UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

September 9, 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.	15-20600-D-11 SAEED ZARAKANI DB-1 VAN DE POL ENTERPRISED, INC. VS.	CONTINUED STATUS CONFERENCE RE: MOTION FOR RELIEF FROM AUTOMATIC STAY 6-16-15 [89]
2.	14-29905-D-11 RAVINDER GILL	CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 10-2-14 [1]

3.	14-26408-D-7 PA-5	MARK GILROY	MOTION TO SELL FREE AND CLEAR OF LIENS AND/OR MOTION TO EMPLOY WEST AUCTIONS, INC. AS AUCTIONEER, AUTHORIZING SALE OF PROPERTY AT PUBLIC AUCTION AND AUTHORIZING PAYMENT OF AUCTIONEER FEES AND EXPENSES 8-11-15 [78]
4.	14-27719-D-7 PPR-1	OMAR OCHOA MENDOZA AND VICTORIA OCHOA	MOTION FOR CONSENT TO ENTER INTO LOAN MODIFICATION AGREEMENT 7-15-15 [15]

Final ruling:

This is a joint motion of Bank of America (the "Bank") and the debtors (collectively, the "Parties") for an order permitting the Parties to enter into a loan modification as to the loan secured by a lien on the debtors' residence. It appears from the motion that the Bank is seeking a comfort order.[1] The motion adds that if the court finds the motion to be "unnecessary to effectuate the loan modification agreement," the Parties would like an order "stating that permission is not needed by the Court to enter into the instant loan modification agreement." Mot. at 2:3-5.

The debtors received their discharge in this case in November of 2014; it appears the case remains open for the trustee to administer assets. (In October of 2014, the trustee issued a notice to creditors to file a claim due to the possible recovery of assets.) The Parties have provided the court with no authority for any of the relief requested. Specifically, there is no authority for the court to issue an order determining the loan modification agreement to be "valid notwithstanding the automatic stay" or determining prospectively that the Bank will not be liable for violations of the stay. Nor is there authority for the court to issue an order deeming the motion unnecessary to "effectuate" the loan modification agreement. In short, there is no authority for the relief requested, and as the debtors' discharge has been entered, the motion appears unnecessary. Accordingly, the motion will be denied by minute order. No appearance is necessary.

---

1 The motion states, "WHEREAS, the loan modification agreement will be valid notwithstanding the automatic stay provisions of 11 U.S.C. § 362(a), and the Creditor will not be liable for violations of the stay for communications in furtherance of that purpose, execution of the applicable documents or recording of the documents during the Debtors' case." Mot. at 2:22-25.

5. 14-25820-D-11 INTERNATIONAL MANUFACTURING GROUP, INC.
15-2130 MCFARLAND V. GENERAL ELECTRIC CAPITAL CORPORATION

MOTION TO DISMISS ADVERSARY PROCEEDING
7-24-15 [8]

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

Tentative ruling:

This is the motion of defendant General Electric Capital Corporation ("GECC") to dismiss the complaint of the plaintiff, Beverly McFarland, who is also the trustee in the chapter 7 case in which this adversary proceeding is pending (the "trustee"), pursuant to Fed. R. Civ. P. 9(b) and 12(b)(1), made applicable in this proceeding by Fed. R. Bankr. P. 7009 and 7012(b), for failure to plead fraud with particularity and failure to state a claim upon which relief can be granted. The plaintiff has filed opposition and GECC has filed a reply. For the following reasons, the motion will be denied.

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 her complaint, the trustee seeks to avoid four transfers of $500,000 each made by an entity named Olivehurst Glove Manufacturers, LLC ("Olivehurst") to GECC as actual fraudulent conveyances, pursuant to § 548(a)(1)(A) of the Bankruptcy Code,[1] and to recover the value of the transfers from GECC, pursuant to § 550. The transfers were made within the year prior to the filing of the chapter 7 petition of International Manufacturing Group, Inc. ("IMG"), the debtor in the case in which this adversary proceeding is pending. Olivehurst has been substantively consolidated into IMG's bankruptcy estate. GECC makes five arguments in support of its contention that the complaint fails to state a claim upon which relief can be granted. The court will take them in the order presented by GECC.[2]

I. The Fraudulent Transfer Versus Preference Issue

First, GECC contends the trustee's claim is a preference claim, not a fraudulent transfer claim, and that, as a preference claim, it is time-barred because all of the transfers were made more than 90 days before the date IMG filed its petition, May 30, 2014. There is no dispute that the transfers were made outside the 90-day period, and therefore cannot be recovered as preferences. The question is whether, even if they could have been recovered as preferences if they had been made within the 90 days, they might be fraudulent transfers as well. GECC cites Boston Trading Group, Inc. v. Burnazos, 835 F.2d 1504 (1st Cir. 1987), for the proposition that "fraudulent transfer laws cannot be used to recover payments to legitimate lenders where the transferee engaged in fraud to raise the money used to repay the lender." GECC's Motion, filed July 24, 2015 ("Mot."), at 10:15-17.

In Boston Trading, a court-appointed receiver for a company that managed the funds of commodities investors sought to recover as actual fraudulent conveyances payments made by the company's owners, Shaw and Kepreos, from the company's funds, to the individual who had sold them the company, Burnazos, toward the purchase price. The evidence showed that Shaw and Kepreos had been churning investors' accounts by making unnecessary trades in order to generate commissions; the receiver alleged Burnazos knew or should have known about their dishonest activity.

The court held that where an individual uses his corporation's money, which he obtained dishonestly, to pay his debt to a creditor "who knows of, but did not participate in, [the] dishonesty," the payment is not recoverable as an actual fraudulent conveyance. 835 F.2d at 1510. The court's discussion and holding both strongly suggest the court believed that a preference, which the payments to Burnazos clearly were, cannot also be a fraudulent transfer. The court made this blanket statement: "The cases and the commentators . . . state that fraudulent conveyance law does not seek to void transfers in a . . . circumstance known as a 'preference.'" Id. In explanation, the court stated that the purpose of the fraudulent transfer laws is not to achieve an equal distribution among creditors (id. at 1508-09), but "to see that the debtor uses his limited assets to satisfy some of his creditors . . . ." Id. at 1509. The court added that "to find an actual intent to defraud creditors when . . . an insolvent debtor prefers a less worthy creditor, would tend to deflect fraudulent conveyance law from one of its basic functions (to see that an insolvent debtor's limited funds are used to pay some worthy creditor), while providing it with a new function (determining which creditor is the more worthy)." Id.

In short, the Boston Trading court came very close to holding, if it did not actually do so, that a transfer that would constitute a preference if made within the preference period cannot also be an actual fraudulent conveyance. However, the court did not also find that a preference cannot be a constructive fraudulent conveyance. Instead, it remanded for a retrial on the issue of whether Burnazos gave a "fair equivalent" in exchange for the payments. 835 F.2d at 1513-14. The court did hold, as to the "good faith" defense to a constructive fraudulent transfer claim, that lack of good faith cannot be found from the mere fact that the creditor received a preference, even where the defendant knew the payment was made with improperly obtained funds. 835 F.2d at 1511-12.

> Whatever "good faith" may mean . . . we believe it does not ordinarily refer to the transferee's knowledge of the source of the debtor's monies which the debtor obtained at the expense of other creditors. To find a lack of "good faith" where the transferee does not participate in, but only knows that the debtor created the other debt through some form of, dishonesty is to void the transaction because it amounts to a kind of 'preference' – concededly a most undesirable kind of preference, one in which the claims of alternative creditors differ considerably in their moral worth, but a kind of preference nonetheless. And all the reasons that militate against finding a § 7 violation ('actual fraud') in such circumstances . . . militate with at least equal force against finding a § 4 violation ('constructive fraud').

