. Thus, assuming the defendants establish at trial that they took their payments in good faith, the trustee may recover from them only to the extent they were "net winners."⁵

As discussed below, the court intends to give both parties the opportunity to supplement the record; the court will then determine whether there remain triable issues of material fact as to the "for value" component of the defendants' defense or whether the issue may be determined by partial summary adjudication.⁶ As for the good faith component of the defense, the defendants' opposition is sufficient to show there are genuine issues of material fact that are fact-intensive and should not be determined by summary judgment.

The court now turns to the trustee's evidence of the payments made to the defendants. The trustee has submitted the declaration of his attorney, Mr. Hughes,

who summarily concludes that the third group of exhibits (the copies of checks, cashier's checks, and deposit slips) are "[t]rue and correct copies of documents evidencing the Payments" (Hughes Decl. at 2:18); that is, the payments made to the defendants that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks and other documents accurately reflect the payments made to the defendants.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

In addition to laying a proper foundation for the documents as a whole, for certain of them, the trustee will need to provide additional evidence, properly authenticated, to demonstrate their relevance to this adversary proceeding. For example, the trustee's list of the purported payments to the defendants includes an entry dated September 5, 2008, which the trustee describes as a "trans" (presumably a transfer). The trustee lists the payee as defendant Padarath Bisessar and the amount as \$30,000. Yet the bank document the trustee has submitted as evidence of this transfer bears the signature of Usha D. Singh. The court has no evidence of any connection between Usha D. Singh and the debtor, and although the court, early on in the parent case, consolidated the debtor's three corporations with the bankruptcy estate, the consolidation order did not include any individuals.⁷ Further, the document does not include the name of either of the defendants. While a detailed comparison of the account numbers on the document with the numbers on the debtor's checks might reveal a link to the debtor, the trustee should provide a readily understandable explanation.⁸

As another example, the trustee's list includes a purported transfer to defendant Vimla Bisessar, dated December 5, 2008, for \$9,660. The document submitted as evidence of this transfer is a deposit slip with defendant Vimla Bisessar's name on it, but with no indication at all of the name of the transferor. The document does not include the name of either of the debtors or any of their corporations. Again, the account numbers might provide the link; it would be helpful to the court if the trustee supplied an explanation, properly authenticated.⁹

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the checks and other documents are what the trustee purports them to be. The trustee will not be required to submit additional evidence as to the \$212,900 in payments the defendants admit they received. The defendants will also have an opportunity to submit evidence laying a sufficient foundation for the court to conclude that their checks and other documents are what they purport them to be.

Finally, as indicated above, the trustee states that the defendants are married to each other and that he has requested their cases be consolidated for all purposes. The court is aware of at least two other situations where adversary

proceedings involving other recipients of payments from Vincent Singh have been consolidated; the adversary proceedings involving these two defendants have not. The payments the trustee seeks to avoid and recover appear to have been made to one or the other defendant, not both. The trustee will need to explain whether he seeks to hold the defendants jointly and severally liable for all the payments, and if so, on what grounds.

To conclude, the court will grant partial summary adjudication in favor of the trustee and against the defendants on the trustee's claims for avoidance and recovery of actual fraudulent transfers under both §§ 548(a)(1)(A) and 550 of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1), to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established that the payments made to the defendants were made in furtherance of the Ponzi scheme.

The court will defer a ruling on the "for value" component of the defendants' defense until both parties have had an opportunity to supplement the record. To the extent the court finds, based on such supplemental evidence, that the defendants have sufficiently demonstrated they gave value to the debtor and thereby acquired restitution claims against him, the court will grant partial summary adjudication as to that issue and defer a ruling on the good faith component of the defendants' defense until the time of trial.

The court will hear the matter.

1 The motion is filed in this adversary proceeding and in AP No. 12-2401, Item 21 on this calendar. The trustee states that the defendants in the two proceedings are married to each other and "Plaintiff has requested that their cases be consolidated for all purposes." Trustee's Motion, filed July 1, 2015 ("Mot."), at 2:3-4. Thus, the court will issue the same tentative ruling on both matters, and for ease of reference, will refer throughout to the defendants jointly.

2 The court reaches this conclusion without relying on Mr. McHale's declaration. The court will leave for another day the question of his qualifications and methodology, assuming the challenge is properly raised.

3 As to that payment, the trustee challenges the defendants' position solely on the basis of the "absence of proper evidence concerning the source of the payment." Trustee's Reply, filed August 5, 2015 ("Reply"), at 10:3-4.

4 The court cautions the defendants that many of the factual statements included in their opposition pertain to the debtor or to the defendants in these adversary proceedings as a whole, and thus, it is unlikely the defendants have personal knowledge of those matters. Therefore, the court would not consider those statements even if the defendants had signed the opposition under oath. Other statements in the opposition would be inadmissible for other reasons. In addition, the defendants have submitted as an exhibit a purported expert report by Joffrey G. Long. The report is hearsay and not properly authenticated. The court recognizes the defendants are representing themselves in propria persona. They will, however, be held to the same procedural and evidentiary rules as litigants who are represented by counsel.

5 This conclusion will satisfy the "for value" component of the good faith test to the extent of the defendants' investments. However, as this is an affirmative

defense, the defendants have the burden to submit admissible evidence, such as copies of the front and back sides of cancelled checks supported by evidence sufficient to properly authenticate them, of the monies they invested.

6 The court recognizes that it indicated earlier the defendants' affirmative defenses would not be determined on summary judgment. However, the trustee has in this motion asked the court to determine the total amount of the payments made to the defendants. If that issue is appropriate for determination on summary judgment, the issue of the investments the defendants made into Singh's operation is also appropriate for such a determination. Further, resolution of the "for value" component of the defense will reduce the remaining issues for trial, and perhaps in some cases, eliminate the need for trial.

7 The trustee's documents also include checks drawn on an account of John A. Singh and Om L. Singh, which appear to be signed by John A. Singh. The trustee has provided no evidence linking either of these individuals to the debtors and no evidence they were involved in the Ponzi scheme.

8 The court notes that the defendants have submitted their own lists of payments they admit having received and payments they dispute having received, and have included this particular payment on the disputed list. Their list indicates the payment was "in partial repayment of Tara Mati Raj's investment with Vincent Singh." Defendants' Ex. 5, p. 1.

9 This particular transfer appears on the defendants' list as disputed.

15.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2317	HLC-1	JUDGMENT
	BURKART V. PRATAP		7-1-15 [112]

Final ruling:

The hearing on this motion is continued to September 23, 2015 at 10:00 a.m. per order entered July 28, 2015. No appearance is necessary.

16.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2359	HLC-1	JUDGMENT
	BURKART V. MAHARAJ		7-1-15 [118]

Final ruling:

The hearing on this motion is continued to September 23, 2015 at 10:00 a.m. per order entered July 28, 2015. No appearance is necessary.

17.	10-42050-D-7	VINCENT/MALANIE SINGH	MOTION FOR SUMMARY JUDGMENT
	12-2365	HLC-1	7-6-15 [110]
	BURKART V. PANDEY		
	ORDER CONTINUING TO 9/23/15		
	AT 10:00 A.M.		

Final ruling:

The hearing on this motion is continued to September 23, 2015 at 10:00 a.m. per order entered July 28, 2015. No appearance is necessary.

18. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2368 HLC-1
BURKART V. PRASAD

CONTINUED MOTION FOR SUMMARY
JUDGMENT
7-1-15 [160]

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Shiu Prasad (the "defendant"), in the amount of \$160,811.35. The defendant has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part and the hearing will be continued for both parties to supplement the record.

