

UNITED STATES BANKRUPTCY COURT  
Eastern District of California

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

Pursuant to District Court General Order 612, no persons are permitted to appear in court unless authorized by order of the court. All appearances of parties and attorneys shall be telephonic through CourtCall, which advises the court that it is waiving the fee for the use of its service by *pro se* (not represented by an attorney) parties through April 30, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.**

March 26, 2020 at 11:00 a.m.

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- |    |                                     |                               |                                     |
|----|-------------------------------------|-------------------------------|-------------------------------------|
| 1. | <a href="#"><u>17-26125-E-7</u></a> | FIRST CAPITAL RETAIL,         | MOTION FOR ENTRY OF DEFAULT         |
|    | <a href="#"><u>19-2116</u></a>      | LLC HSM-1                     | JUDGMENT                            |
|    |                                     | HUSTED V. IAC FUNDING CAPITAL | 2-27-20 <a href="#"><u>[22]</u></a> |
|    |                                     | SOURCE, LLC ET AL             |                                     |

**The Ruling on the Unopposed Motion Has Been Posted As A Tentative Ruling  
To Insure That the Court Correctly and Sufficiently Identified the Agreement and  
Liens to be Avoided**

**If Counsel For Plaintiff Finds the Description Sufficient  
No Appearance at the Hearing is Required**

**Tentative Ruling:** The Motion for Entry of Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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

**Below is the court's tentative ruling.**

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Counsel, Defendants, and Office of the United States Trustee on February 27, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Entry of Default Judgment is granted.**

Kimberly J. Husted ("Plaintiff-Trustee") filed the instant Motion for Default Judgment on February 27, 2020. Dckt. 22. Plaintiff-Trustee seeks an entry of default judgment against IAC Funding Capital Source, LLC, aka IAC Funding Source, LLC ("IAC") and ML Factors Funding, LLC ("ML") (collectively, "Defendants") in the instant Adversary Proceeding No. 19-02116.

The instant Adversary Proceeding was commenced on September 11, 2019. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on October 28, 2019. Dckt. 6. The complaint and summons were properly served on Defendants. Dckt. 7.

Defendants failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on February 14, 2020. Dckt. 14.

## **REVIEW OF COMPLAINT**

Plaintiff-Trustee filed a complaint for relief against Defendants. The Complaint contains the following general allegations as summarized by the court:

- A. Defendant IAC is a limited liability company of unknown domicile, doing business in the state of New York, and Defendant ML is a New Jersey limited liability company.

- B. Debtor scheduled a disputed secured claim held by ML in the amount of \$0.00, and a disputed secured claim held by IAC in the amount of \$30,810.16.
- C. Debtor's Statement of Financial Affairs disclosed that it was a defendant in a concluded collection action in the Supreme Court of the State of New York, in which IAC was the plaintiff, Case No. 17-812770 ("State Court Action").
- D. Based upon Debtor's information, certain of the payments made by the Debtor in connection with the Agreement defined below were paid to ML. Additionally, Defendants share an address in Cedarhurst, New York.
- E. Thus, IAC and ML are transferees of the Avoidable Transfers subject of the Complaint.
- F. Plaintiff alleges that Suneet Singal ("Singal"), on behalf of Debtor, entered into an agreement ("Agreement Transfers") with Defendants, where Singal sold \$52,465.00 of future receivables to Defendants, based upon a percentage of receivable, collected at a rate of \$1,312.00 per day. Any security interest in or lien upon Debtor's assets arising under the Agreement is referred to as "Agreement Liens."
- G. Singal had no authority to legally obligate the Debtor, or to pledge any of its assets as collateral in connection with the Agreement, or to sign any documents on behalf of the Debtor, including any confessions of judgment, in connection with the Agreement.
- H. Based upon the Affidavit of IAC CEO, Samuel Selmar, filed in connection with the State Court Action ("Selmar Affidavit"), and upon Debtor's information, a total of no less than \$28,377.00 were made in connection with the Agreement ("Payments").
- I. Defendants' security interests in and liens on any of Debtor's assets in connection with the Agreement were evidenced by the filing of one or more UCC financing statements.
- J. A judgment was entered in the State Court Action against the Debtor and other in the amount of \$30,810.16.

