

**UNITED STATES BANKRUPTCY COURT**  
Eastern District of California

**Honorable Ronald H. Sargis**  
Chief Bankruptcy Judge  
Modesto, California

**September 29, 2016, at 2:00 p.m.**

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<b>1. <a href="#">16-90401</a>-E-11</b>	<b>NATIONAL EMERGENCY MEDICAL SERVICES David Johnston</b>	<b>CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 5-10-16 [<a href="#">1</a>]</b>
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Debtor's Atty: David C. Johnston

<b>The Status Conference is <span style="color:red">XXXXXXXXXXXXXXXXXXXXXXXXXX</span>.</b>
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Notes:

Continued from 8/4/16

Operating Reports filed: 8/15/16

Initial Status Report of Trustee filed 9/19/16 [Dckt 87]

**SEPTEMBER 29, 2016 STATUS CONFERENCE**

On September 19, 2016, Russell Burbank, the Chapter 11 Trustee, filed a Status Report. Dckt. 87. The Trustee reports:

- A. The Trustee reviewed the history of the Debtor's prior bankruptcy case and the entry of a judgment for \$263,664.00 in favor of NAGE in the U.S. District Court for the District of Massachusetts.
- B. The Chapter 11 Trustee has obtained approval and so employed counsel and an accountant.
- C. On August 12, 2016, the Debtor made an unauthorized payment of \$5,000.00 as a post-petition retainer to a law firm. The Trustee intends to recover these monies for the bankruptcy estate.
- D. The Trustee believes that it may be asserted that heretofore undisclosed employment agreement may exist with several of the Debtor's employees.

- E. The Trustee is proceeding with releasing the Debtor's lease space and reducing expenses.
- F. The Trustee is investigating, including consulting with the Debtor, possible restructures or administration of the Debtor's business so as to maintain it as a going concern rather than merely liquidating office equipment.

### **Notice of Intent to Sell Property**

On September 27, 2016, the Chapter 11 Trustee filed a Notice of Intent to Sell Personal Property. Dckt. 89. The Notice States:

- A. The Trustee intends to sell the personal property listed on Exhibit A to the Notice.
- B. The sale is made pursuant to 11 U.S.C. § 363 (the specific paragraph is not specified) and Federal Rule of Bankruptcy Procedure 6004.
- C. The property to be sold and the proposed purchase price are specified in the exhibits. The names of the purchasers, but not the items to be sold and sales prices, are listed in the Notice.
- D. Unless an objection is filed and served "on or before the date 7 calendar days prior to October 18, 2015, [sic]" "each sale shall occur on or after October 18, 2016."
- E. Confirmations signed by the proposed purchasers are attached as exhibits to the Notice.

A trustee may sell property of the estate, other than in the ordinary course of business, after notice and a hearing. 11 U.S.C. § 363(b)(1). The term "after notice and hearing" is defined by the Bankruptcy Code as follows:

(1) "after notice and a hearing", or a similar phrase--

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if--

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act; . . .

11 U.S.C. § 102(1). Federal Rule of Bankruptcy Procedure 6004 provides that notice of a proposed sale not in the ordinary course of business shall be given as provided in Federal Rule of Bankruptcy Procedure 2002(a)(2), (c)(1), (I), and (k).

Local Bankruptcy Rule 9014-1 specifies the procedure for motions to be presented to the court. Relief requested by from the court, when not specified to be by an adversary proceeding or an application, is brought by motion. Fed. R. Bankr. P. 9013. Local Bankruptcy Rule 9014-1(k) provides:

(k) Opportunity for Hearing.

(1) When an Order Is Necessary or Desired. The notice of opportunity for hearing procedure, as defined in 11 U.S.C. § 102(1), may only be used as permitted in Local Bankruptcy Rule 3015-1© and (d) relating to confirmation of chapter 13 plans. In all other matters, if an order is necessary or is desired by the moving party, the motion shall be set for hearing pursuant to this Local Rule.

(2) When an Order Is Not Necessary or Desired. When the notice of opportunity for hearing procedure is used and no order is necessary or desired, the notice shall:

(A) Succinctly describe the action to be taken;

(B) State that unless written objections and/or a request for a hearing are served on the moving party and filed with the Clerk on or before the date specified in the notice, the action shall be taken;

© Provide a minimum of fourteen (14) days after service (or the longer periods required by, for example, Fed. R. Bankr. P. 2002 or 3007) for the filing of the request for hearing or objections by a party-in-interest; and

(D) Be filed with the Clerk and served by the moving party on all creditors, the debtor, the trustee, or other persons as appropriate or required.

.....

(4) Procedure in Absence of Objection. If no objection or request for hearing is timely filed, the moving party may proceed to take any proposed action that does not require court approval.

The Trustee appears to be utilizing the procedure to sell property without an order of the court, relying on his determination that the court would subsequently concur in the Trustee's determination that "notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances" is the notice that was given by the Trustee.

2. [15-90502-E-7](#) ANNA STARR  
[16-9006](#)  
EDMONDS V. STARR ET AL

CONTINUED STATUS CONFERENCE  
RE: COMPLAINT  
2-10-16 [\[1\]](#)

Plaintiff's Atty: Anthony D. Johnston

Defendant's Atty:

Pro Se [Marlene Starr]

Peter G. Macaluso [Anna E. Starr; William K. Starr]

Adv. Filed: 2/10/16

Answer: 3/14/16

Amd Answer: 3/28/16 [Anna E. Starr]

Nature of Action:

Declaratory judgment

Approval of sale of property of estate and of a co-owner

**The Status Conference is XXXXXXXXXXXXXXXXXX.**

Notes:

Continued from 8/4/16

Substitution of Attorney [for William K. Starr] filed 9/6/16 [Dckt 28]

#### **SEPTEMBER 29, 2016 STATUS CONFERENCE**

On September 22, 2016, Anna Starr and William Starr, though their counsel, report that this matter has been settled, with the final agreement being documented. Dckt. 29.

**Tentative Ruling:** The Motion to Approve Disclosure Statement was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).**

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Local Rule 9014-1(f)(3) Motion.

Correct Notice Not Provided. The court's Order Shortening Time for Service (Dckt. 66) required all creditors to be served by September 15, 2016. A review of the docket shows that a Proof of Service has not been filed.

The Motion to Approve Disclosure Statement was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing

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<b>The Motion for Approval of Disclosure Statement is denied without prejudice.</b>
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#### **NO NOTICE PROVIDED**

The Order Shortening Time for Service required that all creditors be served by September 15, 2016. Dckt. 66. No Certificate of Service has been filed. Accordingly, the Motion for Approval of Disclosure Statement is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion For Approval of the Disclosure Statement filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.

**THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF MOVANT SERVES ALL CREDITORS WITH NOTICE OF THE MOTION FOR APPROVAL OF DISCLOSURE STATEMENT**

**REVIEW OF THE DISCLOSURE STATEMENT**

Case filed: January 5, 2016

Background: The Debtor was formed in December 2009 to pursue real estate investment and lending opportunities. Debtor became the owner of two properties in Oakdale, California: one acquired in October 2010 and the other in March 2015. Before filing this bankruptcy case, Debtor attempted and failed to sell the property that had been acquired in October 2010. Nationstar sought to foreclose on the property, and Debtor filed this bankruptcy case.

Summary of Plan:

Creditor/Class	Treatment	
Unclassified Claim  Administrative Expenses	<b>Claim Amount</b>	\$11,000.00
	<b>Impairment</b>	Unimpaired
	Expenses arising in the ordinary course of business - estimated current at confirmation paid in full on the Effective Date or according to terms of obligation if later	
	Professional Fees, as approved by the Court - estimated to be \$10,000.00 or less paid in full on Effective Date or according to separate written agreement or according to court order if such have not been approved by the court on the Effective Date	
Unclassified Claim  Priority Tax Claims	U.S. Trustee fees: estimated \$1,000 or less paid in full on Effective Date	
	<b>Claim Amount</b>	\$0.00
	<b>Impairment</b>	Unimpaired
	Internal Revenue Service: Nothing due	

<p>Class 1: The Bank of New York Mellon f/k/a The Bank of New York as successor in interest to JP Morgan Chase Bank, N.A. as Trustee for Structured Asset Mortgage Investment II Inc. Mortgage Pass-Through Certificates Series 2004-AR7. This claim is serviced by Nationstar Mortgage LLC</p>	<p><b>Secured Claim Amount</b></p>	<p>\$601,299.13</p>
	<p><b>Impairment</b></p>	<p>Impaired</p>
	<p>Claim No. 2 was filed on May 11, 2016, in the amount of \$601,299.13 and is secured by a first priority deed of trust against real property commonly known as 7318 Crane Road, Oakdale, California.</p> <p>The property's value was determined to be \$486,500.00. Dckt. 56.</p> <p>Debtor plans to sell the property and use the proceeds to pay less than the amount of the Class 1 claim, which will require permission from the claim holder.</p> <p>Debtor anticipates that Class 1 will waive any unsecured portion of its claim and will receive more than it would if it were to exercise its foreclosure rights under the senior deed of trust.</p>	
<p>Class 2: The Bank of New York Mellon f/k/a The Bank of New York as successor trustee to JP Morgan Chase Bank, N.A. as Trustee for the certificateholders of SWABS Master Trust, revolving home equity loan asset backed notes, series 2004-Q by assignment recorded July 26, 2012</p>	<p><b>Secured Claim Amount</b></p>	<p>\$0.00, 11 U.S.C. § 506(a) Valuation</p>
	<p><b>Impairment</b></p>	<p>Impaired</p>
	<p>The property's value was determined to be \$486,500.00. Dckt. 56.</p> <p>Class 1, as senior lien, exceeds the property's value.</p> <p>There will be no distribution to Class 2, unless Class 2 files a proof of claim and shows an allowed claim.</p>	

Class 3: Bellavista Capital a/k/a Bella Vista Capital	<b>Claim Amount</b>	\$250,000.00
	<b>Impairment</b>	Impaired
	<p>The original claim amount is \$250,000.00 and is secured by a first priority deed of trust against property commonly known as 7348 Crane Road, Oakdale, California.</p> <p>Debtor anticipates selling the property to satisfy the Class 3 claim.</p> <p>Debtor believes that the value of the property is greater than the Class 3 claim.</p>	
Class 4: General Unsecured Claim	<b>Claim Amount</b>	\$96,163.00
	<b>Impairment</b>	Impaired
	<p>General unsecured claim holders will receive pro rata payment from the net proceeds of the sale of the 7348 Crane Road property.</p> <p>The sale is not expected to generate net proceeds to pay Class 4.</p>	
Class 5: Equity Security Holders	<b>Claim Amount</b>	
	<b>Impairment</b>	Unimpaired
	<p>The equity security holders shall receive a distribution only in the event that Classes 3 &amp; 4 are paid in full.</p>	

#### A. C. WILLIAMS FACTORS PRESENT

- Y Incidents that led to filing Chapter 11
- Y Description of available assets and their value
- Anticipated future of the Debtor
- Y Source of information for D/S
- Y Disclaimer
- Y Present condition of Debtor in Chapter 11
- Y Listing of the scheduled claims
- Y Liquidation analysis
- N Identity of the accountant and process used
- Future management of the Debtor
- Y The Plan is attached

*In re A.C. Williams*, 25 B.R. 173 (Bankr. N.D. Ohio 1982); *see also In re Metrocraft*, 39 B.R. 567 (Bankr. N.D. Ga. 1984).