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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by August 29, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$160,811.35, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$160,811.35. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling

\$160,811.35 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendants' claim filed in the underlying case, Claim No. 142, pursuant to § 502(d), unless the defendants pay the estate the amount of the avoided transfers. The defendant has raised an affirmative defense; thus, a monetary judgment in the trustee's favor is not appropriate at this time nor is a judgment disallowing his claim. This leaves the trustee's request for the alternative relief.

The court has previously ordered in this and several related adversary proceedings as follows:

With respect to the plaintiff's claims for avoidance and recovery of actual fraudulent transfers under § 548(a) (1) (A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04 (a) (1), partial summary adjudication is appropriate and it is hereby determined, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that debtor Vincent Singh's operation of a Ponzi scheme with the requisite fraudulent intent is not genuinely in dispute and will be treated as established in these adversary proceedings.

Order, filed April 22, 2015 (the "Order"), at 2:8-16. It does not appear any further summary adjudication is necessary concerning the fact that Vincent Singh was running a Ponzi scheme. The sole remaining relief requested is a determination that the debtor made the payments to the defendant totaling \$160,811.35 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) copies of the front and back sides of checks payable to the defendant on accounts of the debtor or one of his companies, copies of cashier's checks payable to the defendant, and copies of deposit slips bearing the name of the defendant.

Mr. McHale testifies that in his opinion, "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. The defendant states there are disputed questions of fact "[w]hether Debtors made the transfer[s] to Defendant with actual intent to hinder, delay, or defraud the creditors" (Defendant's Opposition, filed August 3, 2015 ("Opp."), at 5:16-17) and "[w]hether Debtors made the payments to Defendant as part of a Ponzi scheme." Id. at 5:26-27.

However, the defendant also states he invested in the debtor's business, Perfect Financial Group, believing it to be a legitimate business. He refers to the payments he received as being received in connection with his investments, and he characterizes himself as "one of the victims of Debtors' scheme." Opp. at 6:24. In short, the defendant's opposition leaves the court in no doubt that the payments made to him were made as part of the debtor's operation of the Ponzi scheme and in furtherance of that scheme. The defendant raises no serious argument, and has presented no evidence, that the payments he received were not made in furtherance of Singh's Ponzi scheme.

Thus, the court will grant summary adjudication in favor of the trustee and

against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors.

The only remaining question is the amount of the payments made to the defendant. The trustee requests a determination that Singh made payments to the defendant totaling \$160,811.35 in furtherance of the Ponzi scheme. Of that amount, the defendant admits he received payments totaling \$91,987.35, leaving \$68,824 in dispute. The court finds a determination of the correct figure is not necessary at this time because the defendant has made a claim that, if supported by admissible evidence and if the defendant satisfies the "good faith" component of the defense at trial, would defeat the trustee's claims against him. The defendant claims he invested \$310,500 with Singh, an amount well in excess of the total of payments made to the defendant, as alleged by the trustee. If the court had admissible evidence of those payments and if the defendant proves his good faith at trial, the court would conclude he was a "net loser" in Singh's Ponzi scheme such that the trustee could not recover from him. In that situation, it would not be necessary for the court to determine whether the payments made to the defendant totaled \$160,811.35, as the trustee claims, or only \$91,987.35, as the defendant claims. Either way, the court would conclude the defendant was a "net loser."¹

In fact, the defendant has not provided a list of the investments he claims to have made in Singh's operation and has provided no bank records to support his claim. His opposition is not signed under oath, as required for the court to consider it as evidence. See Fed. R. Evid. 603, incorporated herein by Fed. R. Bankr. P. 9017.2 However, even if it were, the defendant's statement that the total invested was \$310,500 is too conclusory to be of significant evidentiary value. As the court will give the trustee an opportunity to supplement his evidentiary record, the court also will allow the defendant to supplement his.

To the extent of the payments the defendant demonstrates by admissible evidence they invested with Singh, the court's determination in the Order will apply to those payments:

With respect to the defendants' defenses under Bankruptcy Code § 548(c) and Cal. Civ. Code § 3439.08(a) to the plaintiff's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code § 548 (a) (1) (A) and Cal. Civ. Code § 3439.04(a) (1), partial summary adjudication is appropriate and it is hereby determined, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that the following facts are not genuinely in dispute and will be treated as established in these adversary: that the defendants acquired restitution claims against debtor Vincent Singh proceedings at the time they made their investments; that those claims were proportionately reduced by the payments they received from him; and that the satisfaction of their claims for restitution constituted reasonably equivalent value for the payments they received, up to the total amount of their investments with Vincent Singh.

Order, at 3:4-19. Thus, assuming the defendant establishes at trial that he took his payments in good faith, the trustee may recover from him only to the extent he was a "net winner."³

As discussed below, the court intends to give both parties the opportunity to supplement the record; the court will then determine whether there remain triable issues of material fact as to the "for value" component of the defendant's defense or whether the issue may be determined by partial summary adjudication.⁴ As for the good faith component of the defense, the defendant's opposition is sufficient to suggest there are genuine issues of material fact that are fact-intensive and should not be determined by summary judgment.

The court now turns to the trustee's evidence of the payments made to the defendant. The trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the third group of exhibits (the copies of checks, cashier's checks, and deposit slips) are "[t]rue and correct copies of documents evidencing the Payments" (Hughes Decl. at 2:18); that is, the payments made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks and other documents accurately reflect the payments made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them. In addition, quite a few of the documents have this heading at the top: "THIS ITEM IS PART OF A LEGAL STATEMENT RECONSTRUCTION." The trustee will need to explain what this means, who wrote it and why, and whether the original documents were altered in some way.⁵

In addition to laying a proper foundation for the documents as a whole, for certain of them, the trustee will need to provide additional evidence, properly authenticated, to demonstrate their relevance to this adversary proceeding. As an example, the trustee's list of the purported payments to the defendant includes an entry dated October 2, 2008, which the trustee describes as "Cash" (presumably a cash transfer). The trustee lists the payee as the defendant and the amount as \$32,800. Yet the bank document the trustee has submitted as evidence of this transfer bears the defendant's name but shows no indication at all of the name of the transferor. That is, the document does not include the name of either of the debtors or any of their corporations. While a detailed comparison of the account numbers on the document with the numbers on the debtor's checks might reveal a link to the debtor, the trustee should provide a readily understandable explanation. There is a second page that appears to relate to this transfer: it states "This is a substitute document representing a CASH IN TICKET." There is no explanation of the significance of this notation. There is even one document that contains a date and amount only, with no name of the payee or the payor. The documents also include checks drawn on an account of John A. Singh and Om L. Singh, which appear to be signed by John A. Singh. There is no evidence of any connection between these individuals and the debtor, and although the court, early on in the parent case, consolidated the debtor's three corporations with the bankruptcy estate, the consolidation order did not include any individuals. In addition, the trustee has provided no evidence these individuals were involved in the Ponzi scheme.

Finally, several of the checks are payable to Sunita Prasad, who is not a defendant in this proceeding. (And at least one is payable to Shiu and Sunita Prasad and at least one to S Prasad, which could be Shiu or Sunita Prasad.) The trustee will need to explain on what basis he seeks to hold the defendant liable for the payments to Sunita Prasad.

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the checks and other documents are what the trustee purports them to be. The trustee will not be required to submit additional evidence as to the \$91,987.35 in payments the defendant admits he received. The defendant will also have a further opportunity to submit documentary evidence and to lay a sufficient foundation for the court to conclude that such evidence is what he purports it to be.

To conclude, the court will grant partial summary adjudication in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under both §§ 548(a)(1)(A) and 550 of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1), to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established that the payments made to the defendant were made in furtherance of the Ponzi scheme.