**First Claim for Relief—Avoidance of Fraudulent Transfers (11 U.S.C. § 548(a)(1)(A))**

Plaintiff-Trustee alleges the following for the First Cause of Action:

- A. The Agreement Transfers, Agreement Liens, and Payments constituted transfers of an interest of the Debtor in property, or obligations incurred by the Debtor, made within two (2) years before the date of the filing of

the petition in this case.

- B. The Agreement Transfers, Agreement Liens, and Payments were made with the actual intent to hinder, delay, or defraud an entity to which the Debtor was or became indebted, on or after the dates of the Agreement Transfers, Agreement Liens, and Payments.
- C. Thus, the Agreement Transfers, Agreement Liens, and Payments are avoidable under 11 U.S.C. § 548(a)(1)(A).

**Second Claim for Relief—Avoidance of Fraudulent Transfers (11 U.S.C. §§ 548(a)(1)(B)(i) and 548(a)(1)(B)(ii)(I))**

Plaintiff-Trustee alleges the following for the Second Cause of Action:

- A. The Agreement Transfers, Agreement Liens, and Payments constituted transfers of an interest of the Debtor in property, or obligations incurred by the Debtor, for less than reasonably equivalent value in exchange.
- B. Debtor was insolvent on the dates of the Agreement Transfers, Agreement Liens, and Payments, or became insolvent as a result of such transfers or obligations.
- C. Therefore, the Agreement Transfers, Agreement Liens, and Payments are avoidable under 11 U.S.C. §§ 548(a)(1)(B)(i) and 548(a)(1)(B)(ii)(I).

**Third Claim for Relief—Avoidance of Fraudulent Transfers (11 U.S.C. §§ 548(a)(1)(B)(i) and 548(a)(1)(B)(ii)(II))**

Plaintiff-Trustee alleges the following for the Third Cause of Action:

- A. The Agreement Transfers, Agreement Liens, and Payments constituted transfers of an interest of the Debtor in property, or obligations incurred by the Debtor, made within two (2) years before the date of the filing of the petition in this case, for less than reasonably equivalent value in exchange.
- B. On the dates of the Agreement Transfers, Agreement Liens, and Payments, Debtor was engaged or about to engage in a business transaction for which any property remaining with Debtor was an unreasonably small capital.
- C. Thus, the Agreement Transfers, Agreement Liens, and Payments are avoidable under 11 U.S.C. §§ 548(a)(1)(B)(i) and 548(a)(1)(B)(ii)(II).

**Fourth Claim for Relief—Avoidance of Fraudulent Transfers (11 U.S.C. §§ 548(a)(1)(B)(i) and 548(a)(1)(B)(ii)(III))**

Plaintiff-Trustee alleges the following for the Fourth Cause of Action:

- A. The Agreement Transfers, Agreement Liens, and Payments constituted transfers of an interest of the Debtor in property, or obligations incurred by the Debtor, made within two (2) years before the date of the filing of the petition in this case, for less than reasonably equivalent value in exchange.
- B. On the dates of the Agreement Transfers, Agreement Liens, and Payments, Debtor intended to incur, or believed that it would incur, debts beyond its ability to pay as they matured.
- C. Thus, the Agreement Transfers, Agreement Liens, and Payments are avoidable under 11 U.S.C. §§ 548(a)(1)(B)(i) and 548(a)(1)(B)(ii)(III).

**Fifth Claim for Relief—Avoidance of Preferential Transfers - Payments (11 U.S.C. § 547)**

Plaintiff-Trustee alleges the following for the Fifth Cause of Action:

- A. The Payments were made to or for the benefit of the Defendants, on account of antecedent debt owing from the Debtor to the Defendants.
- B. At the time of the Payments, the Debtor was insolvent within the meaning of the Bankruptcy Code.
- C. Based upon the estate's assets and liabilities, the Payments enabled Defendants to receive more than the Defendants would receive if: (1) the case were a Chapter 7 case; (2) the Payments had not been made; and (3) Defendants received payment of their debt to the extent provided by the provisions of the Bankruptcy Code.
- D. Therefore, Plaintiff is entitled to avoid the Payments as preferential pursuant to 11 U.S.C. § 547(b).