Id. at 1512 (citations omitted).[3]

GECC's reliance on Boston Trading is not persuasive in this case for several

reasons. First, as the trustee points out, the case involved only state fraudulent transfer law (in particular, the law of Massachusetts); the cases the court cited in support of its conclusion that a preference cannot also be an actual fraudulent conveyance involved only state law, not § 548 of the Bankruptcy Code. GECC's only response on this point is to note that "Section 548 is based on the Uniform Fraudulent Conveyance Act" (GECC's Reply, filed Sept. 2, 2015 ("Reply"), at 4:25), on which the state fraudulent transfer laws are also based. The answer is too pat. Although the state and federal statutes are "similar in form and substance" (In re United Energy Corp., 944 F.2d 589, 594 (9th Cir. 1991)), they are not identical. See Plotkin v. Pomona Valley Imports (In re Cohen), 199 B.R. 709, 712 (9th Cir. BAP 1996) ["The differences between the fraudulent transfer provisions in the Bankruptcy Code and the Uniform Fraudulent Transfer Act are central to this appeal."]; see also Jobin v. McKay (In re M & L Bus. Mach. Co.), 84 F.3d 1330, 1338 (1996) ["[W]e are not persuaded . . . that the definitions of good faith under . . . state fraudulent conveyance laws should be adopted in interpreting § 548(c). Many of these provisions contain language different than the language used in § 548(c) and . . . involve policy concerns not applicable here."].

Second, as the trustee points out, the statutory language itself strongly suggests that a transfer may be avoidable as both a preference and a fraudulent transfer under federal bankruptcy law. The Bankruptcy Code provides: "Except to the extent that a transfer . . . voidable under this section is voidable under section . . . 547 of this title," a transferee that takes for value and in good faith may retain the property transferred. § 548(c) (emphasis added). Were preferences and fraudulent transfers mutually exclusive, this language would be meaningless.

Third, as the trustee also points out, if preferences and fraudulent transfers were mutually exclusive, trustees in Ponzi scheme cases would be unable to recover payments made to earlier investors at the expense of later ones except those made in the 90-day preference period. Yet "[c]ourts have routinely applied [state fraudulent transfer law] to allow receivers or trustees in bankruptcy to recover monies lost by Ponzi scheme investors. The Ponzi scheme operator is the 'debtor,' and each investor is a 'creditor.' The profiting investors are the recipients of the Ponzi scheme operator's fraudulent transfer." Donell v. Kowell, 533 F.3d 762, 767 (9th Cir. 2008) (citations omitted). "The policy justification is ratable distribution of remaining assets among all the defrauded investors." Id. at 770.[4] As the trustee puts it, "[i]f creditor status were enough to immunize a transfer from section 548 avoidance by magically transforming it into a preference, then a trustee could never avoid transfers made as return of principal under section 548" (Trustee's Opposition, filed Aug. 26, 2015, at 16:20-17:1), which trustees can do in cases of actual fraudulent transfers to transferees not acting in good faith. Donell v. Kowell, 533 F.3d 762, 771 (9th Cir. 2008) ["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.' However, there is a 'good faith' defense that permits an innocent winning investor to retain funds up to the amount of the initial outlay."].

Fourth, a close analysis of Boston Trading reveals that it does not stand for the proposition for which GECC cites it. As stated in its reply, GECC cites the case as "establish[ing] that fraudulent transfer claims do not lie against legitimate creditors receiving payment on legitimate debt, even where the transferee may have had reason to suspect the source of the funds and knew that the transferor was a fraudster." Reply at 3:16-18. Where GECC goes wrong is in focusing on the status, knowledge, and behavior of the transferee – as, for example, a "legitimate

creditor receiving payment on legitimate debt" and the transferee's knowledge "that the transferor was a fraudster," whereas for purposes of an actual fraudulent conveyance, the initial focus is on the transferor and only the transferor. That is, the first question the court must decide is whether the transferor made the transfer "with actual intent to hinder, delay, or defraud" his or her creditors. § 548(a)(1)(A). There is nothing in the statute to suggest that a payment on a legitimate debt to a legitimate creditor cannot be an actual fraudulent conveyance if it was made with the actual intent on the part of the transferor to hinder, delay, or defraud his or her creditors.

This is where GECC departs from the actual holding in Boston Trading; that is, the holding as applied to the facts in the case, as opposed to the court's general conclusions about fraudulent transfers and preferences. The court acknowledged that the Massachusetts statute it was considering "makes 'fraudulent' every transfer made 'with actual intent' (as opposed to 'intent presumed in law') to 'hinder, delay or defraud . . . creditors.'" Boston Trading, 835 F.2d at 1510. The court then held, with regard to the specific facts in the case:

> In effect, the Receiver argues that Shaw and Kepreos took the $ 473,000 from BTG by fraud (or other dishonest means) and paid it to Burnazos who had full knowledge of their dishonesty.
>
> We rephrase the legal question slightly both to reflect the evidence and to avoid the potentially confusing coincidence that we are dealing with a form of initial dishonesty (i.e., the 'churning' of accounts by Shaw and Kepreos) that itself happens to be called fraud. Suppose that S & K, officers of Corporation C, obtain C's money through dishonest means (larceny, fraud, etc.) and use it to pay a debt that S & K owe B, a transferee who knows of, but did not participate in, S & K's dishonesty. Does [the Massachusetts actual fraudulent transfer statute] permit C to recover its money from B? We think the district court correctly ruled that [it] does not.
>
> First, we have found no modern case . . . that has found a fraudulent conveyance in such circumstances. That is not surprising, for the fraud or dishonesty in this example concerns not S & K's transfer to B, but the manner in which the original debt to C arose. Fraudulent conveyance law is basically concerned with transfers that 'hinder, delay or defraud' creditors; it is not ordinarily concerned with how such debts were created.

Id. (first emphasis added). In other words, the court found no actual intent to defraud in the transfer the receiver was challenging, only in the manner in which the transferors had acquired the money in the first place.

The court later referred to the facts before it, "where the only fraud concerns the source of the funds transferred" (id. at 1513 (emphasis in original)), and concluded that "the only 'fraud' shown in respect to Shaw and Kepreos concerns the source of the debt to NIS, not the transfer to Burnazos. That kind of fraud – dishonesty in the creation of the debt – is (in the circumstances present here) not the kind of fraud that the [Massachusetts actual fraudulent transfer statute] addresses." Id. at 1517 (emphasis in original). In other words, the only fraud the court found was in the way the transferors had acquired the money they transferred to the transferee; there was no evidence the transferors made the transfer – the one challenged by the receiver – with the actual intent to hinder, delay, or defraud

creditors. The case simply does not support the conclusion GECC draws from it – that regardless of the transferor's intent in making the challenged transfers, "where, as here, the transfers at issue are used to pay a legitimate creditor a legitimate debt those transfers are not "voidable" in the first instance . . . ." Reply at 3:13-15.

