

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

September 23, 2015 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	15-21000-D-7	THERESA/KEVIN	MOTION FOR ENTRY OF DEFAULT
	15-2096	SHALLENBERGER DTD-1	JUDGMENT
	FIRST NATIONAL BANK OF OMAHA		8-20-15 [16]
	V. SHALLENBERGER		

2.	13-21707-D-7	JAMES/DIANE STRAUSS	MOTION TO REOPEN CHAPTER 7
	KY-3		BANKRUPTCY CASE
			8-20-15 [50]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion to reopen Chapter 7 bankruptcy case is supported by the record. As such the court will grant the motion and reopen the case by minute order. No appearance is necessary.

3. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-41 5-21-15 [560]

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

4. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-42 5-21-15 [565]

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

5. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-44 5-21-15 [575]

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

6. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-45 5-21-15 [580]

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

7. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-46 5-21-15 [585]

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

8. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-47 5-21-15 [590]

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

9. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-48 5-21-15 [595]

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

10. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-49 5-21-15 [600]

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

11. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-50 5-21-15 [605]

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

12. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-52 5-21-15 [615]

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

13. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-53 5-21-15 [620]

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

14. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-54 5-21-15 [625]

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

15. 14-25816-D-11 DEEPAL WANNAKUWATTE CONTINUED MOTION TO ABANDON
DNL-55 5-21-15 [630]

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

16. 15-25626-D-11 GERT/LAURALEE JENSEN MOTION FOR RELIEF FROM
PHL-3 AUTOMATIC STAY
RABOBANK, N.A. VS. 8-24-15 [52]

17. 15-21934-D-7 JAMES/MONICA HODGES MOTION FOR COMPENSATION FOR
DMW-1 NORTHSTATE AUCTIONS, INC.,
AUCTIONEER(S)
8-21-15 [47]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for compensation is supported by the record. As such the court will grant the motion and allow fees of \$5,722.24 and costs of \$2,000. Moving party is to submit an appropriate order. No appearance is necessary.

18. 14-25148-D-11 HENRY TOSTA MOTION FOR COMPENSATION FOR
MF-32 BAUDLER & FLANDERS,
ACCOUNTANT(S)
8-19-15 [519]

Final ruling:

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

19. 14-25148-D-11 HENRY TOSTA
TH-2

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF TERPSTRA
HENDERSON FOR THOMAS H.
TERPSTRA, SPECIAL COUNSEL
8-25-15 [524]

Final ruling:

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

20. 10-42050-D-7 VINCENT/MALANIE SINGH
GJH-10

MOTION FOR COMPENSATION FOR
DUNCAN COTTERILL, SPECIAL
COUNSEL(S)
8-26-15 [572]

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the trustee's motion for approval of interim compensation to the firm of Duncan Cotterill, a New Zealand firm that has been retained to advise the trustee with respect to a movie that may be property of the estate. No opposition has been filed; however, the court has two concerns.

First, the motion is confusing. It begins by stating that the trustee seeks allowance and payment of the amount of "NZD \$4,010.00 (which, at the current conversion rate of New Zealand Dollars to US Dollars (I.e. NZD \$1.00 to \$0.65) equals \$2,606.50)" Later it says the trustee seeks allowance and leave to pay \$2,606.50. Finally, in the prayer, the trustee seeks an order approving fees in the amount of NZD \$4,010 and authority to pay NZD \$4,010. The court takes judicial notice that the conversion rate varies in a single day, not to mention a week or a month, such that NZD \$4,010 may equal, in U.S. dollars, a figure different by several dollars in the morning from the figure it would equal in the afternoon. The court cannot determine from the motion whether the trustee seeks approval of and authority to pay NZD \$4,010.00 or USD \$2,606.50, which may be two different amounts as of the date the order is filed.

Second, although the court will allow the compensation requested on an interim basis at this time, Counsel's application for final approval of its compensation in this case will need to be supported by sufficient evidence to permit the court to determine whether the amount sought by way of this motion is reasonable. The evidence in support of this motion consists of the declaration of Dale Nicholson, who testifies about the areas in which she specializes, the areas in which she has experience, and the areas her practices includes and focuses on. She adds that during 2015, she has charged for her time at \$450 per hour, and that Darise Bennington, also from Duncan Cotterill, has charged at \$340 per hour. There is no information as to how long Ms. Nicholson has been in practice, what other qualifications support her hourly rate, whether she charges the same rate for other

clients, or whether her rate is reasonable based on the customary compensation charged by comparably skilled practitioners other than cases under the Bankruptcy Code. There is no information at all regarding Darise Bennington.

The evidentiary problem is compounded by the fact that, although Ms. Nicholson testifies the invoices filed as exhibits contain accurate statements of the work she and her firm performed, the invoices contain only two figures, which are the total amounts billed for the particular periods - NZD \$990.00 for March 5 to March 6, 2015 and NZD \$3,020.00 for April 20 to June 5, 2015. The invoices itemize the specific services performed, by date and description, but they do not indicate who performed the particular services or how much time was spent on each.

The order approving Duncan Cotterill's employment provides that compensation shall be pursuant to § 330 of the Bankruptcy Code and at the "lodestar rate" applicable at the time the services are rendered in accordance with In re Manoa Fin. Co., 853 F.2d 687 (9th Cir. 1988). The order also states that no hourly rate is approved by the order. Given the limited evidence filed with the motion, the court cannot determine whether the hourly rates charged are reasonable or whether the time spent was reasonable.

For these reasons, the court will approve the compensation requested on an interim basis, subject to final approval on a final fee application. The trustee will need to clarify the amount he seeks authority to pay. The court will hear the matter.

21.	10-42050-D-7	VINCENT/MALANIE SINGH	MOTION FOR COMPENSATION FOR
	GJH-9		GREGORY J. HUGHES, TRUSTEE'S
			ATTORNEY(S)
			8-26-15 [566]

This matter will not be called before 10:45 a.m.

22.	10-42050-D-7	VINCENT/MALANIE SINGH	MOTION FOR COMPENSATION FOR
	MFB-5		MICHAEL F. BURKART, CHAPTER 7
			TRUSTEE
			8-26-15 [561]

This matter will not be called before 10:45 a.m.

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Virender Kumar (the "defendant"), in the amount of \$325,255. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$325,255, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$325,255. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$325,255 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 81, pursuant to § 502(d), unless the defendant pays the

estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$325,255 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement¹ as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).² In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$325,255 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a

genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Sam Lal (the "defendant"), in the amount of \$280,263.1 The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$280,263, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$280,263. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$280,263 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 86, pursuant to § 502(d), unless the defendant pays the

estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$280,263 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement ² as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).³ In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$280,263 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a

genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

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Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 As a preliminary matter, the court notes that the trustee has filed a single motion in two different adversary proceedings, this one and AP No. 12-2357, Item 28 on this calendar. The trustee states: "Although Plaintiff initiated separate adversary proceedings against the two named Defendants, the actions should be consolidated, as the two Defendants are married to each other and have admitted receipt of an identical list of payments from Vincent Singh." Trustee's Motion, filed Aug. 24, 2015, at 2:17-19. As of this date, no motion to consolidate the two adversary proceedings has been filed in either one.

2 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

3 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

25.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2317	HLC-1	JUDGMENT
	BURKART V. PRATAP		7-1-15 [112]

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Vighyan Pratap (the "defendant"), in the amount of \$160,225. The defendant, in propria persona, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant filed a motion to withdraw the reference by the deadline. The motion to withdraw the reference was denied by order of the district court dated March 6, 2015. Thus, the defendant's request to have the matter adjudicated by an Article III court has been denied. In addition, the defendant filed a proof of claim in the chapter 7 case in which this adversary proceeding is pending. In doing so, the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made

by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$160,225, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$160,225. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$160,225 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 33, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense; thus, a monetary judgment in the trustee's favor is not appropriate at this time nor is a judgment disallowing the claim.¹ This leaves the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$160,225 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; (c) copies of the front and back sides of checks payable to the defendant on accounts of the debtor or one of his companies and copies of cashier's checks payable to the defendant; and (d) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and

California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). The defendant challenges Mr. McHale's qualifications and methodology under Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993), and states an intention to file a motion to exclude Mr. McHale's testimony and report. However, the defendant has made no showing in support of the challenge, despite having had an opportunity to do so. Thus, at least for purposes of this motion, the court finds it appropriate to consider Mr. McHale's declaration and report.

The defendant also states that "[t]he Trustee must still establish that each of the Payments made to Pratap were made in furtherance of the Ponzi scheme." Defendant's Opposition, filed Aug. 28, 2015 ("Opp."), at 30:16-17. A good portion of the defendant's opposition appears to be taken from an earlier motion - a motion for summary judgment filed by defendants in other adversary proceedings in this case. It appears the language just quoted may simply have been taken from that motion, as there is no other indication in the opposition that the defendant is seriously challenging the trustee's proof on this issue.² In any event, the defendant's opposition leaves the court in no doubt that the payments made to the defendant were made as part of the debtor's operation of the Ponzi scheme and in furtherance of that scheme. In fact, the defendant begins the opposition as follows: "Defendant [Pratap] is the victim of Vincent T [Singh] in which I invested or gave more money in Singh's fraudulent scheme than he paid me or I received." Opp. at 2:4-5. The defendant raises no serious argument, and has presented no evidence, that Vincent Singh was not running a Ponzi scheme or that the payments the defendant received were not made in furtherance of that Ponzi scheme.

Thus, the court concludes that the payments made to the defendant were made in furtherance of the Ponzi scheme. As to whether the trustee may recover those payments, the defendant will have the opportunity to demonstrate at trial, by way of admissible evidence, that the defendant took the payments for value and in good faith, and to the extent the defendant does so, the trustee may recover from the defendant only to the extent the defendant was a "net winner."