**Sixth Claim for Relief—Recovery of Property of the Estate (11 U.S.C. § 550)**

Plaintiff-Trustee alleges the following for the Sixth Cause of Action:

- A. The Agreement Transfers, Agreement Liens, and Payments (collectively, the "Avoidable Transfers"), were made to and for the benefit of Defendants. Making Defendants transferees of the Avoidable Transfers subject to avoidance pursuant to 11 U.S.C. §§ 547 and 548.
- B. Accordingly, Plaintiff is entitled to recover the Avoidable Transfers, or the value thereof, from Defendants under 11 U.S.C. § 550.

## Prayer

Plaintiff-Trustee requests the following relief in the Complaint's prayer:

- A. That the Agreement Transfers, the Agreement Liens, and the Payments, be avoided pursuant to 11 U.S.C. § 547 and 11 U.S.C. § 548;
- B. For recovery of the Avoidable Transfers, or the value thereof, from the Defendants, pursuant to 11 U.S.C. § 550;
- C. For pre-judgment interest on the Avoidable Transfers at the maximum legal rate pursuant to state and federal law, as applicable, until judgment is entered;
- D. For post-judgment interest on the Avoidable Transfers at the maximum legal rate pursuant to state and federal law, as applicable, from the date of entry of judgment until Plaintiff is paid in full;
- E. For recoverable costs of suit; and
- F. For such other relief as the court deems necessary and proper.

## APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

*Id.* at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62

(B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Debtor's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

## **DISCUSSION**

### **Avoidable Transfers**

The First Claim for Relief seeks avoidance of fraudulent transfers under 11 U.S.C. § 548(a)(1)(A). Plaintiff-Trustee states that the Agreement made in July 2017 and the Payments made to Defendants in July 2017 and August 2017 constitute transfers which are avoidable under § 548 as they were made on or within two (2) years of the date of the filing of the petition and without Debtor's authorization.

The purported transfers (stated to be "purported" in light of the Plaintiff-Trustee asserting that the person signing the documents was not an authorized representative of Debtor) are identified as the Agreement for the purchase of future accounts receivable in about July 14, 2017 (as described in the Affidavit filed as Exhibit E, Dckt. 27); any lien arising out of or relating to the Agreement; and the Payments made in July and August 2017.

Here, Debtor's petition was filed September 14, 2017. Case No. 17-26125, Dckt. 1. The Agreement was purportedly entered into on or about July 14, 2017. There are 62 days between these two dates, and thus the Agreement falls within the two years as described under § 548(a)(1)(A). The transfers were made with the intent to defraud as the person who engaged in the Agreement, Mr. Suneet Singal, was not authorized to entered into the subject agreement.

According to Plaintiff-Trustee, Singal was no longer Debtor's Managing Member at the time of the fraudulent transfers. Singal had sold his interest in the company to Debtor's Managing Member Rameshwar Prasad on February 23, 2017. Prasad Declaration, Exhibit K, Dckt. 27. The Avoidable Transfers were made on July 2017.

Plaintiff argues that Singal had no authority to legally obligate Debtor, or to pledge any of its assets as collateral in connection with the Agreement, or to sign any documents on behalf of the Debtor. The Agreement subject of this adversary proceeding is but one in a series of secured agreements where Singal allegedly misrepresented his authority and entered into such agreements without Mr. Prasad's consent. This is supported by testimony from Debtor's Managing member. *Id.*

Plaintiff-Trustee has shown that the Agreement and Avoidable Transfers, and Payments were made within two years of the date of the filing of the petition. Moreover, Plaintiff-Trustee shows that Mr. Singal entered into an Agreement without Debtor's authorization. Plaintiff-Trustee supports this allegation by providing Mr. Prasad's Declaration under penalty of perjury, that Mr. Singal was no longer the Managing Member, that Mr. Singal had sold his interest to Mr. Prasad, and thus, had no authority to enter into any agreements on behalf of Debtor. Thus, the transfers are avoidable under 11 U.S.C. § 548(a)(1)(A).