GECC fares no better with the second case it cites, although the facts appear at first glance more similar to those in this case. Sharp Int'l Corp. v. State St. Bank & Trust Co. (In re Sharp Int'l Corp.), 403 F.3d 43 (2nd Cir. 2005), involved a debtor company that "was looted by its controlling shareholders." 403 F.3d at 46. The bankruptcy trustee then sued, under New York fraudulent transfer law, one of the debtor's lenders, State Street Bank, "which suspected the fraud and extricated itself in a way that, according to [the trustee], facilitated the victimization of other lenders and the continued looting of [the debtor] itself." Id. The bankruptcy court dismissed the trustee's complaint on a Rule 12(b)(6) motion; the district court affirmed, holding, with respect to the trustee's actual fraudulent transfer claims, that the trustee, although he had alleged actual knowledge of the fraud on the part of State Street, "had not alleged that State Street 'participated in' or 'induced' the [controlling shareholders'] fraud." Id. at 49.

The factual allegations in Sharp Int'l are similar to those in the present case. In that case, the controlling shareholders "falsified sales, inventory, and accounts receivable, and invented customers, in order to report fictitious revenue on [the company's] nonpublic financial records" (403 F.3d at 46), fraudulently reporting that its sales were much higher than they were, thus enabling the shareholders to borrow more and more money, which they then diverted to themselves. After its loans were made, State Street began to suspect problems from the company's "refusal to comply with accounting procedures required under the [parties'] loan agreement," its "fast growth and voracious consumption of cash" (id. at 47), and State Street's responsible officer's experience with a fraud at another company. State Street hired both outside counsel and a financial investigation firm to conduct a formal investigation. It also asked for more information about the company's customers, asked to see its outside auditor's work papers, requested formal confirmation of accounts receivable, reviewed checks for insider payments, and reviewed Dun & Bradstreet reports on several of the company's customers. When this information was either refused or turned up yet more suspicious circumstances, the trustee alleged, State Street "arranged quietly for [the shareholders] to repay the State Street loan from the proceeds of new loans from unsuspecting creditors . . . ." Id.

The court of appeals found these allegations insufficient to support a claim against State Street for aiding and abetting breaches of fiduciary duty because they did not sufficiently allege that State Street knowingly induced or participated in the fraud. 403 F.3d at 50. Although it assumed for purposes of its decision that "State Street knew about the looting as well as about the use of phony books and records to obtain loans" (id.), the court found that "the complaint says no more than that State Street relied on its own wits and resources to extricate itself from peril, without warning persons it had no duty to warn." Id. at 51. As to the actual fraudulent conveyance claim, however, the focus was, as in Boston Trading, on the absence of fraud in the particular transfer the trustee sought to avoid. The court held that the claim "fails for the . . . reason that [the trustee] inadequately alleges fraud with respect to the transaction that [he] seeks to void, i.e., [the debtor's] $ 12.25 million payment to State Street." Sharp Int'l, 403 F.3d at 56, citing Boston Trading, 835 F.2d at 1510, for the proposition that "[f]raudulent conveyance law is basically concerned with transfers that 'hinder,

delay or defraud' creditors; it is not ordinarily concerned with how such debts were created." "The fraud alleged in the complaint relates to the manner in which [the debtor] obtained new funding from the Noteholders, not [the debtor's] subsequent payment of part of the proceeds to State Street." Sharp Int'l, 403 F.3d at 56.

In contrast, in the present case, the complaint contains detailed allegations that, taken as true, would support a finding that the transfers to GECC were made with the actual intent on the part of the transferor to hinder, delay, or fraud creditors.[5] The complaint alleges, first, that each of the transfers was made in furtherance of the Ponzi scheme in that, by causing the transfers to be made, its mastermind, Deepal Wannakuwatte, "hoped to appease GECC, thereby prolonging the duration of the fraudulent scheme by: (a) avoiding any adverse final judgment or findings of fact in litigation; (b) preventing knowledge of his various fraudulent schemes—and by extension, the 'wholesale' division fraud—from becoming more widespread; and/or (c) otherwise enabling IMG to remain in operation and the fraud to continue." Trustee's Complaint, filed June 16, 2015, at 15:15-19. The complaint goes on:

> at the time each of the Settlement Transfers was made, Deepal Wannakuwatte understood that causing those transfers to be made would inevitably harm IMG's and Olivehurst's creditors. Wannakuwatte knew that he had operated a Ponzi scheme, that he had repeatedly defrauded investors into providing financing for IMG's functionally non-existent "wholesale" division, and that IMG's investors would not be repaid when his scheme ended. Wannakuwatte further knew that Olivehurst, IMG, and Relyaid were hopelessly insolvent. Deepal Wannakuwatte knew that causing the Settlement Transfers would harm investors by both: (a) prolonging the scheme and (b) reducing the amount of funds available to repay creditors. Finally, Wannakuwatte knew that using funds to pay off GECC, rather than invest in product, constituted a fraud upon the investors whom had provided funds to Olivehurst.

Id. at 16:1-3. The complaint also alleges sufficient ownership and control by Wannakuwatte over Relyaid, IMG, and Olivehurst to impute his intent to them.

These allegations are more than sufficient to state a claim under §§ 548 and 550 upon which relief can be granted. To be clear, there was no indication in either the Boston Trading or the Sharp Int'l decision that the plaintiff's complaint contained such allegations. For the reasons stated, the court rejects GECC's contention that the trustee's claim is nothing more than a time-barred preference claim.

II. The Question of Duty

Next, GECC contends the complaint cannot stand because "the Trustee can never plead facts which would create the duty upon which her fraudulent transfer claim is premised." Mot. at 4:6-7. The problem with the argument is simple: duty is not an element of a fraudulent conveyance claim. Thus, there is no requirement that the plaintiff plead or prove the transferee had any sort of duty.

GECC frames the issue in terms of law other than the law of fraudulent conveyances:

> GE Capital did not owe a duty to its borrower and guarantors beyond any

> duties expressed in the underlying Equipment Loan Agreement. . . . A lender's decision to exercise rights granted by contract cannot form the basis of a fraudulent transfer claim because no duty to a guarantor or other creditors is breached under these circumstances. The Trustee does not and cannot allege that anything in the Equipment Loan Agreement created a duty to IMG or its creditors requiring GE Capital to disclose anything to anyone about its efforts to collect on the loan. Furthermore, even assuming a failure to disclose material facts known only to one party, no cause of action lies unless there is a fiduciary duty or confidential relationship imposing a duty to disclose. The Trustee does not allege any duty or confidential relationship which required GE Capital to disclose anything to IMG's creditors.

Mot. at 13:3-5; 13:19-14:5 (citations omitted). The authority GECC cites for these propositions, Sipe v. Countrywide Bank, 690 F. Supp. 2d 1141, 1153 (E.D. Cal. 2010), and Cal. Civ. Code 1710(3), has nothing to do with fraudulent conveyance law.[6]

In its reply, GECC seems to back away from its theory that a breach of duty is an element the trustee must plead and instead frame the duty issue more in terms of whether GECC acted in good faith when it took the payments. The court will return to this aspect of the discussion below.

III. The Ponzi Scheme Presumption

Next, GECC claims the trustee's complaint fails because it does not "includ[e] specific facts supporting a reasonable inference that the challenged transfers are connected to a Ponzi scheme" (Mot. at 14:4-5), and therefore, the Ponzi scheme presumption of actual fraud does not apply. GECC relies heavily on the fact that it is not alleged to have been an investor in the Ponzi scheme. First, the court has already concluded that the trustee's complaint sufficiently alleges actual fraud on the part of the transferor to state a claim; thus, application of the Ponzi scheme presumption is not necessary.

