

1
2
3 **POSTED ON WEBSITE**
NOT FOR PUBLICATION

4 **UNITED STATES BANKRUPTCY COURT**
5 **EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO DIVISION**

6 In re:) Case No. 09-24547-D-7
7)
8 LAURENCE R. NICHOLSON &) Docket Control No. TAA-2
9 JOYCE V. NICHOLSON,)
Debtors.) DATE: September 30, 2009
TIME: 10:00 a.m.
DEPT: D (Courtroom 34)

10 **This memorandum decision is not approved for publication and may not**
11 **be cited except when relevant under the doctrine of law of the case**
12 **or the rules of claim preclusion or issue preclusion.**

13 **MEMORANDUM DECISION**

14 **I. Statement of Proceeding**

15 Trustee Thomas A. Aceituno (the "trustee") has brought an
16 Objection to Claims of Exemption ("Trustee's Objection"). Docket
17 No. 53. For reasons set forth below, the Trustee's Objection will
18 be overruled.

19 **II. Background**

20 On March 16, 2009, Laurence R. Nicholson ("Nicholson") and
21 Joyce V. Nicholson (together, the "debtors") filed a voluntary
22 Chapter 7 petition ("Petition"). Docket No. 1. On their Schedule
23 B, the debtors scheduled 25 shares (the "shares") in Applied
24 Science, Inc. ("ASI"), representing a 50 percent stake in the
25 corporation. Id. ASI manufactures blood collection devices for
26 donation centers. Declaration of Dana Demerjian Filed in Support of
27 Debtors' Opposition to the Trustee's Objection, filed October 8,
28 2009, Docket No. 94 ("Demerjian Decl."), Ex. A at 4. ASI has two

1 equal shareholders: Nicholson and the Clifford A. Tyner Trust (the
2 "Tyner Trust"). Id.

3 The debtors assigned a \$0.00 value to their interest in the
4 shares and described the property by stating that the corporation
5 had assets of \$468,711, liabilities of \$860,726 and an accumulated
6 deficit of \$419,270. Petition at 22. The debtors did not claim the
7 shares as exempt on their Schedule C. Id. at 24.

8 On April 20, the trustee convened the meeting of creditors
9 pursuant to 11 U.S.C. § 341. On May 4, the trustee concluded the
10 meeting of creditors and the next day filed a Report of No
11 Distribution. On June 5, Karen Tyner ("Tyner"), as representative
12 of the estate of Clifford A. Tyner, filed a timely Objection to the
13 Chapter 7 Trustee's Determination of No Distribution ("No
14 Distribution Objection").¹ Docket No. 29. See Fed. R. Bankr. P.
15 5009. Therein, Tyner stated that she believed the shares might have
16 material value, and asked the trustee to delay his final report
17 pending an appraisal of the shares. No Distribution Objection at
18 1:26-2:3.

19 On July 21, the trustee filed a Notice of Withdrawal of
20 Trustee's Report of No Distribution. Docket No. 34. Two days
21

22 ¹ Tyner is Clifford Tyner's widow. Declaration of Karen Tyner in
23 Support of the Trustee's Objection, filed October 8, 2009, Docket No.
24 85 ("Tyner Decl."), ¶ 2. It is unclear if the Tyner Trust has
25 distributed its ASI shares to Tyner, or if Tyner is rather the
26 beneficial owner of the Tyner Trust's ASI shares. Tyner is also
27 chairperson of ASI's board of directors, id., and her subsequent
28 pleadings are filed in this capacity as well. See, e.g., Joinder in
Objection to Claims of Exemption and Request for Affirmative Relief,
filed August 17, 2009, Docket No. 59 ("Joinder"). Tyner alleges that
she is a party in interest because she holds personal and derivative
claims against Nicholson for breach of fiduciary duty, id. at ¶ 2, as
detailed herein.

1 later, the trustee filed a Notice of Assets. On July 28, the
2 trustee filed a Motion for Sale of Assets Free and Clear of Liens
3 ("Motion for Sale of Assets"). Docket No. 38. Therein, the trustee
4 moved the court for an order authorizing the sale of the shares.
5 Id. at 1:21-22. The trustee stated that he had accepted Tyner's
6 offer to purchase the shares for \$5,000, subject to overbids at the
7 time of hearing. Id. at ¶ 6. The trustee also stated that he and
8 Tyner had agreed that if the debtors amended their Schedule C to
9 claim an exemption in the shares, Tyner could either increase the
10 purchase price to cover the full amount of the claim of exemption,
11 or cancel the sale. Id.