The Second, Third, and Fourth Claims for Relief seek avoidance of fraudulent transfers under 11 U.S.C. §§ 548(a)(1)(B)(i) and 548(a)(1)(B)(ii)(I), 548(a)(1)(B)(ii)(II), and 548(a)(1)(B)(ii)(III) respectively. Plaintiff-Trustee states that Debtor received less than reasonably equivalent value in exchange for the Transfers, and that at the time of such transfers Debtor was insolvent or rendered insolvent as a result of such transfers. Further that, Debtor was engaged or about to engage in a business or transaction for which any property remaining with the Debtor was an unreasonably small capital. Additionally, Plaintiff-Trustee states Debtor intended to incur, or believed that it would incur, debts beyond its ability to pay as they matured.

Plaintiff-Trustee directs the court to Debtor's Amended Summary of Schedules listed assets of \$564,804.44 and liabilities of \$23,726,054.54. Case No. 17-26125, Dckt. 75. From there, Plaintiff-Trustee would like the court to find that, not only was Debtor obviously insolvent, but that Debtor engaged in a transaction for which any property remaining with the Debtor was an unreasonably small capital, and that Debtor intended to incur debts beyond its ability to pay.

As to the Claims under 11 U.S.C. §§ 548(a)(1)(B)(i) and 548(a)(1)(B)(ii)(I), 548(a)(1)(B)(ii)(II), and 548(a)(1)(B)(ii)(III), the facts presented, and not disputed by Defendants, show that Debtor was indeed insolvent and that it was likely that when Mr. Singal signed the Agreement he knew not only that he was not authorized into such agreement but that engaging in this transaction left Debtor with even more non-existent capital and that he was signing for Debtor to incur in more debt that it could not repay.

Thus, Plaintiff-Trustee has shown that the Transfers are avoidable under 11 U.S.C. §§ 548(a)(1)(B)(i) and 548(a)(1)(B)(ii)(I), 548(a)(1)(B)(ii)(II), and 548(a)(1)(B)(ii)(III).

The Fifth Claim for Relief seeks avoidance of preferential transfers under 11 U.S.C. § 547. Here, Plaintiff-Trustee states that the Payments were made to the benefit of Defendants, for debt owed by Debtor to the Defendants, within 90 days before the filing of the petition, that Debtor was insolvent, and finally, that Defendants received more than Defendants would have received had this been a Chapter 7 case, no Payments had been made, and Defendants received payment of their debt to the extend provided by the Bankruptcy Code.

Again, the court is to find that Debtor was insolvent based on the debt to assets ratio. As explained above, because the Agreement was entered into on July 2017, it was within the ninety days before the filing of the petition. Looking at Debtor's liabilities, it is unlikely that Defendants would have received as much as they received if Trustee had liquidated the business and paid creditors waiting in line to be paid.

Plaintiff-Trustee has shown that the Payments made are preferential transfers made within 90 days before the petition was filed, they were in the benefit of Defendants and are thus avoidable.

## **Recovery**

The Sixth Claim for Relief seeks recovery of the Property of the Estate, either the "Avoidable Transfers or the value thereof, under 11 U.S.C. § 550.

In recovering the damages, Plaintiff-Trustee identifies IAC Funding Source, LLC as the



“creditor” which asserted the right to receive payments of the \$27,240.00 in transfers that were made from the Debtor. This is consistent with the Confession of Judgment Forms and related documents filed by IAC Funding Source, LLC in the New York Court. Exhibits B, D, E, F, and G; Dckt. 27. The Judgment of Confession signed by IAC Funding Source, LLC’s attorney admits receipt of payments of \$28,377.00 and the CEO of IAC Funding Capital Source, LLC (Exhibit E, *Id.*).