However, the court will also deny the motion on the independent basis that the allegations of the complaint are sufficient to state a claim based on the Ponzi scheme presumption. The trustee has cited a number of cases supporting the proposition that, depending on the connections between the Ponzi scheme and the payments to the lenders, the presumption may be applied against commercial lenders who were not investors in the Ponzi scheme. GECC, on the other hand, cites Klein v. Bd. of Trs. of the Cal. State Univ. (In re Moriarty), 2014 Bankr. LEXIS 4802 (Bankr. C.D. Cal. 2014). In that case, a couple named Moriarty made a donation to Cal Poly which Cal Poly agreed to and did use to purchase a new video scoreboard for its stadium and to put the name of the couple's business at the top of the scoreboard. When the couple later filed bankruptcy, the trustee in their case sued to avoid the transfer under § 544 of the Bankruptcy Code and California fraudulent transfer law. The court granted Cal Poly's Rule 12(b)(6) motion – with leave to amend – because the

> complaint does not contain facts describing the Moriarty Ponzi Scheme nor does it contain specific facts to support a reasonable inference that the subject transfers were connected to the Moriarty Ponzi Scheme. Furthermore, Klein's complaint does not allege sufficient facts to form the basis for a finding that the subject transfers actually hindered, delayed or defrauded a creditor of the Debtor or that the Debtor intended the subject transfers to do so on the date of the transfer.

2014 Bankr. LEXIS 4802, at *27.

The case does not support GECC's position here because, unlike the trustee in Moriarty, the trustee has alleged sufficient connections between the Ponzi scheme and the payments to GECC to state a claim to relief based on the Ponzi scheme presumption. First, she has made detailed allegations concerning the Ponzi scheme itself. She has also alleged IMG routinely used the name of consolidated debtor Relyaid (GECC's borrower) in its marketing materials to potential investors in the scheme; that Wannakuwatte pled guilty and was convicted for his role in the scheme; that a large portion of the loan proceeds from GECC were deposited into "the primary bank account through which Ponzi scheme payments to investors were made" (Compl. at 11:16); that other proceeds went to Wannakuwatte, his spouse, IMG, and another consolidated entity; that the funds used to make the payments to GECC came from IMG investors; and that, based on the facts alleged above, the payments were made in furtherance of the Ponzi scheme.

IV. GECC as a Net Loser

GECC next argues that "[t]he Trustee cannot have it both ways." Mot. at 16:13. "She relies on the Ponzi scheme presumption while refusing to recognize that the net winner rule applies. Were the Ponzi scheme presumption applicable, and the transfers at issue were part of the underlying scheme, thus giving rise to the presumption, that presumption operates only against 'net winners.'" Mot. at 16:13-16. (It is undisputed that the payments made to GECC totaled less than the amount GECC loaned Relyaid.)

This argument improperly conflates the Ponzi scheme presumption and the "net winner rule."[7] The Ponzi scheme presumption comes into play only with respect to the transferor's intent in making the challenged transfers; that is, it is relevant solely to the trustee's case-in-chief for avoidance of an actual fraudulent conveyance. The "net winner rule," in contrast, concerns only the issue whether the recipient of the transfer gave reasonably equivalent value to the transferor in exchange for the transfer. Thus, it comes into play solely in connection with (1) the trustee's case-in-chief for avoidance of a constructive fraudulent conveyance under § 548(a)(1)(B) and/or the related state law provision, and (2) the "for value" portion of the transferee's "good faith and for value" defense under § 548(c) and/or related state law provisions. The "net winner" rule is really nothing more than the recognition that a Ponzi scheme investor has a restitution claim against the debtor for the amounts the investor paid into the scheme, the satisfaction of which constitutes reasonably equivalent value for the payments the investor received back before the scheme collapsed. This brings the court to GECC's final argument.

V. The Issue of Good Faith

GECC's final argument is that "[a]ssuming the Trustee adequately pled a fraudulent transfer claim, the complaint must be dismissed as GE Capital is a good faith creditor which took for value." Mot. at 18:17-18. The problem here is that GECC's good faith is a component of its good faith and for value defense, which, in the context of an actual fraudulent conveyance, is an affirmative defense. "It is not incumbent on the plaintiffs to plead lack of good faith on defendants' part because lack of good faith is not an element of a plaintiff's claim under Section 548(a)(1)[(A)]." Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P. (In re Bayou Grp., LLC), 362 B.R. 624, 639 (Bankr. S.D.N.Y. 2007); see also Brandt v. KLC Fin., Inc. (In re Equip. Acquisition Res., Inc.), 481 B.R. 422, 429 (Bankr. N.D. Ill.

2012); Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC), 440 B.R. 243, 256 (Bankr. S.D.N.Y. 2010).

Whether GECC acted in good faith is a question of fact that would ordinarily not be appropriately resolved on a motion to dismiss. "The element of good faith under section 548(c) of the Code, bearing upon a transferee's motivations, is indisputably a factual question that may not be determined on the face of [a] complaint." In re Bernard L. Madoff Inv. Sec., 440 B.R. at 256. However, GECC contends that "based on the allegations in the Complaint viewed in the light most favorable to the Trustee, GE Capital satisfies its burden to establish good faith under section 548(c)." Mot. at 19:16-18.

"Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint." Asarco, LLC v. Union Pac. R.R. Co., 765 F.3d 999, 1004 (9th Cir. 2014) (citations omitted). On the other hand, "[i]f, from the allegations of the complaint as well as any judicially noticeable materials, an asserted defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper." Id. (citation omitted). In GECC's view, the complaint fails because it does not allege GECC knew of the Ponzi scheme and because the "red flags" alleged in the complaint "do not come close to suggesting knowing or reckless participation" in the Ponzi scheme. Mot. at 19:19-20. The argument fails for two reasons. First, as discussed below, "knowing or reckless participation" in the Ponzi scheme is not the appropriate standard for the good faith test in this circuit. GECC's reliance in its motion on Sharp Int'l and in its reply on B.E.L.T., Inc. v. Wachovia Corp., 403 F.3d 474 (7th Cir. 2005), is misplaced. Both cases were decided under state fraudulent transfer laws (New York and Illinois, respectively), and both applied a standard for assessing good faith that is not the standard in the Ninth Circuit under § 548©. Second, the court is not inclined to determine the factual issues attendant to a good faith defense on a Rule 12(b)(6) motion.

"[G]ood faith is not susceptible of precise definition" (In re Agricultural Research & Tech. Group, Inc., 916 F.2d 528, 536 (9th Cir. 1990) ("Agretech") (citation omitted, internal quotation marks omitted)), and the analysis, being intensely factual, must be made on a case-by-case basis. Meeks v. Red River Entm't (In re Armstrong), 285 F.3d 1092, 1096 (8th Cir. 2002). Nevertheless, the courts have provided guidance. Thus, "courts look to what the transferee objectively 'knew or should have known' in questions of good faith, rather than examining what the transferee actually knew from a subjective standpoint." Agretech, 916 F.2d at 535-56. Facts that should have put a reasonable person on notice of a fraudulent scheme, which would have been discovered through a diligent inquiry, constitute bad faith in receiving fraudulent transfers. Id. at 539; see also Woods & Erickson, LLP v. Leonard (In re AVI, Inc.), 389 B.R. 721, 736 (9th Cir. BAP 2008) [looking to what the transferee objectively "knew or should have known," not what he knew from a subjective standpoint]; Plotkin v. Pomona Valley Imports (In re Cohen), 199 B.R. 709, 720 (9th Cir. BAP 1996) ["Facts sufficient to warrant a finding of inquiry notice are . . . sufficient to defeat the good faith that is essential to the § 548(c) safe harbor."].[8]

GECC's framing of the issue in its reply crystallizes the distinction between its view of the applicable good faith standard and the one just described, which applies in the Ninth Circuit. In GECC's view, "'bad faith' is encouraging, aiding, abetting, or concealing a further fraud, embezzlement or Ponzi scheme . . . ." Reply at 2:27. As just discussed, the standard in this circuit for a transferee's good faith defense is not limited to someone who "encouraged, aided, abetted, or

concealed" a fraud.