The only remaining question is the amount of the payments made to the defendant. The trustee requests a determination that Singh made payments to the defendant totaling \$160,225 in furtherance of the Ponzi scheme. In the opposition, the defendant has admitted receiving payments in that total amount. The defendant also claims to have made investments with Singh totaling much more than that, such that the defendant was a "net loser." The defendant has not supported the latter conclusion with sufficient admissible evidence to enable the court to make such a finding. However, the question goes to the affirmative defense that the defendant took the payments in good faith and for value; as to that defense, the defendant

will have an opportunity to present admissible evidence at trial.³ For present purposes, the court is prepared to conclude, based on the trustee's assertion and the defendant's admission, that the defendant received \$160,225 in payments from the debtor.

Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$160,225 were made in furtherance of the Ponzi scheme. There being no dispute as to the amount the defendant received from Singh, \$160,225, there are no other issues for the court to determine on this motion. The matter of the payments the defendant made to Singh and the issue of whether the defendant received in good faith the payments the trustee seeks to recover will be deferred until the time of trial.

The court will hear the matter.

1 In the trustee's words, "[the defendant] has done enough to earn a trial on his defenses." Trustee's Reply, filed Sept. 11, 2015, at 6:15-16.

2 The opposition raises certain other issues such as usury and constructive fraudulent transfer issues. As these issues were not raised by the trustee's motion, the court has no need to consider them at this time.

3 The court recognizes the defendant is in *propria persona*. The defendant will, however, be held to the same procedural rules and rules of evidence as litigants who are represented by counsel.

26. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2319 HLC-1 8-24-15 [88]
BURKART V. SHARMA

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Ajaiey Sharma (the "defendant"), in the amount of \$180,017. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), *aff'd*, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. *Id.* at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a

non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$180,017, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$180,017. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$180,017 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 185, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$180,017 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea

agreement 1 as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).² In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$180,017 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be

deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

27. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2354 HLC-1 8-24-15 [68]
BURKART V. CHEN ET AL

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendants, Zajing Chen and Dongye Pan (the "defendants"), in the amount of \$72,700.¹ The defendants, representing themselves, have filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569.

Here, defendant Zajing Chen was required by an earlier court order to file a

motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that defendant Zajing Chen waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding. At the time Dongye Pan stipulated to being joined as a defendant, he agreed that any orders in this adversary proceeding that are applicable to Zajing Chen would also be deemed applicable to him. Thus, defendant Dongye Pan is bound by the order requiring the filing of a motion to withdraw the reference by November 14, 2014 and by Zajing Chen's failure to file such a motion. As a result, the court finds that defendant Dongye Pan has also waived the right to an Article III adjudication.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendants between August 19, 2008 and August 19, 2010, a total of \$72,700, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendants in the amount of \$72,700. In the alternative, to the extent the defendants assert an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendants totaling \$72,700 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow defendant Zajing Chen's claim filed in the underlying case, Claim No. 43, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendants have raised an affirmative defense; thus, a monetary judgment in the trustee's favor is not appropriate at this time nor is a judgment disallowing the claim. This leaves the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendants totaling \$72,700 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a document that appears to evidence a \$32,700 payment by Vincent Singh to defendant Zajing Chen, which the trustee's attorney testifies was obtained by subpoena to a financial institution at which Singh or one of his entities had an account; and (c) a document that appears to evidence a \$40,000 payment by Satya Prasad to defendant Zajing Chen and an answer to an interrogatory to Satya Prasad, who is a defendant in another of these adversary proceedings, identifying that document as evidencing a payment to another at Singh's direction. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement² as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).³ In addition, the defendants admit in their opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendants were made.

As to the question whether those payments were made by Singh in furtherance of the Ponzi scheme, the defendants raise no opposition, and nothing in their opposition suggests the payments were not made in furtherance of that scheme. Thus, the court concludes that the payments made to the defendants were made in furtherance of the Ponzi scheme. As to the amount of the payments that were made to the defendants, the trustee requests a determination that the payments totaled \$72,700. In their opposition, the defendants have admitted they received payments from Vincent Singh in that total amount. Thus, the court will grant summary adjudication in favor of the trustee and against the defendants to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendants in the total amount of \$72,700 were made in furtherance of the Ponzi scheme.

The defendants add that their investments with Singh totaled \$90,000, such that the defendants were "net losers." In support of this conclusion, the defendants have submitted a declaration of defendant Zajing Chen in which she identifies certain exhibits as being from her personal record and another as being from Bank of America's records received in response to her request. The exhibits are (1) a Bank of America Funds Transfer Request and Authorization signed by the defendant by which she requested that a \$50,000 transfer be made to Vincent Singh's account at the Golden 1 Credit Union; (2) a copy of a letter that appears to be signed by Singh in which he acknowledges receipt of that amount by wire transfer; (3) a Bank of America Funds Transfer Request and Authorization signed by the defendant by which she requested that a \$20,000 transfer be made to Vincent Singh's account at Citibank; (4) a copy of a letter that appears to be signed by Singh in which he acknowledges receipt of that amount by wire transfer; (5) a copy of what appears to be part of a bank statement showing a \$20,000 transfer to a checking account with an account number ending in 1533, together with a copy of a blank check that appears to be on a Bank of America account with an account number ending in 1533 and belonging to Usha Singh, who is Vincent Singh's sister;⁴ and (6) a copy of a letter that appears to be signed by Singh in which he acknowledges receipt of that amount by wire transfer to his sister's account (again identified by an account number ending in 1533).

In reply to this evidence, the trustee repeats that he "is seeking a judgment against Defendants for \$72,700.00, based on evidence that Debtor Vincent Singh paid that amount to Defendants as part of a Ponzi scheme within two years prior to the filing of Vincent Singh's Chapter 7 petition." Trustee's Reply, filed Sept. 16, 2015, at 2:1-3. As to the defendants' position that they were "net losers," the trustee states: "Plaintiff will not respond at this time to Defendants' assertions

that they are net losers." Id. at 2:16-17. He adds: "On the basis of the Court's Order Modifying Scheduling Order (Docket No. 65), it was sufficient for Defendants to have asserted a viable defense in their Opposition. Thus, all issues relating to defenses that Defendants might want to raise should be deemed to be unresolved in the context of Plaintiff's Motion. For these matters, a trial will unfortunately be necessary." Id. at 2:18-21.

True, the trustee's motion did not raise the issue of payments the defendants may have made as investments in Singh's scheme; it was directed only to the payments Singh made to the defendants. However, the motion did expressly request a judgment in the trustee's favor in the amount of \$72,700 and disallowance of the defendants' claim unless the defendants pay that amount. Thus, it is arguable that the trustee put in play by his motion any defenses the defendants might be able to demonstrate in opposition to the motion. Further, the court has the ability under Fed. R. Bankr. P. 7056(f) to grant judgment independent of the motion after giving notice and a reasonable time to respond.

The court has no trouble concluding, as it has in the past in other adversary proceedings in this case, that good faith is an intensely factual issue that should not be determined on summary judgment. However, the court has also made clear that, in cases where the defendants make a sufficient showing of good faith at trial and where they also demonstrate they took their payments for value, the court will award judgment for the trustee only to the extent the defendants were "net winners"; that is, only in the amount by which the total of their recoveries from Singh exceeded the total of their investments. The court has requested, in connection with other adversary proceedings, that the trustee work with the defendants to clear the underbrush as to the amounts they invested. The trustee's counsel should be prepared at the hearing to report whether, in light of the defendants' evidence in opposition to the motion, he continues to assert they did not take their payments "for value."

The court will hear the matter.

1 Dongye Pan was joined as a defendant in this adversary proceeding by a modified scheduling order filed May 12, 2015 (not July 1, 2015 as indicated in the motion).

2 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

3 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

4 As to these two documents - the partial bank statement and the blank check, the defendant testifies as follows: "The exhibit 5 is from Bank of America's record after I asked for and received the transaction records for the period of 2008-2010 from our family's applicable accounts." Z. Chen Decl., filed Sept. 9, 2015, at 2:8-10.

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Sam Lal (the "defendant"), in the amount of \$280,263.¹ The defendant, through counsel, has apparently served opposition and the trustee has filed a reply.² For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$280,263, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$280,263. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$280,263 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 87, pursuant to § 502(d), unless the defendant pays the

estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$280,263 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement³ as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).⁴ In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$280,263 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a

genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 As a preliminary matter, the court notes that the trustee has filed a single motion in two different adversary proceedings, this one and AP No. 12-2315, Item 24 on this calendar. The trustee states: "Although Plaintiff initiated separate adversary proceedings against the two named Defendants, the actions should be consolidated, as the two Defendants are married to each other and have admitted receipt of an identical list of payments from Vincent Singh." Trustee's Motion, filed Aug. 24, 2015, at 2:17-19. As of this date, no motion to consolidate the two adversary proceedings has been filed in either one.

2 Counsel for the defendant filed opposition in AP No. 12-2315 on behalf of the defendant in that adversary proceeding, Sam Lal, and the defendant in this one,

Lalita Lal. For some reason, the opposition was not filed in this adversary proceeding. As the trustee filed a response, however, the court will treat the opposition as filed in both adversary proceedings.

3 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

4 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

29.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2359	HLC-1	JUDGMENT
	BURKART V. MAHARAJ		7-1-15 [118]

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Ashish Maharaj (the "defendant"), in the amount of \$50,018.44. The defendant, in propria persona, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant filed a motion to withdraw the reference by the deadline. The motion to withdraw the reference was denied by order of the district court dated March 6, 2015. Thus, the defendant's request to have the matter adjudicated by an Article III court has been denied. In addition, the defendant filed a proof of claim in the chapter 7 case in which this adversary proceeding is pending. In doing so, the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that

there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$50,018.44, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$50,018.44. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$50,018.44 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 75, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense; thus, a monetary judgment in the trustee's favor is not appropriate at this time nor is a judgment disallowing the claim.¹ This leaves the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$50,018.44 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) copies of the front and back sides of checks payable to the defendant on accounts of the debtor or one of his companies and copies of cashier's checks payable to the defendant. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed.

R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). The defendant challenges Mr. McHale's qualifications and methodology under Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993), and states an intention to file a motion to exclude Mr. McHale's testimony and report. However, the defendant has made no showing in support of the challenge, despite having had an opportunity to do so. Thus, at least for purposes of this motion, the court finds it appropriate to consider Mr. McHale's declaration and report.