#### **APPLICABLE LAW**

Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains "adequate information" to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).

"Adequate information" means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g., In re A.C. Williams, supra*.

There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bankr. N.D. Ga.

1984). "Adequate information" is a flexible concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. *In re Michelson*, 141 B.R. 715, 718–19 (Bankr. E.D.Cal. 1992).

The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D.Pa. 1982).

The court begins its analysis with the statutory requirements of 11 U.S.C. § 1125 for a disclosure statement. Solicitation of an acceptance or rejection of a plan may be made with a written disclosure statement which was approved by the court. The disclosure statement must provide "adequate information." The term "adequate information" is defined in 11 U.S.C. § 1125(a)(1) to be,

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information;...

Determination of whether there is "adequate information" is a subjective determination made by the bankruptcy court on a case by case basis. *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988), *cert. denied* 488 U.S. 926 (1988). Non-bankruptcy rules and regulations concerning disclosures do not govern the determination of whether a disclosure statement provides adequate information. 11 U.S.C. § 1125(d); *Yell Forestry Products, Inc. v. First State Bank*, 853 F.2d 582 (8th Cir. 1988).

## **DISCUSSION**

The proposed Disclosure Statement lists the specific creditors, classes of claims, and proposed treatment. While stating that specified property will be sold, the Disclosure Statement does not provide information about the method or timing of the sale. Attached to the proposed Disclosure Statement is a copy of the Plan as Exhibit A. There is no reason for a copy of the Plan to be attached to the Disclosure Statement. The information to be provided in the Disclosure Statement, is to be stated clearly within the Disclosure Statement, not through a series of exhibits or telling creditors to "read the plan to figure out what is being done to you."

It appears that the terms of the Plan, as stated in the Disclosure Statement is that the Plan Administrator/Debtor has until the end of time to sell the property, whenever in the Plan Administrator/Debtor's opinion it is most advantageous to the Debtor.

Based on the foregoing, the court **denies/grants** the motion to approve the Disclosure Statement.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion For Approval of the Disclosure Statement filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is **denied/granted**.

4. [13-91315-E-7](#)  
[15-9020](#)

APPLEGATE JOHNSTON, INC.

MCGRANAHAN V. C&T WELDING,  
INC. ET AL

**PRE-TRIAL CONFERENCE RE:  
COMPLAINT FOR (1) AVOIDANCE OF  
PREFERENTIAL TRANSFERS; (2)  
AVOIDANCE OF FRAUDULENT  
TRANSFERS; AND (3) RECOVERY OF  
AVOIDED TRANSFERS  
6-30-15 [1](#)**

Plaintiff's Atty: Daniel L. Egan

Defendant's Atty:

Helga A. White [C & T Welding, Inc.; Skyline Steel Erectors, Inc.; Cal West Steel Detailing LLC]

Christopher J. Hersey [SecureCom, Inc.]

Unknown [PDM Steel Service Centers, Inc.][Party dismissed 9/24/15 [Dckt 31]

Adv. Filed: 6/30/15

Answer:

7/29/15 [C & T Welding, Inc.; Skyline Steel Erectors, Inc.; Cal West Steel Detailing LLC]

8/13/15 [SecureCom, Inc.]

Nature of Action:

Recovery of money/property - preference

Notes:

Scheduling Order -

Initial disclosures by 10/30/15

Disclose experts by 2/29/16

Exchange expert reports by 3/31/16

Close of Discovery 6/30/16

Dispositive motions heard by 8/26/16

Substitution of Counsel [for Defendant Securecom, Inc.] filed 8/18/16 [Dckt 44]; Order granting filed 8/19/16 [Dckt 45]

Chapter 7 Trustee, Michael D. McGranahan's Pretrial Conference Statement filed 9/6/16 [Dckt 46]

Pre-Trial Statement of Defendants C&T Welding Inc., Skyline Steel Erectors Inc. and Cal West Steel Detailing LLC filed 9/6/16 [Dckt 48]

## SUMMARY OF COMPLAINT

On September 23, 2015, the Plaintiff-Trustee filed a notice of dismissal of PDM Steel Service Centers, Inc. from this Adversary Proceeding. Dckt. 10. The Claims against C&T Welding, Inc.; Skyline Steel Erectors, Inc.; PDM Steel Service Centers, Inc., and Ahern Rentals, Inc.

In the Complaint the Plaintiff-Trustee alleges that the following transfers may be avoided as preferences pursuant to 11 U.S.C. § 547:

- A. Bankruptcy case filed on July 16, 2013.
- B. Payment of \$90,222.36 made to Defendants C&T and Skyline on June 4, 2013.
- C. Payment of \$8,494.11 made to Defendant C&T on May 24, 2013.
- D. Payment of \$4,361.31 made to Defendants C&T, Ahern, and Skyline on May 24, 2013.
- E. Payment of \$32,535.32 made to Defendants C&T and Ahern on April 23, 2013.
- F. Payment of \$13,440.00 made to Defendants C&T and Cal West on April 30, 2013.

The Complaint also alleges that the following transfers are avoidable as fraudulent conveyances pursuant to 11 U.S.C. §§ 544 and 548, and California Civil Code § 3439.05:

- A. Payment of \$90,222.36 made to Defendant Skyline on June 4, 2013.
- B. Payment of \$4,361.31 made to Defendants Ahern and Skyline on May 24, 2013.
- C. Payment of \$32,535.32 made to Defendant Ahern on April 16, 2013.
- D. Payment of \$13,440.00 made to Defendant Cal West on April 16, 2013.

Plaintiff-Trustee requests relief against each of the Defendants pursuant to 11 U.S.C. § 550.

## SUMMARY OF ANSWERS

C&T Welding, Inc., Skyline Steel Erectors, Inc., and Cal West Steel Detailing, LLC filed an answer with specific admissions and denials. While in the Answer these Defendants asserted that they did not consent to the Bankruptcy Court determining state law issues, citing to *Stern v. Marshall*. As addressed on the record at the first status conference, these Defendants confirmed that the 11 U.S.C. § 547 and related § 550 issues are core proceedings, for which the bankruptcy court will issue all orders and the final judgment.

## **FINAL BANKRUPTCY COURT JUDGMENT**

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(a), (b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), and (O). Complaint ¶¶ 7, 8, Dckt. 1. At the Initial Status Conference, Defendants C&T Welding, Inc., Skyline Steel Erectors, Inc., and Cal West Steel Detailing, LLC confirmed on the record that the claims in the Complaint seeking relief pursuant to 11 U.S.C. § 547 and the related relief thereto under § 550, are core proceedings for which the bankruptcy judge issues all orders and the final judgment.

With respect to the claims for fraudulent conveyance pursuant to 11 U.S.C. §§ 544 and 548, and the related relief under 11 U.S.C. § 550; and the California Civil Code § 3439.05, the parties have not consented to the bankruptcy judge issuing the orders and final judgment.

The bankruptcy judge shall conduct one trial in this Adversary Proceeding, and for the non-core proceedings as provided in 28 U.S.C. § 157(c)(1) and make proposed findings of fact and conclusions of law to the United States District Court for entry of a final judgment on the non-core matters. The Bankruptcy Judge shall coordinate the entry of the judgment on the core proceedings with the entry of the judgment on the non-core proceedings by the District Court so as to have all findings of fact and conclusions of law on the core proceedings determined for the parties and District Court and avoid unnecessary duplication of litigation and judicial cost and expense.

## **PLAINTIFF-TRUSTEE'S PRETRIAL STATEMENT**

Plaintiff-Trustee Michael McGranahan filed his Pretrial Statement on September 6, 2016. Dckt. 46.

## **DEFENDANTS PRETRIAL STATEMENT**

Defendants C&T Welding, Inc., Skyline Steel Erectors, Inc., and Cal West Steel Detailing, LLC filed their Pretrial Statement on September 6, 2016. Dckt. 48.

Defendants suggest that the setting of this trial should be coordinated with the trial in Adversary Proceeding 15-09038 so that the issue of solvency of the Debtor be adjudicated in one proceeding rather than in a series of trials, with potentially conflicting results.

A challenge in Defendants request for coordinating the trial with that in Adversary Proceeding 15-09038 is that though that Adversary Proceeding has been pending for more than a year, and the discovery schedule has already been continued, those defendants are again requesting that the court delay that trial setting and further continue discovery. The defendants in that Adversary Proceeding have argued that it is unreasonable for them to expend any money in hiring experts to conduct discovery, to defend a \$1,000,000 preference action, and demand that the Chapter 7 Trustee assemble all of the discovery requested from the electronic books and records of the Debtor. The court has questioned the merits of that defendant's contention that it is diligently prosecuting that Adversary Proceeding.

In support of the request to continue the Pretrial Conference, Defendants C&T Welding, Inc., Skyline Steel Erectors, Inc., and Cal West Steel Detailing, LLC direct the court to the Reply of Chester C. Lehmann Co, Inc., the defendant in Adversary Proceeding 15-09038, to the plaintiff-trustee in that proceeding opposition to the request for a second extension of discovery. These Defendants assert that such reply is relevant in the current Adversary Proceeding because:

“Defendants in this case do not have the funds to conduct extensive discovery and Plaintiff has provided no documents to Defendants voluntarily in Case No. 2015-09020, whereas Defendants have voluntarily provided numerous documents (several boxes) to Plaintiff. Defendants in other cases have more at stake and are therefore more able and willing to conduct extensive discovery. Defendants are aware of the motion filed by Chester C. Lehmann Inc. Dba Electrical Distributions, Co. in case No. 2015-09038 to extend deadlines and continue the pretrial conference in that case because Plaintiff allegedly has not provided any of the requested documents which shed light on Applegate’s solvency or insolvency during the preference period or relate to other factual and legal issues common to all adversary actions. A copy of the Defendant’s reply filed in case No. 2015-09038 is attached hereto as Exhibit ‘A’.”

