

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Modesto, California

October 20, 2016, at 2:00 p.m.

1. [16-90500-E-11](#) ELENA DELGADILLO

**CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
6-9-16 [1]**

Debtor's Atty: David C. Johnston

Notes:

Continued from 9/8/16

Order granting Motion for Relief from Stay filed 10/3/16 [Dckt 55]

The Status Conference is XXXXXXXXXXXXXXXXXXXX.

OCTOBER 20, 2016 STATUS CONFERENCE

On 3, 2016, the court entered its order modifying the automatic stay to allow Wilmington Savings Fund Society, to exercise rights to obtain possession of real property commonly known as 24606 Patricia Court. Dckt. 55. No opposition was filed to that motion for relief from the stay.

In this case, the Debtor in Possession has the task of recovering assets which she transferred pre-petition to family members. Mr. Lopez, Debtor's most dollar amount significant creditor in this case has previously reported there being communication between counsel for the Debtor in Possession and counsel for Mr. Lopez. See Minutes below for September 8, 2016 Status Conference.

It was reported that the properties were being reconveyed and the parties were working on possible plan terms.

At the October 20, 2016 Status Conference, it was reported XXXXXXXXXXXXXXXX.

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PRIOR STATUS CONFERENCES

SEPTEMBER 8, 2016 STATUS CONFERENCE

The Debtor in Possession did not file an updated Status Report. Creditor Sacramento Lopez filed a Creditor's Status Report on September 6, 2016. Dckt. 51. Mr. Lopez is the main creditor in this case, being scheduled by the Debtor as having an \$850,000.00 unsecured claim.

In his Status Report, Mr. Lopez recounts his version of how the Debtor transferred assets including a grocery store business and more than ten parcels of property out of her name after Mr. Lopez obtained a jury verdict against Debtor. Mr. Lopez has been prosecuting fraudulent conveyance actions against the various transferees, in which most of the transferees failed to answer the complaints.

Notwithstanding the acrimonious pre-petition environment with Debtor and Debtor's non-bankruptcy counsel, the Status Report indicates that there have been "positive communications" with Debtor in Possession's bankruptcy counsel.

Mr. Lopez indicates in his Status Report reservations as to whether the Debtor can fulfill her fiduciary duties as the debtor in possession. The Report indicates that counsel for the Debtor and her significant other in the Lopez litigation is now representing the transferees of the assets from Debtor. Mr. Lopez indicates that communications with counsel for the Debtor in Possession have been spotty, but recognizes that some non-case related issues may be the cause, as opposed to such counsel not doing his job or addressing matters in good faith.

Presentation of the Parties at the Hearing

The Debtor in Possession reported that the deeds for the transferred property were recorded in August 2016. The Debtor in Possession is working with the major creditor, Mr. Lopez, on a plan in this case to provide for creditors (funded through a loan or the sale of the properties).

AUGUST 4, 2016 STATUS CONFERENCE SUMMARY

On July 26, 2016, Debtor in Possession filed a Status Report. Dckt. 31. It is explained that the Debtor is a judgment debtor for a \$620,803.00 judgement (renewed March 3, 2016). The judgment creditor commenced litigation against the Debtor's adult children to set aside alleged fraudulent transfers of assets from Debtor to the children.

The Debtor was also involved in pre-petition lawsuits in connection with a home loan, loan modification efforts, an alleged improper foreclosure, and an unlawful detainer action. Debtor was not represented by her bankruptcy attorney in connection with such pre-petition litigation.

Income

The Debtor in Possession reports having \$1,400.00 in monthly wages and an \$800.00 a month payment on a promissory note for property Debtor sold pre-petition.

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Prosecution of Chapter 11 Case

The Debtor in Possession states that she intends to: (1) obtain deeds from her adult children for the property transferred to them, and (2) if the children will not execute the deeds, then counsel for Debtor in Possession intends to file adversary proceedings against them.

In the state court action commenced by the creditor, a preliminary injunction has been issued preventing the children from transferring the property, but it is reported that the creditor's counsel will consent to having the injunction lifted to convey the property into the bankruptcy estate.

Debtor in Possession (incorrectly identified as the "Debtor," if the intention is to have counsel for the Debtor in Possession prepare, file, and prosecute any such plan) states that she intends to file a plan on or before October 7, 2016, which is the end of the statutory exclusivity period for the Debtor in Possession.

SUMMARY OF SCHEDULES

Real Property Schedule A	FMV	LIENS	
Orchard Rd and River Road	\$350,000		

Personal Property Schedule B	FMV	LIENS	
Total	\$187,300		
Significant Dollar Value Assets			
2015 GMC Sierra Truck	\$35,000	(\$10,525)	
Note Receivable	\$140,000		
Claim Against Alameda County for Civil Rights Violation	Unknown		
Claim to Set Aside Foreclosure Deed Hayward Property	Unknown		
Claim to Recover Real Property Transferred to Children	Unknown		

Secured Claims Schedule D	TOTAL CLAIM AMOUNT	FMV	UNSECURED CLAIM PORTION
Ally Financial - GMC Sierra	(\$10,525)	\$35,000	

PRIORITY UNSECURED CLAIMS SCHEDULE E	TOTAL CLAIM AMOUNT	PRIORITY	GENERAL UNSECURED
None			

GENERAL UNSECURED CLAIMS SCHEDULE F	TOTAL CLAIM AMOUNT		
Total	(\$870,357)		
Significant Dollar Amount General Unsecured Claims			
Lopez	(\$850,000)		
US Bank, N.A.	(\$10,000)		

INCOME, SCHEDULE I Total Average Monthly Income		
Wages (Gross)	\$1,400	
Note Receivable	\$800	
(No Withholding)		

EXPENSES, SCHEDULE J Total Average Monthly Expenses		
Total	(\$2,137)	
Significant Dollar Amount Expenses		
Rent/Mortgage	\$0	
Homeowners/Renters Insurance	\$0	
Home Maintenance	\$0	
Electricity/Gas	(\$170)	
Water/Sewer/Garbage	(\$130)	
Food and Housekeeping Supplies	(\$500)	

Clothing/Laundry	(\$100)	
Personal Care Products	(\$150)	
Medical/Dental	\$0	
Transportation	(\$300)	
Charitable	(\$50)	
Health Ins	\$0	
Vehicle Insurance	\$130	
Car Payment	(\$307)	

STATEMENT OF FINANCIAL AFFAIRS

Part 2 Income

2016 YTD	\$7,700	
2015	\$16,800	
2014	\$16,800	

Part 2 Non-Business Income

2016 YTD	\$4,800	
2015	\$9,600	
2014	\$9,600	

Part 3 Payments within 90 days

Creditor	Amount	Date
None		

Payments within one year

Creditor	Amount	Date
None		

Part 4 Legal Actions and Foreclosures

Wilmington Savings Fund Society vs. Elena Delgadillo HG16808828	Concluded: Unlawful Detainer Superior Court of California Alameda County Hayward, CA
Elena Delgadillo, et al., vs. Sacramento Lopez, et al RG16807958	Concluded: Complaint dismissed/stricken Complaint for damages, to quash, abuse of process, unfair business practices, etc. Superior Court of California Alameda County Hayward, CA
Elena Delgadillo vs. Bank of America, N.A. RG15780993	On Appeal: Improper foreclosure Superior Court of California Alameda County Hayward, CA
Sacramento Lopez vs. Elena Delgadillo, et al. HG13663545	Pending: Complaint to set aside fraudulent conveyances Superior Court of California Alameda County Hayward, CA
Elena Delgadillo vs. County of Alameda RG14731177	Pending: Civil rights violations Superior Court of California Alameda County Hayward, CA

Foreclosures

Wilmington Savings Fund Society	Patricia Court, Hayward, California Foreclosure, December 1, 2015
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2. [16-90002-E-11](#) **1263 INVESTORS LLC** **CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
1-5-16 [1](#)**

Final Ruling: No appearance at the October 20, 2016 Status Conference is required.

Debtor's in Possession Atty: Stephen M. Reynolds

Notes:

Continued from 8/4/16

Ch 11 plan filed 9/8/16 [Dckt 62]

Ch 11 disclosure statement filed 9/8/16 [Dckt 63]; Order denying Disclosure Statement filed 10/3/16 [Dckt 70]

[RLC-6] Ex Parte Motion for Order Shortening Time for Notice of Hearing on Disclosure Statement filed 9/9/16 [Dckt 64]; Order granting filed 9/12/16 [Dckt 66]

First Amended Plan of Reorganization filed 10/9/16 [Dckt 71]

Disclosure Statement to First Amended Plan of Reorganization filed 10/9/16 [Dckt 72]

Ex Parte Motion for Order Shortening Time for Notice of Hearing on Disclosure Statement filed 10/9/16 [Dckt 71] ; Order granting filed 10/11/16 [Dckt 76]

The Status Conference is continued to 2:00 p.m. on December 1, 2016.

OCTOBER 20, 2016 STATUS CONFERENCE

The court has set for hearing a motion to approve the amended disclosure statement of the Debtor in Possession for November 10, 2016. Continuance of the Status Conference is appropriate to allow the parties focus on the approval of the disclosure statement. No party in interest has filed any pleadings advising the court of any matters that need to be addressed at an October Status Conference.