The defendant also states that "[t]he Trustee must still establish that each of the Payments made to Maharaj were made in furtherance of the Ponzi scheme." Defendant's Opposition, filed Aug. 31, 2015 ("Opp."), at 39:22-23. A good portion of the defendant's opposition appears to be taken from an earlier motion - a motion for summary judgment filed by defendants in other adversary proceedings in this case. It appears the language just quoted may simply have been taken from that motion, as there is no other indication in the opposition that the defendant is seriously challenging the trustee's proof on this issue.² In any event, the defendant's opposition leaves the court in no doubt that the payments made to the defendant were made as part of the debtor's operation of the Ponzi scheme and in furtherance of that scheme. In fact, the defendant begins the opposition as follows: "Maharaj is the victim of Vincent Singh. Maharaj invested more money in Singh's fraudulent scheme than received from Vincent Singh." Opp. at 2:1-2. The defendant raises no serious argument, and has presented no evidence, that Vincent Singh was not running a Ponzi scheme or that the payments the defendant received were not made in furtherance of that Ponzi scheme.

Thus, the court concludes that the payments made to the defendant were made in furtherance of the Ponzi scheme. As to whether the trustee may recover those payments, the defendant will have the opportunity to demonstrate at trial, by way of admissible evidence, that the defendant took the payments for value and in good faith, and to the extent the defendant does so, the trustee may recover from the defendant only to the extent the defendant was a "net winner."

The only remaining question is the amount of the payments made to the defendant. The trustee requests a determination that Singh made payments to the defendant totaling \$50,018.44 in furtherance of the Ponzi scheme. In the opposition, the defendant has admitted receiving payments in the total amount of

\$43,018.44; he challenges the trustee's position that he received two additional payments, for \$2,000 and \$5,000. The trustee's evidence is not sufficient to overcome the defendant's challenge as to those two alleged payments; thus, for purposes of this motion, the court is prepared to conclude, based on the trustee's assertion and the defendant's admission, that the defendant received \$43,018.44 in payments from the debtor. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$43,018.44 were made in furtherance of the Ponzi scheme.

The question of the \$2,000 and \$5,000 payments will be moot if the defendant is able to prove he made investments with Singh totaling more than \$50,018.44, such that he was a "net loser."³ The defendant contends he invested a total of \$243,500 with Singh; he has attached to his opposition copies of bank documents that, if properly authenticated, would tend to support the conclusion that the defendant indeed invested significantly more than \$50,018.44 with Singh. For example, there are what appear to be three letters dated after the petition date of the underlying chapter 7 case from Citibank's "Client Research" department to the defendant, in response to his request, that appear to identify wire transfers totaling \$107,500 from the defendant to Perfect Financial and another \$10,000 to Aamco Orangevale. These documents, if properly authenticated, would likely be sufficient to prove the "for value" component of the defendant's affirmative defense. The defendant's declaration attached to his opposition does not purport to authenticate the bank records; however, the defendant will have an opportunity to present admissible evidence at trial.⁴

Yet in reply to the defendant's opposition and what clearly appear to be bank records tending to support the defendant's conclusion that he was a "net loser," the trustee does not address the bank records, but does address the disputed \$2,000 and \$5,000 payments he claims the defendant received. As to the \$2,000, the trustee included it solely on the basis of the defendant's proof of claim, which included as an attachment a narrative in which the defendant stated, "Since January 2009, until June 2009, I had received twice Cashier's Check total of \$4,000" (Trustee's Ex. 3). The defendant states in his opposition that the proof of claim was based on a preliminary calculation. The trustee replies that the defendant should be bound by the admission in his proof of claim. The trustee has no other evidence of the \$2,000 payment. As to the \$5,000 payment, the defendant contends it was a payment from another investor which the defendant combined with his own funds in a wire transfer then sent to Vincent Singh. The trustee claims Vincent Singh transferred the money to the other investor with instructions to forward it to the defendant as a partial return of monies owed to the defendant.

The trustee has gone to some trouble to prepare this reply. As to the defendant's position that he was a "net loser," however, the trustee states: "The fact that Defendant contends he is a 'net loser' is not relevant to the issues presented by Plaintiff's motion." Reply at 4:27-28. He adds that "any defendant who files an opposition asserting a valid-sounding defense will get his/her day in court. It is unnecessary for the Court to evaluate those arguments at this time; regardless of their validity, or the strength of the evidence. Any defense will be deemed to be based on a factual dispute and postponed to trial." Id. at 6:3-7.

True, the trustee's motion did not raise the issue of payments the defendant may have made as investments in Singh's scheme; it was directed only to the payments Singh made to the defendant. However, the motion did expressly request a judgment in the trustee's favor in the amount of \$50,018.44 and disallowance of the defendant's claim unless the defendant pays that amount. Thus, it is arguable that the trustee put in play by his motion any defenses the defendant might be able to demonstrate in opposition to the motion. Further, the court has the ability under Fed. R. Bankr. P. 7056(f) to grant judgment independent of the motion after giving notice and a reasonable time to respond.

The court has no trouble concluding, as it has in the past in other adversary proceedings in this case, that good faith is an intensely factual issue that should not be determined on summary judgment. However, the court has also made clear that, in cases where the defendants make a sufficient showing of good faith at trial and where they also demonstrate they took their payments for value, the court will award judgment for the trustee only to the extent the defendants were "net winners"; that is, only in the amount by which the total of their recoveries from Singh exceeded the total of their investments. The court has requested, in connection with other adversary proceedings, that the trustee work with the defendants to clear the underbrush as to the amounts they invested. The trustee's counsel should be prepared at the hearing to report whether, in light of the defendant's exhibits in opposition to the motion, he continues to assert the defendant did not take his payments "for value."

The court will hear the matter.

1 In the trustee's words, "[the defendant] has done enough to earn a trial on his defenses." Trustee's Reply, filed Sept. 11, 2015 ("Reply"), at 6:14.

2 The opposition raises certain other issues such as usury and constructive fraudulent transfer issues. As these issues were not raised by the trustee's motion, the court has no need to consider them at this time.

3 That is, the issue of the smaller payments will be moot if the defendant proves both that he invested more than he received back (the "for value" component of the affirmative defense) and if he also proves he took his payments in good faith (the other component of the defense). If the defendant prevails on the former but not the latter, the question of the smaller payments will not be moot.

4 The court recognizes the defendant is in propria persona. The defendant will, however, be held to the same procedural rules and rules of evidence as litigants who are represented by counsel.

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Rajesh Narayan (the "defendant"), in the amount of \$52,525. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$52,525, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$52,525. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$52,525 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the

underlying case, Claim No. 172, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$52,525 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement¹ as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).² In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$52,525 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing

that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

31. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2365 HLC-1
BURKART V. PANDEY

CONTINUED MOTION FOR SUMMARY
JUDGMENT
7-6-15 [110]

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Pankaj Pandey (the "defendant"), in the amount of \$61,400. The defendant, in propria persona, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), *aff'd*, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. *Id.* at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. *Id.* at 569.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant filed a motion to withdraw the reference by the deadline. The motion to withdraw the reference was denied by order of the district court dated March 6, 2015. Thus, the defendant's request to have the matter adjudicated by an Article III court has been denied. In addition, the defendant filed a proof of claim in the chapter 7 case in which this adversary proceeding is pending. In doing so, the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$61,400, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment

against the defendant in the amount of \$61,400. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$61,400 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 202, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense; thus, a monetary judgment in the trustee's favor is not appropriate at this time nor is a judgment disallowing the claim.¹ This leaves the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$61,400 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; (c) copies of the front and back sides of checks payable to the defendant on accounts of the debtor or one of his companies and copies of cashier's checks payable to the defendant; and (d) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir.

2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). The defendant challenges Mr. McHale's qualifications and methodology under Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993), and states an intention to file a motion to exclude Mr. McHale's testimony and report. However, the defendant has made no showing in support of the challenge, despite having had an opportunity to do so. Thus, at least for purposes of this motion, the court finds it appropriate to consider Mr. McHale's declaration and report.

The defendant also states that "[t]he Trustee must still establish that each of the Payments made to Defendant were made in furtherance of the Ponzi scheme." Defendant's Opposition, filed Aug. 28, 2015 ("Opp."), at 49:14-15. A good portion of the defendant's opposition appears to be taken from an earlier motion - a motion for summary judgment filed by defendants in other adversary proceedings in this case. It appears the language just quoted may simply have been taken from that motion, as there is no other indication in the opposition that the defendant is seriously challenging the trustee's proof on this issue.² In any event, the defendant's opposition leaves the court in no doubt that the payments made to the defendant were made as part of the debtor's operation of the Ponzi scheme and in furtherance of that scheme. In fact, the defendant begins the opposition as follows: "The Defendant is victim of Perfect Financial and Vincent Singh. I invested more money in Singh's fraudulent scheme than received from Perfect Financial." Opp. at 2:9-11. The defendant raises no serious argument, and has presented no evidence, that Vincent Singh was not running a Ponzi scheme or that the payments the defendant received were not made in furtherance of that Ponzi scheme.

Thus, the court concludes that the payments made to the defendant were made in furtherance of the Ponzi scheme. As to whether the trustee may recover those payments, the defendant will have the opportunity to demonstrate at trial, by way of admissible evidence, that the defendant took the payments for value and in good faith, and to the extent the defendant does so, the trustee may recover from the defendant only to the extent the defendant was a "net winner."

The only remaining question is the amount of the payments made to the defendant. The trustee requests a determination that Singh made payments to the defendant totaling \$61,400 in furtherance of the Ponzi scheme. In the opposition, the defendant has admitted receiving payments in the total amount of \$58,000; he challenges the trustee's position that he received two additional payments, for \$2,400 and \$1,000. The court is not convinced the trustee's evidence, discussed below, is sufficient to overcome the defendant's challenge as to those two alleged payments, at least not on summary judgment; thus, for purposes of this motion, the court is prepared to conclude, based on the trustee's assertion and the defendant's admission, that the defendant received \$58,000 in payments from the debtor. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute

and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$58,000 were made in furtherance of the Ponzi scheme.