Plaintiff-Trustee then documents that Samuel Selmar is the CEO not only of IAC Funding Capital Source, LLC, but also the CEO of ML Factors LLC. *See* Affidavits, Exhibits E and F; *Id.*

Plaintiff-Trustee asserts, and the evidence presented is consistent with, the payments were made to IAC Funding Capital Source, LLC through ML Factors, LLC, the related entities. As such, the fraudulent and preferential payments were made to ML Factors, LLC, which were made for the benefit of IAC Funding Capital Source, LLC. Both are liable for the avoided transfers, jointly and severally.

Specifically, Plaintiff-Trustee seeks to recover the following transfers with a total amount of (\$27,240.00):

1. From Bank of America wire transfer dated 8/17/2017 in the amount of \$9,184.00.
2. From Bank of America wire transfer dated 8/24/2017 in the amount of \$1,000.00.
3. From JP Morgan Chase electronic withdrawal dated 7/26/2017 in the amount of \$9,184.00.
4. From JP Morgan Chase electronic withdrawal dated 7/31/2017 in the amount of \$6,560.00.
5. From JP Morgan Chase electronic withdrawal dated 8/22/2017 in the amount of \$1,312.00.

(Exhibits I & J, pp. 41, 42, 63, 74.)

There seems to be a clerical error in the Motion for Default where the amount sought is stated as \$27,230.00 instead of the \$27,240.00 as shown above.

Regardless, Plaintiff-Trustee has shown that Defendants are transferees and that the payments are avoidable. Thus, Trustee is entitled to recover for the benefit of the estate, under § 550, the property or value of the property from Defendants. In this case, Trustee is entitled to \$27, 240.00.

### **Pre-Judgment and Post-Judgment Interest**

Plaintiff-Trustee requests both pre-judgment and post-judgment interest in the Complaint. However, it is under Plaintiff-Trustee’s Motion for Default Judgment that Plaintiff-Trustee established that the request is made pursuant to the court’s discretion as it pertains to pre-judgment interest and 28 U.S.C. § 1961, as to each of the Payments.

#### **Pre-Judgment Interest**

As noted by Plaintiff-Trustee’s Memorandum of Points and Authorities, the court has discretion to award pre-judgment interest. The Plaintiff-Trustee directs the court to the Ninth Circuit ruling in *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008). As stated by the Ninth Circuit, quoting the

Seventh Circuit, “[P]rejudgment interest should not be thought of as a windfall in any event; it is simply an ingredient of full compensation that corrects judgments for the time value of money.’ *In re P.A. Bergner & Co.*, 140 F.3d 1111, 1123 (7th Cir. 1998). *Donell v. Kowell*, 533 F.3d at 772.

In *Donell v. Youabian*, 2014 U.S. Distr. LEXIS 19510 at \*18 (C.D. Cal. 2014), the court discusses the computation of pre-judgment interest and applicable state law relating thereto, specifically discussing fraudulent conveyance actions and citing a number of reported prior decisions. California Civil Code § 3287 provides that when a person is entitled to recover damages that are capable of being made certain by calculation, then the person is entitled to interest from the date when the person is vested with the right to be paid. Civil Code § 3287 does not specify an interest rate for claims such as these, however, the California Constitution, Art. XV § 1, provides that the rate of interest on things in action shall be 7% per annum, unless otherwise provided by the California Legislature. No alternative provision is cited by Plaintiff-Trustee.

Here, the theories for recovery are overlapping, both under federal law for preferences, and under federal and state law for fraudulent conveyances. (Though the Complaint and Motion identified 11 U.S.C. § 548, the Debtor in Possession and Trustee also have the avoidance powers of creditors as provided in 11 U.S.C. § 544, which includes state fraudulent conveyance rights.) The court computes the interest based on the state law right to pre-judgment interest for things in action, such as the right to avoid a fraudulent conveyance.

Here, the right to recover the transfer existed as of the date of the transfer, at least with respect to the fraudulent conveyances. This could be compared to a preference avoidance action, which rights would not exist until the bankruptcy case is filed. This Adversary Proceeding was commenced on September 11, 2019. The Trustee was appointed in the Chapter 7 case on September 5, 2018. The Bankruptcy Case was filed on September 14, 2017.