The court will defer a ruling on the "for value" component of the defendant's defense until both parties have had an opportunity to supplement the record. To the extent the court finds, based on such supplemental evidence, that the defendant has sufficiently demonstrated he gave value to the debtor and thereby acquired restitution claims against him, the court will grant partial summary adjudication as to that issue and defer a ruling on the good faith component of the defendant's defense until the time of trial.⁶

The court will hear the matter.

1 The trustee has referred in his motion to "additional payments to Defendant outside the two year period before the Petition Date" that the trustee discovered during his investigation (Mot. at 9, n.1); added to the \$160,811.35 the trustee seeks to recover, those additional payments bring the total to \$222,624.35 (see Trustee's Ex. 2), less than the total the defendant contends he invested.

2 The court recognizes the defendant is representing himself in propria persona. He will, however, be held to the same procedural and evidentiary rules as litigants who are represented by counsel.

3 This conclusion will satisfy the "for value" component of the good faith test to the extent of the defendant's investments. However, as this is an affirmative defense, the defendant has the burden to submit admissible evidence, such as copies of the front and back sides of cancelled checks supported by evidence sufficient to properly authenticate them, of the monies he invested.

4 The court recognizes that it indicated earlier the defendants' affirmative defenses would not be determined on summary judgment. However, the trustee has in this motion asked the court to determine the total amount of the payments made to the defendant. If that issue is appropriate for determination on summary judgment, the issue of the investments the defendant made into Singh's operation is also appropriate for such a determination. Further, resolution of the "for value"

component of the defense will reduce the remaining issues for trial, and perhaps in some cases, eliminate the need for trial.

4 The significance of proper authentication is highlighted here by the fact that the defendant has submitted copies of two checks that had also been submitted by the trustee and the fact that the defendants' copies were stamped "Return Reason - A Not Sufficient Funds" whereas the trustee's copies were not. The trustee admits in his reply that at least one of those checks was in fact actually dishonored.

6 The trustee suggests in his reply that the defendant has not sufficiently raised the issue of good faith to entitle him to a trial. "Defendant has not presented any evidence regarding defenses which he wants to raise, nor has he stated that he wants to go to trial on any defenses." Reply at 2:21-22. The court did not require such specificity when it determined that if a defendant responded to the motion and raised the issue of good faith, that issue would go to trial. Here, the defendant has stated in his opposition that it is a disputed question of fact whether he invested in good faith. He has also stated he is not a sophisticated investor or businessman, did not have investment experience before meeting the debtor, and understood the debtor's "kind of business was no different than any other financial institution." Opp. at 6:20-21. He has also characterized himself as one of the debtor's victims. These assertions are sufficient to entitle the defendant to present at trial on the good faith issue.

19. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2383 HLC-1 7-6-15 [102]
BURKART V. NIRANJAN

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Sneh Niranjana (the "defendant"), in the amount of \$34,000. The defendant has not filed opposition. For the following reasons, the motion will be granted conditioned on the trustee supplementing the evidentiary record.

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. Benefits 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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by November 14, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$34,000, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$34,000. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$34,000 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 84, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has filed nothing in response to the motion. Thus, it is appropriate for the court to consider awarding a monetary judgment and a judgment disallowing the claim.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) copies of the front and back sides of checks payable to the defendant on accounts of the debtor or one of his companies, copies of cashier's checks payable to the defendant, and copies of deposit slips bearing the name of the defendant. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D.

Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). There is also conclusive evidence that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. Therefore, the trustee has demonstrated that there is no genuine dispute as to these material facts, and that he is entitled to judgment as a matter of law on his claims for avoidance and recovery of actual fraudulent transfers under both Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments that were made to the defendant.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payments made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell, 533 F.3d at 771 (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court is prepared to conclude, subject to the trustee supplementing the record, that the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant.

For purposes of determining that amount, the trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the third group of exhibits (the copies of checks, cashier's checks, and deposit slips) are "[t]rue and correct copies of documents evidencing the Payments" (Hughes Decl. at 2:5); that is, the payments made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks and other documents accurately reflect the payments made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that

it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the checks and other documents are what the trustee purports them to be. Conditioned on the submission of such evidence, the court will grant summary judgment in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments made to the defendant.

Finally, the court is aware that the defendant is representing herself in propria persona in this adversary proceeding. Although "[p]ro se litigants are not excused from complying with [procedural] rules" (Clinton v. Deutsche Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011)), the court recognizes that the defendant may not have fully understood the court's order extending the deadline for the filing of dispositive motions or the requirement to file opposition to the motion and submit admissible evidence in support of any affirmative defenses the defendant may have. Thus, if the defendant appears at the hearing and requests a further opportunity to file opposition and admissible evidence, the court will exercise its discretion under Fed. R. Civ. P. 56(e) and give the defendant one last chance to do so.

The court will hear the matter.

20.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2396	HLC-1	JUDGMENT
	BURKART V. PRASAD ET AL		7-1-15 [121]

Final ruling:

The hearing on this motion is continued to September 23, 2015 at 10:00 a.m. per order entered July 28, 2015. No appearance is necessary.

21.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2401	HLC-1	JUDGMENT
	BURKART V. BISESSAR		7-1-15 [171]

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendants, Padarath Bisessar and Vimla

Bisessar (the "defendants"), in the amount of \$344,810.1 The defendants have filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part and the hearing will be continued for both parties to supplement the record.

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.

Here, the defendants were required by an earlier court order to file a motion to withdraw the reference by August 29, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendants did not file a motion to withdraw the reference. Accordingly, the court finds that the defendants waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendants between August 19, 2008 and August 19, 2010, a total of \$344,810, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendants in the amount of \$344,810. In the alternative, to the extent the defendants assert an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendants totaling \$344,810 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendants' claim filed in the underlying case, Claim No. 71, pursuant to § 502(d), unless the defendants pay the estate the amount of the avoided transfers. The defendants have raised an affirmative defense; thus, a monetary judgment in the trustee's favor is not appropriate at this time nor is a judgment disallowing their claim. This leaves the trustee's request for the alternative relief.

The court has previously ordered in this and several related adversary proceedings as follows:

With respect to the plaintiff's claims for avoidance and recovery of actual fraudulent transfers under § 548(a)(1)(A) of the Bankruptcy Code

and Cal. Civ. Code § 3439.04 (a) (1), partial summary adjudication is appropriate and it is hereby determined, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that debtor Vincent Singh's operation of a Ponzi scheme with the requisite fraudulent intent is not genuinely in dispute and will be treated as established in these adversary proceedings.

Order, filed April 22, 2015 (the "Order"), at 2:8-16. It does not appear any further summary adjudication is necessary concerning the fact that Vincent Singh was running a Ponzi scheme. The sole remaining relief requested is a determination that the debtor made the payments to the defendants totaling \$344,810 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendants; and (c) copies of the front and back sides of checks payable to the defendants on accounts of the debtor or one of his companies, copies of cashier's checks payable to the defendants, and copies of deposit slips bearing the names of the defendants.

Mr. McHale testifies that in his opinion, "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. The defendants state that they challenge Mr. McHale's qualifications and methodology under Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993), adding that they will file a motion to exclude his testimony and report. The defendants also state that "[t]he Trustee must still establish that each of the Payments made to Defendants were made in furtherance of the Ponzi scheme." Defendants' Opposition, filed July 23, 2015 ("Opp."), at 43:16-17.

A good portion of the defendants' opposition appears to be taken from an earlier motion - the motion that led to the Order. It appears the language just quoted may simply have been a holdover from that motion, as there is no other indication in the opposition that the defendants are seriously challenging the trustee's proof on this issue. In any event, the defendants' opposition leaves the court in no doubt that the payments made to them were made as part of the debtor's operation of the Ponzi scheme and in furtherance of that scheme. In fact, the defendants begin their opposition as follows: "The Defendants are victims of Vincent Singh. They invested more money in Singh's fraudulent scheme than they received from Vincent Singh." Opp. at 2:1-2. The defendants raise no serious argument, and have presented no evidence, that the payments they received were not made in furtherance of Singh's Ponzi scheme.²

Thus, the court will grant summary adjudication in favor of the trustee and against the defendants to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established that the payments made to the defendants were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors.