The question of the \$2,400 and \$1,000 payments will be moot if the defendant is able to prove he made investments with Singh totaling more than \$61,400, such that he was a "net loser."³ The defendant contends he invested a total of \$110,000 with Singh; he has filed with his opposition copies of bank documents that, if properly authenticated, would support the conclusion that the defendant indeed invested significantly more than \$61,400 with Singh. For example, the defendant has submitted copies of what clearly appear to be bank statements for the defendant's account at Wells Fargo Bank that show \$30,000 and \$50,000 withdrawals from that account wire transferred to an account at Bank of the West in the name of Perfect Financial Group and a \$10,000 withdrawal from the defendant's account wire transferred to an account at Golden 1 Credit Union in the name of Vincent Singh. These documents, if properly authenticated, would likely be sufficient to prove the "for value" component of the defendant's affirmative defense. The defendant's declaration attached to his opposition does not purport to authenticate the bank records; however, the defendant will have an opportunity to present admissible evidence at trial.⁴

Yet in reply to the defendant's opposition and what clearly appear to be bank records tending to support the defendant's conclusion that he was a "net loser," the trustee does not address the bank statements, but does address the disputed \$2,400 and \$1,000 payments he claims the defendant received. The defendant challenges the trustee's right to recover those payments because they were made by John Singh, not Vincent Singh. In the defendant's view, "John Singh['s] involvement in the Ponzi was never established and any transaction with John Singh should not be part of Trustee's claim." Opp. at 11:22-24. In reply, the trustee has submitted a declaration of John Singh, Vincent Singh's brother, who, as the trustee describes it, "explains how Vincent Singh used his bank account to write checks to investors." Reply at 2:22-23. Relying on that declaration and on the defendant's failure to respond to the trustee's Requests for Admissions, the trustee contends the defendant "should not be able to assert a dispute as to the payments that Vincent Singh routed through John Singh's bank account. Thus, Plaintiff contends that the actual amount of undisputed payments is the full amount sought by Plaintiff, in the amount of \$61,400.00." Id. at 2:24-27.

The trustee has gone to some trouble to prepare this reply. As to the defendant's position that he was a "net loser," however, the trustee states: "The fact that Defendant contends he is a 'net loser' is not relevant to the issues presented by Plaintiff's motion." Reply at 4:21-22. He adds that "any defendant who files an opposition asserting a valid-sounding defense will get his/her day in court. It is unnecessary for the Court to evaluate those arguments at this time; regardless of their validity, or the strength of the evidence. Any defense will be deemed to be based on a factual dispute and postponed to trial." Id. at 4:21-5:2.

True, the trustee's motion did not raise the issue of payments the defendant may have made as investments in Singh's scheme; it was directed only to the payments Singh made to the defendant. However, the motion did expressly request a judgment in the trustee's favor in the amount of \$61,400 and disallowance of the defendant's claim unless the defendant pays that amount. Thus, it is arguable that the trustee put in play by his motion any defenses the defendant might be able to demonstrate in opposition to the motion. Further, the court has the ability under Fed. R. Bankr.

P. 7056(f) to grant judgment independent of the motion after giving notice and a reasonable time to respond.

The court has no trouble concluding, as it has in the past in other adversary proceedings in this case, that good faith is an intensely factual issue that should not be determined on summary judgment. However, the court has also made clear that, in cases where the defendants make a sufficient showing of good faith at trial and where they also demonstrate they took their payments for value, the court will award judgment for the trustee only to the extent the defendants were "net winners"; that is, only in the amount by which the total of their recoveries from Singh exceeded the total of their investments. The court has requested, in connection with other adversary proceedings, that the trustee work with the defendants to clear the underbrush as to the amounts they invested. The trustee's counsel should be prepared at the hearing to report whether, in light of the defendant's exhibits in opposition to the motion, he continues to assert the defendant did not take his payments "for value."

The court will hear the matter.

1 In the trustee's words, "[the defendant] has done enough to earn a trial on his defenses." Trustee's Reply, filed Sept. 11, 2015 ("Reply"), at 6:9.

2 The opposition raises certain other issues such as usury and constructive fraudulent transfer issues. As these issues were not raised by the trustee's motion, the court has no need to consider them at this time.

3 That is, the issue of the smaller payments will be moot if the defendant proves both that he invested more than he received back (the "for value" component of the affirmative defense) and if he also proves he took his payments in good faith (the other component of the defense). If the defendant prevails on the former but not the latter, the question of the smaller payments will not be moot.

4 The court recognizes the defendant is in propria persona. The defendant will, however, be held to the same procedural rules and rules of evidence as litigants who are represented by counsel.

32. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2367 HLC-1 8-22-15 [123]
BURKART V. PRASAD

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Jain Prasad (the "defendant"), in the amount of \$95,500. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$95,500, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$95,500. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$95,500 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 6, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$95,500 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement¹ as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).² In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$95,500 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir.

2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

33. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2369 HLC-1 8-22-15 [126]
BURKART V. SINGH

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Prem Singh (the "defendant"), in the amount of \$104,700. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$104,700, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$104,700. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$104,700 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 16, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$104,700 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi

scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement¹ as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).² In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$104,700 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not

significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

34. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2395 HLC-1 8-24-15 [125]
BURKART V. PRASAD ET AL

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendants, Parvin Prasad and Savita Deo (the "defendants"), in the amount of \$164,110. The defendants, through counsel, have filed opposition and the trustee has filed a reply.¹ For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendants were required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendants did not file a motion to withdraw the reference. Accordingly, the court finds that the defendants waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendants between August 19, 2008 and August 19, 2010, a total of \$164,110, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendants in the amount of \$164,110. In the alternative, to the extent the defendants assert an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendants totaling \$164,110 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendants' claim filed in the underlying case, Claim No. 116, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendants have asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendants totaling \$164,110 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendants; and (c) copies of two sets of Requests for Admissions, one for each defendant, which the trustee's counsel testifies were served on the defendants and which he also testifies the defendants have not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement 2 as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).³ In addition, the defendants admit in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendants were made.

The defendants also do not dispute the trustee's allegation that those payments were made by Singh to the defendants in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendants to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendants in the total amount of \$164,110 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendants' affirmative defense. The opposition states that the defendants can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendants have presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on them to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendants might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir.

2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendants are represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendants' affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendants to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, their counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 By its terms, the opposition is filed on behalf of defendant Parvin Prasad only, and not defendant Savita Deo. The court assumes this was an oversight on counsel's part, and will treat the opposition as having been filed on behalf of both defendants. If this is incorrect, counsel should bring the matter to the court's attention at the hearing.

2 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

3 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

35. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2396 HLC-1
BURKART V. PRASAD ET AL

CONTINUED MOTION FOR SUMMARY
JUDGMENT
7-1-15 [121]

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendants, Satya Prasad and Jessica Prasad (the "defendants"), in the amount of \$177,923. The defendants, representing themselves, have filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569.

Here, the defendants were required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendants filed a motion to withdraw the reference by the deadline. The motion to withdraw the reference was denied by order of the district court dated March 6, 2015. Thus, the defendants' request to have the matter adjudicated by an Article III court has been denied. In addition, the defendants filed a proof of claim in the chapter 7 case in which this adversary proceeding is pending. In doing so, the defendants waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the chapter 7 case in which this adversary proceeding is pending, Vincent Singh (the "debtor" or "Singh"), to the defendants between August 19, 2008 and August 19, 2010, a total of \$177,923, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code §

3439.04(a)(1). Thus, he seeks a judgment against the defendants in the amount of \$177,923. In the alternative, to the extent the defendants assert an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendants totaling \$177,923 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow defendants' claim filed in the underlying case, Claim No. 108, pursuant to § 502(d), unless the defendants pay the estate the amount of the avoided transfers. The defendants have raised an affirmative defense; thus, a monetary judgment in the trustee's favor is not appropriate at this time nor is a judgment disallowing the claim.¹ This leaves the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendants totaling \$177,923 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendants; (c) copies of the front and back sides of checks payable to the defendants on accounts of the debtor or one of his companies and copies of counter deposit slips; and (d) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendants and which he also testifies the defendants have not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement² as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).³ In addition, there is no indication in their opposition that the defendants dispute the contention that Singh was running a Ponzi scheme during the period in which the payments to the defendants were made.

The defendants do list as disputed questions of fact whether those payments were made by Singh as part of a Ponzi scheme and with the actual intent to hinder, delay, or defraud creditors. However, it appears the defendants have confused the issue with the question of the defendants' intent in investing with Singh. They have offered no argument or evidence on either of these actual issues. Thus, the court concludes that the payments made to the defendants were made in furtherance of the Ponzi scheme and with the actual intent on the part of the debtor to hinder, delay, or defraud creditors. As to whether the trustee may recover those payments, the defendants will have the opportunity to demonstrate at trial, by way of admissible evidence, that the defendants took the payments for value and in good faith, and to the extent they do so, the trustee may recover from them only to the extent they were "net winners."

The only remaining question at this time is the amount of the payments made to the defendants. The trustee requests a determination that Singh made payments to the defendants totaling \$177,923 in furtherance of the Ponzi scheme. In the opposition, the defendants have admitted receiving payments in the total amount of

\$127,223; they challenge the trustee's position that they received five additional payments totaling \$50,700. The defendants have listed those five alleged payments - three checks and two wire transfers - by date, type, check number if applicable, payee, and amount. However, they claim the payments were not deposited into their bank accounts. They have submitted no admissible evidence and no explanation as to why the payments were drawn up but then not deposited.

The trustee has replied with an analysis of four of the five challenged payments. First, he submitted as exhibits (1) copies of what appear to be bank statements for defendant Satya Prasad's accounts showing deposits in the amounts of three of the challenged payments; and (2) a copy of the defendants' supplemental responses to a set of interrogatories served by the trustee, in which the defendants acknowledged receipt of two of the challenged payments - one of those identified in the bank statements and another one. These exhibits leave one of the five challenged payments unaccounted for - it will be discussed below.