In light of the nature of these transactions, the limited amounts of the transfers, and the conduct of parties, the court computes the interest from the date of the transfers. These amounts are computed as follows:

<b>Transaction Date</b> <b>Principal Amount</b> <b>of Avoidable</b> <b>Transfers</b>	<b>Amount of</b> <b>Obligation</b> <b>(avoided and</b> <b>preferential</b> <b>transfer)</b>	<b>Number of</b> <b>Days from</b> <b>Transfer</b> <b>to March</b> <b>26, 2020</b>	<b>Applicable Pre-</b> <b>Judgment</b> <b>Interest of 7%</b> <b>Per Annum</b>	<b>Interest</b> <b>per day</b>	<b>Pre-</b> <b>Judgment</b> <b>Interest</b> <b>(Interest Per</b> <b>Day x</b> <b>Number of</b> <b>Days</b>	<b>Pre-</b> <b>Judgment</b> <b>Obligation,</b> <b>Including</b> <b>Interest For</b> <b>Judgment</b>
8/17/17 Transfer From Bank of America Account	\$9,184.00	953	0.07	\$1.76	\$1,677.28	\$10,861.28
8/24/17 Transfer From Bank of America Account	\$1,000.00	946	0.07	\$0.19	\$179.74	\$1,179.74
7/26/17 Transfer From JPMorgan Chase Account	\$9,184.00	975	0.07	\$1.76	\$1,716.00	\$10,900.00

7/31/17 Transfer From JPMorgan Chase Account	\$6,560.00	970	0.07	\$1.26	\$1,222.20	\$7,782.20
8/22/17 Transfer From JPMorgan Chase Account	\$1,312.00	948	0.07	\$0.25	\$237.00	\$1,549.00
	=====				=====	
<b>Principal Amount of Avoidable Transfers</b>	<b>\$27,240.00</b>		<b>Total Pre-Petition Interest</b>		<b>\$5,032.22</b>	
<b>Total Damages (Avoided Transfers Amount and Pre-Judgment Interest)</b>						<b>\$32,272.22</b>

#### Post-Judgment Interest

Post-Judgment Interest shall accrue as provided in 28 U.S.C. § 1961.

#### **Costs of Suit**

In the Complaint, Plaintiff-Trustee requests “recoverable costs of suit.” The Motion for Entry of Default states that Plaintiff-Trustee is entitled to recoverable costs of suit, namely the \$350.00 filing fee for the Complaint, pursuant to Rule 7054(b)(1) of the Federal Rules of Bankruptcy Procedure. Such request as part of the present Motion is an efficient use of time and expense (attorney’s fees for Plaintiff-Trustee’s counsel).

#### **CONCLUSION**

Applying the above mentioned bankruptcy codes, the court finds that Plaintiff-Trustee is entitled to the avoidance of the fraudulent transfers discussed above and therefore entitled to recovery as detailed to the benefit of the estate.

The court finds that the Complaint is sufficient, and the requests for relief requested therein are meritorious. The court has not been shown that there is or may be any dispute concerning material facts. Defendants has not contested any facts in this Adversary Proceeding. Further, there is no evidence of excusable neglect by Defendants. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendants has been given several opportunities to respond, and there is no indication that Defendants has a meritorious defense or disputes Plaintiff-Trustee’s right to judgment in this Adversary Proceeding. The court finds it necessary and proper for the entry of a default judgment against Defendants.

#### **RULING**

The court grants the default judgment in favor of Plaintiff-Trustee and against Defendants IAC Funding Capital Source, LLC, aka IAC Funding Source, LLC and ML Factors Funding, LLC,

determining that the transfers are avoided, and for a monetary judgment of \$32,622.22 (consisting of \$27,240 in avoided transfers, \$5,033.22 in pre-petition interest and \$350.00 in costs) against both Defendants, for which they are jointly and several liable.