The only remaining question is the amount of the payments made to the defendants. The trustee requests a determination that Singh made payments to the defendants totaling \$344,810 in furtherance of the Ponzi scheme. Of that amount,

the defendants admit they received payments totaling \$212,900, leaving \$131,910 in dispute. The defendants have submitted a list of the particular payments the trustee claims they received which the defendants dispute having received. The trustee has offered a reply as to all of them except a \$3,150 payment the defendants claim was a rent payment from their tenant and was unrelated to Vincent Singh.³ Resolution of the issues as to the disputed \$131,910 would require factual determinations and, as to some of the payments, an analysis as to whether the defendants were "transferees" from whom the trustee may recover under § 550.

The court finds that those determinations and that analysis are not necessary at this time because the defendants have submitted copies of bank records that, if supported by admissible evidence and if the defendants satisfy the "good faith" component of the defense at trial, would defeat the trustee's claims against them. The bank records purportedly represent the defendants' investments with Vincent Singh; they total \$628,750, an amount well in excess of the total of payments made to the defendants, as alleged by the trustee. If the court had admissible evidence of those payments and if the defendants prove their good faith at trial, the court would conclude they were "net losers" in Singh's Ponzi scheme such that the trustee could not recover from them. In that situation, it would not be necessary for the court to determine whether the payments made to the defendants totaled \$344,810, as the trustee claims, or only \$212,900, as the defendants claim. Either way, the court would conclude the defendants were "net losers."

The trustee has categorized the defendants' bank records in his reply under the heading of "Irrelevant Arguments" for several reasons. First, he points out that the court has already determined it will not consider affirmative defenses in the context of a summary judgment motion but only at trial. As the monies the defendants invested with Singh support the "for value" component of their "in good faith and for value" defense, they pertain to an affirmative defense. Second the trustee complains that "Defendants have carefully included information about all payments made by them to Vincent Singh, but have not included any payments to them before August 20, 2008." Reply, at 10:23-25. This may be a red herring, because the trustee has referred in his motion to "additional payments to Defendants outside the two year period before the Petition Date" that the trustee discovered during his investigation (Mot. at 9, n.1); added to the \$344,810 the trustee seeks to recover, those additional payments bring the total to \$544,666 (see Trustee's Ex. 2), less than the total the defendants contend they invested.

Third, the trustee claims the defendants' evidence does not prove the money they paid to Singh actually came from them. In fact, the defendants' purported bank records have not been properly authenticated. The defendants state in their opposition that "[t]rue and correct copies of the documents evidencing the Payments" they made to Singh are submitted as exhibits; however, the opposition is not signed under oath, as required for the court to consider it as evidence. See Fed. R. Evid. 603, incorporated herein by Fed. R. Bankr. P. 9017.⁴ However, even if it were, the defendants' statement that the exhibits are true and correct copies of the documents evidencing the payments does not constitute sufficient authentication of the documents. The defendants did sign a declaration, which they filed as an attachment to their opposition, in which they testify under oath that "[they] have not recovered sums that equal the amount [they] invested in the investment scheme and [they] are net loser[s]." Opp., at 51:10-11. However, that statement is too conclusory to prove the defendants' assertion and they do not purport to authenticate the bank records in any way. As the court will give the trustee an opportunity to supplement his evidentiary record, the court also will allow the defendants to supplement theirs.

To the extent of the payments the defendants demonstrate by admissible evidence they invested with Singh, the court's determination in the Order will apply to those payments:

With respect to the defendants' defenses under Bankruptcy Code § 548(c) and Cal. Civ. Code § 3439.08(a) to the plaintiff's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code § 548 (a) (1) (A) and Cal. Civ. Code § 3439.04(a) (1), partial summary adjudication is appropriate and it is hereby determined, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that the following facts are not genuinely in dispute and will be treated as established in these adversary: that the defendants acquired restitution claims against debtor Vincent Singh proceedings at the time they made their investments; that those claims were proportionately reduced by the payments they received from him; and that the satisfaction of their claims for restitution constituted reasonably equivalent value for the payments they received, up to the total amount of their investments with Vincent Singh.

Order, at 3:4-19.

The trustee takes issue with this statement in the defendants' opposition: "The Court has found that Defendants did not know of the fraud at the time of the Investments, and the Trustee is prohibited from litigating that issue." Opp. at 43:20-21. In the trustee's view, "the Court has not found that Defendants did not know of the fraud at the time of the Investments, and the Trustee is not prohibited from litigating that issue." Reply at 11:9-11. The defendants are correct: the issue is foreclosed by the court's ruling on the earlier motion and by the language in the Order just quoted.

The trustee made an attempt in his opposition to that motion to demonstrate that the defendants were not innocent investors. He argued that 1) the underlying contracts between the defendants and Vincent Singh, as evidenced by the promissory notes, called for usurious interest, and thus, were illegal and unenforceable; and (2) the transactions were part of a conspiracy to evade taxes, and were illegal and unenforceable for that reason as well. Thus, the trustee claimed, "he has presented evidence from which the Court can infer that [the defendants] were not innocent." Opp. at 35:3-4. The court rejected both of the trustee's theories, finding instead that he had not alleged, and had not produced any evidence to demonstrate, that the defendants actually knew about Vincent Singh's fraudulent scheme at the time they made their investments. The court held:

Given (1) the conclusive evidence that Vincent Singh was operating a Ponzi scheme, (2) the trustee's position that "all payments from and to investors . . . which were for 'investment' purposes were payments in furtherance of the Ponzi scheme" (McHale Decl., at 2:23-26), and (3) the trustee's failure to submit any evidence that any defendant had actual knowledge of the fraudulent scheme, the court concludes that the defendants acquired restitution claims against Vincent Singh at the time they made their investments, that those claims were proportionately reduced by the payments they received from him, and that the satisfaction of their claims for restitution constituted reasonably equivalent value for the payments they received. The trustee has failed to demonstrate that a genuine issue of fact as to any of these findings and conclusions remains to be tried.

Memorandum Decision, filed April 22, 2015, at 34:16-35:12. Thus, assuming the defendants establish at trial that they took their payments in good faith, the trustee may recover from them only to the extent they were "net winners."⁵

As discussed below, the court intends to give both parties the opportunity to supplement the record; the court will then determine whether there remain triable issues of material fact as to the "for value" component of the defendants' defense or whether the issue may be determined by partial summary adjudication.⁶ As for the good faith component of the defense, the defendants' opposition is sufficient to show there are genuine issues of material fact that are fact-intensive and should not be determined by summary judgment.