The trustee also submitted a supplemental declaration of his attorney, Christopher Hughes, who testifies to the procedures by which the trustee obtained copies of the debtor's bank records - from the banks and from law firms for various defendants - and to the various notations on the documents that identify the manner in which particular documents were obtained. The identifiers on the bank statements filed with the trustee's reply are those Mr. Hughes testifies were used by the firm of Diamond McCarthy in producing responses to requests for production of documents. Thus, the bank statements were produced by that firm, when it was counsel for the defendants in this adversary proceeding, to the trustee's counsel.

To summarize, the bank statements appear from the listed dates and amounts to evidence three of the challenged payments; the interrogatory responses reflect one of those and another one. Together, the bank statements and responses identify four of the five challenged payments. In addition, the documents originally filed with the trustee's motion, which he has further authenticated by way of Mr. Hughes' supplemental declaration, are sufficient to evidence those four payments. As for the fifth of the challenged payments, an alleged \$15,000 payment, the trustee has submitted two items of evidence. First there is a document Mr. Hughes testifies was received in response to a subpoena to one of the banks used by the debtor - the document is entitled "The Golden 1 Credit Union - Teller Chronological Journal." It bears an "as of" date and a "run" date of May 28, 2010 and appears to evidence two transactions, each in the amount of \$15,000. One may have been a transfer in and the other a transfer out, but that is not clear. In any event, neither defendant's name appears on the document. Second, there is a handwritten list apparently written by the debtor and attached to his statement of financial affairs. The list is entitled "Transfers/Payments from May 19th to Aug. 19th, 2010." The list includes this entry: "5/28 Xfer to Satya/Jessica Prasad \$15,000." In light of the defendants' challenge, the court does not find these two items of evidence sufficient to support the conclusion that this payment was received by the defendants.

The court concludes that the trustee has produced sufficient evidence of four of the five challenged payments, for a total of \$35,700. Adding this to the undisputed amount, \$127,223, brings the total to \$162,923. The court will grant summary adjudication in favor of the trustee and against the defendants to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors

and that payments made to the defendants in the total amount of \$162,923 were made in furtherance of the Ponzi scheme.

The issue of the remaining \$15,000 challenged payment will be moot if the defendants are able to prove they made investments with Singh totaling more than \$177,923, such that they were "net losers."⁴ The defendants will have an opportunity to present admissible evidence at trial. They are cautioned that they have thus far submitted no admissible evidence to the court; if they wish to have a chance of defeating the trustee's claims, they will need to submit sufficient admissible evidence at trial to prove their for value and good faith defense.⁵

The court will hear the matter.

1 In the trustee's words, "[the defendants] have done enough to earn a trial on their defenses." Trustee's Reply, filed Sept. 11, 2015 ("Reply"), at 7:16.

See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

3 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

4 That is, the issue of the payment will be moot if the defendants prove both that they invested more than they received back (the "for value" component of the affirmative defense) and if they also prove they took their payments in good faith (the other component of the defense). If the defendants prevail on the former but not the latter, the question of the \$15,000 payment will not be moot.

5 The court recognizes the defendants are in propria persona. They will, however, be held to the same procedural rules and rules of evidence as litigants who are represented by counsel.

36. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2410 HLC-1 8-22-15 [121]
BURKART V. NARESH

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Ram Naresh (the "defendant"), in the amount of \$167,423. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$167,423, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$167,423. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$167,423 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 179, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$167,423 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi

scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement¹ as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).² In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$167,423 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not

significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

37. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2411 HLC-1 8-22-15 [122]
BURKART V. DILBECK

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Sunita Dilbeck (the "defendant"), in the amount of \$27,189.57. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$27,189.57, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$27,189.57. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$27,189.57 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 136, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$27,189.57 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi

scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement¹ as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).² In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$27,189.57 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not

significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

38. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR SUMMARY JUDGMENT
12-2433 HLC-1 8-22-15 [120]
BURKART V. SINGH

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Jagdishwar Singh (the "defendant"), in the amount of \$217,330. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$217,330, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$217,330. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$217,330 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 13, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$217,330 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi

scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement¹ as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).² In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$217,330 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not

significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

39.	10-42050-D-7	VINCENT/MALANIE SINGH	MOTION FOR SUMMARY JUDGMENT
	12-2445	HLC-1	8-22-15 [119]
	BURKART V. KUMAR		

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Ashok Kumar (the "defendant"), in the amount of \$24,040. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$24,040, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$24,040. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$24,040 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 180, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$24,040 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement 1 as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).2 In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$24,040 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir.

2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

40.	10-42050-D-7	VINCENT/MALANIE SINGH	MOTION FOR SUMMARY JUDGMENT
	12-2458	HLC-1	8-22-15 [69]
	BURKART V. GUO		

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Xin Guo (the "defendant"), in the amount of \$43,276. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$43,276, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$43,276. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$43,276 in furtherance of the Ponzi scheme. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$43,276 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement¹ as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).² In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$43,276 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir.

2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

2 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

41.	10-42050-D-7	VINCENT/MALANIE SINGH	MOTION FOR SUMMARY JUDGMENT
	12-2487	HLC-1	8-24-15 [118]
	BURKART V. KUMAR		

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Kushnick 1 Kumar (the "defendant"), in the amount of \$59,440. The defendant, through counsel, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569. Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant did not file a motion to withdraw the reference. Accordingly, the court finds that the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$59,440, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$59,440. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$59,440 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 82, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense which, if properly supported, would preclude entry of a monetary judgment in the trustee's favor or a judgment disallowing the claim at this time. See discussion below. This would leave the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$59,440 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A. McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a summary list of the payments the trustee contends were made by the debtor to the defendant; and (c) a copy of a set of Requests for Admissions which the trustee's counsel testifies were served on the defendant and which he also testifies the defendant has not responded to. The court will begin with the evidence of a Ponzi

scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's guilty plea and plea agreement² as conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1).³ In addition, the defendant admits in the opposition that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant also does not dispute the trustee's allegation that those payments were made by Singh to the defendant in furtherance of the Ponzi scheme. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$59,440 were made in furtherance of the Ponzi scheme.

The court turns, then, to the question of the defendant's affirmative defense. The opposition states that the defendant can produce evidence at trial to support a "good faith and for value" defense and that the issues concerning this defense should be reserved for trial. The trustee replies that the defendant has presented no evidence to show the existence of facts to support a viable defense, as it was incumbent on the defendant to do, and thus, summary judgment should be granted in the trustee's favor regardless of any affirmative defense the defendant might assert at trial. The rule and the case law support the trustee's position. The rule provides that

[a] party asserting that a fact . . . is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (. . .), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056.

Thus, on a properly supported motion for summary judgment, the opposing party must demonstrate that there is a genuine dispute about a material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a "genuine" dispute if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (emphasis added). An opposing party may not rest on the allegations or denials in his or her pleadings, but must present "significant probative evidence" tending to support his or her position. Id. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not

significantly probative, summary judgment may be granted." Id. (citations omitted); see also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008) (citation omitted) ["The nonmoving party 'may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.'"].

There are other adversary proceedings in this case in which the defendants are representing themselves without an attorney. In those cases, the court has ordered, with regard to the trustee's summary judgment motions, that "any Defendant shall be deemed to have demonstrated a triable issue of fact concerning a relevant affirmative defense by asserting that defense in his or her response." See, e.g., Order Modifying Scheduling Order, filed July 1, 2015 in AP No. 12-2354. In this adversary proceeding, where the defendant is represented by counsel, the court and the parties discussed at the most recent pretrial conference whether a similar procedure should be adopted here. The recording of that hearing indicates the court, with the parties' consent, determined no such limitation need be imposed. Thus, no scheduling order similar to the one in AP No. 12-2354 has been issued in this adversary proceeding.

The court would be reluctant to grant summary judgment in the trustee's favor for the full amount prayed for without entertaining the defendant's affirmative defense, and will consider exercising its discretion under Rule 56(e) to allow the defendant to submit evidence to show that a genuine dispute exists regarding the affirmative defense. However, the defendant's counsel should be prepared to explain at the hearing why he did not make a proper record in the first place, as required by Rule 56(c).

The court will hear the matter.

1 Spelled Kushnik according to the defendant's opposition and Koshmick according to the defendant's proof of claim.

2 See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

3 See Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), see also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012).

42.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2491	HLC-1	JUDGMENT
	BURKART V. MAHARAJ		7-6-15 [109]

This matter will not be called before 10:45 a.m.

Tentative ruling:

This is the motion of the plaintiff in this adversary proceeding, who is the trustee in the underlying chapter 7 case (the "trustee"), for summary judgment in favor of the trustee and against the defendant, Susi Maharaj (the "defendant"), in the amount of \$11,552. The defendant, in propria persona, has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted in part.

Following the Ninth Circuit's decision in Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553 (9th Cir. 2012), aff'd, Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014), bankruptcy courts do not have constitutional authority to enter final judgments on fraudulent transfer claims against non-creditors. 702 F.3d at 565. The Bellingham court, however, also held that a defendant's right to a hearing in an Article III court is waivable. Id. at 566. "[A] litigant's actions may suffice to establish consent" to adjudication by a non-Article III court. Id. at 569.

Here, the defendant was required by an earlier court order to file a motion to withdraw the reference by a certain date or be deemed to have consented to this court's jurisdiction to enter findings of fact, conclusions of law, and final judgment in all causes of action in this adversary proceeding. The defendant filed a motion to withdraw the reference by the deadline. The motion to withdraw the reference was denied by order of the district court dated March 6, 2015. Thus, the defendant's request to have the matter adjudicated by an Article III court has been denied. In addition, the defendant filed a proof of claim in the chapter 7 case in which this adversary proceeding is pending. In doing so, the defendant waived the right to an Article III adjudication, and the court has authority to enter a final judgment in this adversary proceeding.