Defendants’ Pretrial Statement, pp. 8:22-26, 9:1-6; Dckt. 48.

Because Defendants have adopted the arguments of the defendant in Adversary Proceeding 15-09038, the court considers them as they apply in this Adversary Proceeding. Any comments or conclusions of the court as they apply to Defendants in this Adversary Proceedings are not determinations as to the defendants in Adversary Proceeding 15-09038.

First, in considering Defendants arguments in this Adversary Proceeding, it appears to be one of “we don’t want to have to comply with the rules of discovery in federal court, we’re rather not incur the reasonable and necessary costs and expenses, and the Plaintiff-Trustee will not voluntarily give us whatever he thinks that we need to win.” No explanation is provided as to why and how merely engaging in normal federal court discovery is an unreasonable burden and something for which these Defendants, of all the defendants in federal judicial proceedings, should be given an exemption.

Defendants seek to slide in the contentions of the defendants in Adversary Proceeding 15-09038 that those defendants feel that the plaintiff-trustee in that action should have to produce whatever they demand, and that it is even too burdensome for those defendants to file motions to compel production.

Defendants direct the court to read, and apparently wholeheartedly adopt (subject to the certifications of Federal Rule of Bankruptcy Procedure 9011), the various statements, allegations and contentions made therein. The allegations and statements set forth in the Reply include the following:

- A. Defendant Chester C. Lehmann, Inc. disputes the plaintiff-trustee’s contention that the plaintiff-trustee has been diligent in prosecuting the adversary proceedings in connection with the Applegate Johnson, Inc. bankruptcy case.

- B. One contention that the plaintiff-trustee has not been diligent is stated as, “For instance, Plaintiff inexplicably did not send demand letters to either one of the Defendants prior to initiating the lawsuits against them in spite of the fact that Defendants’ counsel and Plaintiff’s counsel were in direct communication after Debtor’s bankruptcy filing in regard to other matters pertaining to the bankruptcy and Defendant’s case is by far the largest case Plaintiff is pursuing.”
- C. With respect to discovery and the unreasonable conduct of the plaintiff-trustee, defendant Chester C. Lehmann Co, Inc. directs the court to the following: “Additionally, Plaintiff has not noticed any depositions in Defendants’ cases.”
- D. Another contention is that nineteen of the thirty-four adversary proceedings to recover preference were dismissed.
- E. As to the settling defendants, defendant Chester C. Lehmann Co, Inc. argues:
- “All the defendants who have settled thus far did so having received little to nothing in the way of a document production from Plaintiff, and as Plaintiff notes, most of the depositions were noticed by one law firm, Hopkins and Carley LLP, which represents three defendants. (Plaintiff’s Opposition, at p.3) The other defendants have not actively deposed the relevant parties. In fact, almost all of the cases were resolved before Plaintiff even produced a copy of Debtor’s server, where Plaintiff claims that all of Debtor’s documents are kept.”
- F. Defendant Chester C. Lehmann Co, Inc. further argues,
- “Defendants’ counsel spoke with several of the attorneys for the other defendants in these adversary cases and the unanimous consensus was that though the claims against their clients ultimately would not prevail at trial, taking their cases to trial was not economically prudent in light of the lesser amounts of money sought by the Plaintiff against their clients.”
- G. Plaintiff asserts that such preference litigation is “unfair” because,
- “The Plaintiff, on the other hand, is in the more economically advantageous position of being able to minimize his legal expenses by using almost the same set of facts and legal arguments for all 34 adversary actions. The settlement of the other cases highlights the inequitable financial nature of this litigation rather than any great diligence by Plaintiff.”
- H. As to defendant Chester C. Lehmann Co, Inc.’s active prosecution of discovery, it is stated,

“Defendants have not yet filed a motion to compel against Plaintiffs and neither has Plaintiff filed any against Defendants, though the two have been involved in a discovery dispute since December 2015.”

I. With respect to defendant Chester C. Lehmann Co, Inc.’s diligent prosecution of discovery, it is asserted:

“Defendant has taken all necessary steps to litigate this lawsuit. Defendant timely answered the Complaint, provided opposing counsel with all requested documents through informal discovery, was the first to propound discovery, cooperated in all meet and confer efforts, agreed to attend mediation, and has insisted that opposing party seek extensions of deadlines or has sought those extensions itself when it became clear that Plaintiff’s delays in document production were jeopardizing Defendants ability to litigate this matter.”

“Noticing depositions has been premature in Defendants’ cases because Debtor’s financial documents, contracts, correspondence, etc. have still not been made available by Plaintiff. Defendant’s counsel has spoken with a number of Debtor’s former employees and principals and they have informed him that Debtor’s finances and projects were closely tracked, but all of Debtor’s records were left with the Plaintiff after Debtor’s bankruptcy filing.”

“Filing motions to enforce the outstanding subpoenas and deposing all parties that might have some information about Debtor is imprudent and unfair when Plaintiff has a duty to produce all the information that Defendant seeks related to Plaintiff’s claims.”

On this point of discovery and documents, the court recalls an exchange with counsel for defendant Chester C. Lehmann Co, Inc. concerning why third parties who had the documents (such as the insurance or bonding companies who had the financial statements of the Debtor upon which they relied in issuing the insurance or bonds) were not subpoenaed, defendant Chester C. Lehmann Co, Inc.’s counsel’s response was that such third-parties would not comply with such discovery, so instead that defendant wanted to make the plaintiff-trustee provide it. No good explanation was provided as to why the third-parties could ignore a federal subpoena and why defendant Chester C. Lehmann Co, Inc. would not compel compliance (including the recovery of the necessary costs and expenses in compelling compliance with a federal subpoena).

J. It is further asserted,

“Since the beginning of this discovery process Plaintiff had represented that almost all of Debtor’s records were stored on its server. (Id., at ¶ 9.) This assertion seems to have no foundation however. In Defendant’s conversations with Debtor and its former employees in the aftermath of said production, it became clear that many of Debtor’s documents were in fact stored on the laptops and desktops that Plaintiff destroyed in 2013. (Id., at ¶ 20.) There is no rational reason for Defendant to pay

outside consultants to scour for information that should be provided at Plaintiff's expense and which might not even be located on the hard drives and server that Plaintiff provided."

Exhibit A, Dckt. 49.

Whether the court allows discovery to be extended for defendant Chester C. Lehmann Co, Inc., which is defending a \$1,000,000+ preference action, it is not grounds for excusing these Defendants from the diligent prosecution of their Adversary Proceeding. The court has expressed serious reservations that it has been and is unreasonable for defendant Chester C. Lehmann Co, Inc. to exercise its rights under the Federal Rules of Civil Procedure to conduct discovery to defend a \$1,000,000+ preference action.

It appears that Defendants in this Adversary Proceeding are now attempting to use the ligation strategy action, or inaction, of defendant Chester C. Lehmann Co, Inc. in not enforcing its rights and actively conducting discovery as a reason for these Defendants not to go to trial.

The court does not find this contention to be reasonable, credible, or a basis for delaying trial in this Adversary Proceeding. If Defendants and their counsel thought that defendant Chester C. Lehmann Co, Inc. was a critical part of their discovery in this Adversary Proceedings, Defendants and their experienced counsel have had more than a year to coordinate discovery with counsel in the other Adversary Proceeding. Instead, Defendants now argue that it would be "unfair" for them to continue in the diligent prosecution of their defense while Chester C. Lehmann Co, Inc. and its counsel request/demand/implore the court to extend discovery for a second time so they can continue to argue about discovery, for which in over a year Chester C. Lehmann Co, Inc. has not attempted to enforce its rights to conduct discovery concerning the \$1,000,000+ preference action being prosecuted against it.

If Defendants believed that conducting discovery with Chester C. Lehmann Co, Inc. was an important part of its trial strategy, they would have done so over this past year. They have not. In the best light, it appears that this request for a continuance in this Adversary Proceeding is an attempt to take advantage of a fortuitous coincidence of a defendant in another action arguing with the plaintiff-trustee. To a more jaundiced eye, one might believe it is part of a preconceived, coordinated scheme to derail the proper administration of justice and the court's management of the cases and adversary proceedings before it. Given Defendants' experienced counsel and her reputation, the court presumes that it is the former.

The court shall set this matter for trial, there being no good faith, bona fide basis to delay this matter.

In this Adversary Proceeding, the transfers at issue and recovery sought were:

- A. C & T Welding, Inc. and Skyline Steel Erectors, Inc.....\$90,222.36
- B. C&T Welding, Inc. and PDM Steel Service Centers, Inc.....\$ 8,494.11

- C. C&T Welding, Inc., Ahern Rentals, Inc. and Skyline Steel Erectors, Inc.....\$ 4,361.31
- D. C&T Welding, Inc. and Ahern Rentals, Inc.....\$32,535.32
- E. C&T Welding, Inc. and Cal West Steel Detailing, LLC.....\$13,440.00

Of these, the following claims have been resolved and defendants dismissed:

- A. PDM Steel Service Centers, Inc.
  - 1. Settlement Approved July 23, 2015 (13-91315, Dckt. 468).
  - 2. Settlement Amount.....\$4,247.05.
  - 3. PDM Steel Service Centers, Inc. granted a general release for any claims in this or related to the claims in this litigation.
- B. Ahern Rentals, Inc.
  - 1. Settlement Approved September 3, 2015 (*Id.*, Dckt. 488).
  - 2. Settlement Amount.....\$18,446.82
  - 3. Ahern Rental, Inc. granted a general release for any claims in this or related to the claims in this litigation.

As set forth in the Plaintiff-Trustee's Pretrial Conference Statement, the following amounts remain claims in this Adversary Proceeding:

- A. \$90,222.36.....jointly and severally from C&T Welding, Inc. and Skyline Steel Erectors, Inc.
- B. \$42,180.66..... from C&T Welding, Inc.
- C. \$4,361.31..... from C&T Welding, Inc.
- D. \$16,267.66..... from C&T Welding, Inc.
- E. \$13,440.00.....from C&T Welding, Inc. and Cal West Steel Detailing, LLC

## DEFENDANT SURECOM, INC. PRETRIAL STATEMENT

No Pretrial Conference Statement was filed by SecureCom, Inc. Though an answer was filed by Surecom, Inc., it is not named as a defendant in the Complaint and has not intervened as a party.