12 On July 28, the debtors amended their Schedule B to assign a
13 \$19,949 value to the shares. Docket No. 43. They also amended
14 their Schedule C to claim the full value of the shares as exempt
15 pursuant to California Code of Civil Procedure section
16 703.140(b)(5). Id. On July 31, the debtors again amended their
17 Schedule B to assign a \$0.00 value to the shares. Docket No. 44.
18 They also amended their Schedule C to claim an additional \$2,075
19 exemption in the shares pursuant to California Code of Civil
20 Procedure section 703.140(b)(6).² Id.

21
22 ² The debtors' amended filings in July violate Federal Rule of
23 Bankruptcy Procedure 1008, in that they are not submitted under
24 oath. The debtors' amended filing in August, which is the debtors'
25 last word on their claimed exemption in the shares, does not suffer
from the same defect. Therefore, the court need not decide whether
the debtors' previous amended filings are valid notwithstanding their
lack of compliance with the Federal Rules of Bankruptcy Procedure.

26 It should be noted that the debtors' request for judicial notice of
27 their August 2009 amended filing, see Request for Notice Filed in
28 Support of Debtors' Opposition to Trustee's Objection to Claims of
Exemption, filed September 16, 2009, Docket No. 70, is inappropriate
and unnecessary. While Federal Rule of Evidence 201 does apply to

1 On August 4, Tyner filed a Notice of Subpoena, notifying the
2 parties in interest of her service of a subpoena on Nicholson
3 personally and in his capacity as ASI's registered agent. Docket
4 No. 49.

5 On August 12, the Trustee's Objection was filed. Therein, the
6 trustee asks the court to disallow any claim of exemption with
7 respect to the shares. Objection at 4:5-6. The trustee alleges
8 that the debtors amended their Schedules in response to his sale of
9 the shares to Tyner, id. at ¶¶ 8-9, and in order to recover value
10 for an asset they had represented was worthless, id. at ¶ 10.

11 In the Joinder, filed on August 17, Tyner alleges that the
12 debtors, hoping the trustee would abandon the shares, knowingly
13 misrepresented their value as zero in their original Schedule B.
14 Joinder ¶ 4. Then, in their amended schedules, Tyner alleges the
15 debtors claimed an exemption in the shares in order to prevent the
16 sale of the shares to her, or at least extract a payment from such
17 sale. Id. Finally, Tyner claims, on information and belief, that
18 Nicholson removed: (i) electronically-stored data from an ASI
19 computer in order to put this data beyond the reach of Tyner's
20 subpoena, id. at ¶ 6; and (ii) other assets from ASI's offices in an
21 effort to thwart the trustee's sale of the shares to Tyner, id. at ¶
22 7. Each of these actions, Tyner claims, constitutes bad faith and
23 is grounds for disallowance of the debtors' amended exemptions. Id.
24 at ¶ 9.

25 / / /

26 _____
27 bankruptcy proceedings, see Fed. R. Bank. P. 9017, the court need not
28 take judicial notice of documents that are already part of the record
of this case in order to consider them.

1 Also on August 17, the debtors amended their Schedule B to
2 assign a \$25,000 value to the shares. Docket No. 61. The same day,
3 the debtors amended their Schedule C, this time to disclaim the
4 previously-claimed \$2,075 exemption in the shares. Id.

5 On August 19, the court issued an Order on the Motion for Sale
6 of Assets, Docket No. 66 ("Order"). The court determined that
7 Rostrevor Partners, LLC ("Rostrevor Partners"), who bid \$25,949
8 during a hearing on the motion, had submitted the highest and best
9 offer for the shares.³ Order at ¶ 1. The court authorized the
10 trustee to consummate the sale of the shares to Rostrevor Partners,
11 but ordered him to hold in escrow \$19,949 pending resolution of the
12 parties' dispute over the debtors' entitlement to an exemption in
13 the shares. Id. at ¶ 3.

14 On August 20, ASI's newly-constituted board of directors
15 appointed Morgan President and Chief Executive Officer and
16 terminated Nicholson's employment. Declaration of Jonathan Morgan
17 in Support of the Trustee's Objection, filed October 8, 2009, Docket
18 No. 88 ("Morgan Decl."), Ex. A.