In considering a motion for summary judgment, the court looks beyond the pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

By this motion, the trustee asks the court to determine that the payments made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant between August 19, 2008 and August 19, 2010, a total of \$11,552, are avoided as actual fraudulent transfers pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, he seeks a judgment against the defendant in the amount of \$11,552. In the alternative, to the extent the defendant asserts an affirmative defense in response to the motion, the trustee seeks a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$11,552 in furtherance of the Ponzi scheme. The trustee also asks the court to disallow the defendant's claim filed in the underlying case, Claim No. 74, pursuant to § 502(d), unless the defendant pays the estate the amount of the avoided transfers. The defendant has asserted an affirmative defense; thus, a monetary judgment in the trustee's favor is not appropriate at this time nor is a judgment disallowing the claim.¹ This leaves the trustee's request for the alternative relief - a determination that the debtor was running a Ponzi scheme and made the payments to the defendant totaling \$11,552 in furtherance of the Ponzi scheme.

In support of the motion, the trustee has submitted (1) a declaration of his attorney, Christopher Hughes; (2) a declaration of his expert witness, Gerard A.

McHale, Jr.; and (3) exhibits consisting of (a) Mr. McHale's expert report; (b) a copy of a check payable to the defendant on an account of one of the debtor's companies; (c) copies of the front and back sides of a check payable to the defendant on an account of Manoj and Meriam Kumar; (d) parts of a transcript of a Rule 2004 examination of Manoj Kumar in which he testified that Vincent Singh used his bank account for a brief period of time when Singh's was frozen; and (e) a copy of the defendant's supplemental responses to a set of interrogatories which the defendant signed in April of 2013. The court will begin with the evidence of a Ponzi scheme.

Mr. McHale testifies that in his opinion, Vincent Singh was operating a Ponzi scheme from 2005 or 2006 until August of 2010, and that "[a]ll payments from and to investors during that period which were for 'investment' purposes were payments in furtherance of the Ponzi scheme." McHale Decl., at 2:17-19. In addition, the court has been made aware earlier in this litigation that the debtor, Vincent Singh, has pled guilty in federal court to wire fraud in connection with his operation of the Ponzi scheme. The court takes judicial notice of the debtor's plea agreement, in which the debtor admitted he solicited investors by telling them their money would be used to make safe loans for a high rate of return; that he did not use all investor money in the way he had told investors he would; that he made millions of dollars worth of payments to investors to make it appear his business was successful in the way he had described to investors, so as to induce them to give him even more money; that when he made those payments to investors, he was generally using investors' principal; that the appearance of a successful business was false; that his false statements convinced the investors to invest with him; and that he did not use investor money to make hard money loans, but instead to pay other investors. See Ex. A to Plea Agreement in United States v. Singh, Case No. 2:12-CR-352 (E.D. Cal.), filed March 20, 2014.

In Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 812 (9th Cir. 2008), the court found a debtor's plea agreement, in circumstances substantially similar to those in this case, to be admissible evidence, under Fed. R. Evid. 807(a)(1), of his operation of a Ponzi scheme with the actual intent to defraud. Further, the court held that "a debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent under 11 U.S.C. § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1), and precludes relitigation of that issue." Id. at 814. See also Donell v. Kowell, 533 F.3d 762, 700 (9th Cir. 2008) (citation omitted) ["[T]he mere existence of a Ponzi scheme is sufficient to establish actual intent to defraud."]; AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008) ["Eisenberg's plea demonstrates the existence of fraudulent intent and a Ponzi scheme."]; La Bella v. Bains, 2012 U.S. Dist. LEXIS 76502, *10-12, 2012 WL 1976972, *4 (S.D. Cal. 2012) [taking judicial notice of plea agreement to establish actual intent to defraud in a Ponzi scheme].

In light of these decisions, and based on the debtor's guilty plea and plea agreement and Mr. McHale's declaration and report, and there being no evidence to the contrary, the court finds there is conclusive evidence that the debtor was operating a Ponzi scheme and conclusive evidence of the debtor's fraudulent intent under Bankruptcy Code § 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). The defendant challenges Mr. McHale's qualifications and methodology under Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993), and states an intention to file a motion to exclude Mr. McHale's testimony and report. However, the defendant has made no showing in support of the

challenge, despite having had an opportunity to do so. Thus, at least for purposes of this motion, the court finds it appropriate to consider Mr. McHale's declaration and report.

The defendant also states that "[t]he Trustee must still establish that each of the Payments made to Maharaj were made in furtherance of the Ponzi scheme." Defendant's Opposition, filed Aug. 31, 2015 ("Opp."), at 35:9-10. A good portion of the defendant's opposition appears to be taken from an earlier motion - a motion for summary judgment filed by defendants in other adversary proceedings in this case. It appears the language just quoted may simply have been taken from that motion, as there is no other indication in the opposition that the defendant is seriously challenging the trustee's proof on this issue.² In any event, the defendant's opposition leaves the court in no doubt that the payments made to the defendant were made as part of the debtor's operation of the Ponzi scheme and in furtherance of that scheme. In fact, the defendant begins the opposition as follows: "Maharaj is the victim of Vincent Singh. Maharaj invested more money in Singh's fraudulent scheme than received from Vincent Singh." Opp. at 1-28-2:1. The defendant raises no serious argument, and has presented no evidence, that Vincent Singh was not running a Ponzi scheme or that the payments the defendant received were not made in furtherance of that Ponzi scheme.

Thus, the court concludes that the payments made to the defendant were made in furtherance of the Ponzi scheme. As to whether the trustee may recover those payments, the defendant will have the opportunity to demonstrate at trial, by way of admissible evidence, that the defendant took the payments for value and in good faith, and to the extent the defendant does so, the trustee may recover from the defendant only to the extent the defendant was a "net winner."

The only remaining question is the amount of the payments made to the defendant. The trustee requests a determination that Singh made payments to the defendant totaling \$11,552 in furtherance of the Ponzi scheme. The defendant has admitted she received these payments. Thus, the court will grant summary adjudication in favor of the trustee and against the defendant to the extent of determining, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that it is not genuinely in dispute and will be treated as established in this adversary proceeding that Vincent Singh was running a Ponzi scheme with the requisite fraudulent intent to hinder, delay, or defraud creditors and that payments made to the defendant in the total amount of \$11,552 were made in furtherance of the Ponzi scheme.

Finally, the defendant claims she made investments with Singh totaling \$25,000, such that she was a "net loser." She has attached to her opposition (1) copies of what appear to be the front and back sides of a cashier's check for \$20,000 naming Perfect Financial Group, Inc. as the payee and the defendant as the remitter; and (2) a copy of a Provident Credit Union Outgoing Wire Transfer Form - Branch, signed by the defendant by which it appears she authorized a \$5,000 wire transfer from her account to an account of Perfect Financial Group at U.S. Bank. These documents, if properly authenticated, would likely be sufficient to prove the "for value" component of the defendant's affirmative defense. The defendant's declaration attached to her opposition does not purport to authenticate the bank records; however, the defendant will have an opportunity to present admissible evidence at trial.³

Yet in reply to the defendant's opposition and what clearly appear to be bank records tending to support the defendant's conclusion that she was a "net loser,"

the trustee does not address the bank records. As to the defendant's position that she was a "net loser," the trustee states: "The fact that Defendant contends she is a 'net loser' is not relevant to the issues presented by Plaintiff's motion." Reply at 4:8-9. He adds that "any defendant who files an opposition asserting a valid-sounding defense will get his/her day in court. It is unnecessary for the Court to evaluate those arguments at this time; regardless of their validity, or the strength of the evidence. Any defense will be deemed to be based on a factual dispute and postponed to trial." Id. at 5:1-5.

True, the trustee's motion did not raise the issue of payments the defendant may have made as investments in Singh's scheme; it was directed only to the payments Singh made to the defendant. However, the motion did expressly request a judgment in the trustee's favor in the amount of \$11,552 and disallowance of the defendant's claim unless the defendant pays that amount. Thus, it is arguable that the trustee put in play by his motion any defenses the defendant might be able to demonstrate in opposition to the motion. Further, the court has the ability under Fed. R. Bankr. P. 7056(f) to grant judgment independent of the motion after giving notice and a reasonable time to respond.

The court has no trouble concluding, as it has in the past in other adversary proceedings in this case, that good faith is an intensely factual issue that should not be determined on summary judgment. However, the court has also made clear that, in cases where the defendants make a sufficient showing of good faith at trial and where they also demonstrate they took their payments for value, the court will award judgment for the trustee only to the extent the defendants were "net winners"; that is, only in the amount by which the total of their recoveries from Singh exceeded the total of their investments. The court has requested, in connection with other adversary proceedings, that the trustee work with the defendants to clear the underbrush as to the amounts they invested. The trustee's counsel should be prepared at the hearing to report whether, in light of the defendant's exhibits in opposition to the motion, he continues to assert the defendant did not take her payments "for value."

The court will hear the matter.

1 In the trustee's words, "[the defendant] has done enough to earn a trial on her defenses." Trustee's Reply, filed Sept. 11, 2015 ("Reply"), at 5:12.

2 The opposition raises certain other issues such as usury and constructive fraudulent transfer issues. As these issues were not raised by the trustee's motion, the court has no need to consider them at this time.

3 The court recognizes the defendant is in propria persona. The defendant will, however, be held to the same procedural rules and rules of evidence as litigants who are represented by counsel.

43. 15-23561-D-7 MARK/PENELOPE SMITH
DMW-2

MOTION TO SELL
8-25-15 [19]

44. 15-25863-D-7 SONJA MCMAINS
APN-1
WELLS FARGO BANK, N.A. VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
8-21-15 [11]

Final ruling:

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

45. 14-20064-D-7 GLENN GREGO
BHS-3

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH COASTLINE RE
HOLDINGS CORP.
8-26-15 [434]

Tentative ruling:

This is the trustee's motion to approve a compromise and to sell and assign, pursuant to § 363(b) of the Bankruptcy Code, the estate's interest in a lawsuit pending in the San Luis Obispo County Superior Court (the "state court"), Case No. 14CVP-0032 (the "Lawsuit"), for \$55,000. The debtor has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted and the court will entertain overbidding, if any, at the hearing.