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

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

The Motion for Entry of Default Judgment filed by Kimberly J. Husted ("Plaintiff-Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Entry of Default Judgment is granted and the court shall enter judgment for Plaintiff-Trustee Kimberly J. Husted and against IAC Funding Capital Source, LLC, aka IAC Funding Source, LLC and ML Factors Funding, LLC, jointly and severally, determining pursuant to 11 U.S.C. § 547(b), § 548(a)(1)(a), and § 548(a)(1)(B), and each of them as separate and independent grounds, that the following transfers are avoided:

- A. Agreement for the purchase of future accounts receivable in about July 14, 2017 (as described in the Affidavit filed as Exhibit E, Dckt. 27);
- B. Any lien arising out of or relating to the above Agreement; and
- C. The payment of \$27,240.00 in July and August 2017.

**IT IS FURTHER ORDERED** that as provided in 11 U.S.C. § 550(a) a monetary judgment is granted Kimberly J. Husted, the Plaintiff-Trustee, in the amount of \$32,622.22 (consisting of \$27,240 in avoided transfers, \$5,033.22 in pre-petition interest and \$350.00 in costs) and against Defendants IAC Funding Capital Source, LLC, aka IAC Funding Source, LLC and ML Factors Funding, LLC, for which each of the Defendants is joint and severally liable.

## FINAL RULINGS

2. [17-26125-E-7](#) [18-2030](#) FIRST CAPITAL RETAIL,  
LLC CONTINUED STATUS CONFERENCE  
RE: AMENDED COMPLAINT  
5-17-18 [\[39\]](#)
- FIRST DATA MERCHANT SERVICES  
LLC V. MCA RECOVERY, LLC ET AL

**Final Ruling: No appearance at the March 26, 2020 Hearing is required.**

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Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty: unknown

Adv. Filed: 6/3/19  
Answer: none  
Nature of Action:  
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:  
Continued from 3/4/20 to allow the first settlement payment to clear and Plaintiff have a dismissal of this Adversary Proceeding filed.

<p><b>The Adversary Proceeding having been dismissed (Order, Dckt. 25), the Status Conference is Removed From the Calendar.</b></p>
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**Final Ruling: No appearance at the March 26, 2020 Status Conference is required.**

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Plaintiff's Atty: Randy B. Soref; Andrew Joseph Nazar

Defendants' Atty:

Robert S. McWhorter [MCA Recovery, LLC]

Gabriel E. Liberman [First Capital Retail, LLC]

Jeffrey D. Ganz; J. Russell Cunningham [13<sup>th</sup> Floor/Pilot, LLC]

Adv. Filed: 3/22/18

Answer: 4/23/18 [First Capital Retail, LLC]

Amd. Cmplt. Filed: 5/17/18

Answer: 7/20/18 [13<sup>th</sup> Floor/Pilot, LLC]

7/20/18 [First Capital Retail, LLC]

7/20/18 [MCA Recovery, LLC]

Amd. Answer: 8/3/18 [MCA Recovery, LLC]

Cross-Claim Filed [by 13<sup>th</sup> Floor/Pilot, LLC]: 7/20/18

Answer: none

Cross-Claim Filed [by MCA Recovery, LLC]: 8/3/18

Answer: 8/22/18 [13<sup>th</sup> Floor/Pilot, LLC]

Amd. Cross-Claim Filed [by 13<sup>th</sup> Floor/Pilot, LLC]: 8/22/18

Answer: 10/23/18 [MCA Recovery, LLC]

Notes:

Continued from 1/30/20 to allow the Parties to document the understanding/settlement that has been reached.

<b>The Status Conference is continued to 2:00 p.m. on April 22, 2020.</b>
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### **MARCH 26, 2020 STATUS CONFERENCE**

This Adversary Proceeding was commenced on March 22, 2018, by First Data Merchant Services, LLC, to interplead monies that were the subject of a dispute with the then Debtor in Possession. A Chapter 7 Trustee was appointed in the bankruptcy case on September 5, 2018.

At the January 20, 2020 Continued Status Conference the Parties advised the court that an "understanding" had been reached and counsel for First Capital was working on the settlement. Civil Minutes, Dckt. 169. The Parties requested a continuance so that they could document their "understanding" and get the settlement approved in the related Bankruptcy Case as provided in Federal

This followed the December 12, 2019, Continued Status Conference in which the parties reported to the court that they wanted a continuance to allow for a “final round of negotiations,” that they were on the “five yardline” and should be able to get this matter resolved. Dckt. 168.