The court shall issue an Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

- A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.
- B. **Plaintiff** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2016**.
- C. **Defendant** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2016**.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, **2016**.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, **2016**.
- F. The Trial shall be conducted at ----x.m. on -----, **2016**.

The Parties in their respective Pretrial Conference Statements, Dckts. -----, -----, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

<b>Plaintiff-Trustee Michael McGranahan</b>	<b>Defendants C&amp;T Welding, Inc., Skyline Steel Erectors, Inc., and Cal West Steel Detailing, LLC.</b>	<b>Securecom, Inc. Answer Filed, Not Named In the Complaint as a Defendant</b>
Jurisdiction and Venue:  1. Federal Court Jurisdiction pursuant to 28 U.S.C. § 1334, 157(a) and 157(b).  2. Venue pursuant to 28 U.S.C. § 1409.	Jurisdiction and Venue:  1. Core Proceeding for 11 U.S.C. § 547 preference claims.  2. Asserts that 11 U.S.C. § 548 and state law fraudulent conveyance claims are not core proceedings, subject to 28 U.S.C. § 157(c)(1). Defendants do not consent to Bankruptcy Judge issuing final judgment on the non-core proceedings. See Civil Minutes for the Scheduling Conference, Dekt. 35, and	Jurisdiction and Venue:  No Pretrial Statement Filed

	Scheduling Order in this Adversary Proceeding, Dckt. 36.	
<p>Undisputed Facts:</p> <p>1. The following Transfers Were Made By the Debtor in the 90-Day Period Preceding the Commencement of the Bankruptcy Case:</p> <p style="padding-left: 40px;">a. Ck 76538, dated 6/4/13, in the amount of \$90,222.36, to Skyline Steel Erectors, Inc. and C&amp;T Welding, Inc.</p> <p style="padding-left: 40px;">b. Ck 76551, dated 5/24/13, in the amount of \$8,494.11, to PDM Steel Service Centers, Inc. And C&amp;T Welding, Inc.</p> <p style="padding-left: 40px;">c. Ck 76512, dated 5/24/13, in the amount of \$4,361.31, to C&amp;T Welding, Inc., Ahern Rentals, Inc. and Skyline Steel Erectors, Inc.</p> <p style="padding-left: 40px;">d. Ck 76316, dated 4/16/13, in the amount of \$32,535.32, to C&amp;T Welding, Inc., Ahern Rentals</p> <p style="padding-left: 40px;">e. Ck 76318, dated 4/16/13, in the amount of \$13,440.00, to C&amp;T Welding, Inc. and Cal West Steel Detailing, LLC.</p> <p>(Collectively the “Challenged Payments.”)</p> <p>2. At the time of Challenged Payments set forth above, Defendant C&amp;T Welding, Inc. was a creditor of Debtor.</p> <p>3. Each of the Challenged Payments were transfers were either to or for the benefit of Defendant C&amp;T Welding, Inc.</p> <p>4. Each of the transfers set forth above were transfers on account of an antecedent debt owed by Debtor to C&amp;T Welding, Inc.</p>	<p>Undisputed Facts:</p> <p>1. None.</p>	<p>Undisputed Facts:</p> <p>No Pretrial Statement Filed</p>

<p>5. Each of the transfers set forth above enabled Defendant C&amp;T Welding, Inc. to receive more than it would have received had the payment not been made and Defendant C&amp;T Welding, Inc. received payment through a case under Chapter 7 of the Bankruptcy Code.</p> <p>6. Each of Defendant Skyline Steel Erectors and Cal West Steel Detailing are either initial transferees of each of the transfers set forth above or are immediate transferees of such transfers.</p> <p>7. Trustee reached settlements with PDM Steel Service Centers, Inc. and Ahern Rentals, Inc. Under the settlements, Trustee received \$4,247.05 from PDM Steel Service Centers, Inc. and \$18,446.82 from Ahern Rentals, Inc.</p> <p>8. Trustee is only entitled to one single satisfaction of his demand for return of the Challenged Transfers.</p>		
<p>Disputed Facts:</p> <p>1. Defendants may seek to challenge the presumption that Debtor was insolvent in the 90 days prior to the bankruptcy case.</p> <p>2. Defendants contend that the Challenged Payments were made in the ordinary course of business or financial affairs of the Debtor and the transferee, or that they were made according to ordinary business terms.</p> <p>3. Defendants may dispute that Defendants Skyline and Cal West were creditors of Debtor.</p> <p>4. Defendants may dispute that Defendant C&amp;T Welding received the transferred payments, arguing instead that Defendant C&amp;T Welding merely acted as a conduit of a payment to Defendants Skyline and Cal West.</p>	<p>Disputed Facts:</p> <p>1. Defendants allege, but Plaintiff disputes, that the long delay in bringing the within adversary action was made in bad faith and was a deliberate attempt to prejudice Defendants' claims under the Payment Bond.</p> <p>2. Defendants allege, but Plaintiff disputes, that the funds used to pay Defendants were not property of the estate but instead were earmarked and held in trust by Applegate to pay the Sub-Contractors who worked on the Project. Neither the Trustee nor the general unsecured creditors of the bankruptcy estate are members of the class entitled to share in these funds.</p>	<p>Disputed Facts:</p> <p>No Pretrial Statement Filed</p>

	<p>3. Defendants allege, but Plaintiff disputes, that Applegate's payments to Defendants were made in the ordinary course of business according to ordinary business terms.</p> <p>4. Defendants allege, but Plaintiff disputes, that the payments were simultaneous exchanges for new value.</p> <p>5. Defendants allege, but Plaintiff disputes, that Applegate's payments to Defendants are offset by new value received from Defendants.</p> <p>6. Defendants allege, but Plaintiff disputes, that Applegate was solvent at the time of payments.</p> <p>7. Defendants allege that Applegate received fair and reasonably equivalent value in exchange for the payments made to Defendants. Defendants does not know if Plaintiff disputes this factual assertion.</p> <p>8. Defendants allege, but Plaintiff disputes, that Defendants did not receive more from the payments alleged in the complaint than what they would have received if such payments had not been made. If such payments had not been made by Applegate, Defendants would have been paid from Liberty Mutual under the Payment Bond.</p> <p>9. Defendants allege that recovery of the funds listed in the complaint by the Trustee, that were paid by the City of San Jose for the construction of the Project, would be a violation of California and Federal law, the Performance Bond and the Payment Bond. Defendants</p>	
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	<p>believe that Plaintiff disputes this factual assertion.</p> <p>10. Skyline and Cal West assert that they are not creditors of the estate.</p>	
<p>Disputed Evidentiary Issues:</p> <p>1. None Identified.</p>	<p>Disputed Evidentiary Issues:</p> <p>1. Defendants asserts that Plaintiff waived its right to present expert testimony in this lawsuit. Plaintiff did not provide any expert declaration to Defendants.</p>	<p>Disputed Evidentiary Issues:</p> <p>No Pretrial Statement Filed</p>
<p>Relief Sought:</p> <p>1. For avoidance and recovery of check no. 76538 in the amount of \$90,222.36 from Defendant C&amp;T and Defendant Skyline;</p> <p>2. For avoidance of check number 76511, in the amount of \$8,494.11 and recovery of \$2,180.66 from Defendant C&amp;T;</p> <p>3. For avoidance of check number 76512, in the amount of \$4,361.31, and recovery of \$4,361.31 from Defendant C&amp;T;</p> <p>4. For avoidance of check number 76316, in the amount of \$32,535.32, and recovery of \$16,267.66 from Defendant C&amp;T.</p> <p>5. For avoidance of check number 76318, in the amount of \$13,440.00, and recovery of 13,440.00 from Defendants C&amp;T and Cal West.</p>	<p>Relief Sought:</p> <p>1. Defendants request the Court to deny Plaintiff's complaint. Defendants seek attorney's fees and costs.</p>	<p>Relief Sought:</p> <p>No Pretrial Statement Filed</p>
<p>Points of Law:</p> <p>1. 11 U.S.C. § 547, Preferential Transfer.</p>	<p>Points of Law:</p> <p>1. <i>Granfinanciera, S.A. v. Nordberg</i>, 492 U.S. 33, 34 - 35; 109 S. CT. 2782, 106 L.Ed.2d 26,</p>	<p>Points of Law:</p> <p>No Pretrial Statement Filed</p>

<p>2. 11 U.S.C. § 547(b)(3) Presumption of Insolvency. <u>Lewis W Shurtleff, Inc.</u>, 778 F.2d 1416, 1421 (9th Cir. 1985)</p> <p>3. 11 U.S.C. § 548, Fraudulent Conveyance.</p>	<p><i>Executive Benefits Insurance Agency v. Arkison (In re Bellingham)</i>, 134 S. Ct. 2165, 2167 (2014) and <i>Stern v. Marshall</i>, 564 U.S. —, —, 131 S. CT. 2594, 2601 - 2602, 2609, 180 L.Ed.2d 475 (2011.); Fraudulent Conveyance claims are non-core proceedings.</p> <p>2. The Miller Act (40 U.S.C. Section 3131 et seq.), as to application of the “earmarking doctrine.” (No authorities cited for application of such doctrine.)</p> <p>3. 11 U.S.C. § 547(c)(2); payments made according ordinary business terms.</p> <p>4. 11 U.S.C. § 547(c)(1)(a), payments were contemporaneous exchanges for new value.</p> <p>5. C&amp;T Welding, Inc. Was not a transferee as it did not cash any of the checks. <i>Barnhill v. Johnson</i>, 503 U.S. 393, 399 112 S. Ct. 1386, 1390, 118 L. Ed. 2d 39 (1992).</p>	
<p>Abandoned Issues:</p> <p>1. None Identified.</p> <p>2. Two Defendants have been dismissed pursuant to settlements.</p>	<p>Abandoned Issues:</p> <p>1. None Identified</p>	<p>Abandoned Issues:</p> <p>No Pretrial Statement Filed</p>
<p>Witnesses:</p> <p>1. Charles DeLucci</p> <p>2. Jennifer Turner</p> <p>3. Dustin Torres</p>	<p>Witnesses:</p> <p>1. Charles A. DeLucci Jr., who will testify as an expert and non-expert witness;</p> <p>2. Dustin Torrez, who will testify as an expert and non-expert witness;</p>	<p>Witnesses:</p> <p>No Pretrial Statement Filed</p>