The Lawsuit arose out of the appointment by the San Luis Obispo County Superior Court of a receiver for the debtor's property in Cambria, California known as the Mariner's Inn. The receiver was appointed on January 21, 2011. On January 27, 2011, the debtor filed a chapter 11 petition in the bankruptcy court for the Central District of California. On March 16, 2011, the bankruptcy court ordered the receiver to turn over the property to the debtor as debtor-in-possession, which the receiver did. On April 5, 2011, the bankruptcy court ordered the appointment of a chapter 11 trustee in the case. In February of 2012, the case was converted to chapter 7, and in April of 2013, the bankruptcy court granted the debtor's motion to declare certain assets of the estate, including the claims the debtor later asserted in the Lawsuit, abandoned to the debtor. On January 22, 2014, the state court authorized the debtor to file suit against the receiver, and shortly thereafter, the debtor filed the Lawsuit, naming the bank that had obtained the appointment of the

receiver, the receiver, the company she hired to manage the property, two of its employees, and her bonding company.¹

The crux of the Lawsuit is the debtor's claim that the receiver and persons working with or for her, while in possession of the Mariner's Inn, stole a large number of valuable items belonging to the debtor, including cut and uncut diamonds, diamond rings, a Rolex watch, a bass fishing boat, a baseball signed by Babe Ruth and Lou Gehrig, a prehistoric clam shell, an antique cuckoo clock, and a first edition Superman comic book. The debtor alleged the value of the missing items was at least \$1,255,680. It is highly significant that none of these items was listed in the debtor's schedules of his property, which he filed in his chapter 11 case commenced six days after the receiver took possession of the Mariner's Inn. The court will address the debtor's position on this issue below.

The trustee has cast the motion as both a motion to approve a compromise and a motion to approve the sale and assignment of the claims, as is appropriate under Ninth Circuit law. See In re Lahijani, 325 B.R. 282, 284 (9th Cir. BAP 2005); Goodwin v. Mickey Thompson Entm't Group, Inc. (In re Mickey Thompson Entm't Group, Inc.), 292 B.R. 415, 421 (9th Cir. BAP 2003). Thus, the court will consider the trustee's analysis of the compromise, discussed below, and will entertain overbids at the hearing, on the terms proposed in the motion. The first overbid, if any, must be at least \$56,000; succeeding bids must be in minimum increments of \$1,000. The trustee also seeks a waiver of the 14-day stay of Fed. R. Bankr. P. 6004(h), which the court will grant.

The trustee has analyzed the transaction as a compromise in light of the Woodson factors. See In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988). The court agrees with the trustee's analysis. First, it appears the probability of success in the litigation is low. The bank has successfully demurred to the complaint and been dismissed from the Lawsuit, obtaining a \$21,827 award against the debtor for its attorney's fees and costs. The trustee has set forth case law for the propositions that (1) claims against court-appointed receivers are limited to recovery from the receiver's bond, in this case \$10,000; (2) the debtor is judicially estopped from pursuing claims for loss of the items of personal property by his failure to disclose them in his bankruptcy schedules; and (3) the debtor cannot establish a claim for trespass, conversion, or interference with contractual relations because the receiver's possession and control of the property were lawful. The trustee also points out that the debtor has failed to produce documentation evidencing his ownership of the personal property. This court need not determine these issues; its role is only "to canvas the issues and see whether the settlement falls below the lowest point in the range of reasonableness." Spirtos v. Ray (In re Spirtos), 2006 Bankr. LEXIS 4894, *32 (9th Cir. BAP 2006). The court finds that, based on the trustee's arguments on the applicable case law and for reasons further discussed below, the settlement clearly does not fall below that lowest point.

Second, it is unclear whether the defendants in the Lawsuit could satisfy a judgment beyond the amount of the receiver's \$10,000 bond. Third, the Lawsuit has been pending since early 2014 without, as the trustee notes, moving beyond the pleading stage. In addition, the issues would be relatively complex and expensive to litigate - there are several remaining causes of action and several defendants and, as already pointed out, several hurdles in the case law, as mentioned above. The court is unsure of the validity of the trustee's position that the debtor is judicially estopped from pursuing the claim (a different issue from the issue of his standing),² but does find that the debtor's response on the issue exposes a serious lack of credibility, which would be, at the very least, unhelpful to anyone

prosecuting the Lawsuit. Specifically, the debtor failed to schedule any of the allegedly very valuable items he now asserts were converted by the receiver and others when he filed his first chapter 11 case, just six days after the receiver was appointed. He does not address this issue in his opposition, but does address it in his motion to compel abandonment of the Lawsuit, also on this calendar.

Regarding his failure to schedule what he believed to be over \$1.2 million worth of personal property, the debtor states: "The property that was stolen was not listed on the Debtor's original bankruptcy schedules because he did not have them. These properties were missing, due to the fact that the receiver was in possession of them and he could only claim an action for their recovery, which he in fact did. The statement by the Trustee's attorney that he is estopped is false." Debtor's Mot. For Order Abandoning Lawsuits, filed Aug. 26, 2015, at 2:17-21. First, the debtor did not schedule "an action for their recovery" until nine months into the case, if at all. See n.2, supra. Second, the statement that the debtor did not list the items because he did not have possession of them is seriously undermined by his responses in his Statement of Financial Affairs and original Schedule B filed in the case.

In the statement of affairs, where required to list (1) all property attached, garnished, or seized under any legal or equitable process within the prior year and (2) all property that had been in the hands of a custodian, receiver, or court-appointed official within the prior year, the debtor responded by listing the state court receiver and the "Hotel Business \$4,850,000.00." He did not list the items of personal property he later claimed the receiver converted. The \$4,850,000 figure is the value he listed on his Schedule A for the real property where the Mariner's Inn was located; thus, that figure, as shown in the statement of affairs, did not include any personal property, let alone over \$1.2 million in personal property. In addition, on his Schedule B, where required to list the location of his assets, the debtor listed "At Debtors Residence" for most of the items, but listed a fax machine, laptop, desk, and chair valued at \$500 as being "At Debtors Business." It is not credible that the debtor did not believe he was also required to list over \$1.2 million in heirlooms and memorabilia as being at his business. It is a reasonable inference, probably the only one, that the debtor failed to disclose those items because he either did not own them or did not want his creditors to find out about them. In either case, the debtor's lack of credibility would be likely to weaken the case if the Lawsuit were tried, a factor the court finds significant in the Woodson analysis.

Finally, the trustee cites the complexity of the facts and issues, the significant cost and delay that would be involved in litigation, and the unlikelihood of success in support of his conclusion that the compromise is in the paramount interest of creditors. The court concurs.

The debtor raises a number of objections. First, he claims this court has been divested of jurisdiction to approve the sale/compromise by his pending appeal from the court's order disallowing his exemption of the Lawsuit.³ He cites no authority. "The timely filing of a notice of appeal to either a district court or bankruptcy appellate panel will typically divest a bankruptcy court of jurisdiction over those aspects of the case involved in the appeal." Sherman v. SEC (In re Sherman), 491 F.3d 948, 967 (9th Cir. 2007) (citation omitted). On the other hand, "[t]he bankruptcy court retains jurisdiction over all other matters that it must undertake to implement or enforce the judgment or order, although it may not alter or expand upon the judgment. If a party wants to stay all of the proceedings in bankruptcy court while an appeal is pending, it must file a motion for a stay." Id. (citations

omitted, internal quotation marks omitted). Further, "a trial court retains jurisdiction to take actions that preserve the status quo during the pendency of an appeal, although the court may not finally adjudicate substantial rights directly involved in the appeal." Rains v. Flinn (In re Rains), 428 F.3d 893, 904 (9th Cir. 2005) (citation omitted).

First, the issues involved in the trustee's motion are whether the proposed sale/compromise of the Lawsuit will result in the "optimal value [being] realized by the estate under the circumstances" (Lahijani, 325 B.R. at 288) and whether it is fair and equitable (*id.* at 290), not whether the debtor is entitled to an exemption claim in the Lawsuit, which is the subject of the appeal. Thus, resolution of this motion will not involve issues directly involved in the appeal. Second, in deciding the motion, the court will not be altering or expanding the order on appeal. If anything, in granting the motion, the court will be acting in accordance with the effect of the order.

The situation here is akin to that in Houshang Dardashti v. Golden (In re Houshang Dardashti), 2008 Bankr. LEXIS 4678 (9th Cir. BAP 2008). In that case, the trustee obtained an order requiring the debtor to turn over property he had inherited within the 180 days following the filing of his case. The debtor did not appeal. However, several months later, he filed an adversary proceeding seeking a declaration that his interest in the property was not property of the bankruptcy estate. When the court dismissed the adversary proceeding, the debtor appealed from the dismissal order. While that appeal was pending, the trustee moved in the bankruptcy court for an order holding the debtor in contempt for failing to comply with the turnover order. The debtor argued his appeal from the order dismissing his adversary proceeding divested the court of jurisdiction to hear the contempt motion. The court disagreed and held the debtor in contempt. On appeal from the contempt order, the debtor again raised the issue that the bankruptcy court had been divested of jurisdiction:

Because in that appeal Dardashti raised the issue of whether his interest in the Properties was property of the bankruptcy estate, and because the Turnover Order's provision that Dardashti execute a power of attorney to Trustee presumed that the bankruptcy estate held an interest in the Properties, Dardashti argues that the Contempt Order enforcing the Turnover Order was affected by the appeal of the Dismissal Order. Because it affected the appeal, Dardashti suggests the bankruptcy court could not enforce the Turnover Order pending resolution of that appeal.

2008 Bankr. LEXIS 4678 at *14.

The BAP disagreed, finding that case law "does not support the argument that an appeal divests the bankruptcy court of jurisdiction to issue any order that might affect an order on appeal." *Id.* at 15. Instead, the Panel held that the test was only "whether the Contempt Order significantly altered, amended or expanded the Dismissal Order while that order was on appeal." *Id.* at 16. The Panel cited Rains, 428 F.3d at 904, holding that "absent a stay or supersedeas, the court retains jurisdiction to implement or enforce the judgment or order but may not alter or expand upon the judgment." The Panel concluded that "[b]ecause no stay was in place, the bankruptcy court was free to enforce the Turnover Order. The Contempt Order did not significantly alter, amend, or expand the Dismissal Order on appeal." 2008 Bankr. LEXIS 4678 at *18.