For the reasons stated, the court concludes the plaintiff's complaint contains factual allegations sufficient to state a claim to relief under § 548(a)(1)(A), and the motion will be denied. The court will hear the matter.

---

1 Unless otherwise indicated, all statutory references are to the United States Bankruptcy Code, Title 11, United States Code.

2 GECC's contention that the complaint fails to state fraud with particularity is woven throughout the motion, not separately treated; the court addresses it in like fashion.

3 As discussed below, this analysis of the good faith standard appears to be contrary to Ninth Circuit law.

4 This latter statement blunts GECC's insistence on the differing purposes behind preference and fraudulent conveyance law as decisive.

5 It is important to note that the verbs, as used in § 548(a)(1)(A), are in the disjunctive; thus, the trustee need establish only one of the three with respect to the payments to GECC – that they were made with the actual intent to hinder creditors, the actual intent to delay creditors, or the actual intent to defraud creditors. In re Stanton, 457 B.R. 80, 93-94 (Bankr. D. Nev. 2011); In re Roca, 404 B.R. 531, 543-44 (Bankr. D. Ariz. 2009).

6 GECC also cites Sharp Int'l, 403 F.3d at 52, n.2, which, as discussed above, was a fraudulent conveyance case; however, GECC's citation is to a section of the opinion concerning a claim for aiding and abetting the breach of a fiduciary duty.

7 The presumption is simply stated: "[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud." Donell v. Kowell, 533 F.3d 762, 770 (9th Cir. 2008) (citations omitted, internal quotation marks omitted). The net winner "rule," more accurately called the "netting rule," is simple as well:

> Amounts transferred by the Ponzi scheme perpetrator to the investor are netted against the initial amounts invested by that individual. If the net is positive, the receiver has established liability, and the court then determines the actual amount of liability, which may or may not be equal to the net gain, depending on factors such as whether transfers were made within the limitations period or whether the investor lacked good faith. If the net is negative, the good faith investor is not liable because payments received in amounts less than the initial investment, being payments against the good faith losing investor's as-yet unsatisfied restitution claim against the Ponzi scheme perpetrator, are not avoidable within the meaning of UFTA.

Id. at 771.

8 Other circuits apply the same or a similar standard. Thus, "[a] transferee does not act in good faith when he has sufficient [actual] knowledge to place him on inquiry notice of the debtor's possible insolvency." Goldman v. Capital City Mortg. Corp. (In re Nieves), 648 F.3d 232, 238 (4th Cir. 2011) (citation omitted). "[G]ood faith under § 548(c) should be measured objectively and . . . if the circumstances

would place a reasonable person on inquiry of a debtor's fraudulent purpose, and a diligent inquiry would have discovered the fraudulent purpose, then the transfer is fraudulent." Jobin v. McKay (In re M & L Bus. Mach. Co.), 84 F.3d 1330, 1338 (10th Cir. 1996). "[T]he recipient of a voidable transfer may lack good faith if he possessed enough knowledge of the events to induce a reasonable person to investigate." Bonded Fin. Servs. v. European Am. Bank, 838 F.2d 890, 897-98 (7th Cir. 1988).

6.	14-21822-D-7 SCB-2	EMMA/MACK JACKSON	MOTION TO EMPLOY BAR NONE AUCTION AS AUCTIONEER, AUTHORIZING SALE OF PROPERTY AT PUBLIC AUCTION AND AUTHORIZING PAYMENT OF AUCTIONEER FEES AND EXPENSES 8-12-15 [26]

Tentative ruling:

This is the trustee's motion for authority to sell a vehicle at auction and to employ Bar None Auctions to conduct the auction. The motion was brought pursuant to LBR 9014-1(f)(1) and no party-in-interest has filed opposition. However, the court is not prepared to grant the motion at this time because the declaration supporting the employment of Bar None Auctions is insufficient to permit the court to conclude that Bar None is a disinterested person and does not hold or represent an interest adverse to the estate, as required by § 327(a) of the Bankruptcy Code.

Bar None's president testifies that he and his firm are disinterested persons and that neither he nor anyone on his staff holds or represents an interest materially adverse to the interests of the trustee or the estate "by reason of any direct or indirect relationship to, connection with, or interest in, the Debtors or the Chapter 7 Trustee." J. Seidel Decl. at 3:4-6. Whether a professional is a disinterested person and whether a professional holds or represents an adverse interest are conclusions the court is to draw, not the professional. Further, the declarant refers in that sentence only to the absence of a relationship to, connection with, or interest in the debtors or the trustee; he does not mention creditors or other parties-in-interest. The declarant also states that neither he nor anyone on his staff "has any connection with the Debtors, the Chapter 7 Trustee, the United States Trustee's Office, or any person employed in the United States Trustee's Office, or their respective attorneys and accountants." Id. at 3:9-11. Again, noticeably missing is any reference to the creditors and other parties-in-interest in the case. As a result of these omissions, the declaration does not comply with Fed. R. Bankr. P. 2014(a) or LBR 2014-1.

The court will hear the matter and, if an appropriate supplemental declaration has been filed by the time of the hearing, with a file-stamped copy available for the court's review, the court will grant the motion. Otherwise, the court will consider continuing the hearing.

7. 14-22526-D-7 DAVID JONES MOTION FOR CONTEMPT
PLC-4 8-6-15 [143]

Tentative ruling:

This is the debtor's motion for an order finding John Meredith to be in civil contempt for violating the automatic stay, for which the debtor asks that Meredith be "sanctioned accordingly" and ordered to pay the debtor's reasonable attorney's fees. Meredith has filed opposition and requested sanctions of his own – against the debtor's counsel. The debtor has filed a response. For the following reasons, the motion will be denied, as will Meredith's request.

The debtor and Meredith are parties to an adversary proceeding in this court brought by Meredith against the debtor for a determination that an alleged debt owed by the debtor to Meredith is nondischargeable and for denial of the debtor's discharge. The adversary proceeding was commenced in June of 2014 and is set for a pretrial conference on November 12, 2015.

This motion arises out of a message left on the debtor's personal cell phone on July 10, 2015 wherein Meredith is alleged to have said, in a condescending tone: "Yeah David Jones, this is John. I was just wondering if you want to, ah, sit down and settle this thing up or do you want to continue to keep bantering here. I don't know if you are getting tired of it yet. But anyways, if you're interested, you know how to contact me. Maybe we can put this thing to bed if you're willing. So anyways, have a good day." Debtor's Ex. 2. The debtor testifies to his receipt of this message and to its accurate transcription. He adds that he has received several other calls at his place of employment which showed Meredith on the caller ID. He states that in each instance, the caller hung up before saying anything. The debtor testifies to being very irritated by these calls and hang-ups and to having felt a surge of anxiety and being sick to his stomach when he saw the caller ID on his personal cell phone, which happened while he was in a hospital emergency room after breaking a bone and spraining his ankle. The debtor decided not to take the call at that time; he adds that he was in pain and nervous and upset about his injury when he heard Meredith's voice and listened to the message the next day.