3. [16-90513-E-7](#) **TIRZAH HAMILTON**
[16-9012](#)
EDMONDS V. HAYES ET AL

STATUS CONFERENCE RE:
COMPLAINT
8-24-16 [1]

Plaintiff's Atty: Steven S. Altman
Defendant's Atty: unknown

Adv. Filed: 8/24/16
Answer: 9/22/16

Nature of Action:
Recovery of money/property sec. 548
Turnover of real property or personal property or its current value

The Status Conference is XXXXXXXXXXXXXXXXXX.
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Notes:
Plaintiff's First Status Conference Statement filed 9/28/16 [Dckt 11]

SUMMARY OF COMPLAINT

Irma Edmonds, the Chapter 7 Trustee in the Tirzah Hamilton bankruptcy case, ("Plaintiff-Trustee") has filed a Complaint to avoid transfers and recover the value of property from Brian Hayes, Delores Hamilton, and Valerie Tan ("Defendants"). It is alleged that within one year of the commencement of the Chapter 7 bankruptcy case by Tirzah Hamilton ("Debtor"), real property commonly known as 2401 Walnut Park Dr., Modesto, California, was transferred by Debtor to Defendants for less than adequate consideration. It is alleged that the consideration paid was \$180,000.00, and from the proceeds a gift of \$8,600.47 was made by Debtor to defendant Valerie Tan. It is further alleged that the property had a value of \$190,000.00 at the time of the transfer.

Plaintiff-Trustee seeks to have the two transfers avoided and the property and money recovered by the bankruptcy estate.

SUMMARY OF ANSWER

The Defendants have filed an Answer, each in pro se. Dckt. 10. In answer the Complaint, Defendants provide detail responses or counter allegations, including:

- A. Defendant Hayes is the ex-boyfriend and father of two children with Debtor.
- B. Defendant Tan was the former owner of the property transferred and was rightfully owed the money she was paid from escrow as the seller of the property to Debtor earlier in the year prior to the filing of bankruptcy.

- C. Wells Fargo Bank, N.A. “denied” the transfer of the property from Defendant Tan to Debtor. (This appears to be a statement that Wells Fargo Bank, N.A. did not consent to the sale and chose to exercise its due on sale clause, as a creditor cannot prevent a person from exercising the right to alienate (transfer) real property.)
- D. It is asserted that the quitclaim deed by which Debtor acquired title was “invalid.”
- E. When the property was transferred to Defendants, the obligation owed to Wells Fargo Bank, N.A. had to be satisfied and a new loan obtained by Defendants.
- F. It is asserted that the transfer did not make Debtor insolvent, but she did not have any gainful employment for a significant period of time prior to and after the transfer.
- G. Based on appraisals, the value of the property was \$180,000.00 when transferred.
- H. The \$10,000 held in escrow for Ms. Tran was pursuant to the 2013 contract by which the property was transferred to Debtor.

Attached to the Answer are several documents which include the following:

- A. Exhibit 1b is a letter from Wells Fargo Bank, N.A. asserting the right to accelerate the obligation secured by the property pursuant to the due on sale clause in the deed of trust.
- B. Exhibit 4 is an appraisal concluding that the property has a value of \$180,000.00.

What is not clear to the court is how much of an obligation was owed to Wells Fargo Bank, N.A. that was secured by the property (assuming that there was an obligation and the lien on the property was properly perfected - 11 U.S.C. § 544).

FINAL BANKRUPTCY COURT JUDGMENT

The Plaintiff-Trustee alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(E), (H), (K), and (O). Plaintiff-Trustee consents to the bankruptcy judge determining any non-core issues. Complaint, ¶ 3, Dckt. 1.

Defendant admits that this court has “jurisdiction” for this Adversary Proceeding. Answer, ¶ 3, Dckt. 1. The Answer does not clearly deny, nor consent, to this court entering all orders and the final judgment for any non-core issues in this Adversary Proceedings. See Federal Rule of Bankruptcy Procedure 7008 requiring a party to state whether the any issues are non-core, and if non-core, whether such consent to entry of final orders and judgment is given.

The court addressed with the parties the exercise of federal judicial power by the bankruptcy judge and the giving of consent to the bankruptcy judge to issue final orders and judgment for any non-core matters. **To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this is Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgment in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.**

ISSUANCE OF PRE-TRIAL SCHEDULING ORDER

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

- A. The Plaintiff-Trustee alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. §§ 1334 and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(E), (H), (K), and (O). Plaintiff-Trustee consents to the bankruptcy judge determining any non-core issues. Complaint, ¶ 3, Dckt. 1.
- B. Defendant admits that this court has “jurisdiction” for this Adversary Proceeding. Answer, ¶ 3, Dckt. 1. The Answer does not clearly deny, nor consent, to this court entering all orders and the final judgment for any non-core issues in this Adversary Proceedings. See Federal Rule of Bankruptcy Procedure 7008 requiring a party to state whether any issues are non-core, and if non-core, whether such consent to entry of final orders and judgment is given.
- C. The court addressed with the parties the exercise of federal judicial power by the bankruptcy judge and the giving of consent to the bankruptcy judge to issue final orders and judgment for any non-core matters. **To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgment in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.**
- D. Initial Disclosures shall be made on or before -----, **2016**.
- E. Expert Witnesses shall be disclosed on or before -----, **2017**, and Expert Witness Reports, if any, shall be exchanged on or before -----, **2017**.
- F. Discovery closes, including the hearing of all discovery motions, on -----, **2017**.
- G. Dispositive Motions shall be heard before -----, **2017**.

H. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at -----
p.m. on -----, 2017.

4. [13-91315-E-7](#) [15-9020](#) **APPLEGATE JOHNSTON, INC.** **CONTINUED PRE-TRIAL**
MCGRANAHAN V. C&T WELDING, **CONFERENCE RE: COMPLAINT FOR**
INC. ET AL **(1) AVOIDANCE OF PREFERENTIAL**
FRAUDULENT TRANSFERS; (2) AVOIDANCE OF
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:

Continued from 9/29/16

The Pre-Trial Conference is XXXXXXXXXXXXXXXXXXXXXXXX.

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.

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- 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 in 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 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, 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'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 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 litigation 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

REQUEST FOR CONTINUANCE

At the hearing, the Parties requested a one-month continuance to allow for further settlement discussions.

DEFENDANT SURECOM, INC. PRETRIAL STATEMENT

The Parties report that Surecom, Inc. is not a party to this Adversary Proceeding and they believe that the Answer was filed by mistake. Surecom, Inc. is a party in another adversary proceeding, which has been fully resolved by settlement.

Counsel for Plaintiff will confer with counsel for Surecom, Inc. and have a withdrawal of the Answer, as having been filed in error, filed to complete the record in this Adversary Proceeding.

The Parties in their respective Pretrial Conference Statements, Dckts. 46 and 48, have stated the following facts and issues of law:

Plaintiff-Trustee Michael McGranahan	Defendants C&T Welding, Inc., Skyline Steel Erectors, Inc., and Cal West Steel Detailing, LLC.
<p>Jurisdiction and Venue:</p> <ol style="list-style-type: none"> 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. 	<p>Jurisdiction and Venue:</p> <ol style="list-style-type: none"> 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. <i>See</i> Civil Minutes for the Scheduling Conference, Dckt. 35, and Scheduling Order in this Adversary Proceeding, Dckt. 36.
<p>Undisputed Facts:</p> <ol style="list-style-type: none"> 1. The following Transfers Were Made By the Debtor in the 90-Day Period Preceding the Commencement of the Bankruptcy Case: <ol style="list-style-type: none"> a. Ck 76538, dated 6/4/13, in the amount of \$90,222.36, to Skyline Steel Erectors, Inc. and C&T Welding, Inc. b. Ck 76551, dated 5/24/13, in the amount of \$8,494.11, to PDM Steel Service Centers, Inc. And C&T Welding, Inc. c. Ck 76512, dated 5/24/13, in the amount of \$4,361.31, to C&T Welding, Inc., Ahern Rentals, Inc. and Skyline Steel Erectors, Inc. d. Ck 76316, dated 4/16/13, in the amount of \$32,535.32, to C&T Welding, Inc., Ahern Rentals e. Ck 76318, dated 4/16/13, in the amount of \$13,440.00, to C&T Welding, Inc. and Cal West Steel Detailing, LLC. 	<p>Undisputed Facts:</p> <ol style="list-style-type: none"> 1. None.

<p>(Collectively the “Challenged Payments.”)</p> <ol style="list-style-type: none"> 2. At the time of Challenged Payments set forth above, Defendant C&T Welding, Inc. was a creditor of Debtor. 3. Each of the Challenged Payments were transfers either to or for the benefit of Defendant C&T Welding, Inc. 4. Each of the transfers set forth above were transfers on account of an antecedent debt owed by Debtor to C&T Welding, Inc. 5. Each of the transfers set forth above enabled Defendant C&T Welding, Inc. to receive more than it would have received had the payment not been made and Defendant C&T Welding, Inc. received payment through a case under Chapter 7 of the Bankruptcy Code. 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. 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. 8. Trustee is only entitled to one single satisfaction of his demand for return of the Challenged Transfers. 	
<p>Disputed Facts:</p> <ol style="list-style-type: none"> 1. Defendants may seek to challenge the presumption that Debtor was insolvent in the 90 days prior to the bankruptcy case. 	<p>Disputed Facts:</p> <ol style="list-style-type: none"> 1. Defendants allege, but Plaintiff disputes, that the long delay in bringing the within adversary action was made in bad faith and

<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&T Welding received the transferred payments, arguing instead that Defendant C&T Welding merely acted as a conduit of a payment to Defendants Skyline and Cal West.</p>	<p>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>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 were 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 do 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,</p>
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	<p>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 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>Relief Sought:</p> <p>1. For avoidance and recovery of check no. 76538 in the amount of \$90,222.36 from Defendant C&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&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&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&T.</p> <p>5. For avoidance of check number 76318, in the amount of \$13,440.00, and recovery of</p>	<p>Relief Sought:</p> <p>1. Defendants request the Court to deny Plaintiff's complaint. Defendants seek attorney's fees and costs.</p>