The court now turns to the trustee's evidence of the payments made to the defendants. The trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the third group of exhibits (the copies of checks, cashier's checks, and deposit slips) are "[t]rue and correct copies of documents evidencing the Payments" (Hughes Decl. at 2:18); that is, the payments made to the defendants that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks and other documents accurately reflect the payments made to the defendants.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

In addition to laying a proper foundation for the documents as a whole, for certain of them, the trustee will need to provide additional evidence, properly authenticated, to demonstrate their relevance to this adversary proceeding. For example, the trustee's list of the purported payments to the defendants includes an entry dated September 5, 2008, which the trustee describes as a "trans" (presumably a transfer). The trustee lists the payee as defendant Padarath Bisessar and the amount as \$30,000. Yet the bank document the trustee has submitted as evidence of this transfer bears the signature of Usha D. Singh. The court has no evidence of any connection between Usha D. Singh and the debtor, and although the court, early on in the parent case, consolidated the debtor's three corporations with the bankruptcy estate, the consolidation order did not include any individuals.⁷ Further, the document does not include the name of either of the defendants. While a detailed comparison of the account numbers on the document with the numbers on the debtor's checks might reveal a link to the debtor, the trustee should provide a readily understandable explanation.⁸

As another example, the trustee's list includes a purported transfer to defendant Vimla Bisessar, dated December 5, 2008, for \$9,660. The document submitted as evidence of this transfer is a deposit slip with defendant Vimla Bisessar's name on it, but with no indication at all of the name of the transferor. The document does not include the name of either of the debtors or any of their corporations. Again, the account numbers might provide the link; it would be

helpful to the court if the trustee supplied an explanation, properly authenticated.⁹

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the checks and other documents are what the trustee purports them to be. The trustee will not be required to submit additional evidence as to the \$212,900 in payments the defendants admit they received. The defendants will also have an opportunity to submit evidence laying a sufficient foundation for the court to conclude that their checks and other documents are what they purport them to be.

Finally, as indicated above, the trustee states that the defendants are married to each other and that he has requested their cases be consolidated for all purposes. The court is aware of at least two other situations where adversary proceedings involving other recipients of payments from Vincent Singh have been consolidated; the adversary proceedings involving these two defendants have not. The payments the trustee seeks to avoid and recover appear to have been made to one or the other defendant, not both. The trustee will need to explain whether he seeks to hold the defendants jointly and severally liable for all the payments, and if so, on what grounds.

To conclude, the court will grant partial summary adjudication in favor of the trustee and against the defendants on the trustee's claims for avoidance and recovery of actual fraudulent transfers under both §§ 548(a)(1)(A) and 550 of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1), to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established that the payments made to the defendants were made in furtherance of the Ponzi scheme.

The court will defer a ruling on the "for value" component of the defendants' defense until both parties have had an opportunity to supplement the record. To the extent the court finds, based on such supplemental evidence, that the defendants have sufficiently demonstrated they gave value to the debtor and thereby acquired restitution claims against him, the court will grant partial summary adjudication as to that issue and defer a ruling on the good faith component of the defendants' defense until the time of trial.

The court will hear the matter.

1 The motion is filed in this adversary proceeding and in AP No. 12-2401, Item 21 on this calendar. The trustee states that the defendants in the two proceedings are married to each other and "Plaintiff has requested that their cases be consolidated for all purposes." Trustee's Motion, filed July 1, 2015 ("Mot."), at 2:3-4. Thus, the court will issue the same tentative ruling on both matters, and for ease of reference, will refer throughout to the defendants jointly.

2 The court reaches this conclusion without relying on Mr. McHale's declaration. The court will leave for another day the question of his qualifications and methodology, assuming the challenge is properly raised.

3 As to that payment, the trustee challenges the defendants' position solely on the basis of the "absence of proper evidence concerning the source of the payment." Trustee's Reply, filed August 5, 2015 ("Reply"), at 10:3-4.

4 The court cautions the defendants that many of the factual statements included in their opposition pertain to the debtor or to the defendants in these adversary proceedings as a whole, and thus, it is unlikely the defendants have personal knowledge of those matters. Therefore, the court would not consider those statements even if the defendants had signed the opposition under oath. Other statements in the opposition would be inadmissible for other reasons. In addition, the defendants have submitted as an exhibit a purported expert report by Joffrey G. Long. The report is hearsay and not properly authenticated. The court recognizes the defendants are representing themselves in propria persona. They will, however, be held to the same procedural and evidentiary rules as litigants who are represented by counsel.

5 This conclusion will satisfy the "for value" component of the good faith test to the extent of the defendants' investments. However, as this is an affirmative defense, the defendants have the burden to submit admissible evidence, such as copies of the front and back sides of cancelled checks supported by evidence sufficient to properly authenticate them, of the monies they invested.

6 The court recognizes that it indicated earlier the defendants' affirmative defenses would not be determined on summary judgment. However, the trustee has in this motion asked the court to determine the total amount of the payments made to the defendants. If that issue is appropriate for determination on summary judgment, the issue of the investments the defendants made into Singh's operation is also appropriate for such a determination. Further, resolution of the "for value" component of the defense will reduce the remaining issues for trial, and perhaps in some cases, eliminate the need for trial.

7 The trustee's documents also include checks drawn on an account of John A. Singh and Om L. Singh, which appear to be signed by John A. Singh. The trustee has provided no evidence linking either of these individuals to the debtors and no evidence they were involved in the Ponzi scheme.

8 The court notes that the defendants have submitted their own lists of payments they admit having received and payments they dispute having received, and have included this particular payment on the disputed list. Their list indicates the payment was "in partial repayment of Tara Mati Raj's investment with Vincent Singh." Defendants' Ex. 5, p. 1.

9 This particular transfer appears on the defendants' list as disputed.

22. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2402 HLC-1 7-6-15 [99]
BURKART V. CHAND

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Vinesh Chand (the "defendant"), in the amount of \$61,135.11. The defendant has not filed opposition. For the following reason, the court intends to deny the motion.

The trustee served this motion on the defendant at an address on Waterman Road in Sacramento. That is the same address at which the trustee served the defendant with the complaint and amended complaint in this proceeding, in August of 2012 and March of 2013, respectively. In September of 2013, the court denied the trustee's motion for entry of a default judgment against the defendant, which had also been served on the defendant at the Waterman Road address, on the ground it did not appear service had been correctly accomplished. The court noted that according to the docket in this adversary proceeding, on two separate occasions, an envelope addressed to the defendant at the Waterman Road address had been returned to the court as undeliverable.

The court added that it had discovered that an individual named Vinesh Chand had filed, in another adversary proceeding in this case, Adv. No. 10-2573, a Change of Address listing the Waterman Road address as his old address, as of November 18, 2011, with his new address being on Silverdale Court in Sacramento. The trustee did not file his complaint commencing this adversary proceeding until August 6, 2012. By that time, the defendant had, according to the Change of Address, moved from the Waterman Road address.

In a status conference statement filed May 8, 2014, the trustee stated: "Plaintiff served a motion for default on Defendant. However, the Court raised concerns about service. Plaintiff has been unable to find a more recent address for defendant to serve him with the documents but is continuing efforts." Plaintiff's Status Conference Statement, DN 62, p. 15. As indicated above, the court's ruling on the trustee's motion for entry of a default judgment referred to the defendant's Change of Address filed in Adv. No. 10-2573, listing the Silverdale Court address as his new address. However, the trustee did not serve the defendant at that address, instead continuing to use the Waterman Road address listed in the Change of Address as the defendant's old address.

In support of the present motion, the trustee's attorney testifies: "The address at which Defendant was served was 8155 Waterman Rd. 1523, Sacramento, CA 95829, which is the address used by Defendant in his proof of claim and in an adversary proceeding filed by him against Debtor Vincent Singh. This is the address Plaintiff has used for all notices and mailed communications to Defendant." Declaration of Christopher Hughes, DN 102, at 2:24-28. It is accurate that the Waterman Road address was used by the defendant in his adversary proceeding against Vincent Singh, Adv. No. 10-2573 - that was the address he used on his complaint, filed September 16, 2010. However, he filed a Change of Address in November of 2011 indicating he had moved from the Waterman Road address to the Silverdale Court address.

As indicated above, the court's docket in this adversary proceeding indicates an envelope addressed to the defendant at the Waterman Road address (the court's entry of default) was returned as undeliverable in December of 2012. Now, two and one-half years later, the trustee continues to use that address. As it appears the defendant has never been properly served in this adversary proceeding, it appears the adversary proceeding should be dismissed pursuant to Fed. R. Civ. P. 4(m), incorporated herein by Fed. R. Bankr. P. 7004(a)(1) (requiring service within 120 days).