The December 12, 2019, representations followed the October 24, 2019 Continued Status Conference for which the Parties a Joint Status Report (Dckt. 165). The court’s Civil Minutes from the October 24, 2019 Continued Status Conference states:

The Status Conference is continued to 11:00 a.m. on December 12, 2019, the documentation of the settlement and this matter will be dismissed or any to allow the Parties to complete motions required in the parent case noticed and set for hearing.

In the Joint Status Report the remaining Parties report:

On August 7, 2019, MCA’s counsel circulated a draft settlement agreement to counsel for the Trustee and Pilot. Since then, the parties exchanged comments on the settlement agreement, but have not finalized the settlement agreement as there are certain terms that must be resolved. The parties will continue to work towards settlement.

Dckt. 165. The court continues the Status Conference to allow the Parties and their counsel to Diligently bring this Adversary Proceeding to a conclusion. The court declines, at this time, to conduct in person weekly status conferences as a method of managing the diligent prosecution by the Parties.

Civil Minutes, Dckt. 167.

Though the “draft settlement agreement” has been circulated since August 2019, there is nothing in the file in this Adversary Proceeding or the Bankruptcy Case showing that an agreement has been achieved and the settlement of this Adversary Proceeding is being diligently prosecuted. No Motion to Authorize a compromise by the Trustee has been filed. On March 16, 2020, two blank Withdrawal of Claim Forms have been filed; Dckts. 592, 593; on which the only addition information to the pre-printed form is an illegible signature.

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

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

The Continued Status Conference having been set to allow the Parties to complete the settlement of this Adversary Proceeding that they represented to exist and to file the necessary motion for authorization as provided in Federal Rule of Bankruptcy Procedure 9019; no actual settlement now being shown in the

file and there being no Motion seeking authorization as provided in Federal Rule of Bankruptcy Procedure 9019 filed in the Bankruptcy Case (17-26125); no further updates Status Reports filed by any party to this Adversary Proceeding; this Adversary Proceeding now being seven hundred and thirty-five (735) days old, the Parties being unable to complete the represented settlement; and good cause appearing;

**IT IS ORDERED** that the Status Conference is continued to 2:00 p.m. on April 22, 2020.

**IT IS FURTHER ORDERED** that the managing member and counsel for 13<sup>th</sup> Floor/Pilot, LLC, the managing member and counsel for MCA Recovery, LLC, and Kimberly Husted, Trustee, and her counsel, and each of them shall appear in person at the April 22, 2020 continued Status Conference – No Telephonic Appearances Permitted for the forgoing persons ordered to appear.

**IT IS FURTHER ORDERED** that 13<sup>th</sup> Floor/Pilot, LLC, MCA Recovery, LLC, and Kimberly Husted, Trustee, and each of them, shall file their separate, updated Pretrial Conference Statements which shall include the following information:

**Initial Disclosures.** At the Discovery Conference the parties shall arrange to make the "initial disclosures" required by Rule 26(a). Within 14 calendar days after the Discovery Conference, each party shall make these initial disclosures to all other parties. These initial disclosures shall include, without limitation, the following:

- A. the identities of all potential witnesses, including expert witnesses;
- B. all documents and other tangible things relevant to the allegations of the pleadings including written reports of expert witnesses;
- C. information concerning damages asserted or denied; and
- D. copies of relevant insurance policies.

All disclosures shall be in writing, signed by the party or his or her attorney, and served on all other parties.

**Discovery Plan.** The parties shall also develop and file an updated written discovery plan signed by all parties or their counsel, that reflects the parties' views and proposals concerning:

- A. what changes, if any, should be made in the timing, form, or requirements of the initial disclosures;



B. the timing, subject matter, and limitations, if any, of discovery to be conducted after the initial disclosures.

The court concludes that new, updated, complete statements for the above are necessary, and not merely reference to a prior pleading, are necessary given the large passage of time without this matter being resolved in the manner represented on multiple occasions to the court.

C. the subject of any orders that the court should enter under Fed.R.Bankr.P. 7016(b) and (c) and 7026(a)(1)(E).