19 On September 16, the debtors filed a timely Opposition to the
20 Trustee's Objection ("Debtors' Opposition"). Docket No. 69.
21 Therein, the debtors insist that their assignment of a \$0.00 value
22 to the shares was correct on the bankruptcy filing date. Debtors'
23 Opposition at 3:6-7. According to the debtors, ASI's prospects
24

25 ³ Jonathan Morgan ("Morgan") is Rostrevor Partners' Managing Member.
26 Supplemental Declaration of Jonathan Morgan in Support of Finding of
27 Good Faith and Waiver of Stay of Fed. R. Bankr. P. 6004(h), filed
28 August 19, 2009, Docket No. 67, ¶ 1. Morgan has provided advice to
Tyner in connection with ASI since approximately June 2009. Id. at ¶
3.

1 improved only in late June, when sales increased and the firm began
2 to develop a relationship with Pall Medical. Id. at 3:9-13. Pall
3 Medical is a division of Pall Corporation, a large medical company.
4 Tyner Decl. ¶ 4. By August 19, when the trustee sold the shares to
5 Rostrevor Partners, the debtors estimate ASI had a 95 percent chance
6 of getting \$600,000 in orders from Pall Medical within a few days.
7 Id. at 3:16-20. Given ASI's dramatic change of fortune, the debtors
8 contend that an exemption claim of \$19,949 was wholly reasonable.
9 Id. at 3:25-28.⁴

10 On September 25, Tyner filed an untimely Reply in Support of
11 Joinder ("Reply").⁵ Docket No. 73. See Local Bankruptcy Rule 9014-
12 1(f)(iii). In the Reply, Tyner renews her assertion that the
13 debtors acted in bad faith. Reply at 2:21-23.

14 As evidence that the debtors knowingly misrepresented the value
15 of ASI's shares initially, Tyner alleges that Nicholson, on behalf
16 of ASI, offered to purchase her ASI shares for value shortly after
17 the debtors' bankruptcy filing. Id. at ¶ 4. Tyner submits a
18 document dated April 27, 2009, entitled "Tyner Stock Buyout
19 Proposal." Tyner Decl., Ex. A. By this document, ASI purportedly
20 offers to buy Tyner's shares for \$250, plus four percent of ASI's
21 total sales through March 31, 2012, to the extent new product sales
22 total at least \$25,000 per month. Id. at Ex. A, § 9.

24 ⁴ The debtors also deny that Nicholson stole ASI's assets or acted
25 improperly in any other way. Id. at 4:3-13.

26 ⁵ By way of explanation, Tyner contends that she never received
27 service of the Debtors' Opposition. Reply at 1 n.1. The court has
28 reviewed the docket and notes that there is no proof of service of the
Debtors' Opposition. The court will therefore excuse Tyner's late
filing.

1 ASI's offer also proposes accord and satisfaction of a \$252,364
2 debt purportedly owed Nicholson as a result of estimated pay
3 discrepancies between him and Clifford Tyner. Id. Finally, ASI
4 offers to make best efforts to cause Tyner to be released from
5 approximately \$560,000 in personal guarantees. Id. ASI estimates
6 the total transaction value to be at least \$450,000.⁶ Id.

7 Tyner also submits a document entitled "Notes for ASI/Nicholson
8 Shares after Discussion with Helga White." Morgan Decl., Ex. B.
9 The document is undated, is marked "CONFIDENTIAL" in handwritten
10 script, and does not identify its author. Id. Tyner alleges that
11 Nicholson authored the document. Reply at 3:10-12.

12 In the document, Nicholson purportedly wrote that he intended
13 to "[p]lay [the bankruptcy] objection low [and] minimize the amount
14 of information provided to Tyner[]." Id. at Ex. A, § 1. Nicholson
15 also purportedly wrote that he would not "push Tyner[] to withdraw
16 [the] objection, as this may constitute [bankruptcy] fraud" and that
17 "[i]f we know that the present value of the shares is worth
18 something ... then the court may say we conspired to conceal the
19 value that the trustee should have known." Id. at Ex. A, § 2.
20 Finally, Nicholson purportedly wrote that he intended to "[o]btain
21 [a] short 1 page valuation (in the works) and submit [it] to [the]
22 [t]rustee and Tyner[,] [since] [t]oo much information may cause the
23 trustee to dig deeper and find out about the Pall discussions." Id.
24 at Ex. A, § 3.