13,440.00 from Defendants C&T and Cal West.	
<p>Points of Law:</p> <ol style="list-style-type: none"> 11 U.S.C. § 547, Preferential Transfer. 11 U.S.C. § 547(b)(3) Presumption of Insolvency. <i>Lewis W Shurtleff, Inc.</i>, 778 F.2d 1416, 1421 (9th Cir. 1985) 11 U.S.C. § 548, Fraudulent Conveyance. 	<p>Points of Law:</p> <ol style="list-style-type: none"> <i>Granfinanciera, S.A. v. Nordberg</i>, 492 U.S. 33, 34–35; 109 S. Ct. 2782, 106 L.Ed.2d 26, <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, 2601–02, 2609, 180 L.Ed.2d 475 (2011.); Fraudulent Conveyance claims are non-core proceedings. 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.) 11 U.S.C. § 547(c)(2); payments made according ordinary business terms. 11 U.S.C. § 547(c)(1)(a), payments were contemporaneous exchanges for new value. C&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>Abandoned Issues:</p> <ol style="list-style-type: none"> None Identified. Two Defendants have been dismissed pursuant to settlements. 	<p>Abandoned Issues:</p> <ol style="list-style-type: none"> None Identified
<p>Witnesses:</p> <ol style="list-style-type: none"> Charles DeLucci 	<p>Witnesses:</p> <ol style="list-style-type: none"> Charles A. DeLucci Jr., who will testify as

<ol style="list-style-type: none"> 2. Jennifer Turner 3. Dustin Torres 	<p>an expert and non-expert witness;</p> <ol style="list-style-type: none"> 2. Dustin Torres, who will testify as an expert and non-expert witness; 3. Tyson Siebertz; 4. Jennifer Turner, , who will testify as an expert and non-expert witness; 5. Luz Smith; 6. Miguel Hernandez, , who will testify as an expert and non-expert witness; 7. Representative from Applegate Johnson Inc., whose identity will be determined before trial.
<p>Exhibits:</p> <ol style="list-style-type: none"> 1. Check dated 6/4113 to C&T Welding, Inc. and Star Seismic 2. Check dated 6/4113 to C&T Welding, Inc. and Skyline Steel Erectors 3. Check dated 5/24113 to C&T Welding, Inc. and Valley Iron Inc. 4. Check dated 5/24113 to C&T Welding Inc. and Brown-Strauss Steel 5. Check dated 5/24113 to C&T Welding, Inc. and PDM Steel Service Centers 6. Check dated 5/24113 to C&T Welding. Inc. and Ahern Rentals/Skyline Steel 7. Check dated 5/24113 to C&T Welding, Inc. and Bristol Machine Co. 8. Check dated 4116113 to C&T Welding. Inc. and Ahern Rentals 	<p>Exhibits:</p> <ol style="list-style-type: none"> 1. Invoices, change orders, pay-roll information, correspondence as to work performed and invoices provided and payments made—all related to the Project. 2. Contracts related to the Project. 3. Performance Bond. 4. Payment Bond. 5. Claims made to, and payments received from, Liberty Mutual under the Bonds. 6. Correspondence by and between Liberty Mutual’s counsel and Defendants’ counsel. 7. Payments, reports and correspondence by and between the City of San Jose and Defendants regarding the Project. 8. Applegate’s bankruptcy schedules.

9. Check Stub	9. Lien documents, including but not limited to, preliminary notices, stop notices, conditional releases and unconditional releases.
10. No Exhibit 10 on Pretrial Statement.	
11. Attachment A to Contract	10. Correspondence by and between Defendants, Applegate and the City of San Jose.
12. Email to DeLucci	
13. Email	11. Information as to funding of the Project.
14. Email	
15. Email from DeLucci to Herzog dated 3/18/13	12. Settlement documents by and between Plaintiff and other named Defendants in case No. 2015-09020.
16. Emails from DeLucci	13. Documents produced by Liberty Mutual.
17. To Skyline Steel Erectors Invoice dated 8/20/12	14. Information as to collateral offered by Applegate and/or its owners for issuance of Performance and Payment Bonds.
18. C&T Welding Invoice dated 3/6/13	
19. Email from Turner to Smith dated 3/11/16	15. Deposition testimony by representatives of the City of San Jose and Liberty Mutual.
20. Request for Change Order	
21. California Lien Waiver and Release Form	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.
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 10/2/12	
30.	Release of Lien Claim and Claim and Stop Notice for Public Work Project	
31.	Bid Proposal for Steel Detailing by Cal West Steel	
32.	Invoice from Cal West Steel Detailing to C&T Welding, Inc.	
33.	Future Innovations Inc. Customer Open Balance Sheet	
34.	Conditional Waiver and Release Cal West Steel	
35.	1st Amended Stop Payment Notice	
36.	City of San Jose Contract	
37.	Notice of Deposition	
38.	Skyline Steel Erectors Inc.'s Response to Trustee's Request for Production of Documents	
39.	Skyline Steel Erectors Inc.'s Response to Trustee's Interrogatories	
40.	Skyline Steel Erectors Inc.'s Response to Trustee's 2nd Set of Interrogatories	
41.	Email from Jen Turner to Chuck Delucci dated 7/25/12	
42.	Email from Chuck Delucci dated 3/27/13	
43.	Email from Jen Turner to Diana Lehne dated 7/27/12	
44.	Email from John Bergman to Chuck Delucci dated 7/27/12	

<p>45. Notice of Deposition PMK for C&T Welding, Inc.</p> <p>46. C&T Welding Inc.'s Response to Trustee's Interrogatories</p> <p>47. C&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&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>Further Discovery or Motions:</p> <p>1. None Identified.</p>	<p>Further Discovery or Motions:</p> <p>1. None Identified.</p>
<p>Stipulations:</p> <p>1. None Identified.</p>	<p>Stipulations:</p> <p>1. None Identified.</p>

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. States Attorneys' Fees Requested, No basis identified.
Additional Items 1. None Identified	Additional Items 1. None Identified
Trial Time Estimation:	Trial Time Estimation: Three (3) Days

5. [13-91315](#)-E-7 APPLEGATE JOHNSTON, INC.
[15-9030](#)
MCGRANAHAN V. ACE

CONTINUED PRE-TRIAL
CONFERENCE RE: COMPLAINT FOR
AUTOMATIC(1) AVOIDANCE OF
PREFERENTIAL TRANSFERS; GARAGE
DOORS, INC. 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:
Continued from 9/29/16

The Pretrial Conference is XXXXXXXXXXXXXXXXXXXXX.

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 litigation 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.

REQUEST FOR CONTINUANCE

At the hearing, the Parties requested a one-month continuance to allow for further settlement discussions.

The Parties in their respective Pretrial Conference Statements, Dckts. 18, 20, have stated in this Adversary Proceeding the following facts and issues of law:

Plaintiff-Trustee	Defendant
<p>Jurisdiction and Venue:</p> <ol style="list-style-type: none"> Core Proceeding as stated on the record at the October 1, 2015 Status Conference. Civil Minutes, Dckt. 13, and Scheduling Order, Dckt. 14. 	<p>Jurisdiction and Venue:</p> <ol style="list-style-type: none"> Core Proceeding as stated on the record at the October 1, 2015 Status Conference. Civil Minutes, Dckt. 13, and Scheduling Order, Dckt. 14.
<p>Undisputed Facts:</p> <ol style="list-style-type: none"> Debtor Applegate Johnston made a transfer to Defendant on or after May 16, 2013 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. The Challenged Payment was a transfer of property of the Debtor. At the time of the transfer, Defendant was a creditor of Debtor. 	<p>Undisputed Facts:</p> <ol style="list-style-type: none"> None

<p>4. The Challenged Payment was made on account of an antecedent debt owed by Chapter 7 Debtor to Defendant for installation of a commercial door.</p> <p>5. Debtor commenced a Chapter 7 bankruptcy case on July 16, 2016. The Challenged Payment was made within 90 days of the bankruptcy filing.</p> <p>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.</p> <p>7. The distribution to unsecured creditors in Debtor's case will be less than 100% of the amount of the debt.</p> <p>8. Defendant did not provide any new value contemporaneously with the Challenged Payment.</p> <p>9. Defendant did not provide any new value to Debtor after the Challenged Payment.</p>	
<p>Disputed Facts:</p> <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>Disputed Facts:</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</p>

	<p>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 exchange 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</p> <p>9. Defendant alleges 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. 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</p>

	<p>right to present expert testimony in this lawsuit.</p> <p>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 seeks 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>1. Miguel Hernandez</p> <p>2. Liberty Mutual (by deposition transcript)</p>	<p>Witnesses:</p> <p>1. Charles A. DeLucci Jr., who will testify as an expert.</p> <p>2. Dustin Torrez, who will testify as an expert.</p>

	<ol style="list-style-type: none"> 3. Jennifer Turner, who will testify as an expert. 4. Miguel Hernandez, who will also testify as an expert. 5. Representative of Applegate Johnson Inc. Identity to be determined.
<p>Exhibits:</p> <ol style="list-style-type: none"> 1. Notice of Deposition 2. Proposal 3. Contract Agreement 4. Subcontract Change Order 5. Invoice dated 11/28/12 6. Invoice dated 11/28/12 7. Payment Receipt 8. Payment Receipt 9. Payment Receipt 10. Payment Receipt 11. Check Stub 12. Email from Ku to Ace Automatic dated 7/24/13 13. Declaration of Miguel Hernandez 14. Check dated 5/16/13 to Ace Automatic Garage Doors. Inc. 	<p>Exhibits:</p> <ol style="list-style-type: none"> 1. Invoices, change orders, pay-roll information, correspondence as to work performed and invoices provided and payments made - all related to the Project. 2. Contracts related to the Project. 3. Performance Bond. 4. Payment Bond. 5. Claims made to, and payments received from, Liberty Mutual under the Bonds. 6. Correspondence by and between Liberty Mutual's counsel and Defendant's counsel. 7. Payments, reports and correspondence by and between the City of San Jose and Defendant regarding the Project. 8. Applegate's bankruptcy schedules. 9. Lien documents, including but not limited to, preliminary notices, stop notices, conditional releases and unconditional releases. 10. Correspondence by and between Defendant, Applegate and the City of San Jose.