Meredith does not deny leaving this message.[1] By way of background, he testifies to his claim against the debtor having dragged on for over two years, through mediation, arbitration, a lawsuit against Telecomm, a lawsuit against Everything Radios, Inc., the death of another individual, Viliami Paea and his probate proceedings, the bankruptcies of Telecomm and the debtor, and the current adversary proceeding, all of which Meredith says have generated attorney's fees of almost $100,000. Meredith states he has "felt increasing pressure to resolve these cases." Meredith Decl., filed Aug. 23, 2015, at 4:5-6. With regard to the cell phone message he left for the debtor, Meredith states:

> **Accordingly, on a single occasion, I called David Jones directly on his cellular telephone to see if he was interested in settling all these cases. David Jones did not answer, and so I left a voice message inviting him to discuss settlement. I did not intend to harass him, or annoy him, and I sincerely only wanted to see if he was interested in settling these cases. [¶] I was aware that David Jones filed bankruptcy. I was not aware, nor was I ever informed, that I was prohibited from contacting David Jones at all.**

Id. at 4:7-15.

Meredith claims his message did not violate the automatic stay. He cites Zotow v. Johnson (In re Zotow), 432 B.R. 252 (9th Cir. BAP 2010), in which the Bankruptcy Appellate Panel stated that "mere requests for payment," unaccompanied by coercion, harassment, or pressure to pay, do not violate the stay. 432 B.R. at 258. The communication involved in Zotow was a payment change notification from a mortgage servicer, as opposed to a voice message from an individual creditor left on the debtor's personal cell phone. In any event, for the reasons discussed below, the court need not determine whether Meredith's message to the debtor violated the stay.

First, the fact that Meredith may have contacted David Jones to discuss settlement of an adversary proceeding filed post-petition does not per se violate the automatic stay. Although a party's attorney may be prohibited from contacting an individual who is a party to litigation who is represented by an attorney, there is no prohibition to parties directly communicating with one another regarding ongoing litigation.[2] Second, the court finds that the message, even if it did violate the stay, did not significantly harm the debtor. It appears the debtor's accident and resulting visit to the emergency room worsened his reaction to seeing Meredith's name on his caller ID. The debtor claims the message "added insult to injury" (Jones Decl., filed Aug. 6, 2015, at 3:5), and he characterizes Meredith as "[going] after [the debtor's] personal peace and protection the bankruptcy court is supposed to provide [him]." Id. at 3:18-19. However, Meredith is not alleged to have known about the accident and emergency room visit, and in the court's view, the message itself is relatively innocuous. In short, the court is simply not convinced there has been compensable damage here.

The debtor also refers in his declaration to an alleged email, a copy of which he filed as an exhibit, in which Meredith apparently referred to doing "whatever it takes to bury [the debtor]" (Debtor's Ex. 1) and to putting the debtor out business. The debtor attempts to tie the email in to the present motion by stating, "That is exactly what JOHN MEREDITH did to me, put me out of business and I feel like he is trying to bury me." Jones Decl., at 2:9-10. The court will disregard the email as irrelevant as it predates the filing of the debtor's bankruptcy case by eight months, and therefore, has nothing to do with whether Meredith has violated the automatic stay. Although the email might be said to have some bearing on Meredith's attitude toward the debtor, it is far too attenuated in time to be of relevance here.

Finally, Meredith points out that the cited email was from him to his attorney. He claims the debtor obtained the email by hacking into Meredith's email account in violation of Cal. Pen. Code § 502 and the attorney-client privilege, and he complains that the debtor previously obtained three other emails between Meredith and his attorney, also illegally, which the debtor attached to his answer in the adversary proceeding. Meredith concludes that "the Debtor's accessing and filing with the Court e-mail communications between John Meredith and his Attorney must be found improper and Debtor's counsel should be sanctioned." Meredith's Opp., filed Aug. 23, 2015, at 9:20-22. According to Meredith's exhibits, his attorney raised this issue with the debtor's attorney ten months ago, stating he would seeks damages, injunctive relief, and sanctions if the debtor's attorney did not ask the court to remove the emails from the record. The debtor's attorney responded that the email account had been used and paid for by Telecomm, that Meredith gave the password to the debtor, and that the debtor continued to monitor the account for Telecomm business orders. Meredith's attorney rejected that analysis as soon as he received it, and reiterated his demand that the debtor's attorney take corrective action.

That last communication on this subject was made almost ten months ago, and since then, so far as the record reveals, neither party has taken any action with respect to the emails. Although the debtor has submitted a declaration in response to Meredith's charges, these issues are unrelated to the debtor's motion for an order of contempt and were not properly raised in opposition to that motion. Further, the court is certainly not prepared to conclude that a crime has been committed or to make any findings regarding the issue of the attorney-client privilege, whether it has been waived, and so on. Accordingly, Meredith's request for sanctions will be denied.

For the reasons stated, the motion and Meredith's request for sanctions will both be denied. The court will hear the matter.

---

1 Meredith has, however, objected that the transcription of the message is unauthenticated and inadmissible. The court does not agree. The transcription is authenticated by the debtor, who testifies he heard the message. The transcription is not hearsay as it is the statement of a party opponent. Thus, the court will consider it.

2 In his reply, the debtor cites McHenry v. Key Bank (In re McHenry), 179 B.R. 165 (9th Cir. BAP 1995), for the proposition that "[a] phone call to 'settle' a debt is a violation of the stay." Debtor's Response, filed Sept. 1, 2015, at 4:11. The debtor did not provide a pin cite and the court has not found that statement in the reported decision, although the Panel did find the particular phone call in that case to have been a violation of the stay. 179 B.R. at 167. What the debtor does not point out is the Panel's conclusion that, although the debtors were "inconvenienced and annoyed," they "had shown no actual damages." Id. At 168. The court reaches the same conclusion in this case.

8. 15-25930-D-11 SILVERHAWK INC. STATUS CONFERENCE RE: VOLUNTARY PETITION
7-28-15 [1]

Final ruling:

This case was dismissed on August 13, 2015. As a result the status conference is concluded. No appearance is necessary.

9. 06-22532-D-7 RIO MORALES MOTION FOR ADMINISTRATIVE EXPENSES
SMD-3
8-10-15 [584]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to pay administrative expense claims resulting from taxes incurred by the estate is supported by the record. As such the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

10. 15-24140-D-7 DONALD/CONSTANCE SPAINHOWER
TSC-1
BANK OF AMERICA, N.A. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-4-15 [14]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtors' Statement of Intentions indicates they will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

11. 15-23746-D-7 GORDON BONES
BLF-2

CONTINUED AMENDED MOTION TO COMPEL ABANDONMENT
6-25-15 [31]

12. 15-24146-D-7 ROY/GAIL LINGLEY
JFL-1
CARRINGTON MORTGAGE SERVICES, LLC VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
8-12-15 [24]

Final ruling:

This matter is resolved without oral argument. This is Carrington Mortgage Services, LLC'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.

13. 14-32452-D-11 JOHN RODRIGO

ORDER TO SHOW CAUSE
8-14-15 [98]

14. 10-47553-D-7 EAS-6 — CHARLES PROTTEAU — MOTION TO AVOID LIEN OF ARCADIA, INC. 8-6-15 [70]

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.