	<p>3. Tyson Siebertz;</p> <p>4. Jennifer Turner, , who will testify as an expert and non-expert witness;</p> <p>5. Luz Smith;</p> <p>6. Miguel Hernandez, , who will testify as an expert and non-expert witness;</p> <p>7. Representative from Applegate Johnson Inc., whose identity will be determined before trial.</p>	
<p>Exhibits:</p> <p>1. Check dated 6/4113 to C&amp;T Welding, Inc. and Star Seismic</p> <p>2. Check dated 6/4113 to C&amp;T Welding, Inc. and Skyline Steel Erectors</p> <p>3. Check dated 5/24113 to C&amp;T Welding, Inc. and Valley Iron Inc.</p> <p>4. Check dated 5/24113 to C&amp;T Welding Inc. and Brown-Strauss Steel</p> <p>5. Check dated 5/24113 to C&amp;T Welding, Inc. and PDM Steel Service Centers</p> <p>6. Check dated 5/24113 to C&amp;T Welding, Inc. and Ahern Rentals/Skyline Steel</p> <p>7. Check dated 5/24113 to C&amp;T Welding, Inc. and Bristol Machine Co.</p> <p>8. Check dated 4116113 to C&amp;T Welding, Inc. and Ahern Rentals</p> <p>9. Check Stub</p> <p>10. No Exhibit 10 on Pretrial Statement.</p>	<p>Exhibits:</p> <p>1. Invoices, change orders, pay-roll information, correspondence as to work performed and invoices provided and payments made - all related to the Project.</p> <p>2. Contracts related to the Project.</p> <p>3. Performance Bond.</p> <p>4. Payment Bond.</p> <p>5. Claims made to, and payments received from, Liberty Mutual under the Bonds.</p> <p>6. Correspondence by and between Liberty Mutual's counsel and Defendants' counsel.</p> <p>7. Payments, reports and correspondence by and between the City of San Jose and Defendants regarding the Project.</p> <p>8. Applegate's bankruptcy schedules.</p> <p>9. Lien documents, including but</p>	<p>Exhibits:</p> <p>No Pretrial Statement Filed</p>

11. Attachment A to Contract 12. Email to DeLucci 13. Email 14. Email 15. Email from DeLucci to Herzog dated 3/18/13 16. Emails from DeLucci 17. To Skyline Steel Erectors Invoice dated 8/20/12 18. C&T Welding Invoice dated 3/6/13 19. Email from Turner to Smith dated 3/11/16 20. Request for Change Order 21. California Lien Waiver and Release Form 22. California Lien Waiver and Release Form 23. Unconditional Waiver and Release on Progress Payment 24. C&T printout of payments from Valley Iron Inc. 25. Unconditional Waiver and Release on Progress Payment 26. Unconditional Waiver and Release on Progress Payment 27. Statement of Account Brown-Strauss Steel 28. California Lien Waiver and Release Form 29. Bristol Machine Co. Invoice dated	not limited to, preliminary notices, stop notices, conditional releases and unconditional releases.  10. Correspondence by and between Defendants, Applegate and the City of San Jose.  11. Information as to funding of the Project.  12. Settlement documents by and between Plaintiff and other named Defendants in case No. 2015-09020.  13. Documents produced by Liberty Mutual.  14. Information as to collateral offered by Applegate and/or its owners for issuance of Performance and Payment Bonds.  15. Deposition testimony by representatives of the City of San Jose and Liberty Mutual.  16. Any and all additional documents that might be discovered by other Defendants in other adversary actions filed in Applegate's bankruptcy case which relate to the Project.	
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<p>10/2/12</p> <p>30. Release of Lien Claim and Claim and Stop Notice for Public Work Project</p> <p>31. Bid Proposal for Steel Detailing by Cal West Steel</p> <p>32. Invoice from Cal West Steel Detailing to C&amp;T Welding, Inc.</p> <p>33. Future Innovations Inc. Customer Open Balance Sheet</p> <p>34. Conditional Waiver and Release Cal West Steel</p> <p>35. 1<sup>st</sup> Amended Stop Payment Notice</p> <p>36. City of San Jose Contract</p> <p>37. Notice of Deposition</p> <p>38. Skyline Steel Erectors Inc.'s Response to Trustee's Request for Production of Documents</p> <p>39. Skyline Steel Erectors Inc.'s Response to Trustee's Interrogatories</p> <p>40. Skyline Steel Erectors Inc.'s Response to Trustee's 2nd Set of Interrogatories</p> <p>41. Email from Jen Turner to Chuck Delucci dated 7/25/12</p> <p>42. Email from Chuck Delucci dated 3/27/13</p> <p>43. Email from Jen Turner to Diana Lehne dated 7/27/12</p> <p>44. Email from John Bergman to Chuck Delucci dated 7/27/12</p> <p>45. Notice of Deposition PMK for C&amp;T Welding, Inc.</p>		
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<p>46. C&amp;T Welding Inc.'s Response to Trustee's Interrogatories</p> <p>47. C&amp;T Welding Inc.'s Response to Trustee's 2nd Set of Interrogatories</p> <p>48. Notice of Deposition of PMK for Cal West Steel Detailing, LLC</p> <p>49. Cal West Steel Detailing LLC's Response to Trustee's Interrogatories</p> <p>50. Cal West Steel Detailing LLC's Response to Trustee's 2nd Set of Interrogatories</p> <p>51. Check dated 4/16/13 to C&amp;T Welding, Inc. and Cal West Steel Detailing</p>		
<p>Discovery Documents:</p> <p>1. Deposition of Liberty Mutual</p> <p>2. Deposition of Charles DeLucci</p> <p>3. Deposition of Jennifer Turner</p> <p>4. Deposition of Dustin Torres</p> <p>5. Production of Documents from Central Valley Community Bank</p>	<p>Discovery Documents:</p> <p>1. Deposition testimony of representative of City of San Jose.</p> <p>2. Deposition testimony of representative of Liberty Mutual.</p>	<p>Discovery Documents:</p> <p>No Pretrial Statement Filed</p>
<p>Further Discovery or Motions:</p> <p>1. None Identified.</p>	<p>Further Discovery or Motions:</p> <p>1. None Identified.</p>	<p>Further Discovery or Motions:</p> <p>No Pretrial Statement Filed</p>
<p>Stipulations:</p> <p>1. None Identified.</p>	<p>Stipulations:</p> <p>1. None Identified.</p>	<p>Stipulations:</p> <p>No Pretrial Statement Filed</p>
<p>Amendments:</p>	<p>Amendments:</p>	<p>Stipulations:</p>

1. None Identified	1. None Identified.	No Pretrial Statement Filed
Dismissals: 1. None Identified	Dismissals: 1. None Identified.	Dismissals: No Pretrial Statement Filed
Agreed Statement of Facts: 1. None Identified	Agreed Statement of Facts: 1. None Identified.	Agreed Statement of Facts: No Pretrial Statement Filed
Attorneys' Fees Basis: 1. No Attorneys Fees Requested.	Attorneys' Fees Basis: 1. States Attorneys' Fees Requested, No basis identified.	Attorneys' Fees Basis: No Pretrial Statement Filed
Additional Items 1. None Identified	Additional Items 1. None Identified	Additional Items No Pretrial Statement Filed
Trial Time Estimation:	Trial Time Estimation: Three (3) Days	Trial Time Estimation:

5. [13-91315](#)-E-7 APPLGATE JOHNSTON, INC.  
[15-9027](#)  
MCGRANAHAN V. AJR DOOR  
SERVICE, INC.

PRE-TRIAL CONFERENCE RE:  
COMPLAINT FOR (1) AVOIDANCE OF  
PREFERENTIAL TRANSFERS; AND (2)  
RECOVERY OF AVOIDED TRANSFERS  
7-9-15 [\[1\]](#)

Plaintiff's Atty: Daniel L. Egan  
Defendant's Atty: Douglas W. Allan

Adv. Filed: 7/9/15  
Answer: 8/3/15

Nature of Action:  
Recovery of money/property - preference

<b>The Pretrial Conference is <span style="color: red;">XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX</span>.</b>
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Notes:  
Scheduling Order -  
Initial disclosures by 10/5/15  
Disclose experts by 1/15/16  
Exchange expert reports by 3/18/16  
Close of Discovery 5/31/16  
Dispositive motions heard by 7/15/16

#### **SEPTEMBER 27, 2016 PRETRIAL CONFERENCE**

On May 17, 2016, the court entered its order approving the compromise between the Plaintiff-Trustee and Defendant AJR Door Service, Inc. 13-91315, Dckt. 640. Under the terms of the settlement, AJR Door Service, Inc. is to make installment payments to the Plaintiff-Trustee through March 2017.

6. [13-91315](#)-E-7 APPLGATE JOHNSTON, INC.  
[15-9029](#)  
MCGRANAHAN V. STRUCK

**PRE-TRIAL CONFERENCE RE:  
COMPLAINT FOR (1) AVOIDANCE OF  
PREFERENTIAL TRANSFERS; AND (2)  
RECOVERY OF AVOIDED TRANSFERS  
7-9-15 [1]**

Plaintiff's Atty: Daniel L. Egan  
Defendant's Atty: Matthew J. Olson

Adv. Filed: 7/9/15  
Answer: 8/26/15

Nature of Action:  
Recovery of money/property - preference

**The Pre-Trial Conference is continued to 2:00 p.m. on December 1, 2016  
(Order, Dckt. 35).**

Notes:  
Scheduling Order -  
Initial disclosures by 10/31/15  
Disclose experts by 1/15/16  
Exchange expert reports by 3/18/16  
Close of discovery ~~5/31/16~~ ~~7/29/16~~ 10/15/16  
Dispositive motions heard by ~~7/15/16~~ ~~8/31/16~~ 11/18/16

Substitution of Counsel [for Defendant James D. Struck, dba The Struck Firm] filed 5/26/16 [Dckt 22];  
Order granting filed 5/31/16 [Dckt 26]

Stipulation to Continue Certain Deadlines filed 6/27/16 [Dckt 27]; Order granting filed 6/29/16 [Dckt 28]

Stipulation for Continuance of Pretrial Conference and Related Deadlines filed 9/12/16 [Dckt 32]; Order  
granting filed 9/14/16 [Dckt 35]

7. **13-91315-E-7 APPLEGATE JOHNSTON, INC.  
15-9030  
MCGRANAHAN V. ACE AUTOMATIC  
GARAGE DOORS, INC.**

**PRE-TRIAL CONFERENCE RE:  
COMPLAINT FOR (1) AVOIDANCE OF  
PREFERENTIAL TRANSFERS; AND (2)  
RECOVERY OF AVOIDED TRANSFERS  
7-9-15 [\[1\]](#)**

Plaintiff's Atty: Daniel L. Egan  
Defendant's Atty: Helga A. White

Adv. Filed: 7/9/15  
Answer: 8/6/15

Nature of Action:  
Recovery of money/property - preference

Notes:  
Scheduling Order -  
Initial disclosures by 10/30/15  
Disclose experts by 2/29/16  
Exchange expert reports by 3/31/16  
Close of discovery 6/30/16  
Dispositive motions heard by 8/26/16

Chapter 7 Trustee, Michael D. McGranahan's Pretrial Conference Statement filed 9/6/16 [Dckt 18]

Pre-Trial Statement of Defendant Ace Automatic Garage Doors, Inc. filed 9/6/16 [Dckt 20]

**SUMMARY OF COMPLAINT**

In the Complaint the Plaintiff-Trustee alleges that the following transfers may be avoided as preferences pursuant to 11 U.S.C. § 547 and recovery pursuant to 11 U.S.C. § 550:

- a. Bankruptcy case filed on July 16, 2013.
- b. Payment of \$24,704.27 made to Defendant ACE Automatic Garage Doors, Inc. on May 16, 2013.