The court will hear the matter.

23. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2434 HLC-1 7-6-15 [158]
BURKART V. REDDY

Final ruling:

This adversary proceeding has been dismissed by order entered August 3, 2015. The motion will be denied as moot by minute order. No appearance is necessary.

24. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2442 HLC-1 7-6-15 [62]
BURKART V. REDDY

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Muniamma Reddy (the "defendant"), in the amount of \$28,930. The defendant has not filed opposition. For the following reasons, the motion will be granted conditioned on the trustee supplementing the evidentiary record.

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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by November 14, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$28,930, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$28,930. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$28,930 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 19, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has filed nothing in response to the motion. Thus, it is appropriate for the court to consider awarding a monetary judgment and a judgment disallowing the claim.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) copies of the front and back sides of checks payable to the defendant on accounts of the debtor or one of his companies, copies of cashier's checks payable to the defendant, and copies of deposit slips bearing the name of the defendant. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation

omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). There is also conclusive evidence that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. Therefore, the trustee has demonstrated that there is no genuine dispute as to these material facts, and that he is entitled to judgment as a matter of law on his claims for avoidance and recovery of actual fraudulent transfers under both Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments that were made to the defendant.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payments made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell, 533 F.3d at 771 (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court is prepared to conclude, subject to the trustee supplementing the record, that the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant.

For purposes of determining that amount, the trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the third group of exhibits (the copies of checks, cashier's checks, and deposit slips) are "[t]rue and correct copies of documents evidencing the Payments" (Hughes Decl. at 2:15); that is, the payments made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks and other documents accurately reflect the payments made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

In addition to laying a proper foundation for the documents as a whole, for one

of them, the trustee will need to provide additional evidence, properly authenticated, to demonstrate its relevance to this adversary proceeding. The trustee's documents include a check drawn on an account of John A. Singh and Om L. Singh, which appears to be signed by John A. Singh. There is no evidence of any connection between these individuals and the debtor, and although the court, early on in the parent case, consolidated the debtor's three corporations with the bankruptcy estate, the consolidation order did not include any individuals. In addition, the trustee has provided no evidence these individuals were involved in the Ponzi scheme.

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the checks and other documents are what the trustee purports them to be. Conditioned on the submission of such evidence, the court will grant summary judgment in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments made to the defendant.

Finally, the court is aware that the defendant is representing herself in propria persona in this adversary proceeding. Although "[p]ro se litigants are not excused from complying with [procedural] rules" (Clinton v. Deutsche Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011)), the court recognizes that the defendant may not have fully understood the court's order extending the deadline for the filing of dispositive motions or the requirement to file opposition to the motion and submit admissible evidence in support of any affirmative defenses the defendant may have. Thus, if the defendant appears at the hearing and requests a further opportunity to file opposition and admissible evidence, the court will exercise its discretion under Fed. R. Civ. P. 56(e) and give the defendant one last chance to do so.

The court will hear the matter.

25.	10-42050-D-7	VINCENT/MALANIE SINGH	MOTION FOR SUMMARY JUDGMENT
	12-2455	HLC-1	7-6-15 [67]
	BURKART V. KUMAR		

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Jyoti Kumar, aka Joyti Kumar (the "defendant"), in the amount of \$22,000. The defendant has not filed opposition. For the following reasons, the motion will be granted conditioned on the trustee supplementing the evidentiary record.

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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by November 14, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$22,000, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1), and may be recovered from the defendant pursuant to § 550. Thus, he seeks a judgment against the defendant in the amount of \$22,000. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$22,000 in furtherance of the Ponzi scheme. The defendant has filed nothing in response to the motion. Thus, it is appropriate for the court to consider awarding a monetary judgment and a judgment disallowing the claim.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; and (b) a copy of a purported "Outgoing Wire Detail" naming the defendant as beneficiary and Vincent Singh as originator. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of

dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). There is also conclusive evidence that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. Therefore, the trustee has demonstrated that there is no genuine dispute as to these material facts, and that he is entitled to judgment as a matter of law on his claims for avoidance and recovery of actual fraudulent transfers under both Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments that were made to the defendant.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payments made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell, 533 F.3d at 771 (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court is prepared to conclude, subject to the trustee supplementing the record, that the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant.

For purposes of determining that amount, the trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the second

exhibit (the purported "Outgoing Wire Detail") is a "[t]rue and correct copy of the document evidencing the Payment" (Hughes Decl. at 2:4); that is, the payment made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that this document accurately reflects the payment made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the document filed as an exhibit is "a true and correct copy of the document evidencing the Payment" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the document and as to the chain of custody or control since he obtained it.

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the document is what the trustee purports it to be. Conditioned on the submission of such evidence, the court will grant summary judgment in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments made to the defendant.

Finally, the court is aware that the defendant is representing himself in propria persona in this adversary proceeding. Although "[p]ro se litigants are not excused from complying with [procedural] rules" (Clinton v. Deutsche Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011)), the court recognizes that the defendant may not have fully understood the court's order extending the deadline for the filing of dispositive motions or the requirement to file opposition to the motion and submit admissible evidence in support of any affirmative defenses the defendant may have. Thus, if the defendant appears at the hearing and requests a further opportunity to file opposition and admissible evidence, the court will exercise its discretion under Fed. R. Civ. P. 56(e) and give the defendant one last chance to do so.

The court will hear the matter.

26.	10-42050-D-7	VINCENT/MALANIE SINGH	MOTION FOR SUMMARY JUDGMENT
	12-2470	HLC-1	7-6-15 [73]
	BURKART V. BEZAWADA		

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Arun Bezawada (the "defendant"), in the amount of \$20,000. The defendant has not filed opposition. For the following reasons, the motion will be granted conditioned on the trustee supplementing the evidentiary record.

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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by November 14, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that a payment made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, in the amount of \$20,000, is avoided as an actual fraudulent transfer pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$20,000. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$20,000 in furtherance of the Ponzi scheme. The defendant has filed nothing in response to the motion. Thus, it is appropriate for the court to consider awarding a monetary judgment and a judgment disallowing the claim.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a copy of the front and back sides of a check payable to the defendant on an account of one of the debtor's companies; and (c) evidence of the defendant's address in the form of a bank statement and private investigator's report. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has

pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). There is also conclusive evidence that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. Therefore, the trustee has demonstrated that there is no genuine dispute as to these material facts, and that he is entitled to judgment as a matter of law on his claims for avoidance and recovery of actual fraudulent transfers under both Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments that were made to the defendant.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payments made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell, 533 F.3d at 771 (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court is prepared to conclude, subject to the trustee supplementing the record, that

the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant.

For purposes of determining that amount, the trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the second exhibit (the copy of the check) is "[a] true and correct copy of the document evidencing the Payment" (Hughes Decl. at 2:4); that is, the payment made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that the document accurately reflects the payment made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the document and as to the chain of custody or control since he obtained it.

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the document is what the trustee purports it to be. Conditioned on the submission of such evidence, the court will grant summary judgment in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payment made to the defendant.

Finally, the court is aware that the defendant is representing himself in propria persona in this adversary proceeding. Although "[p]ro se litigants are not excused from complying with [procedural] rules" (Clinton v. Deutsche Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011)), the court recognizes that the defendant may not have fully understood the court's order extending the deadline for the filing of dispositive motions or the requirement to file opposition to the motion and submit admissible evidence in support of any affirmative defenses the defendant may have. Thus, if the defendant appears at the hearing and requests a further opportunity to file opposition and admissible evidence, the court will exercise its discretion under Fed. R. Civ. P. 56(e) and give the defendant one last chance to do so.

The court will hear the matter.