15. 10-47553-D-7 EAS-7 — CHARLES PROTTEAU — MOTION TO AVOID LIEN OF MICHAEL P. ALLEN GENERAL CONTRACTORS, INC. 8-6-15 [85]

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.

16. 10-47553-D-7 EAS-8 — CHARLES PROTTEAU — MOTION TO AVOID LIEN OF L.A. COMMERCIAL GROUP, INC. 8-6-15 [80]

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.

17. 10-47553-D-7 EAS-9 — CHARLES PROTTEAU — MOTION TO AVOID LIEN OF FIDELITY RECOVERY SERVICE 8-6-15 [75]

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.

18. 09-29162-D-11 SK FOODS, L.P. CONTINUED OMNIBUS OBJECTION TO CLAIMS
SH-316 2-25-15 [5500]

Final ruling:

Pursuant to a stipulated order filed August 19, 2015, this matter is removed from calendar.

19. 14-23368-D-7 JESSE M. LANGE MOTION FOR ADMINISTRATIVE EXPENSES AND/OR MOTION TO PAY
BLL-13 DISTRIBUTOR, INC. 7-24-15 [109]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to pay administrative expense claims resulting from taxes incurred by the estate is supported by the record. As such the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

20. 14-23368-D-7 JESSE M. LANGE MOTION FOR COMPENSATION FOR BYRON LEE LYNCH, TRUSTEE'S ATTORNEY
BLL-14 DISTRIBUTOR, INC. 7-24-15 [103]

Final ruling:

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

21. 15-22975-D-7 LETICIA GONZALEZ MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 7-31-15 [17]
SANTANDER CONSUMER USA, INC.
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 August 18, 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.

22. 15-23286-D-7 NBC-2 — TOBY GARMAN AND ANGELA JOHNSON-GARMAN — MOTION TO AVOID LIEN OF PACIFIC SERVICE CREDIT UNION 7-27-15 [20]

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 debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

23. 13-35288-D-7 14-2097 GENERAL COUNCIL OF THE ASSEMBLIES OF GOD V. BOLE ET — DUSTIN/KAREN BOLE — MOTION TO COMPEL, MOTION TO AMEND DISCOVERY SCHEDULE 7-9-15 [102]

Tentative ruling:

This is the defendants' motion to compel the plaintiff to provide further responses to discovery requests and to extend the discovery bar date in this adversary proceeding. The plaintiff has filed opposition. For the following two reasons, the motion will be denied.

The defendants claim "the Plaintiffs have refused to provide the required discovery responses in this matter, have misrepresented when responses would be forthcoming, and have failed to communicate, leaving Defendants no other choice than to seek Court intervention." Defendants' Motion, filed July 9, 2015, at 1:20-23. The specific requests to which the defendants are seeking additional responses are requests for production of documents which were filed and apparently served on February 10, 2015 and April 14, 2015, respectively.

A brief procedural history of this adversary proceeding is in order. The proceeding was commenced on April 8, 2014. On September 17, 2014, almost a year ago, the parties filed a Joint Proposed Discovery Plan in which they proposed that all non-expert discovery would be completed by January 15, 2015; that expert discovery, if any, would be completed by March 15, 2015; and that dispositive motions would be filed by April 30, 2015. The court adopted roughly that schedule in a Scheduling Order issued September 18, 2014, setting the discovery bar date as January 30, 2015. On January 30, 2015, the parties filed a Joint Request to Extend Deadlines by 45 Days Pursuant to Stipulation, whereby they requested that the discovery bar date be extended to March 16, 2015. The request was granted by an Amended Scheduling Order filed February 2, 2015. Neither party filed anything further concerning the discovery bar date until the defendants filed this motion, on July 9, 2015. A pretrial conference was scheduled for September 17, 2015, and has since been continued by the court to October 1, 2015.

Thus, this motion was filed almost four months after the already-extended discovery bar date expired, 15 months after the adversary proceeding was commenced, and one year after the defendants filed their answer to the plaintiff's complaint. Although the parties originally agreed – on September 17, 2014 – to a discovery bar

date of January 15, 2015, and the court originally gave them until January 30, 2015, there is no indication in the record that the defendants conducted any discovery during those four and one-half months. Instead, they waited until February 10, 2015, shortly after the parties had agreed to extend the discovery bar date to March 16, 2015, before serving their first request for production of documents by the plaintiff. As the plaintiff had 30 days from the date of service to respond to the request, the defendants allowed themselves virtually no time to seek an order requiring further responses if the plaintiff's original responses proved insufficient.

The defendants have provided no explanation for these delays. The court is aware that the defendants are representing themselves, a fact the court has kept in mind throughout this proceeding. However, individuals representing themselves are bound by all applicable rules and law. Local Dist. Rule 183(a), incorporated herein by LBR 1001-1(c). It is clear the defendants were aware there would be a discovery bar date in this proceeding from as earlier as September 17, 2014, when they signed the joint discovery plan and agreed to be bound by a discovery bar date of January 15, 2015. They were also aware of the extended bar date, March 16, 2015, and agreed to it. There is nothing in the record to indicate the defendants were prevented from conducting discovery in a timely manner, and the court finds no reason to give them extra time to do so at this late stage.

Although not the primary reason, the motion will also be denied because the defendants have failed to meet and confer or attempt to meet and confer with the plaintiff in a good faith effort to obtain the requested discovery without court action, as required by Fed. R. Civ. P. 37(a)(1), incorporated herein by Fed. R. Bankr. P. 7037. At a status conference held July 9, 2015, the same day this motion was filed, the filing of the motion was raised and the court referred the parties to its decision in In re Sanchez, Adv. Proc. No. 06-2251,[1] for the standards to which the court holds parties in determining whether they have made a good faith effort to meet and confer. The defendants have offered nothing before or since to demonstrate they made any attempt to meet and confer. The plaintiff's counsel has testified she emailed the defendants, albeit late in the game (on August 21 and August 24), requesting a schedule to meet and confer and has received no response.

The moving and responding papers raise additional issues that need to be addressed briefly. First, the defendants appear concerned that they have obtained three boxes of discovery from the Northern California / Nevada District Resource Center Store which they have made available to the plaintiff, but the plaintiff has not picked them up or had copies made. The defendants state, "Plaintiffs' counsel, Ms. Gehrke, misrepresented to Defendants that the three (3) boxes of documents for Defendants' discovery would be scanned and sent in as discovery." Mot. at 5:4-6. The defendants also express concern that they may be prejudiced by "their inability to adequately and reasonably provide[] requested documentation." Id. at 1:27. The court is unsure what the defendants mean by "sent in as discovery" or why they are concerned about their ability to produce requested documents. However, the court will explain to the defendants that documents produced or made available in response to discovery requests are not "sent in" to the court; thus, at least at this time, there is no issue for the court to decide in regards to the three boxes of documents, and, so far as the court is aware, no reason the defendants could not offer the documents at trial if they choose.[2] The defendants' ability to submit those documents into evidence at trial assumes, of course, that the defendants comply with all applicable rules, including the Federal Rules of Evidence, with respect to the documents, and also assumes they include the documents in the list of exhibits in their pretrial statement.[3]

The defendants also refer in the motion to not having access to their depositions, apparently their deposition transcripts. According to the excerpts cited by the plaintiff, the defendants were made aware at the depositions that they could review the original transcripts at the court reporter's office. The plaintiff has no obligation to pay for copies for the defendants, and there is no indication the defendants have had a request to purchase copies denied.