	11. Information as to funding of the Project. 12. Documents produced by Liberty Mutual. 13. Information as to collateral offered by Applegate and/or its owners for issuance of Performance and Payment Bonds. 14. Deposition testimony by representatives of the City of San Jose and Liberty Mutual. 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.
Discovery Documents: 1. Subpoena for documents to Central Valley Community Bank, and responsive documents. 2. Subpoena for documents to Central Valley Community Bank, and responsive documents 3. Deposition of Liberty Mutual 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	Discovery Documents: 1. Deposition testimony of representative of City of San Jose. 2. Deposition testimony of representative of Liberty Mutual.
Further Discovery or Motions: 1. None Identified	Further Discovery or Motions: 1. None Identified

Stipulations: 1. None Identified	Stipulations: 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.

6. [13-91315-E-7](#) **APPLEGATE JOHNSTON, INC.**
[15-9047](#)
**MCGRANAHAN V. INTEGRATED
COMMUNICATIONS SYSTEMS**

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

Plaintiff's Atty: Daniel L. Egan
Defendant's Atty: Stephen W. Cusick

Adv. Filed: 7/13/15
Answer: 8/19/15

Nature of Action:
Recovery of money/property - preference

The Status Conference is XXXXXXXXXXXXXXXXXX.
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Notes:

Amended Scheduling Order filed 4/21/16 [Dckt 14] -
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

[NHA-1] Motion by Defendant ICS Integrated Communication Systems for Summary Judgment filed 5/16/16 [Dckt 16] ; Stipulation filed 6/1/16 [Dckt 23]; Order granting in part, denying in part filed 7/11/16 [Dckt 31]

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 \$71,197.32 made to Defendant ICS Integrated Communications Systems between May 13, 2013 and June 26, 2013.

SUMMARY OF ANSWER

In the Answer, Defendant ICS Integrated Communications Systems admits and denies specific allegations in the Complaint. Defendant asserts eight 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. In its answer, ICS Integrated Communications Systems admits the allegations of jurisdiction and core proceedings. Answer ¶¶ 3,4, Dckt. 9. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

The court shall issue a 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 -----, **2017**.
- C. **Defendant** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2017**.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, **2017**.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, **2017**.
- F. The Trial shall be conducted at ----x.m. on -----, **2017**.

The Parties in their respective Pretrial Conference Statements, Dckts. 35, 37, 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 Trustee

Defendant ICS Integrated Communications
Systems

Jurisdiction and Venue:	Jurisdiction and Venue:
1. Admit Federal Jurisdiction, Core, and Consent to Non-Core.	1. Admit Federal Jurisdiction, Core, and Consent to Non-Core.

<p>Undisputed Facts:</p> <ol style="list-style-type: none"> 1. Debtor Applegate Johnston made two transfers to Defendant on or after May 13, 2013, in the aggregated amounts of \$71,197.32 (the “Challenged Payments.”) The Challenged Payments were made by joint check from Bogard Construction payable jointly to Debtor and Defendant. 2. At the time of the Challenged Payments, Defendant was a creditor of Debtor. 3. The Challenged Payments were made on account of an antecedent debt owed by Debtor to Defendant. 4. Debtor commenced a Chapter 7 bankruptcy case on July 16, 2013. The Challenged Payments were made within 90 days of the bankruptcy filing. 5. The Challenged Payments were 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. 6. The distribution to unsecured creditors in Debtor’s case will be less than 1000% of the amount of the debt. 7. Defendant did not provide any new value to Debtor after the Challenged Payment. 	<p>Undisputed Facts - Court Determined Material Facts Not in Dispute (Order, Dckt. 31):</p> <ol style="list-style-type: none"> 1. ICS Integrated Communication Systems (“Defendant”) is a construction-contracting firm that installs and supports communications systems in buildings, such as those used for fire-and-life safety, security, audio-video, voice-data and IT support. 2. Defendant entered into a 5-page written subcontract with Applegate Johnston, Inc. (“Debtor”) effective 7/25/2012, for work to be done at the Northside Branch Library project. The contract designated Debtor to be the ‘Contractor’ and Defendant to be the ‘Subcontractor.’ 3. The general contractor on the Northside Branch Library project was another entity, Bogard Construction Co., Inc. Debtor was a subcontractor on that project to Bogard Construction Inc., which made Defendant a sub-subcontractor. 4. Bogard Construction, Inc., as general contractor, executed a Construction Labor and Material Payment Bond for the Northside Branch Library project. In that bond Bogard bound itself ‘to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract’ where its subcontractors did not make such payments. That obligation extended to ‘An individual or entity having a direct contract with Contractor or with a subcontractor of Contractor to furnish labor, materials or equipment for use in the performance of the Contract.’ 5. Defendant became suspicious of Debtor’s viability not long after ICS commenced work under its contract with Debtor.
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	<p>Defendant expressed these concerns to the general contractor Bogard Construction, Inc.</p>
6.	<p>In this adversary proceeding Michael D. McGranahan, as Chapter 7 Trustee for Debtor, seeks to void as preferential transfers and to recover two transfers allegedly made from Debtor to Defendant: transfer number 898-0001 made May 13, 2013, in the amount of \$21,059.66 and transfer number 232-0001 made June 26, 2013 in the amount of \$50,137.66.</p>
7.	<p>The transfers of funds in those amounts were made at those times, but the funds transferred were funds of the general contractor Bogard Construction, Inc. The two transfers were made by checks on the account of the general contractor on the project, Bogard Construction, Inc., and made payable jointly to Debtor and to Defendant.</p>
8.	<p>The checks were issued by the general contractor as payments for amounts invoiced Defendant to Debtor in the exact same amounts [Exhibits D and E, Dckt. 17], where Debtor could not make payment on them.</p>
9.	<p>Debtor endorsed the checks over to Defendant to evidence its intent that the money should go to Defendant. Defendant deposited the full amount of those checks in its account, and those funds were accordingly transferred directly from Bogard Construction, Inc.'s bank account to Defendant's bank account.</p>
10.	<p>Debtor never did deposit or otherwise come to possess any of the funds that were thereby transferred by those two checks. Debtor could not have deposited those funds into its own account without</p>

	<p>Defendant having endorsed the checks over to Debtor. Conversely, Defendant could not have deposited those funds into its account without Debtor having endorsed the checks over to Defendant.</p>
11.	<p>The checks were made out jointly to enable Debtor to approve the amounts being invoiced under the terms of the applicable subcontract, and to document Debtor's agreement to and acquiescence in those payments being so made.</p>
12.	<p>Along with the invoices for the amounts ultimately paid by Bogard Construction, Inc. in the two transfers at issue in this Adversary Proceeding, Defendant submitted conditional waivers of its lien rights with respect to the work done for those amounts. Those waivers were conditioned upon receipt by Defendant of the amounts in question. Bogard Construction, Inc.'s payment of those amounts activated those waivers of lien rights and made those waivers effective.</p>
13.	<p>Apart from the two checks issued by Bogard Construction, Inc. as discussed above [Exhibits G and H, Dckt. 17], Defendant received no other payments or transfers from Debtor in the 90 days before Debtor filed for bankruptcy.</p>
14.	<p>Bogard Construction, Inc. entered into a construction contract to build a project known as the Northside Branch Library. Debtor was a commercial construction contractor that acted as a subcontractor to Bogard Construction, Inc. on the Northside Branch Library project.</p>
15.	<p>Debtor then entered into a sub-subcontract with Defendant in 2012.</p>
16.	<p>Defendant acknowledges that it had no</p>

	<p>written contract of its own, directly with Bogard Construction, Inc.</p> <p>17. Defendant does, however, claim to be an intended, third-party beneficiary of promises made by Bogard Construction, Inc. in a Construction Labor And Materials Payment Bond dated June 18, 2012 (Exhibit B, Dckt. 17).</p>
<p>June 2016 Stipulation of Facts, Dckt. 23</p> <ol style="list-style-type: none"> 1. Bogard Construction, Inc. (“Bogard”) entered into a construction contract to build a project known as the Northside Branch Library, Applegate Johnston, Inc. 2. (“Debtor”) was a commercial construction contractor that acted as a subcontractor to Bogard on the Northside Branch Library project. 3. Debtor then entered into a sub-subcontract with Defendant in 2012. 4. Defendant acknowledges that it had no written contract of its own, directly with Bogard. Defendant does, however, claim to be an intended, third-party beneficiary of promises made by Bogard in a Construction Labor And Materials Payment Bond dated June 18, 2012 (Defendant’s Exhibit B). 	
<p>Disputed Facts:</p> <ol style="list-style-type: none"> 1. Defendant contends that the Challenged Payments were not transfers of property of the Debtor. 	<p>Disputed Facts:</p> <ol style="list-style-type: none"> 1. Whether (i) debtor transferred assets to Bogard, and (ii) rather than Bogard paying for the assets, Bogard (in making the two payments at issue here) actually diverted