**SUMMARY OF ANSWER**

In the Answer, Defendant admits and denies specific allegations in the Complaint. Defendant asserts six affirmative defenses.

## **FINAL BANKRUPTCY COURT JUDGMENT**

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(a), (b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), and (O). Complaint ¶¶ 3,4, Dckt. 1. At the Initial Status Conference, Defendant Ace Automatic Garage Doors, Inc. confirmed on the record that the claims in the Complaint seeking relief pursuant to 11 U.S.C. § 547 and the related relief thereto under § 550, are core proceedings for which the bankruptcy judge issues all orders and the final judgment.

### **PLAINTIFF-TRUSTEE'S PRETRIAL STATEMENT**

Plaintiff-Trustee, Michael McGranahan, filed his Pretrial Statement on September 6, 2016. Dckt. 18.

### **DEFENDANT'S PRETRIAL STATEMENT**

Defendant Ace Automatic Garage Doors, Inc. filed its Pretrial Statement on September 6, 2016. Dckt. 20.

Defendant suggests that the setting of this trial should be coordinated with the trial in Adversary Proceeding 15-09038 so that the issue of solvency of the Debtor be adjudicated in one proceeding rather than in a series of trials, with potentially conflicting results.

A challenge in Defendant's request for coordinating the trial with that in Adversary Proceeding 15-09038 is that though that Adversary Proceeding has been pending for more than a year, and the discovery schedule has already been continued, those defendants are again requesting that the court delay that trial setting and further continue discovery. The defendants in that Adversary Proceeding have argued that it is unreasonable for them to expend any money in hiring experts to conduct discovery, to defend a \$1,000,000 preference action, and demand that the Chapter 7 Trustee assemble all of the discovery requested from the electronic books and records of the Debtor. The court has quested the merits of that defendant's contention that it is diligently prosecuting that Adversary Proceeding.

In support of the request to continue the Pretrial Conference, Defendant Ace Automatic Garage Doors, Inc. directs the court to the Reply of Chester C. Lehmann Co, Inc., the defendant in Adversary Proceeding 15-09038, to the plaintiff-trustee in that proceeding opposition to the request for a second extension of discovery. This Defendant assert that such reply is relevant in the current Adversary Proceeding because:

"Defendant in this case does not have the funds to conduct extensive discovery and Plaintiff has provided no documents to Defendant voluntarily in Case No. 2015-09030, whereas Defendant has voluntarily provided numerous documents (several boxes) to Plaintiff. Defendants in other cases have more at stake and are therefore more able and willing to conduct extensive discovery. Defendant is aware of the motion filed by Chester C. Lehmann Inc. Dba Electrical Distributors, Co. in case No.

2015-09038 to extend deadlines and continue the pretrial conference in that case because Plaintiff allegedly has not provided any of the requested documents which shed light on Applegate's solvency or insolvency during the preference period or relate to other factual and legal issues common to all adversary actions. A copy of the Defendant's reply filed in case No. 2015-09038 is attached hereto as Exhibit 'A'."

Defendants' Pretrial Statement, p. 711-21; Dckt. 20.

Because Defendant has adopted the arguments of the defendant in Adversary Proceeding 15-09038, the court considers them as they apply in this Adversary Proceeding. Any comments or conclusions of the court as they apply to Defendants in this Adversary Proceedings are not determinations as to the defendants in Adversary Proceeding 15-09038.

First, in considering Defendant's arguments in this Adversary Proceeding, it appears to be one of "I don't want to have to comply with the rules of discovery in federal court, we'd rather not incur the reasonable and necessary costs and expenses, and the Plaintiff-Trustee will not voluntarily give us whatever he thinks that we need to win." No explanation is provided as to why and how merely engaging in normal federal court discovery is an unreasonable burden and something for which this Defendant, of all the defendants in federal judicial proceedings, should be given an exemption.

Defendant seeks to slide in the contentions of the defendants in Adversary Proceeding 15-09038 that those defendants feel that the plaintiff-trustee in that action should have to produce whatever they demand, and that it is even too burdensome for those defendants to file motions to compel production.

Defendant directs the court to read, and apparently wholeheartedly adopt (subject to the certifications of Federal Rule of Bankruptcy Procedure 9011, the various statements, allegations and contentions made therein. The allegations and statements set forth in the Reply include the following:

- A. Defendant Chester C. Lehmann, Inc. disputes the plaintiff-trustee's contention that the plaintiff-trustee has been diligent in prosecuting the adversary proceedings in connection with the Applegate Johnson, Inc. bankruptcy case.
- B. One contention that the plaintiff-trustee has not been diligent is stated as, "For instance, Plaintiff inexplicably did not send demand letters to either one of the Defendants prior to initiating the lawsuits against them in spite of the fact that Defendants' counsel and Plaintiff's counsel were in direct communication after Debtor's bankruptcy filing in regard to other matters pertaining to the bankruptcy and Defendant's case is by far the largest case Plaintiff is pursuing."
- C. With respect to discovery and the unreasonable conduct of the plaintiff-trustee, defendant Chester C. Lehmann Co, Inc. directs the court to the following: "Additionally, Plaintiff has not noticed any depositions in Defendants' cases."
- D. Another contention is that nineteen of the thirty-four adversary proceedings to recover preference were dismissed.

E. As to the settling defendants, defendant Chester C. Lehmann Co, Inc. argues:

“All the defendants who have settled thus far did so having received little to nothing in the way of a document production from Plaintiff, and as Plaintiff notes, most of the depositions were noticed by one law firm, Hopkins and Carley LLP, which represents three defendants. (Plaintiff’s Opposition, at p.3) The other defendants have not actively deposed the relevant parties. In fact, almost all of the cases were resolved before Plaintiff even produced a copy of Debtor’s server, where Plaintiff claims that all of Debtor’s documents are kept.”

F. Defendant Chester C. Lehmann Co, Inc. further argues,

“Defendants’ counsel spoke with several of the attorneys for the other defendants in these adversary cases and the unanimous consensus was that though the claims against their clients ultimately would not prevail at trial, taking their cases to trial was not economically prudent in light of the lesser amounts of money sought by the Plaintiff against their clients.”

G. Defendant Chester C. Lehmann Co, Inc. asserts that such preference litigation is “unfair” because,

“The Plaintiff, on the other hand, is in the more economically advantageous position of being able to minimize his legal expenses by using almost the same set of facts and legal arguments for all 34 adversary actions. The settlement of the other cases highlights the inequitable financial nature of this litigation rather than any great diligence by Plaintiff.”

H. As to defendant Chester C. Lehmann Co, Inc.’s active prosecution of discovery, it is stated,

“Defendants have not yet filed a motion to compel against Plaintiffs and neither has Plaintiff filed any against Defendants, though the two have been involved in a discovery dispute since December 2015.”

I. With respect to defendant Chester C. Lehmann Co, Inc.’s diligent prosecution of discovery, it is asserted:

“Defendant has taken all necessary steps to litigate this lawsuit. Defendant timely answered the Complaint, provided opposing counsel with all requested documents through informal discovery, was the first to propound discovery, cooperated in all meet and confer efforts, agreed to attend mediation, and has insisted that opposing party seek extensions of deadlines or has sought those extensions itself when it became clear that Plaintiff’s delays in document production were jeopardizing Defendants ability to litigate this matter.”

“Noticing depositions has been premature in Defendants’ cases because Debtor’s financial documents, contracts, correspondence, etc. have still not been made available by Plaintiff. Defendant’s counsel has spoken with a number of Debtor’s former employees and principals and they have informed him that Debtor’s finances and projects were closely tracked, but all of Debtor’s records were left with the Plaintiff after Debtor’s bankruptcy filing.”

“Filing motions to enforce the outstanding subpoenas and deposing all parties that might have some information about Debtor is imprudent and unfair when Plaintiff has a duty to produce all the information that Defendant seeks related to Plaintiff’s claims.”

On this point of discovery and documents, the court recalls an exchange with counsel for defendant Chester C. Lehmann Co, Inc. concerning why third parties who had the documents (such as the insurance or bonding companies who had the financial statements of the Debtor upon which they relied in issuing the insurance or bonds) were not subpoenaed, defendant Chester C. Lehmann Co, Inc.’s counsel’s response was that such third-parties would not comply with such discovery, so instead that defendant wanted to make the plaintiff-trustee provide it. No good explanation was provided as to why the third-parties could ignore a federal subpoena and why defendant Chester C. Lehmann Co, Inc. would not compel compliance (including the recovery of the necessary costs and expenses in compelling compliance with a federal subpoena).

J. It is further asserted,

“Since the beginning of this discovery process Plaintiff had represented that almost all of Debtor’s records were stored on its server. (Id., at ¶ 9.) This assertion seems to have no foundation however. In Defendant’s conversations with Debtor and its former employees in the aftermath of said production, it became clear that many of Debtor’s documents were in fact stored on the laptops and desktops that Plaintiff destroyed in 2013. (Id., at ¶ 20.) There is no rational reason for Defendant to pay outside consultants to scour for information that should be provided at Plaintiff’s expense and which might not even be located on the hard drives and server that Plaintiff provided.”

Exhibit A, Dckt. 49.

Whether the court allows discovery to be extended for defendant Chester C. Lehmann Co, Inc., which is defending a \$1,000,000+ preference action, it is not grounds for excusing this Defendant from the diligent prosecution of this Adversary Proceeding. The court has expressed serious reservations that it has been and is unreasonable for defendant Chester C. Lehmann Co, Inc. to exercise its rights under the Federal Rules of Civil Procedure to conduct discovery to defend a \$1,000,000+ preference action.