27.	10-42050-D-7	VINCENT/MALANIE SINGH	MOTION FOR SUMMARY JUDGMENT
	12-2472	HLC-1	7-6-15 [64]
	BURKART V. CHAUDHARY		

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Vimlesh Chaudhary (the "defendant"), in the amount of \$24,000. The defendant has not filed opposition. For the following reasons, the motion will be granted conditioned on the trustee supplementing the evidentiary record.

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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by November 14, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$24,000, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$24,000. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$24,000 in furtherance of the Ponzi scheme. The defendant has filed nothing in response to the motion. Thus, it is appropriate for the court to consider awarding a monetary judgment and a judgment disallowing the claim.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) copies of the front and back sides of checks payable to the defendant on an account of one of the debtor's companies. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). There is also conclusive evidence that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. Therefore, the trustee has demonstrated that there is no genuine dispute as to these material facts, and that he is entitled to judgment as a matter of law on his claims for avoidance and recovery of actual fraudulent transfers under both Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments that were made to the defendant.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payments made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell, 533 F.3d at 771 (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code §

548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court is prepared to conclude, subject to the trustee supplementing the record, that the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant.

For purposes of determining that amount, the trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the third group of exhibits (the copies of checks) are "[t]rue and correct copies of documents evidencing the Payments" (Hughes Decl. at 2:12); that is, the payments made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks accurately reflect the payments made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the documents are what the trustee purports them to be. Conditioned on the submission of such evidence, the court will grant summary judgment in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments made to the defendant.

Finally, the court is aware that the defendant is representing himself in propria persona in this adversary proceeding. Although "[p]ro se litigants are not excused from complying with [procedural] rules" (Clinton v. Deutsche Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011)), the court recognizes that the defendant may not have fully understood the court's order extending the deadline for the filing of dispositive motions or the requirement to file opposition to the motion and submit admissible evidence in support of any affirmative defenses the defendant may have. Thus, if the defendant appears at the hearing and requests a further opportunity to file opposition and admissible evidence, the court will exercise its discretion under Fed. R. Civ. P. 56(e) and give the defendant one last chance to do so.

The court will hear the matter.

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Mohit Gosai (the "defendant"), in the amount of \$15,800. The defendant has not filed opposition. For the following reasons, the motion will be granted conditioned on the trustee supplementing the evidentiary record.

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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by November 14, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$15,800, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$15,800. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$15,800 in furtherance of the Ponzi scheme. The defendant has filed nothing in response to

the motion. Thus, it is appropriate for the court to consider awarding a monetary judgment and a judgment disallowing the claim.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; and (b) copies of the front and back sides of checks payable to the defendant on accounts of one of the debtor's companies and a third party. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). There is also conclusive evidence that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. Therefore, the trustee has demonstrated that there is no genuine dispute as to these material facts, and that he is entitled to judgment as a matter

of law on his claims for avoidance and recovery of actual fraudulent transfers under both Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments that were made to the defendant.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payments made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell, 533 F.3d at 771 (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court is prepared to conclude, subject to the trustee supplementing the record, that the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant.

For purposes of determining that amount, the trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the third group of exhibits (the copies of checks) are "[t]rue and correct copies of documents evidencing the Payments" (Hughes Decl. at 2:4); that is, the payments made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks accurately reflect the payments made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the checks are what the trustee purports them to be. Conditioned on the submission of such evidence, the court will grant summary judgment in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments made to the defendant.

In addition to laying a proper foundation for the documents as a whole, for one of them, the trustee will need to provide additional evidence, properly authenticated, to demonstrate its relevance to this adversary proceeding. The trustee's documents include a check drawn on an account of Om Lata Singh, which appears to be signed by the same individual. There is no evidence of any connection between this individual and the debtor, and although the court, early on in the parent case, consolidated the debtor's three corporations with the bankruptcy estate, the consolidation order did not include any individuals. In addition, the trustee has provided no evidence this individual was involved in the Ponzi scheme.

Finally, the court is aware that the defendant is representing himself in propria persona in this adversary proceeding. Although "[p]ro se litigants are not excused from complying with [procedural] rules" (Clinton v. Deutsche Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011)), the court recognizes that the defendant may not have fully understood the court's order extending the deadline for the filing of dispositive motions or the requirement to file opposition to the motion and submit admissible evidence in support of any affirmative defenses the defendant may have. Thus, if the defendant appears at the hearing and requests a further opportunity to file opposition and admissible evidence, the court will exercise its discretion under Fed. R. Civ. P. 56(e) and give the defendant one last chance to do so.

The court will hear the matter.

29. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2481 HLC-1 7-6-15 [74]
BURKART V. MARDAL

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Jai Mardal, aka Jai Hind Ramayan Mandall, aka Jai Hind Ramayan Mandali, aka Jai Hind Ramayan Bhajan Mandali (the "defendant"), in the amount of \$22,000. The defendant has not filed opposition. For the following reasons, the motion will be granted conditioned on the trustee supplementing the evidentiary record.

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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by November 14, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that

there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$22,000, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$22,000. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$22,000 in furtherance of the Ponzi scheme.¹ The defendant has filed nothing in response to the motion. Thus, it is appropriate for the court to consider awarding a monetary judgment and a judgment disallowing the claim.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) copies of the front and back sides of checks payable to the defendant on an account of one of the debtor's companies; and (c) copies of the defendant's proofs of claim filed in the parent case. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation

omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). There is also conclusive evidence that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. Therefore, the trustee has demonstrated that there is no genuine dispute as to these material facts, and that he is entitled to judgment as a matter of law on his claims for avoidance and recovery of actual fraudulent transfers under both Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments that were made to the defendant.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payments made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell, 533 F.3d at 771 (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court is prepared to conclude, subject to the trustee supplementing the record, that the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant.

For purposes of determining that amount, the trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the second group of exhibits (the copies of checks) are "[a] true and correct copy of the documents evidencing the Payments" (Hughes Decl. at 2:5); that is, the payments made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks and other documents accurately reflect the payments made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

The court will permit the trustee to submit evidence laying a sufficient

foundation for the court to conclude that the checks and other documents are what the trustee purports them to be. Conditioned on the submission of such evidence, the court will grant summary judgment in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments made to the defendant.

Finally, the court is aware that the defendant is representing himself or itself² in propria persona in this adversary proceeding. Although "[p]ro se litigants are not excused from complying with [procedural] rules" (Clinton v. Deutsche Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011)), the court recognizes that the defendant may not have fully understood the court's order extending the deadline for the filing of dispositive motions or the requirement to file opposition to the motion and submit admissible evidence in support of any affirmative defenses the defendant may have. Thus, if the defendant appears at the hearing and requests a further opportunity to file opposition and admissible evidence, the court will exercise its discretion under Fed. R. Civ. P. 56(e) and give the defendant one last chance to do so.

The court will hear the matter.

1 Although the motion states that the defendant has filed a proof of claim, it does not indicate the trustee is requesting the claim be disallowed.

2 According to Mr. Hughes' declaration, the defendant may be a temple. Mr. Hughes testifies that he believes the defendant is aware of the complaint and that the principal parties involved with the temple, whom he names, are also aware of it.

30. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2490 HLC-1 7-6-15 [60]
BURKART V. DEO

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Sarla Deo (the "defendant"), in the amount of \$37,455. The defendant has not filed opposition. For the following reasons, the motion will be granted conditioned on the trustee supplementing the evidentiary record.

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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by November 14, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$37,455, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$37,455. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$37,455 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 188, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has filed nothing in response to the motion. Thus, it is appropriate for the court to consider awarding a monetary judgment and a judgment disallowing the claim.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) copies of the front and back sides of checks payable to the defendant on accounts of the debtor or one of his companies or third parties. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful

in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). There is also conclusive evidence that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. Therefore, the trustee has demonstrated that there is no genuine dispute as to these material facts, and that he is entitled to judgment as a matter of law on his claims for avoidance and recovery of actual fraudulent transfers under both Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments that were made to the defendant.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payments made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell, 533 F.3d at 771 (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court is prepared to conclude, subject to the trustee supplementing the record, that the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant.