<p>2. Defendant contends that the Challenged Payments were 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>proceeds of that transaction to Defendant as a preferred creditor of debtor, so as to create a voidable step transaction.</p> <p>2. Whether Defendant had an interest in the monies it received.</p> <p>3. Whether an obligation existed whereby Bogard had to Pay Defendant.</p> <p>4. Whether the Contractor Bogard had already promptly made payment, directly or indirectly through its sub-contractor Applegate, for all sums due Defendant, before Bogard made the two payments at issue here.</p>
<p>Disputed Evidentiary Issues:</p> <p>1. None Identified.</p>	<p>Disputed Evidentiary Issues:</p> <p>1. None Identified.</p>
<p>Relief Sought:</p> <p>1. Avoidance of the two transfers.</p>	<p>Relief Sought:</p> <p>1. Monetary judgment in the amount of the two payments—\$71,197.32.</p>
<p>Points of Law:</p> <p>1. 11 U.S.C. § 547(b).</p> <p>2. <i>In re Sierra Steel, Inc.</i>, 96 B.R. 275, 279 (B.A.P. 9th Cir. 1989)</p> <p>3. The “greater amount test,” explained in <i>In re Lewis W Shurtleff, Inc.</i>, 778 F.2d 1416,1421 (9th Cir. 1985).</p>	<p>Points of Law:</p> <p>1. <i>Jackson v. Flohr</i>, 227 F.2d 607, 610–11 (9th Cir. 1955);</p> <p>2. <i>Keenan Pipe & Supply Co. v. Shields</i>, 241 F.2d 486 (9th Cir. 1956);</p> <p>3. <i>Shaw Inds. v. Gill (In re Flooring Concepts)</i>, 37 B.R. 957, 961 (B.A.P. 9th Cir. 1984);</p> <p>4. <i>In re Anderson Plumbing Co.</i>, 71 B.R. 19 (Bankr. E.D. Cal 1986).</p>

<p>Abandoned Issues:</p> <p>1. None.</p>	<p>Abandoned Issues:</p> <p>1. None</p>
<p>Witnesses:</p> <p>1. Michael D. McGranahan</p> <p>2. Aaron Colton</p>	<p>Witnesses:</p> <p>1. Aaron Colton</p> <p>2. Jared D. Bogard</p>
<p>Exhibits:</p> <p>1. Subcontract between Applegate Johnston, Inc. and Defendant dated September 4, 2012.</p> <p>2. Invoice Dated March 14, 2013.</p> <p>3. Invoice Dated March 13, 2013.</p> <p>4. Joint Check dated May 10, 2013, in the amount of \$21,059.60.</p> <p>5. Joint Check dated June 24, 2013, in the amount of \$50,137.66.</p>	<p>Exhibits:</p> <p>Exhibit A. Applegate Johnston Contraction Subcontract between Applegate Johnston (Debtor) and Integrated Communications Systems (Defendant).</p> <p>Exhibit B. Construction Labor and Material Payment Bond naming Bogard Construction Inc. as “Contractor as Principal” and Liberty Mutual Surety as “Surety.”</p> <p>Exhibit C. Complaint in this Adversary Proceeding.</p> <p>Exhibit D. March 14, 2013 Invoice by Defendant to Debtor for \$21,059.60, with due date of April 13, 2013.</p> <p>Exhibit E. May 13, 2013 Invoice by Defendant to Debtor for \$50,137.66, with a due date of June 12, 2013, and stating it includes a previously billed amount of \$26,353.00.</p> <p>Exhibit F. Check No. 89297 issued by Bogard Construction, Inc., dated May 10, 2013, in the amount of \$21,059.60, which is made jointly payable to Debtor and Defendant.</p> <p>Exhibit G. Check No. 89655 issued by Bogard</p>

	<p>Construction, Inc., dated June 24, 2013, in the amount of \$50,137.66, which is made jointly payable to Debtor and Defendant.</p> <p>Exhibit H. Conditional Waiver and Release by Defendant dated March 14, 2013, for lien, stop payment notice, and payment bond rights by Defendant conditioned on payment of \$21,059.60 for a check drawn for which the “Maker” is Debtor.</p> <p>Exhibit I. Conditional Waiver and Release by Defendant dated May 13, 2013, for lien, stop payment notice, and payment bond rights by Defendant conditioned on payment of \$50,137.66 for a check drawn for which the “Maker” is Debtor. This Conditional Waiver states that Defendant has not received payment of the \$21,059.60 to which the April 2013 Conditional Release was given.</p> <p>Exhibit J. A Contracts Receipt History listing payments received from several persons, including Debtor and Bogard.</p>
<p>Discovery Documents:</p> <ol style="list-style-type: none"> 1. Defendant’s Responses to Requests for Admissions. 2. Defendant’s Responses to Request for Production of Documents. 3. Defendant’s Answers to Interrogatories. 	<p>Discovery Documents:</p> <ol style="list-style-type: none"> 1. None.
<p>Further Discovery or Motions:</p> <ol style="list-style-type: none"> 1. None. 	<p>Further Discovery or Motions:</p> <ol style="list-style-type: none"> 1. None.
<p>Stipulations:</p> <ol style="list-style-type: none"> 1. Docket 23 - Stipulation to Facts. 	<p>Stipulations:</p> <ol style="list-style-type: none"> 1. None

Amendments: 1. None.	Amendments: 1. None
Dismissals: 1. None.	Dismissals: 1. None
Agreed Statement of Facts: 1. None.	Agreed Statement of Facts: 1. The Parties are utilizing the findings made by the court previously.
Attorneys' Fees Basis: 1. No attorneys' fees requested.	Attorneys' Fees Basis: 1. No fees requested by either party.
Additional Items 1. None.	Additional Items 1. None.
Trial Time Estimation:	Trial Time Estimation: Two to Three Days

7. [13-91315-E-7](#) **APPLEGATE JOHNSTON, INC.** **PRE-TRIAL CONFERENCE RE:**
[15-9049](#) **MCGRANAHAN V. JOHNSON** **COMPLAINT FOR AVOIDANCE OF**
ELECTRONICS **PREFERENTIAL TRANSFER AND**
RECOVERY OF AVOIDED TRANSFER
7-13-15 [1]

Plaintiff's Atty: Daniel L. Egan
Defendant's Atty: Anne K. Secker

Adv. Filed: 7/13/15
Answer: 8/17/15

Nature of Action:
Recovery of money/property - preference

The Status Conference is XXXXXXXXXXXXXXXXXX.

Notes:
Amended Scheduling Order filed 10/16/15 [Dckt 15]

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

Order to Reschedule Pre-Trial Conference filed 4/21/16 - Dckt. 18

Defendant Johnson Electric's Pretrial Conference Statement filed 9/26/16 [Dckt 20]

Chapter 7 Trustee, Michael D. McGranahan's Pretrial Conference Statement filed 9/27/16 [Dckt 22]

Request to Appear Telephonically at October 20, 2016 Pretrial Conference filed 10/5/16 [Dckt 24]; Order granting filed 10/5/16 [Dckt 26]

SUMMARY OF COMPLAINT

In the Complaint the Michael D. McGranahan, 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 \$19,598.254 made to Defendant Johnson Electronics on May 1, 2013.

SUMMARY OF ANSWER

In the Answer, Defendant Johnson Electronics admits and denies specific allegations in the Complaint. Defendant asserts seventeen 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. In its answer, Johnson Electronics admits the allegations of jurisdiction and core proceedings. Answer ¶¶ 3,4, Dckt. 7. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre- Trial Conference Order was issued are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

The court shall issue a 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 -----, **2017**.
- C. **Defendant** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2017**.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, **2017**.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, **2017**.
- F. The Trial shall be conducted at ----**x.m. on -----, 2017**.

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:

Michael D. McGranahan, Plaintiff-Trustee

Defendant Johnson Electric

Jurisdiction and Venue:	Jurisdiction and Venue:
1. Jurisdiction, venue, core matter, and non-	1. Jurisdiction, venue, core matter, and non-

core final orders and judgment to be issued by bankruptcy judge confirmed.	core final orders and judgment to be issued by bankruptcy judge confirmed.
<p>Undisputed Facts:</p> <ol style="list-style-type: none"> 1. In May 2012, Debtor entered into two subcontracts with Defendant for the installation of a fire alarm system and an intrusion system at the Alisal Union High School District. 2. Defendant did the work and provided monthly invoices to Debtor. 3. Debtor initially failed to pay the invoices, and Defendant made numerous phone calls and e-mails attempting to obtain payment. 4. On January 30, 2013, Defendant filed a stop notice against the owner and the general contractor attempting to obtain payment of the [long, as phrased by Plaintiff-Trustee] overdue invoices. 5. Also on January 30, 2013, Debtor apparently made partial payment of the amounts owed to Defendant. However, amounts remained owing to Defendant. 6. In an attempt to obtain payment, Defendant apparently negotiated the following transaction 10 within the 90 day preference period. <ol style="list-style-type: none"> a. Defendant, Debtor and Blach Construction Company, the general contractor, entered into a joint check agreement under which Debtor instructed Blach Construction Company to make a final payment jointly to Debtor and Defendant. b. Simultaneously, on April 23, 2013, Blach issued a joint check (the "Challenged Payment") to 	<p>Undisputed Facts:</p> <ol style="list-style-type: none"> (a) Blach Construction Company was the general contractor for the construction of the Tuscany Elementary School, owned by the Alisal Union High School District in Salinas, California ("Project"). (b) The Project was a public works project. (c) Pursuant to relevant provisions of the California Public Contract Code, Blach Construction posted Payment Bond No. 070011646 that served as security in the event that Blach or any of its subcontractors failed to pay for any materials, provision, equipment or supplies or any labor supplied to the Project. (d) Blach subcontracted with Applegate Johnson to perform certain work on the Project. (e) Applegate Johnson subcontracted with Johnson Electronics to install and program the fire alarm and the intrusion system for the project pursuant to written subcontracts dated May 16, 2012. (f) Applegate agreed to pay Johnson \$14,696 for the intrusion system. (g) Applegate agreed to pay Johnson \$114,215 for the fire alarm system. (h) In addition to the base contract amounts, Applegate agreed to four change orders that increased the amounts due Johnson as follows: <ol style="list-style-type: none"> (i) May 14, 2012 \$12,199.44 (ii) October 17, 2012 \$ 762.10 (iii) October 18, 2012 \$ 1,767.09