It appears that Defendant in this Adversary Proceeding is now attempting to use the ligation strategy action, or inaction, of defendant Chester C. Lehmann Co, Inc. in not enforcing its rights and actively conducting discovery as a reason for this Defendant not to go to trial.

The court does not find this contention to be reasonable, credible, or a basis for delaying trial in this Adversary Proceeding. If Defendant and its counsel thought that defendant Chester C. Lehmann Co, Inc. was a critical part of their discovery in this Adversary Proceedings, Defendant and its experienced counsel have had more than a year to coordinate discovery with counsel in the other Adversary Proceeding. Instead, Defendant now argues that it would be “unfair” for it to continue in the diligent prosecution of their defense while Chester C. Lehmann Co, Inc. and its counsel request/demand/implore the court to extend discovery for a second time so they can continue to argue about discovery, for which in over a year Chester C. Lehmann Co, Inc. has not attempted to enforce its rights to conduct discovery concerning the \$1,000,000+ preference action being prosecuted against it.

If Defendant believed that conducting discovery with Chester C. Lehmann Co, Inc. was an important part of its trial strategy, it would have done so over this past year. Defendant has not. In the best light, it appears that this request for a continuance in this Adversary Proceeding is an attempt to take advantage of a fortuitous coincidence of a defendant in another action arguing with the plaintiff-trustee. To a more jaundiced eye, one might believe it is part of a preconceived, coordinated scheme to derail the proper administration of justice and the court’s management of the cases and adversary proceedings before it. Given Defendant’s experienced counsel and her reputation, the court presumes that it is the former.

The court shall issue an Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

- A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.
- B. **Plaintiff** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2016**.
- C. **Defendant** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2016**.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, **2016**.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, **2016**.
- F. The Trial shall be conducted at ----x.m. on -----, **2016**.

The Parties in their respective Pretrial Conference Statements, Dckts. -----, -----, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

Plaintiff(s)	Defendant(s)
<p>Jurisdiction and Venue:</p> <p>1. Core Proceeding as stated on the record at the October 1, 2015 Status Conference. Civil</p>	<p>Jurisdiction and Venue:</p> <p>1. Core Proceeding as stated on the record at the October 1, 2015 Status Conference. Civil</p>

Minutes, Dckt. 13, and Scheduling Order, Dckt. 14.	Minutes, Dckt. 13, and Scheduling Order, Dckt. 14.
<p>Undisputed Facts:</p> <ol style="list-style-type: none"> <li>1. Debtor Applegate Johnston made a transfer to Defendant on or after May 16, 2103 in the amount of \$24,704.27 (the "Challenged Payment.") The transfer was made by check, a copy of which is attached as Exhibit 14.</li> <li>2. The Challenged Payment was a transfer of property of the Debtor.</li> <li>3. At the time of the transfer, Defendant was a creditor of Debtor.</li> <li>4. The Challenged Payment was made on account of an antecedent debt owed by 7 Debtor to Defendant for installation of a commercial door.</li> <li>5. Debtor commenced a Chapter 7 bankruptcy case on July 16, 2016. The Challenged Payment was made within 90 days of the bankruptcy filing.</li> <li>6. The Challenged Payment was made on account of a debt that was unsecured as to Debtor. Defendant had no security interest in property of the Debtor to secure the payment.</li> <li>7. The distribution to unsecured creditors in Debtor's case will be less than 100% of the amount of the debt.</li> <li>8. Defendant did not provide any new value contemporaneously with the Challenged Payment.</li> <li>9. Defendant did not provide any new value to Debtor after the Challenged Payment.</li> </ol>	<p>Undisputed Facts:</p> <ol style="list-style-type: none"> <li>1. None</li> </ol>
Disputed Facts:	Disputed Facts:

<p>1. Defendant may seek to challenge the presumption that Debtor was insolvent in the 90 days prior to the bankruptcy case.</p> <p>2. Defendant contends that the Challenged Payment was made in the ordinary course of business or financial affairs of the Debtor and the transferee, or that it was made according to ordinary business terms.</p>	<p>1. Defendant alleges, but Plaintiff disputes, that the long delay in bringing the within adversary action was made in bad faith and was a deliberate attempt to prejudice Defendant's claim under the Payment Bond.</p> <p>2. Defendant alleges, but Plaintiff disputes, that the funds used to pay Defendant were not property of the estate but instead were earmarked and held in trust by Applegate to pay the Sub-Contractors who worked on the Project. Neither the Trustee nor the general unsecured creditors of the bankruptcy estate are members of the class entitled to share in these funds.</p> <p>3. Defendant alleges, but Plaintiff disputes, that Applegate's payment to Defendant was made in the ordinary course of business according to ordinary business terms.</p> <p>4. Defendant alleges, but Plaintiff disputes, that the payment was a simultaneous exchanges for new value.</p> <p>5. Defendant alleges, but Plaintiff disputes, that Applegate's payment to Defendant was offset by new value received from Defendant.</p> <p>6. Defendant alleges, but Plaintiff disputes, that Applegate was solvent at the time of payment.</p> <p>7. Defendant alleges that Applegate received fair and reasonably equivalent value in exchange for the payment made to Defendant. Defendant does not know if Plaintiff disputes this factual assertion.</p> <p>8. Defendant alleges, but Plaintiff disputes, that Defendant did not receive more from the payment alleged in the complaint than what it would have received if such</p> <p>9. Defendant alleges that recovery of the funds listed in the complaint by the Trustee, that were</p>
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	<p>paid by the City of San Jose for the construction of the Project, would be a violation of California and Federal law, the Performance Bond and the Payment Bond. Defendant believes that Plaintiff disputes this factual assertion.</p>
<p>Disputed Evidentiary Issues:</p> <p>1. None Identified.</p>	<p>Disputed Evidentiary Issues:</p> <p>1. Defendant asserts that Plaintiff waived its right to present expert testimony in this lawsuit. Plaintiff did not provide any expert declaration to Defendant.</p>
<p>Relief Sought:</p> <p>1. Trustee seeks avoidance and recovery of the Challenged Payment.</p>	<p>Relief Sought:</p> <p>1. Defendant requests the Court to deny Plaintiff's complaint. Defendant seek attorney's fees and costs.</p>
<p>Points of Law:</p> <p>1. 11 U.S.C. § 547(b); Preference Avoidance.</p> <p>2. <i>In re Sierra Steel, Inc.</i>, 96 B.R. 275, 279 (B.A.P. 9th Cir. 1989.); 11 U.S.C. § 547(b)(3), presumption of insolvency.</p> <p>3. <i>In re Lewis W Shurtleff, Inc.</i>, 778 F.2d 1416,1421 (9th Cir. 1985); 11 U.S.C. § 547(b)(5), comparison to Chapter 7 distribution.</p>	<p>Points of Law:</p> <p>1. The Miller Act (40 U.S.C. Section 3131 et seq.), as to application of the "earmarking doctrine." (No authorities cited for application of such doctrine.)</p> <p>2. 11 U.S.C. § 547(c)(2); payments made according ordinary business terms.</p> <p>3. 11 U.S.C. § 547(c)(1)(a), payments were contemporaneous exchanges for new value.</p> <p>4. The Trustee received fair and reasonably equivalent value for the payment made to Defendant.</p>
<p>Abandoned Issues:</p> <p>1. None</p>	<p>Abandoned Issues:</p> <p>1. None</p>
<p>Witnesses:</p>	<p>Witnesses:</p>

<ol style="list-style-type: none"> <li>1. Miguel Hernandez</li> <li>2. Liberty Mutual (by deposition transcript)</li> </ol>	<ol style="list-style-type: none"> <li>1. Charles A. DeLucci Jr., who will testify as an expert.</li> <li>2. Dustin Torrez, who will testify as an expert.</li> <li>3. Jennifer Turner, who will testify as an expert.</li> <li>4. Miguel Hernandez, who will also testify as an expert.</li> <li>5. Representative of Applegate Johnson Inc. Identity to be determined.</li> </ol>
<p>Exhibits:</p> <ol style="list-style-type: none"> <li>1. Notice of Deposition</li> <li>2. Proposal</li> <li>3. Contract Agreement</li> <li>4. Subcontract Change Order</li> <li>5. Invoice dated 11/28112</li> <li>6. Invoice dated 11128112</li> <li>7. Payment Receipt</li> <li>8. Payment Receipt</li> <li>9. Payment Receipt</li> <li>10. Payment Receipt</li> <li>11. Check Stub</li> <li>12. Email from Ku to Ace Automatic dated 7/24/13</li> <li>13. Declaration of Miguel Hernandez</li> <li>14. Check dated 5116113 to Ace Automatic</li> </ol>	<p>Exhibits:</p> <ol style="list-style-type: none"> <li>1. Invoices, change orders, pay-roll information, correspondence as to work performed and invoices provided and payments made - all related to the Project.</li> <li>2. Contracts related to the Project.</li> <li>3. Performance Bond.</li> <li>4. Payment Bond.</li> <li>5. Claims made to, and payments received from, Liberty Mutual under the Bonds.</li> <li>6. Correspondence by and between Liberty Mutual's counsel and Defendant' counsel.</li> <li>7. Payments, reports and correspondence by and between the City of San Jose and Defendant regarding the Project.</li> <li>8. Applegate's bankruptcy schedules.</li> <li>9. Lien documents, including but not limited to, preliminary notices, stop notices, conditional releases and unconditional releases.</li> <li>10. Correspondence by and between Defendant,</li> </ol>

Garage Doors. Inc.	<p>Applegate and the City of San Jose.</p> <p>11. Information as to funding of the Project.</p> <p>12. Documents produced by Liberty Mutual.</p> <p>13. Information as to collateral offered by Applegate and/or its owners for issuance of Performance and Payment Bonds.</p> <p>14. Deposition testimony by representatives of the City of San Jose and Liberty Mutual.</p> <p>15. Any and all additional documents that might be discovered by other Defendants in other adversary actions filed in Applegate's bankruptcy case which relate to the Project.</p>
<p>Discovery Documents:</p> <p>1. Subpoena for documents to Central Valley Community Bank, and responsive documents.</p> <p>2. Subpoena for documents to Central Valley Community Bank, and responsive documents</p> <p>3. Deposition of Liberty Mutual</p> <p>4. Deposition of Miguel Hernandez 7:11-15 8:19-21 13:21-14:16 15:13-16:8 16:17-17:25 21:19-22 21:23-22:12</p>	<p>Discovery Documents:</p> <p>1. Deposition testimony of representative of City of San Jose.</p> <p>2. Deposition testimony of representative of Liberty Mutual.</p>
<p>Further Discovery or Motions:</p> <p>1. None Identified</p>	<p>Further Discovery or Motions:</p> <p>1. None Identified</p>
Stipulations:	Stipulations:

1. None Identified	1. None identified
Amendments: 1. None Identified	Amendments: 1. None Identified.
Dismissals: 1. None Identified	Dismissals: 1. None Identified
Agreed Statement of Facts: 1. None Identified	Agreed Statement of Facts: 1. None Identified
Attorneys' Fees Basis: 1. No Attorneys' Fees Requested	Attorneys' Fees Basis: 1. No Basis for Attorneys' Fees Identified
Additional Items 1. None Identified	Additional Items 1. None Identified.
Trial Time Estimation:	Trial Time Estimation: One (1) Day.