Finally, with regard to its response to one of the defendants' document requests, the plaintiff refers to a "document summarizing Plaintiff's sales for an 8-year span to [a] third party, the Northern California & Nevada District Store." Resp. at 5:23-24. The plaintiff adds that "because this information is not public and affects the business interests of a third party, Plaintiff requests that the Court enter a protective order deeming such documents confidential and limiting their disclosure to the parties in this case, and only for the purposes of this case. Upon entry of an appropriate protective order, Plaintiff will provide the sales record to Debtors." Id. at 5:24-6:2. A request for a protective order is not properly made through an opposition to a motion to compel discovery. However, to resolve the matter in a practical fashion, assuming the defendants do not oppose an order requiring confidentiality as to these documents, the court will entertain the terms of such an order at the hearing.

To conclude, the defendants were made aware by the court's original scheduling order, issued September 18, 2014, just what the court meant by requiring that discovery be "completed" by the bar date and they were put on notice that requests to modify the scheduling order would "ordinarily be denied unless the moving party makes a strong showing of diligence in complying with this scheduling order." Scheduling Order, DN 54, at 9:10-12. They were also put on notice by that order of the court's standard for a good faith effort to meet and confer before filing a motion on a discovery dispute, as set forth in the court's Sanchez decision. Here, the defendants failed to make a good faith effort to meet and confer with the plaintiff about this motion and they have failed to make a showing of diligence in pursuing their discovery requests. For these reasons, the motion will be denied.

The court will hear the matter.

---

1 Sanchez v. Wash. Mutual Bank (In re Sanchez), 2008 Bankr. LEXIS 4239, 2008 WL 4155115 (Bankr. E.D. Cal. 2008).

2 Nor has the plaintiff raised an issue about those documents. The plaintiff's response is this: "While Debtor must make the documents available to Plaintiff, Plaintiff is not required to undertake the expense of processing those documents and has no obligations relevant to the Motion to Compel in connection with the three boxes of documents." Plaintiff's Resp., at 8:23-25.

3 The parties are cautioned that although certain deadlines were changed by the Amended Scheduling Order, the other terms and requirements of the original Scheduling Order, filed September 18, 2014, remain in effect. The Scheduling Order sets forth in detail the matters that must be included in the pretrial statements. The parties are also cautioned to carefully review the Notice of and Order for Trial that will be issued in this adversary proceeding following the pretrial conference.

24. 14-28694-D-11 RICHARD/JENNIFER GARCIA — MOTION FOR FINAL DECREE AND ORDER CLOSING CASE
CAH-6 — 8-3-15 [96]

Tentative ruling:

This is the debtors' motion for a final decree and order closing this chapter 11 case. The motion was noticed pursuant to LBR 9014-1(f)(1) and no opposition has been filed. However, the court has a concern; namely, that the debtors' counsel, Hughes Financial Law ("Counsel"), never obtained court approval of its employment and has never filed an application for approval of its compensation.

Counsel did not file its application for approval of its employment until the case had been pending for seven weeks. The application, which Counsel set for hearing a month later, generated a tentative ruling to deny the application because Counsel had failed to meet the disclosure requirements of Fed. R. Bankr. P. 2014(b) and because the application created confusion as to the nature of one attorney's affiliation with Counsel and as to the amounts that had been paid by the debtors to Counsel pre-petition. The hearing was continued to allow Counsel to supplement the record, which Counsel failed to do. The court therefore denied the motion, on December 22, 2014. The court stated at the hearing that the motion would be denied without prejudice, to which the attorney appearing for the debtors responded, "We'll refile, Your Honor." Yet in the nine months since that time, Counsel has not done so. As a result, it appears Counsel is entitled to no compensation for its services rendered in and in connection with this case.

Further, Counsel has never sought approval of its compensation. It is clear from Counsel's amended Rule 2016(b) statement, filed October 7, 2014, that the debtors paid Counsel at least $18,000 during the year prior to the commencement of this case and another $4,000 14 months before the case was filed, for a total of $22,000. In a declaration in support of Counsel's employment application, Anthony Hughes indicated that the parties initially believed, when this case was commenced, that the debtors still had a $13,000 credit in their account, but when all the billings were turned in, it was determined that all of the money – the entire $22,000 – had gone toward fees incurred in certain pre-petition state court litigation. This situation, according to Hughes, "actually left Debtors $0.00 retainer available for the filing of this case." Hughes Decl., filed Oct. 16, 2014, at 3:18-19. He added, "As a result of this error, the Hughes firm credited this amount back to the debtors for the filing of this case for customer service purposes." Id. at 3:19-20. Finally, he stated in that declaration that he "would seek court authorization for employment and payment of all fees pursuant to Bankruptcy Code §§ 327, 328, 330 and 331." Id. at 4:7-8. This testimony indicates the debtors began this case with a $13,000 credit to be applied to services to be rendered in the case. Counsel has never sought court approval to apply that $13,000 credit toward fees for Counsel's services in and in connection with this case.

It is possible Counsel views itself as having provided all of its post-petition services in this case at no charge to the debtors, since the $13,000 credit Counsel and the debtors initially believed the debtors had remaining was actually exhausted by the pre-petition state court litigation. That conclusion, however, is contradicted by Mr. Hughes' testimony in October of 2014 that Counsel had credited that amount "back to the debtors for the filing of this case for customer service purposes" and that he would seek court approval of Counsel's employment and

compensation. Therefore, if Counsel seeks to retain the $13,000, the court will require that Counsel seek approval of all of its fees and costs incurred in and in connection with this case, both pre- and post-petition, and that Counsel expressly address the issues raised by the court's tentative ruling for the November 19, 2014 hearing on its employment application, DN 42, which Counsel failed to address in response to that ruling or at all. As a result of this open issue, it is not appropriate that a final decree be entered or that the case be closed at this time.

The court will hear the matter.

25.	14-28694-D-11 CAH-7	RICHARD/JENNIFER GARCIA	MOTION FOR ENTRY OF DISCHARGE 8-3-15 [92]

26.	15-20998-D-7 MDM-3	OSCAR ORTIZ	MOTION TO ABANDON 7-22-15 [31]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to abandon real and personal property and the trustee has demonstrated the property to be abandoned is of inconsequential value to the estate. Accordingly, the motion will be granted and the moving party is to submit an appropriate order. No appearance is necessary.

27.	12-32504-D-11 ABS-44	THOMMAS/VIRGINIA YARAK	MOTION FOR FINAL DECREE AND/OR MOTION FOR ENTRY OF DISCHARGE 8-26-15 [599]

28. 15-24942-D-7 JESSICA MARTINEZ — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-19-15 [32]

29. 15-26574-D-7 CLAIRE BENOIT
JBC-1
TUSCANY ASSOCIATES LIMITED PARTNERSHIP VS. — MOTION FOR RELIEF FROM AUTOMATIC STAY
8-25-15 [23]

30. 14-26078-D-7 LUISITA SONGCO
ADJ-3 — CONTINUED MOTION FOR CONTEMPT
7-23-15 [101]

Final ruling:

Per the order entered on September 1, 2015 the hearing on this motion is removed from calendar. No appearance is necessary.

31. 15-26395-D-7 R & R RV SALES LLC — ORDER TO SHOW CAUSE
8-24-15 [16]