<p>Debtor and Defendant in the agreed amount.</p> <p>c. Debtor endorsed the check over to Defendant.</p> <p>7. Also on April 23, 2013, Defendant issued a conditional lien release to Blach Construction Company.</p> <p>8. Defendant did not provide any new value to Debtor after the issuance of the April 23, 2013 joint check.</p> <p>9. Debtor filed a Chapter 7 bankruptcy case on July 16, 2013, within 90 days of the joint check transaction.</p>	<p>(iv) March 27, 2013 \$ 1,512.34</p> <p>(i) Johnson provided a preliminary 20-day notice in accordance to California law to Applegate, Blach and Alisal Union High School District on June 19, 2012.</p> <p>(j) Blach, as general contractor, had subcontracted with Applegate on a project owned by the SPCA ("SPCA project") prior to the contracts for this Project.</p> <p>(k) Applegate subcontracted with Johnson to perform fire alarm work on the SPCA project.</p> <p>(l) Applegate failed to pay Johnson timely on the SPCA project, and the parties entered into a joint check agreement by which Johnson was paid directly from Blach via joint check on the SPCA project in exchange for the waiver of Johnson's mechanics lien and bond rights on the SPCA project.</p> <p>(m) Johnson's work on the SPCA project was completed prior to the completion of its work on the Project.</p> <p>(n) Johnson began work on the Project in September 2012.</p> <p>(o) Johnson rendered invoices to Applegate as Johnson's work progressed.</p> <p>(p) Applegate failed to pay Johnson for work Johnson performed.</p> <p>(q) Johnson communicated with Applegate and Blach to arrange for a Joint Check Agreement between the parties, as they had done before on the SPCA project, so that Blach would issue a joint check to Johnson and Applegate for the amounts Applegate owed Johnson, with the understanding that the total amount of the check would be retained by Johnson.</p>
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(r) During those communications Applegate agreed that Johnson was owed \$19,598.25 for work (consisting entirely of labor) that Johnson had performed on the Project and that Blach should release that amount directly to Johnson.

(s) On April 23, 2013, Applegate, Blach and Johnson signed a Joint Check Agreement in which Blach agreed to issue a joint check to Johnson and Applegate for the amount the \$19,598.25 that Johnson was owed. The parties agreed that Johnson would retain the full amount of the check.

(t) The entire amount due Johnson, \$19,598.25 represented labor performed on the Project.

(u) As a condition for issuing the joint check, Blach required Johnson to execute a statutory lien waiver of all of its Stop Notice rights against Alisal Union High School District and all of its rights under the Payment Bond posted by Blach.

(v) The Stop Notice rights and the Payment Bond rights were independent legal rights that Johnson had against Alisal Union School District and against the bonding company issuing the Payment Bond.

(w) As consideration for Blach's issuing the joint check for \$19,598.25, Johnson issued statutory lien waivers that released all of Johnson's rights against Alisal Union School District and against Blach and the Payment Bond.

(x) When Blach received the statutory lien waivers of Johnson's Stop Notice and Payment Bond rights, Blach issued the joint check to Johnson and Applegate.

(y) Applegate endorsed the check and gave the check to Johnson.

(z) Johnson cashed the check and applied the payment to pay the labor it had supplied to the Project.

<p>Disputed Facts:</p> <ol style="list-style-type: none"> 1. Plaintiff contends that the joint check did not constitute a payment in the ordinary course of business. It is anticipated that Defendant disagrees. 	<p>Disputed Facts:</p> <ol style="list-style-type: none"> 1. None.
<p>Disputed Evidentiary Issues:</p> <ol style="list-style-type: none"> 1. None. 	<p>Disputed Evidentiary Issues:</p> <ol style="list-style-type: none"> 1. None.
<p>Relief Sought:</p> <ol style="list-style-type: none"> 1. Plaintiff-Trustee seeks to avoid the transfer and recover the monies relating to the joint check. 	<p>Relief Sought:</p> <ol style="list-style-type: none"> 1. Plaintiff-Trustee seeks to recover \$19,598.25.
<p>Points of Law:</p> <ol style="list-style-type: none"> 1. 11 U.S.C. § 547(b) Statutory Preference. 2. Plaintiff contends that a joint check is a transfer of a Debtor's interest unless the maker of the check had an independent legal obligation to make the payment to the Defendant. Here, the joint check agreement is not sufficient to constitute an independent legal obligation of Blach Construction Company. 3. <i>In re Flooring Concepts, Inc.</i>, 37 B.R. 957, 961 (B.A.P. 9th Cir. 1984) and <i>Keenan Pipe & Supply Co. v. Shields</i>, 241 F.2d 486, 488 (9th Cir. 1956). 4. <i>In re Food Catering & Hour., Inc.</i>, 971 F.2d 396, 397 (9th Cir. 1992). 5. <i>In re Sierra Steel, Inc.</i>, 96 B.R. 275, 279 (B.A.P. 9th Cir. 1989), presumption of insolvency. 	<p>Points of Law:</p> <ol style="list-style-type: none"> 1. <i>Shaw Industries v. Gill (In re Flooring Concepts)</i>, 37 B.R. 957 (B.A.P. 9th Cir., 1984); <i>Keenan Pipe & Supply v. Shields</i> (1956) 241 F.2d 486; (Blach's independent contractual obligation to pay Johnson put the joint check in issue in this case outside of the class of voidable, preferential transfers.) 2. Public Contract Code § 7103(d); Civil Code § 9550. (Blach had an independent obligation to pay Defendant.) 3. Release of stop notice and not making claim on bond constitute contemporaneous exchange for new value under 11 U.S.C. § 547(a)(2) and (c)(1) and (4) and <i>Modtech Holdings, Inc.</i>, 503 B.R. 737, 740 (Bankr. C.D. Cal. 2013) and <i>In re JWJ Contracting Co.</i>, 287 B.R. 501, 507 (B.A.P. 9th Cir. 2002), <i>aff'd</i>, 371 F.3d 1079 (9th Cir. 2004).

6. <i>In re Lewis W. Shurtleff, Inc.</i> , 778 F.2d 1416,1421 (9th Cir. 1985)	4. 11 U.S.C. § 547(c), asserting that the check was accepted in the ordinary course of business with Debtor.
Abandoned Issues: 1. None.	Abandoned Issues: 1. None.
Witnesses: 1. Dick Johnson 2. Connie DeJoya 3. Brad Hulbert (or Hurlbert) 4. Michael D. McGranahan	Witnesses: 1. Dick Johnson 2. Shawna Johnson 3. Connie DeJoya 4. Brad Hurlbert 5. Lauri Rushford 6. Diane Lehne 7. Tim Johnston 8. Tim Applegate 9. Richard Applegate 10. Peter Howell 11. Thomas Gordner 12. Sara Gil 13. Joy Kazinski
Exhibits: 1. Subcontract between Applegate Johnston, Inc. and Johnson Electronics dated May 22,2012 (JE0001-5).	Exhibits: (a) Contract between Johnson and Applegate-Johnston dated May 15, 2012, for Tuscany Elementary School (Applegate job number

2.	Subcontract between Applegate Johnston, Inc. and Johnson Electronics dated May 22, 2012 (JEOO06-10).	754) for intrusion system.
3.	Johnson Electronics Invoices and Job Labor Journal (JEOO15-29).	(b) Contract between Johnson and Applegate-Johnston dated May 15, 2012, for Tuscany Elementary School (Applegate job number 754) for fire alarm system.
4.	Johnson Electronics Change Order Proposals (JE0030-33)	(c) Invoices from Johnson to Applegate dated as follows:
5.	Stop Notice by Johnson Electronics dated January 30, 2013 (JEOO034-36)	(i) 9/17/12 progress billing
6.	Unconditional Release dated January 30, 2013 (JE0074)	(ii) 10/8/12 progress billing
7.	Unconditional Release dated January 30, 2013 (1E0075)	(iii) 10/8/12 (change order billing)
8.	Joint Check Agreement dated April 23, 2013 (1E0038-39)	(iv) 11/9/12 progress billing
9.	Joint Check No. 42186 dated April 24, 2013 in the amount of \$19,598.25 (1E0040)	(v) 11/9/12 (change order billing)
10.	Email correspondence (JE0041-70) Conditional Waiver and Release dated April 23, 2013 (JE0072)	(vi) 12/5/12 progress billing
11.	Unconditional Waiver and Release dated May 6, 2013 (JE0073)	(vii) 2/05/13 (change order #2 billing)
		(viii) 2/05/13 (change order #3 billing)
		(ix) 2/5/13 progress billing
		(x) 5/15/13 change order billing
		(d) Change Orders dated as follows:
		(i) 5/14/12
		(ii) 10/17/12
		(iii) 10/18/12
		(iv) 3/27/13
		(e) Johnson Labor journals for Project as follows:
		(i) 11/30/12 to 12/21/12
		(ii) 1/7/2013-3/25/13
		(f) Preliminary Notice dated June 19, 2012, with Proof of Service of Preliminary Notice.
		(g) Applegate-Johnson's job files for the Project, including without limitation, plans, project records, material invoices, emails between the parties to the Project relating to the work Johnson performed and the joint check agreement.
		(h) Payment Bond No. 070011646 issued for the protection of unpaid subcontractors,