25
26 ⁶ The document also states that "ASI is currently 'under water' in
27 value" in the amount of \$500,000-\$800,000, id. at Ex. A, § 7, but
28 notes that a distribution agreement has been proposed with Pall
Medical, id. at Ex. A, § 8.

1 Tyner attempts to authenticate this document in three ways.
2 First, Morgan testifies that he located the document in the files of
3 ASI's former counsel. Morgan Decl. ¶ 9. Morgan provides additional
4 circumstantial evidence that Nicholson authored the document, in the
5 form of several e-mails between Nicholson and his counsel.⁷ Second,
6 Van C. Durrer, Esq., counsel to ASI and Tyner, testifies that he
7 took custody of the files retrieved from ASI's former counsel, and
8 that the document is a true and correct copy of what existed in the
9 possession of such former counsel. Declaration of Van C. Durrer in
10 Support of the Trustee's Objection, filed October 8, 2009, Docket
11 No. 87, ¶ 4.

12 Third, Jamie Tyner testifies that she recognizes the
13 handwriting on the document as Nicholson's. Declaration of Jamie
14 Tyner in Support of the Trustee's Objection, filed October 8, 2009,
15 Docket No. 84 ("J. Tyner Decl."), ¶ 4. Jamie Tyner testifies that
16 she became familiar with Nicholson's handwriting by working closely
17 with him at ASI for over five years. Id. at ¶ 2. Jamie Tyner also
18 submits copies of several canceled ASI checks signed by Nicholson as
19 evidence of his handwriting. Id. at Ex. A.

20 / / /

21
22 ⁷ These consist of a June 25, 2009, e-mail from Nicholson to Helga
23 A. White, Esq. ("White"), with a copy to Andrew A. Harris, Esq.
24 ("Harris"), in which Nicholson poses several questions regarding the
25 exemption objection, id. at Ex. D; and a July 2, 2009, e-mail in which
26 Harris directs Nicholson to "speak with Helga and take notes" and to
27 ask certain questions regarding the objection exemption, id. at Ex. C.
28 Nicholson later asks Harris to "talk about what I discussed with Helga
this morning." Id. at Ex. C. White is the debtors' bankruptcy
attorney. Declaration of Helga A. White Filed in Support of Debtors'
Opposition to Trustee's Objection, filed September 16, 2009, Docket
No. 71, ¶ 1. Harris is ASI's former corporate counsel. Morgan Decl.
¶ 5.

1 Tyner also presents additional evidence that ASI had begun to
2 develop a business relationship with Pall Medical by the time of the
3 debtors' bankruptcy filing. This evidence consists of: (i) a
4 document dated April 2, 2009, on ASI letterhead entitled "Proposed
5 Distribution Relationship with Pall Medical," Declaration of James
6 Bancroft in Support of the Trustee's Objection, filed October 8,
7 2009, Docket No. 86, Ex. A; and (ii) an e-mail from Nicholson to a
8 Pall Medical employee dated March 4, 2009, entitled "New Idea for
9 Applied Science Relationship," J. Tyner Decl., Ex. B. The e-mail,
10 which Nicholson forwarded to Jamie Tyner on March 6, proposes that
11 Pall Medical "become the ASI sales representative in Europe and for
12 the American Red Cross." Id. at Ex. B.

13 Additionally, Tyner presents evidence in support of her
14 contention that Nicholson misappropriated ASI property. This
15 evidence consists of copies of two canceled ASI checks payable to
16 the order of KSL Financial and signed by Nicholson. Tyner Decl.,
17 Ex. B. KSL Financial is the firm Nicholson engaged to perform a
18 valuation analysis of ASI. Demerjian Decl. ¶ 3. One, in the amount
19 of \$1,800, is dated June 17, 2009; the other, in the amount of \$800,
20 is dated July 15, 2009. Tyner Decl., Ex. B.

21 Tyner also points to Nicholson's admission, in a letter to
22 Morgan dated September 14, 2009, that he "retained a copy of the
23 HemoFlow 400 source code in good faith as a safety backup."⁸ Reply
24 at 4:23-26; Declaration of Laurence R. Nicholson Filed in Support of
25 Debtors' Opposition to Trustee's Objection, filed September 16,
26 2009, Docket No. 72, Ex. A. Tyner does not present any evidence in

27 ⁸ ASI has marketed the HemoFlow line of blood mixers since 1999.
28 Demerjian Decl., Ex. A. at 4.