8. [13-91315-E-7](#)                      **APPLEGATE JOHNSTON, INC.**  
[15-9042](#)  
**MCGRANAHAN V. I.C.**  
**ELECTRONICS, INC.**

**PRE-TRIAL CONFERENCE RE:**  
**COMPLAINT FOR (1) AVOIDANCE OF**  
**PREFERENTIAL TRANSFERS; AND (2)**  
**RECOVERY OF AVOIDED TRANSFERS**  
**7-13-15 [1]**

Plaintiff's Atty: Daniel L. Egan  
Defendant's Atty: Walter J. Schmidt

Adv. Filed: 7/13/15  
Answer: 8/4/15

Nature of Action:  
Recovery of money/property - preference

<b>The Pretrial Conference is <span style="color: red;">XXXXXXXXXXXXXXXXXXXXXX</span>.</b>
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Notes:  
Scheduling Order -  
Initial disclosures by 10/31/15  
Disclose experts by 1/15/16  
Exchange expert reports by 3/18/16  
Close of discovery 5/31/16  
Dispositive motions heard by 7/15/16

#### **SEPTEMBER 27, 2016 PRETRIAL CONFERENCE**

On July 12, 2016, the court entered its order approving the settlement of the claims in this Adversary Proceeding. 13-91315, Dckt. 652. Under the terms of the Settlement, Defendant was to make a \$7,000.00 lump sum payment to the Plaintiff-Trustee.

9. [13-91315-E-7](#)                      **APPLEGATE JOHNSTON, INC.**  
[15-9046](#)  
**MCGRANAHAN V. SECURECOM, INC.**

**PRE-TRIAL CONFERENCE RE:  
COMPLAINT FOR (1) AVOIDANCE OF  
PREFERENTIAL TRANSFERS; AND (2)  
RECOVERY OF AVOIDED TRANSFERS  
7-13-15 [1](#)**

Plaintiff's Atty: Daniel L. Egan  
Defendant's Atty: Christopher J. Hersey

Adv. Filed: 7/13/15  
Answer: 10/15/15

Nature of Action:  
Recovery of money/property - preference

<b>The Pretrial Conference is <span style="color: red;">XXXXXXXXXXXXXXXXXXXXXXXXXXXX</span>.</b>
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Notes:

Scheduling Order -  
Initial Disclosures by 11/20/15  
Disclose experts by 1/15/16  
Exchange expert reports by 3/18/16  
Close of Discovery 5/31/16  
Dispositive Motions heard by 7/15/16

Substitution of Attorney [by Securecom, Inc.] filed 8/19/16 [Dckt 21]; Order granting filed 8/19/16 [Dckt 22]

#### **SEPTEMBER 27, 2016 STATUS CONFERENCE**

The court entered its order on August 29, 2016, authorizing the Plaintiff-Trustee to settle the claims in this Adversary Proceeding. 13-91315, Dckt. 671. Under the terms of the Settlement, Defendant is to make two settlement payments, with the last one within five business days after the entry of the order approving the settlement.

10. [13-91315-E-7](#)  
[15-9052](#)

APPLEGATE JOHNSTON, INC.

MCGRANAHAN V. LAGUNA GOLD  
MORTGAGE, INC.

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT AND THIRD-PARTY  
COMPLAINT  
7-15-15 [\[1\]](#)

Third-party Plaintiff's Atty: Daniel L. Egan  
Third-party Plaintiff: Laguna Gold Mortgage, Inc.

Third-party Defendant's Atty: Patrick M. Keene  
Third-party Defendant: Ahern Rentals, Inc.

Adv. Filed: 1/14/16 [Dckt 44]  
Answer: none

Notes:

Continued from 8/4/16 to allow for the hearing on the motion to approve compromise and the parties to conclude this Adversary proceeding pursuant to said compromise if approved.

**The Pretrial Conference is ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~.**

#### SEPTEMBER 27, 2016 STATUS CONFERENCE

The court entered its order on August 29, 2016, authorizing the Plaintiff-Trustee to settle the claims in this Adversary Proceeding. 13-91315, Dckt. 670. Under the terms of the Settlement, Defendant is to make one settlement payments within 10 days of executing the settlement agreement.

11. [12-93049](#)-E-11

MARK/ANGELA GARCIA  
Mark Hannon

STATUS CONFERENCE RE:  
VOLUNTARY PETITION  
11-30-12 [\[1\]](#)

**Final Ruling:** No appearance at the September 27, 2016 Status Conference is required.

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Debtor's Atty: Mark J. Hannon

**The Status Conference is continued to 2:00 p.m. on December 15, 2016.**

Notes:

Continued from 4/7/16

Operating Reports filed: 4/16/16; 5/15/16; 6/16/16 [May, June]; 7/16/16; 8/17/16; 9/16/16

[SDN-3] Order Confirming Amended Plan of Reorganization [Dated: January 20, 2016] filed 5/6/16 [Dckt 781]

[MJH-16] Motion for Compensation and Expenses by Mark J. Hannon as Counsel for the Debtors filed 6/13/16 [Dckt 793]; Order granting filed 8/15/16 [Dckt 839]

[PA-9] Third and Final Application for Compensation of Kristin Kirchner, Accountant filed 7/7/16 [Dckt 804]; Order granting filed 8/15/16 [Dckt 838]

[JB-1] Second and Final Application for Compensation of John Bell, Chapter 11 Trustee filed 7/8/16 [Dckt 812]; Order granting filed 8/15/16 [Dckt 836]

[SDN-4] First and Final Application for Approval of Compensation for Creditor YP, Plan Proponent's, Attorneys filed 9/2/16 [Dckt 843], Set for hearing 10/20/16 at 10:30 a.m.

[MJH-17] Motion for Authority to Sell Real Property and to Pay Attorneys Fees, Liens and Allowed Claims filed 9/15/16 [Dckt 849], Set for hearing 10/20/16 at 10:30 a.m.

Chapter 11 Status Conference Report of Debtor filed 9/20/16 [Dckt 855]

#### **SEPTEMBER 27, 2016 STATUS CONFERENCE**

The Plan Administrator/Debtors report that they are prosecuting the confirmed Plan, and that the final anticipated motions are set for hearing in October 2016. The court continues the Status Conference.

12. [09-94269-E-7](#)  
[15-9018](#)

SUSHIL/SUSEA PRASAD

FERLMANN V. MEYER WILSON CO.,  
LPA ET AL

STATUS CONFERENCE CONTINUED RE:  
AMENDED COMPLAINT  
6-8-16 [\[156\]](#)

**Final Ruling:** No appearance at the September 27, 2016 Status Conference is required.  
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Plaintiff's Atty: Matthew J. Olson; Roxanne Bahadurji; Iain A. MacDonald

Defendant's Atty:

William A. Munoz; Kristin L. Iversen [Meyer Wilson Co., LPA]

Steve Altman [Sushil Prasad; Susea S. Prasad]

Holly Estioko [Transamerica Financial Advisors, Inc.]

Third Amd. Cmpl. Filed: 6/8/16

Answer: 7/5/16

Nature of Action:

Recovery of money/property - other

Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

<b>The Status Conference is continued to 2:00 p.m. on December 15, 2016.</b>
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Notes:

Continued from 8/25/16. Parties to participate in supervised mediation on 9/14/16

Plaintiff's Status Conference Statement filed on 9/22/16 [Dckt 181]

### **SEPTEMBER 27, 2016 STATUS CONFERENCE**

The Plaintiff-Trustee filed a Status Report advising the court that this matter has been resolved through a judicially supervised mediation and that a hearing for approval of the settlement will be set for October 2016. The Motion for Approval of the settlement has been filed in the bankruptcy case (09-94269, Dckt. 152), with the hearing set for October 20, 2016.

The court continues the Status Conference to allow the parties to proceed with obtaining approval of and settling the disputes and issues before the court.

13. [14-90473](#)-E-7      ROBERT WOJTOWICZ AND      PRE-TRIAL CONFERENCE RE:  
[14-9023](#)      SHERRI HERTZIC-WOJTOWICZ      AMENDED COMPLAINT TO RECOVER  
HERTZIC-WOJTOWICZ V. IRM      PREFERENTIAL TRANSFER  
CORPORATION ET AL      9-29-15 [\[46\]](#)

**The Adversary Proceeding having been dismissed (Dckt. 67), the Status Conference is removed from the Calendar.**

14. [15-90087](#)-E-7      DIOLINDA MACHADO      CONTINUED STATUS CONFERENCE RE:  
[15-9016](#)      MACHADO V. MACHADO      COMPLAINT  
5-15-15 [\[1\]](#)

**Final Ruling:** No appearance at the September 27, 2016 Status Conference is required.

Plaintiff's Atty: Anthony D. Johnston  
Defendant's Atty: Pro Se

Adv. Filed: 5/15/15  
Answer: 6/22/15

Nature of Action:  
Dischargeability - other  
Dischargeability - false pretenses, false representation, actual fraud  
Dischargeability - willful and malicious injury  
Dischargeability - fraud as fiduciary, embezzlement, larceny

**The Status Conference is continued to 2:00 p.m. on December 15, 2016.**

Notes:  
Continued from 6/16/16 by request of parties

Status Report [Plaintiff] filed 9/21/16 [Dckt 18]

## **SEPTEMBER 27, 2016 STATUS CONFERENCE**

On September 21, 2016, Plaintiff Mary Machado filed a Status Report. Dckt. 18. The court is advised that a criminal restitution order has been entered in the state court proceedings and Plaintiff will proceed with a motion for summary judgment based thereon in this Adversary Proceeding.

The Motion for Summary Judgment and supporting pleadings were filed on September 28, 2016. Dckts. 20 - 26. The hearing on the Motion for Summary Judgment is scheduled November 10, 2016. The court continues the Status Conference to allow for the prosecution of the Motion for Summary Judgment.