	<p>sub-subcontractors, material suppliers and laborers for the Project.</p> <p>(i) Stop Notice dated January 30, 2013, for amounts Johnson was owed on the Project at that time.</p> <p>(j) Joint Check Agreement dated April 23, 2013, between Johnson, Blach and Applegate Johnston.</p> <p>(k) Check for \$19,598.25 from Blach made payable to Johnson and Applegate.</p> <p>(l) Email correspondence produced by Johnson to Trustee labeled JE0041-J0070.</p> <p>(m) Conditional Lien Wavier from Johnson dated 1/30/13, 2/25/13, 4/23/13 and Unconditional Lien Waiver from Johnson dated 5/5/13.</p>
<p>Discovery Documents:</p> <p>1. Defendant's Responses to Interrogatories</p> <p>2. Defendant's Responses to Request for Production of Documents</p>	<p>Discovery Documents:</p> <p>1. None</p>
<p>Further Discovery or Motions:</p> <p>1. None.</p>	<p>Further Discovery or Motions:</p> <p>1. None</p>
<p>Stipulations:</p> <p>1. None.</p>	<p>Stipulations:</p> <p>1. None</p>
<p>Amendments:</p> <p>1. Amend to correct to legal name of defendant.</p>	<p>Amendments:</p> <p>1. None</p>
<p>Dismissals:</p> <p>1. None.</p>	<p>Dismissals:</p> <p>1. None</p>

<p>Agreed Statement of Facts:</p> <p>1. None.</p>	<p>Agreed Statement of Facts:</p> <p>1. None at this time.</p>
<p>Attorneys' Fees Basis:</p> <p>1. No Attorneys' Fees Requested.</p>	<p>Attorneys' Fees Basis:</p> <p>1. No Attorneys' Fees Requested.</p>
<p>Additional Items</p> <p>1. A Settlement Conference has Been Requested by Defendant. Plaintiff-Trustee requests that the court consider the request in the light of what the Plaintiff-Trustee believes to be the stark disagreement between the parties on the law.</p> <p>2. Plaintiff-Trustee suggests that a bifurcation of the trial, first addressing the legal issues in dispute and applying the undisputed legal issues may have the effect of making the parties consider possible settlements.</p>	<p>Additional Items</p> <p>1. Defendant Requests a Settlement Conference.</p>
<p>Trial Time Estimation: Three Hours.</p>	<p>Trial Time Estimation:</p>

8. [13-90219-E-7](#) **DOUGLAS KENNEDY**
[13-9041](#)
KENNEDY V. INTERNAL REVENUE
SERVICE

CONTINUED STATUS CONFERENCE
RE: COMPLAINT
12-23-13 [1]

Plaintiff's Atty: Trevor J. Zink
Defendant's Atty: Boris Kukso

Adv. Filed: 12/23/13
Reissued Summons: 2/14/14

Answer: 3/10/14

Nature of Action:
Dischargeability - priority tax claims

The Status Conference is XXXXXXXXXXXXXXXXXXXX.
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Notes:
Continued from 7/7/16

OCTOBER 20, 2016 STATUS CONFERENCE

No updated Status Reports were filed. At the Status Conference, XXXXXXXXXXXX.

JULY 7, 2016 STATUS CONFERENCE

The Parties report that oral argument has been completed in *Smith, et al v. IRS (In re Smith)* and the Ninth Circuit panel has taken the matter under submission. No date for issuance of a ruling is projected. The Parties request that the court continue the hearing a further four to six months.

JANUARY 14, 2016 STATUS CONFERENCE

The Parties filed a Joint Status Conference Report on December 28, 2015. Dckt. 63. This court has stayed this Adversary Proceeding pending the Ninth Circuit Court of Appeals addressing related legal issues in *Smith, et al v. IRS (In re Smith)*. The Parties further report that briefing in *Smith* has been completed, but the Circuit has not yet set oral argument for that appeal. The parties request that this court further continue the Status Conference four to six months to allow for the continuing prosecution of and ruling on that appeal.

The court continues the Status Conference, erring on the longer side, to allow the Parties the opportunity to consider and constructively discuss how the ruling in *Smith* impacts the prosecution of this Adversary Proceeding.

9. [14-91565-E-7](#) **RICHARD SINCLAIR**
[15-9007](#)
KATAKIS ET AL V. SINCLAIR

CONTINUED STATUS CONFERENCE
RE: COMPLAINT
2-20-15 [1]

Plaintiff's Atty: Kimberley v. Deede
Defendant's Atty: Pro Se
Chapter 7 Trustee Atty: Aaron A. Avery

Adv. Filed: 2/20/15
Answer: 3/30/15; 11/25/15

Nature of Action:
Dischargeability - willful and malicious injury

The Status Conference is XXXXXXXXXXXXXXXXXX.
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Notes:
Continued from 8/4/16

Plaintiffs' Unilateral Status Report filed 10/11/16 [Dckt 49]

OCTOBER 20, 2016 STATUS CONFERENCE

Plaintiff again filed a unilateral Status Report. Dckt. 49. It is reported that, from Plaintiffs' perspective, there are no new developments in this matter. The Trustee is still reviewing the possible claims and rights of the estate.

At the Status Conference, XXXXXXXXXXXXXXXXXXXXXX.

AUGUST 4, 2016 STATUS CONFERENCE

Plaintiff's filed a unilateral Status Report on July 26, 2016. Dckt. 44. No new developments are reported, with the court being advised that the Trustee is still reviewing the possible claims in the state court action. September 12, 2016, is the continued status conference in the state court action, at which the Trustee is to address the matters in the state court.

At the hearing, Counsel for Plaintiff reported that the Chapter 7 Trustee and Plaintiff are in the midst of settlement concerning the possible claims that Mr. Sinclair identified as ones that could be asserted.

APRIL 28, 2016 STATUS CONFERENCE

Plaintiffs' Unilateral Status Report

On April 14, 2016, Plaintiffs filed their Unilateral Status Report. Dckt. 38. Plaintiffs report that the Chapter 7 Trustee is reviewing the pending State Court Action. Plaintiffs believe that this Adversary Proceeding should be continued to afford more time to address these issues with the Chapter 7 Trustee and determine how the Trustee's decision to prosecute or not prosecute the State Court Action impacts the litigation in this Adversary Proceeding.

JANUARY 14, 2016 STATUS CONFERENCE

The Plaintiff appeared and requested that the Status Conference be continued while the Trustee investigated the case. Richard Sinclair did not appear at the Status Conference.

Plaintiffs filed a Unilateral Status Report on January 6, 2016. Dckt. 36. The court has stayed further proceedings in this Adversary Proceeding, having modified the automatic stay to allow the Parties to litigate the pending State Court Action. Plaintiffs report the following updated information:

- A. On July 22, 2015, filed a notice of conditional settlement with one of the non-debtor defendants, Stanley Flake, and dismissed Mr. Flake from the State Court Action on September 10, 2015.
- B. Richard Sinclair filed a Third Amended Cross-Complaint in June 2015 against Plaintiffs.
- C. In July 2015, Plaintiffs filed a demurrer to the Third-Amended Complaint and a motion to strike.
- D. In August 2015, Mr. Sinclair filed a notice of disability, which asserted substantially the same disability as presented to this court in August 2015.
- E. The State Court granted an extension to Mr. Sinclair to September 29, 2015, to file an opposition to the demurrer.
- F. Mr. Sinclair filed an opposition to the demurrer and the hearing on the demurrer was set for November 10, 2015.
- G. Prior to the November 10, 2015 hearing, the U.S. Trustee filed a motion to covert Mr. Sinclair's bankruptcy case to one under Chapter 7.
- H. Upon being provided notice of the pending motion to convert the bankruptcy case, the State Court dropped the demurrer and other pending motions, believing that if the case were converted and a trustee was appointed, it would not have "jurisdiction" over the cross-claim.

- I. Mr. Sinclair's bankruptcy case was converted to one under Chapter 7 in December 2015. The State Court Action has been "put on hold" to allow the Chapter 7 Trustee to investigate the cross-claim.

The Chapter 7 Trustee having been recently appointed, Plaintiffs request that this Status Conference be continued until after mid-March, 2016, to allow the newly appointed Trustee time to investigate the issues relating to the State Court Action, this Adversary Proceeding, and the Bankruptcy Case.

10. [14-91565-E-7](#) **RICHARD SINCLAIR** **CONTINUED STATUS CONFERENCE**
[15-9008](#) **CALIFORNIA EQUITY MANAGEMENT** **RE: COMPLAINT**
GROUP, INC. ET AL V. SINCLAIR **2-23-15 [1]**

Plaintiff's Atty: Hilton A. Ryder; D. Greg Durbin
Defendant's Atty: Pro Se

Adv. Filed: 2/23/15
Answer: 3/30/15; 4/8/16

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

The Status Conference is XXXXXXXXXXXXXXXX.

Notes:
Continued from 7/7/16

OCTOBER 20, 2016 STATUS CONFERENCE

Plaintiffs filed a unilateral Status Report. Dckt. 47. Plaintiffs continue to litigate the underlying issues in the District Court Action now pending in Fresno. Defendant-Debtor's motion for reconsideration was taken under submission on July 19, 2016. No ruling on the motion for reconsideration is identified by Plaintiffs. The court's review of the District Court docket in that action shows the last action taken by that court to be the July 19, 2016 taking of the motion for reconsideration under submission.

At the Status Conference, XXXXXXXXXXXXXXXX.

JULY 7, 2016 STATUS CONFERENCE

Plaintiff filed an updated Status Report on June 28, 2016. Dckt. 41. Plaintiff reports that the prove up hearings have been conducted (“May 10, 2016”) in the District Court action and the matter is under submission. Defendant-Debtor has filed a motion for reconsideration of the entry of Defendant-Debtor’s default in the District Court action, which was set by Defendant-Debtor for hearing on July 25, 2016. Plaintiff has filed proposed findings of fact and conclusions of law, and Defendant-Debtor has filed objections thereto, in the District Court action.

JANUARY 14, 2016 STATUS CONFERENCE

The Plaintiff appeared and requested that the Status Conference be continued while the Trustee investigated the case. Richard Sinclair did not appear at the Status Conference.