1 support of her contention that Nicholson "deliberately deleted
2 electronic files of ASI shortly before the hearing on the motion to
3 sell the ASI shares, in a direct effort to thwart, hinder or delay
4 the sale." Reply at 4:26-5:3. Instead, Tyner simply makes
5 reference to an "ongoing forensic investigation." Id.

6 On October 8, the debtors filed an Objection to Admissibility
7 of Tyner's Exhibits ("Admissibility Objection"). Docket No. 90. In
8 the Admissibility Objection, the debtors object to the admissibility
9 of the "Notes for ASI/Nicholson Shares" document. Id. at 1:20-24.

10 The debtors contend that Tyner has not laid a proper foundation for
11 admission of the document. Id. at 1:25-27. The debtors also
12 contend that the document is protected by Laurence's right to
13 privacy and attorney-client privilege. Id. at 1:27-2:4. In support
14 thereof, Nicholson testifies (assuming arguendo he authored the
15 document) that he never distributed the notes to anyone.

16 Declaration of Laurence Nicholson Filed in Support of Debtors'
17 Opposition to Trustee's Objection, filed October 8, 2009, Docket No.
18 96, at ¶ 18.

19 Also on October 8, the debtors filed KSL Financial's valuation
20 analysis of ASI, dated July 2, 2009. See Demerjian Decl., Ex. A.
21 The analysis is based primarily on ASI's 2005 and 2006 federal
22 corporate returns; 2007 and 2008 year-end profit/loss statements;
23 and 2005, 2006 and 2007 balance sheets. Id. These documents report
24 ASI's net loss as \$72,541 in 2006; \$370,146 in 2007; and \$88,067 in
25 2008. Id. These documents also report that ASI had a negative
26 asset value of at least \$502,923 as of March 31, 2009. Id. Based
27 on these figures, the analysis assigns a zero value to ASI as of
28 March 31, 2009. Id.

1 III. Analysis

2 "A voluntary petition, list, schedule or statement may be
3 amended by the debtor as a matter of course at any time before the
4 case is closed." Fed. R. Bankr. P. 1009(a). Amendment is liberally
5 allowed, but may be denied on a showing that the debtor acted in bad
6 faith.⁹ In re Michael, 163 F.3d 526, 529 (9th Cir. 1998). Bad
7 faith must be established by clear and convincing evidence. Id.
8 The usual, but not exclusive, ground for a finding of bad faith is
9 the debtor's attempt to hide assets. In re Arnold, 252 B.R. 778,
10 785 (9th Cir. BAP 2000).

11 The court must therefore first decide whether the debtors
12 believed the shares had value when they represented to the trustee
13 and the court that ASI was worthless. Neither the trustee nor Tyner
14 contest KSL Financial's assessment of ASI's financial condition as
15 of March 31, 2009. Instead, they argue ASI had value despite its
16 financial condition due to Pall Medical's agreement to distribute
17 ASI's products.

18 But the movants have not set forth evidence that Pall Medical
19 agreed to do so prior to the debtors' exemption amendments in July
20 2009. Nicholson's communications with Pall Medical personnel in
21 March and April 2009 constitute preliminary negotiations in
22 anticipation of a business relationship. And a mere expectancy does
23 not make for a valuable contractual right. Knott v. McDonald's
24 Corp., 147 F.3d 1065, 1068 (9th Cir. 1998).

25 Nicholson's April 27, 2009, offer to purchase Tyner's shares
26 _____

27 ⁹ Amendment may also be denied on a finding of prejudice to third
28 parties. Id. Because neither the trustee nor Tyner alleges prejudice
as a result of the debtors' amended exemptions, the court will not
consider this ground for denial of the debtors' amendments.

1 reflects the speculative nature of the Pall Medical relationship.
2 It provides for a nominal initial payment augmented by a percentage
3 of ASI sales payable only if ASI's new sales exceed \$25,000 per
4 month.¹⁰

5 Also, the court will give little evidentiary weight to the
6 "Notes for ASI/Nicholson Shares" document. The document (even if it
7 does reflect Nicholson's conversation with White, his personal
8 attorney) is not protected by the attorney-client privilege;
9 Nicholson's decision to share the contents of the document with
10 Harris (who represented ASI) served as a waiver of any such
11 privilege. See Weil v. Investment/Indicators, Research and Mgmt.,
12 Inc., 647 F.2d 18, 24 (9th Cir. 1981).