For purposes of determining that amount, the trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the third group of exhibits (the copies of checks) are "[t]rue and correct copies of documents

evidencing the Payments" (Hughes Decl. at 2:18); that is, the payments made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks and other documents accurately reflect the payments made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

In addition to laying a proper foundation for the documents as a whole, for three of them, the trustee will need to provide additional evidence, properly authenticated, to demonstrate their relevance to this adversary proceeding. The trustee's documents include checks drawn on accounts of John A. Singh and Om L. Singh or Om L. Singh, which appear to be signed by John A. Singh or Om L. Singh. There is no evidence of any connection between these individuals and the debtor, and although the court, early on in the parent case, consolidated the debtor's three corporations with the bankruptcy estate, the consolidation order did not include any individuals. In addition, the trustee has provided no evidence these individuals were involved in the Ponzi scheme.

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the checks and other documents are what the trustee purports them to be. Conditioned on the submission of such evidence, the court will grant summary judgment in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments made to the defendant.

Finally, the court is aware that the defendant is representing herself in propria persona in this adversary proceeding. Although "[p]ro se litigants are not excused from complying with [procedural] rules" (Clinton v. Deutsche Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011)), the court recognizes that the defendant may not have fully understood the court's order extending the deadline for the filing of dispositive motions or the requirement to file opposition to the motion and submit admissible evidence in support of any affirmative defenses the defendant may have. Thus, if the defendant appears at the hearing and requests a further opportunity to file opposition and admissible evidence, the court will exercise its discretion under Fed. R. Civ. P. 56(e) and give the defendant one last chance to do so.

The court will hear the matter.

31. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2491 HLC-1 7-6-15 [109]
BURKART V. MAHARAJ

Final ruling:

The hearing on this motion is continued to September 23, 2015 at 10:00 a.m. per order entered July 28, 2015. No appearance is necessary.

32. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2492 HLC-1 7-6-15 [114]
BURKART V. PRASAD

Final ruling:

The hearing on this motion is continued to October 7, 2015 at 10:00 a.m. per order entered July 28, 2015. No appearance is necessary.

33. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2498 HLC-1 7-6-15 [62]
BURKART V. MALHI

This matter will not be called before 10:45 a.m.

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 in favor of the trustee and against the defendant, Balvinder Singh Malhi (the "defendant"), in the amount of \$10,000. The defendant has not filed opposition.¹ For the following reasons, the motion will be granted conditioned on the trustee supplementing the evidentiary record.

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.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by August 29, 2014 or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that a payment made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, in the amount of \$10,000, is avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$10,000. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$10,000 in furtherance of the Ponzi scheme. The defendant has filed nothing in response to the motion. Thus, it is appropriate for the court to consider awarding a monetary judgment and a judgment disallowing the claim.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; and (b) a copy of the front and back sides of a check drawn on an account of one of the debtor's companies and signed by the debtor. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed.

R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). There is also conclusive evidence that the payments made to the defendant were made in furtherance of the Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. Therefore, the trustee has demonstrated that there is no genuine dispute as to these material facts, and that he is entitled to judgment as a matter of law on his claims for avoidance and recovery of actual fraudulent transfers under both Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments that were made to the defendant.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payments made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell, 533 F.3d at 771 (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court is prepared to conclude, subject to the trustee supplementing the record, that the trustee is entitled to judgment as a matter of law for the full amount of the payment made to the defendant.

For purposes of determining that amount, the trustee has submitted the declaration of his attorney, Mr. Hughes, who summarily concludes that the second exhibit (the copy of the check) is a "[t]rue and correct copy of the document evidencing the Payment" (Hughes Decl. at 2:4); that is, the payment made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that this document accurately reflects the payment made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a),

incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the document filed as an exhibit is "a true and correct copy of the document evidencing the Payment" is insufficient for this purpose. The trustee needs to lay a sufficient foundation as to how he came into possession of the document and as to the chain of custody or control since he obtained it.

The court will permit the trustee to submit evidence laying a sufficient foundation for the court to conclude that the document is what the trustee purports it to be. Conditioned on the submission of such evidence, the court will grant summary judgment in favor of the trustee and against the defendant on the trustee's claims for avoidance and recovery of actual fraudulent transfers under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1) in the amount of the payments made to the defendant.

Finally, the court is aware that the defendant is representing himself in propria persona in this adversary proceeding. Although "[p]ro se litigants are not excused from complying with [procedural] rules" (Clinton v. Deutsche Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011)), the court recognizes that the defendant may not have fully understood the court's order extending the deadline for the filing of dispositive motions or the requirement to file opposition to the motion and submit admissible evidence in support of any affirmative defenses the defendant may have. Thus, if the defendant appears at the hearing and requests a further opportunity to file opposition and admissible evidence, the court will exercise its discretion under Fed. R. Civ. P. 56(e) and give the defendant one last chance to do so.

The court will hear the matter.

1 The trustee has filed a reply to an opposition the defendant apparently served on the trustee. However, the opposition has not been filed with the court.

34. 14-32452-D-11 JOHN RODRIGO
SJS-3

CONTINUED MOTION TO USE CASH
COLLATERAL
5-18-15 [72]

35. 11-28863-D-7 AQUA POOL & SPA, INC.
CWC-20

MOTION FOR ADMINISTRATIVE
EXPENSES
7-10-15 [243]

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 approval to pay certain post-petition administrative tax claims paid by the estate is supported by the record. As such the court will grant the motion and allow certain post-petition taxes paid by the estate as an administrative expense. Moving party is to submit an appropriate order. No appearance is necessary.

36. 12-27473-D-7 MICHAEL P. ALLEN GENERAL MOTION TO COMPROMISE
HCS-2 CONTRACTORS, INC. CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH MICHAEL ALLEN
7-13-15 [31]

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.

37. 15-21876-D-7 LILLIAN PENTON MOTION FOR RELIEF FROM
KAZ-1 AUTOMATIC STAY
JPMORGAN CHASE BANK, N.A. 7-15-15 [41]
VS.

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 debtor received her discharge on June 22, 2015 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

38. 15-22377-D-7 SUSAN SMETTS MOTION TO AVOID LIEN OF KELKRIS
BLG-3 ASSOCIATES, INC.
7-15-15 [30]

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.

39. 15-24595-D-7 NEIL/AURORA HUTCHINGS MOTION FOR RELIEF FROM
EJF-1 AUTOMATIC STAY
BANK OF AMERICA, N.A. VS. 7-9-15 [10]

Final ruling:

This matter is resolved without oral argument. This is Bank of America, 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.

40.	15-24202-D-7 DNL-2	CHERYL MCNEIL	MOTION TO EMPLOY GARY GWILLIAM AS SPECIAL COUNSEL 7-28-15 [35]
41.	13-29030-D-7	WILLIAM/JANET CHENG	ORDER TO SHOW CAUSE 7-29-15 [875]
42.	14-29547-D-7 PA-8	FRANCIS/ISABEL FAHRNER	MOTION TO ABANDON 7-29-15 [111]
43.	15-22894-D-7 JDP-1	JESS MILBOURN AND MONDA KORICH	MOTION TO AVOID LIEN OF COLLECTRONICS, INC. 7-27-15 [14]

44. 14-31725-D-11 TAHOE STATION, INC.
FWP-9

MOTION FOR TURNOVER OF PROPERTY
O.S.T.
8-4-15 [219]

This matter will not be called before 10:30 a.m.