SUMMARY OF COMPLAINT

California Equity Management Group, Inc. and Fox Hollow of Turlock Owners’ Association (“Plaintiffs”) seeks to have the damages relating to the claims asserted in a pending District Court Action, case 03-05439, are nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4) and (6). The default of Richard Sinclair (“Defendant-Debtor”) has been entered in the District Court Action, but no judgment has been entered therein.

SUMMARY OF ANSWER

Richard Sinclair, the Defendant-Debtor, filed an answer which specifically admits and denies the allegations in the Complaint. Defendant-Debtor asserts twenty-three affirmative defenses.

11. [14-91565-E-7](#) **RICHARD SINCLAIR**
[15-9009](#)
KATAKIS ET AL V. SINCLAIR

CONTINUED STATUS CONFERENCE
RE: COMPLAINT
2-23-15 [1]

Plaintiff's Atty: Hilton A. Ryder; D. Greg Durbin
Defendant's Atty: Pro Se

Adv. Filed: 2/23/15
Answer: 3/30/15; 11/25/15

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

Notes:
Continued from 7/7/16

The Status Conference is XXXXXXXXXXXXXXXXXX.
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OCTOBER 20, 2016 STATUS CONFERENCE

Plaintiffs filed a unilateral Status Report. Dckt. 56. Plaintiffs continue to litigate the underlying issues in the District Court Action now pending in Fresno. Defendant-Debtor's motion for reconsideration was taken under submission on July 19, 2016. No ruling on the motion for reconsideration is identified by Plaintiffs. The court's review of the District Court docket in that action shows the last action taken by that court to be the July 19, 2016 taking of the motion for reconsideration under submission.

At the Status Conference, XXXXXXXXXXXXXXXXXX.

JULY 7, 2016 STATUS CONFERENCE

Though the obligation upon which this Adversary Proceeding is based is from State Court proceedings, Plaintiff asserts that the finding in the District Court Action (the obligation from which is the subject of Adversary Proceeding 15-9008) will also be asserted in this Adversary Proceeding.

Plaintiff filed an updated Status Report in Adversary Proceeding 15-9008 on June 28, 2016. Plaintiff reports that the prove up hearings have been conducted ("May 10, 2016") in the District Court action and the matter is under submission. Defendant-Debtor has filed a motion for reconsideration of the entry of Defendant-Debtor's default in the District Court action, which was set by Defendant-Debtor for hearing on July 25, 2016. Plaintiff has filed proposed findings of fact and conclusions of law, and Defendant-Debtor has filed objections thereto, in the District Court action.

FEBRUARY 4, 2015 STATUS CONFERENCE

SUMMARY OF COMPLAINT

Andrew Katakis, California Equity Management Group, Inc., and Fox Hollow of Turlock Owners' Association ("Plaintiffs") seek a determination that a judgment against Richard Sinclair, the Defendant-Debtor, in the amount of \$1,337,073.72 is nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). This judgment is alleged to have been obtained in Stanislaus County Superior Court case no. 332233.

SUMMARY OF ANSWER

Defendant-Debtor, Richard Sinclair, the Defendant-Debtor, has filed two answers to the Complaint. The First Answer was filed on March 30, 2015. (The answer was filed twice, Docket Entries 8 and 9). The Second Answer was filed on November 25, 2015. The Second Answer admits and denies specific allegations in the Complaint, and includes more detailed responses as part of the admissions and denials. The Second Answer includes twenty-two affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint, unnumbered paragraph titled "Jurisdiction," p.11:11-13; Dckt. 1. Though extensive in admitting and denying the numbered paragraph allegations and asserting affirmative defenses, the Second Answer neither admits nor denies the allegations of jurisdiction and that this is a core proceeding. There is an affirmative obligation to admit or deny allegations of whether the matter is a core proceeding, and if contended non-core, whether the responding party consents to the bankruptcy judge issuing all orders and the final judgment.

The relief sought in the Complaint is for a determination of whether a debt is non-dischargeable based on fraud, fraud or defalcation while in a fiduciary capacity, or wilful and malicious injury as provided by Congress in 11 U.S.C. § 523(a)(2), (4), and (6). These claims arise under the Bankruptcy Code and are core proceedings for which the bankruptcy judge issues all orders and the final judgment in this Adversary Proceeding, for the Complaint as it exists as of the February 4, 2016 Status Conference.

STATUS REPORT FILED BY PLAINTIFFS

Plaintiffs state that in the related Adversary Proceeding, 15-9008, the court has modified the automatic stay to allow Plaintiffs to prosecute to judgment in the United States District Court the underlying obligation which they assert in Adversary Proceeding 15-9008. This court has continued the status conference in that Adversary Proceeding to July 7, 2016, to allow time for judgment to be entered in that District Court action.

In this Adversary Proceeding (15-9009), Plaintiffs seek to have a state court judgment in the amount of \$1,337,073.72 determined nondischargeable. In the Status Report Plaintiffs assert that the claims upon which the state court judgment are based on the same fraud that is the basis for the District Court

claims. Plaintiffs suggest that this court should delay the prosecution of this Adversary Proceeding to allow the default judgment to be entered in the District Court action because under the default judgment, alleged facts can be deemed as admitted and true.

The court does not concur in delaying the prosecution of this Adversary Proceeding pending entry of judgment and final adjudication of the District Court action. Plaintiffs seek to have a determination made as to the nondischargeability of the debt determined in a state court action. That state court action has been litigated, the judgment on those state court claims has been determined, the factual findings made, and the conclusions of law drawn by the state court.

Plaintiffs state that they intend to seek summary judgment in this Adversary Proceeding. The Status Report indicates that Plaintiffs would intend to simultaneously prosecute the two summary judgment motions in the two separate proceedings.

12. [14-91565-E-7](#) **RICHARD SINCLAIR** **CONTINUED STATUS CONFERENCE**
[15-9007](#) **KATAKIS ET AL V. SINCLAIR** **RE: COMPLAINT**
2-20-15 [1]

Plaintiff's Atty: Kimberley v. Deede
Defendant's Atty: Pro Se
Chapter 7 Trustee Atty: Aaron A. Avery

Adv. Filed: 2/20/15
Answer: 3/30/15; 11/25/15

Nature of Action:
Dischargeability - willful and malicious injury

The Status Conference is XXXXXXXXXXXXXXXX.

Notes:
Continued from 8/4/16

Plaintiffs' Unilateral Status Report filed 10/11/16 [Dckt 49]

OCTOBER 20, 2016 STATUS CONFERENCE

Plaintiffs report that there have been no new developments in this Adversary Proceeding. The Chapter 7 Trustee is reviewing the possible claims and rights the estate may have against Plaintiffs.

At the Status Conference, XXXXXXXXXXXXXXXX.

AUGUST 4, 2016 STATUS CONFERENCE

Plaintiff's filed a unilateral Status Report on July 26, 2016. Dckt. 44. No new developments are reported, with the court being advised that the Trustee is still reviewing the possible claims in the state court action. September 12, 2016, is the continued status conference in the state court action, at which the Trustee is to address the matters in the state court.

At the hearing, Counsel for Plaintiff reported that the Chapter 7 Trustee and Plaintiff are in the midst of settlement concerning the possible claims which Mr. Sinclair identified as ones that could be asserted.

APRIL 28, 2016 STATUS CONFERENCE

Plaintiffs' Unilateral Status Report

On April 14, 2016, Plaintiffs filed their Unilateral Status Report. Dckt. 38. Plaintiffs report that the Chapter 7 Trustee is reviewing the pending State Court Action. Plaintiffs believe that this Adversary Proceeding should be continued to afford more time to address these issues with the Chapter 7 Trustee and determine how the Trustee's decision to prosecute or not prosecute the State Court Action impacts the litigation in this Adversary Proceeding.

JANUARY 14, 2016 STATUS CONFERENCE

The Plaintiff appeared and requested that the Status Conference be continued while the Trustee investigated the case. Richard Sinclair did not appear at the Status Conference.

Plaintiffs filed a Unilateral Status Report on January 6, 2016. Dckt. 36. The court has stayed further proceedings in this Adversary Proceeding, having modified the automatic stay to allow the Parties to litigate the pending State Court Action. Plaintiffs report the following updated information:

- A. On July 22, 2015, filed a notice of conditional settlement with one of the non-debtor defendants, Stanley Flake, and dismissed Mr. Flake from the State Court Action on September 10, 2015.
- B. Richard Sinclair filed a Third Amended Cross-Complaint in June 2015 against Plaintiffs.
- C. In July 2015, Plaintiffs filed a demurrer to the Third-Amended Complaint and a motion to strike.
- D. In August 2015, Mr. Sinclair filed a notice of disability, which asserted substantially the same disability as presented to this court in August 2015.
- E. The State Court granted an extension to Mr. Sinclair to September 29, 2015, to file an opposition to the demurrer.

- F. Mr. Sinclair filed an opposition to the demurrer and the hearing on the demurrer was set for November 10, 2015.
- G. Prior to the November 10, 2015 hearing, the U.S. Trustee filed a motion to convert Mr. Sinclair's bankruptcy case to one under Chapter 7.
- H. Upon being provided notice of the pending motion to convert the bankruptcy case, the State Court dropped the demurrer and other pending motions, believing that if the case was converted and a trustee was appointed, it would not have "jurisdiction" over the cross-claim.
- I. Mr. Sinclair's bankruptcy case was converted to one under Chapter 7 in December 2015. The State Court Action has been "put on hold" to allow the Chapter 7 Trustee to investigate the cross-claim.

The Chapter 7 Trustee having been recently appointed, Plaintiffs request that this Status Conference be continued until after mid-March, 2016, to allow the newly appointed Trustee time to investigate the issues relating to the State Court Action, this Adversary Proceeding, and the Bankruptcy Case.