13 However, the court finds that Tyner has not laid a sufficient
14 foundation for admission of the document. First, the court is
15 unmoved by Jamie Tyner's assertion that she recognizes Nicholson's
16 handwriting on the document. A document may be authenticated by
17 non-expert opinion on handwriting. Fed. R. Evid. 901(b)(2) (made
18 applicable to bankruptcy cases by Fed. R. Bankr. P. 9017). But
19 the handwritten capital print on the document is non-distinctive,
20 and in no way similar to the cursive script on the ASI checks.

21 Second, Morgan's testimony that he located the document in the
22 files of ASI's former counsel, and Van Durrer's testimony regarding
23 the document's chain of custody, proves nothing regarding the

24
25 ¹⁰ It is true that Nicholson also offered accord and satisfaction
26 of a substantial alleged debt, and to make best efforts to cause Tyner
27 to be release from sizeable personal guarantees. The alleged debt,
28 however, is likely unenforceable, if only because it is based on
unsubstantiated estimates of Clifford Tyner's efforts on ASI's behalf.
Nicholson may well have recognized that the purported debt was
unenforceable. Similarly, ASI's promise to make best efforts to cause
Tyner's release is of questionable monetary value.

1 document's authorship. Finally, the e-mails submitted by Morgan
2 between Nicholson, White and Harris also are not "sufficient to
3 support a finding that the matter in question is what its proponent
4 claims." Fed. R. Evid. 901(a).

5 Even if the court were to find that Nicholson authored the
6 document, the court still would not find that the debtors acted in
7 bad faith. At most, the document reflects Nicholson's belief that
8 ASI had value and his desire that the trustee not learn of the Pall
9 Medical discussions. But if Nicholson did author the document, he
10 likely did so on or around July 3, 2009. See Morgan Decl. ¶¶ 10-11.
11 If so, the document reveals nothing about the debtors' assessment of
12 ASI's value on March 16, 2009, but rather is consistent with
13 Nicholson's testimony that ASI's prospects improved in late June.

14 Nicholson's purported desire to conceal the Pall Medical
15 discussions from the trustee is also an insufficient basis for a
16 finding of bad faith. The bad-faith exception to Rule 1009(a)
17 regulates bad-faith acts, not thoughts. Here, the debtors amended
18 their schedules to reflect ASI's value on July 28, a scant three
19 weeks after Nicholson allegedly authored the document.¹¹

20 The debtors' alleged intent to prevent the trustee's sale of
21 the shares (or extract a monetary payment from such sale) also is
22 not grounds for finding bad faith. Claiming an exemption late is
23 not by itself bad faith; there must be some additional indicium
24 thereof. Arnold, 252 B.R. at 786. In this case, once the debtors
25 / / /

27 ¹¹ The court also questions whether the debtors in July 2009 had a
28 duty to disclose ASI's as-yet unconsummated relationship with Pall
Medical.

1 realized the shares had value, they had every right to use their
2 exemption claims in an attempt to capture that value.

3 Finally, the court refuses to disallow the debtors' exemption
4 amendments based on the movants' other allegations of misconduct.
5 First, this alleged misconduct bears only a tangential relationship
6 to the debtors' exemption claims. Second, the court is not
7 convinced that the debtors acted improperly.¹²

8 IV. Conclusion

9 Based on the foregoing, the court finds that the movants have
10 not presented clear and convincing evidence that the debtors acted
11 in bad faith. Accordingly, the court will overrule the Trustee's
12 Objection.

13 The court will issue an order consistent with this memorandum.

14
15 Dated: October 22, 2009

_____/s/
Robert S. Bardwil
United States Bankruptcy Judge

16
17
18
19
20
21
22
23
24 ¹² As noted, the movants have presented no evidence that Nicholson
25 improperly removed data from ASI's electronic systems. Also, Tyner's
26 assertion that "the theft of funds to pay for the [KSI Financial]
27 appraisal was theft," Reply at 4:23, is belied by her prior statement
28 that "ASI, at the direction and under the control of Nicholson ... is
undertaking an appraisal process ... intended to determine the value
of [the] shares[,]" No Distribution Objection at 1:26-28. Finally,
the fact that Nicholson freely admitted he retained a copy of the
HemoFlow 400 source code suggests he did so under a claim of right
rather than in bad faith.