As in Dardashti, in the present case, the debtor's argument is that in this

motion, the trustee assumes the Lawsuit is property of the estate, whereas the debtor's argument on appeal is that it is exempt; thus, approving the sale/compromise would "affect" the order on appeal. However, as held in Dardashti, that is not the test. As in that case, here, an order approving the sale/compromise would not alter, amend, or expand the order disallowing the debtor's exemption. Thus, the court concludes it has jurisdiction to grant the motion. As in Dardashti, in the present case, in granting the trustee's motion, the court will be, at most, enforcing the order disallowing the debtor's exemption claim; it will not be altering or expanding that order.⁴ Had the debtor wished to prevent this court from taking any action concerning the Lawsuit, he could have sought a stay pending appeal; he did not do so. Thus, this court is not divested of jurisdiction to approve the sale/compromise of the Lawsuit, any more than, in the absence of a stay pending appeal, it would be divested of jurisdiction to issue a writ garnishing the debtor's wages in enforcement of a monetary judgment.

The debtor also argues the order of abandonment he obtained from the Central District bankruptcy court in his prior case has res judicata effect in this case, precluding relitigation of the issue of his right to the claims asserted in the Lawsuit. The argument fails for at least two reasons. "In order for res judicata to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties." Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997). The "identity of claims" does not refer to the "claims" the debtor asserts against the receiver; it refers to the claims determined by the order sought to be given res judicata effect and the new order being sought. Here, there is no identity of claims between those at issue in the debtor's motion to abandon in the prior case and the trustee's motion to sell in this case. In issuing the order of abandonment, the court in the prior case determined that the debtor's claims against the receiver and others were burdensome or of inconsequential value and benefit to the bankruptcy estate in that case. In denying the debtor's motion to abandon the claims in this case and granting the trustee's motion to sell them, this court is determining that the claims are of consequential value and benefit to the estate in this case. These are two completely different issues.⁵

Further, the order of abandonment in the prior case did not prevent the debtor's claims against the receiver and others from becoming property of the bankruptcy estate in this new case. Instead, when the debtor filed this new case, "all legal or equitable interests of the debtor in property as of the commencement of the case" became property of the bankruptcy estate in this case. § 541(a)(1). The statute does not exclude property deemed abandoned in an earlier case.

The res judicata argument fails for the additional reason that there is no identity or privity between the parties in the earlier case and those in this case. The debtor was and is a party to both cases, as are Pacific Western Bank and certain others who have filed claims in this case. However, although there is some overlap, there are creditors in this case who were not creditors in the prior case, most significantly, the trustee and his attorney, who hold administrative claims in this case.

The debtor also contends that all claims in this case have been withdrawn or will be disallowed on his objections, such that there is no reason to sell the Lawsuit. The court recognizes that three claims have been withdrawn, and another, the claim of the Franchise Tax Board, has been amended to \$0. However, the court has overruled the debtor's objection to another of the claims and intends to overrule two others, based on tentative rulings on this calendar. The debtor's

objection to the second-largest claim, that of Pacific Western Bank, is still pending. Finally, the court disagrees wholeheartedly with the debtor's contention that the trustee and his attorney are milking this case for their own financial gain. Even if the debtor succeeds in obtaining the disallowance of all or most of the non-administrative claims, he will have taken almost two years, and maybe longer, to do so, during which time the trustee had an obligation to pursue available assets, which is what he has done. His and his attorney's administrative claims alone defeat the debtor's argument that there is no reason to sell the Lawsuit.

The court also rejects the debtor's unsupported contention that the trustee and his attorney have colluded with the IRS to induce it to file an invalid late claim. Proofs of claim are filed under oath. That the debtor may obtain disallowance of all or part of the IRS's claim based on amended returns filed by the debtor over a year after this case was filed does not mean the proof of claim was invalid when filed. In any event, as of this date, the IRS's claim has not been withdrawn and the debtor's objection to it will not be heard until October 21, 2015. As of this date, the IRS has a claim, presumed valid under Fed. R. Bankr. P. 3001(f), for \$73,333. That claim alone is reason enough to permit the sale of the Lawsuit to go forward, but even without it, the trustee's and his attorney's administrative claims provide sufficient reason.

The remainder of the debtor's arguments go to the merits of the Lawsuit, which the court need not determine. It is sufficient that, balancing those arguments against the trustee's arguments and the court's findings regarding the debtor's failure to disclose in his bankruptcy schedules the \$1,255,680 in assets he claims the receiver stole, the court finds the likelihood of success in the Lawsuit to be low. Balancing all the required factors, the court concludes that the compromise is fair and equitable and that the sale, being subject to overbidding, will generate the highest possible price for the estate. Accordingly, the court will grant the motion and entertain overbids at the hearing.

The court will hear the matter.

1 It is doubtful the debtor had standing to file the Lawsuit because he had, on January 3, 2014, filed the current bankruptcy case. Even if he had standing, as a debtor-in-possession, to file the case when he did, he no longer had standing to pursue it after this bankruptcy case was converted to chapter 7 and a trustee was appointed, on February 6, 2014. See Dunmore v. United States, 358 F.3d 1107, 1112 (9th Cir. 2004). The state court recognized this standing defect in its order sustaining the demurrer of one of the defendants, issued February 6, 2015. The court issued an order to show cause why the Lawsuit should not be dismissed on that ground, and when the debtor's counsel failed to appear, dismissed the Lawsuit. The debtor has filed a motion for reconsideration, asserting his counsel made a calendaring mistake. The motion for reconsideration is set for November 2, 2015. Because of the pending motion for reconsideration, in issuing this ruling, this court places no significance on the fact that the Lawsuit has been dismissed.

2 On an amended Schedule B, the debtor scheduled "Claims vs. SLTB [the bank] and Others for violations of 11 USC 362; & irregularity in residential loan made to Debtor for Brighton prop. and related COAs [causes of action]," which he valued at \$3.5 million. Amended Sch. B, filed Sept. 2, 2011, in Case No. 11-10391, Bankruptcy Court for the Central District of California. The Brighton property is not the property where the Mariner's Inn was located; however, arguably, the reference to

claims against the bank and others included the claims asserted in the Lawsuit. Further, the debtor obtained an order from the bankruptcy court determining that the claims later asserted in the Lawsuit were "returned to the Debtor." Order of Abandonment, filed April 11, 2013 in the same case. It is arguable, although not certain, that the filing of the amended Schedule B and issuance of the abandonment order would defeat a judicial estoppel argument.

3 According to the docket in that case, Case No. 2:15-cv-00458-TLN in the district court for this district, the matter was submitted without oral argument on August 5, 2015.

4 See also Hagel v. Drummond (In re Hagel), 184 B.R. 793, 798 (9th Cir. BAP 1995), holding that an appeal from an order denying confirmation of a chapter 13 plan does not divest the bankruptcy court of jurisdiction to dismiss the case for failure thereafter to propose a new plan.

In this case, the bankruptcy court [in granting the motion to dismiss] was not expanding upon or altering the order denying plan confirmation. Rather, the court was, at most, enforcing the order. Once plan confirmation was denied and the Debtors declined to amend their schedules or file a new plan, the only sensible course of action was to dismiss the Chapter 13 case. Otherwise, the Debtors would have the benefit of the automatic stay for the months or years while the order was on appeal, while having no confirmed plan compelling them to pay their creditors.

5 For the same reason, collateral estoppel does not apply. One of the several requirements for the application of that doctrine is that the issues sought to be given preclusive effect must be identical to the issues decided in the former proceeding. Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1123 (9th Cir. 2003).

46. 14-20064-D-7 GLENN GREGO
WR-39
Final ruling:

OBJECTION TO CLAIM OF PACIFIC
GAS AND ELECTRIC COMPANY, CLAIM
NUMBER 3
8-17-15 [398]

This is the debtor's objection to the claim of Pacific Gas and Electric Company, Claim No. 3. The objection will be overruled for the following reasons. First, the moving party failed to utilize the same docket control number on the objection and all the documents filed in support of the objection, as required by LBR 9014-1(c)(1) and (4). The objection itself bears DC No. WR-39; the notice of hearing, DC No. WR-38; and the supporting declarations, WR-40 and WR-41. Second, the notice of hearing states that the objection is filed on 28 days' notice, pursuant to LBR 9014-1(f)(1), and thus, that written opposition shall be filed and served at least 14 calendar days preceding the date of the hearing, whereas the objection is governed by LBR 3007-1. That rule provides that if written opposition is to be required, the moving party must give at least 44 days' notice of the hearing, whereas here, the debtor gave only 37 days' notice. Third, the proofs of service do not include a caption or a docket control number, as required by LBR 9004-1(a), the court's Revised Guidelines for the Preparation of Documents, EDC 2-901 (Rev. 1/17/14), and LBR 9014-1(e)(3).

As a result of these notice and other procedural defects, the objection will be overruled by minute order. No appearance is necessary.

47. 14-20064-D-7 GLENN GREGO
WR-44

OBJECTION TO CLAIM OF
EMPLOYMENT DEVELOPMENT
DEPARTMENT, CLAIM NUMBER 4
8-17-15 [406]

Tentative ruling:

This is the debtor's objection to the claim of the Employment Development Department (the "EDD"), Claim No. 4, in the amount of \$8,219.28. The EDD has filed opposition. For the following reasons, the objection will be overruled.

First, the court notes certain procedural problems with the objection and the notice of hearing. Specifically, the debtor gave insufficient notice of the hearing (see LBR 3007-1); the objection and documents supporting it all contain different docket control numbers, which is contrary to LBR 9014-1(c)(1) and (4); and the proofs of service do not include a caption or a docket control number, as required by LBR 9004-1(a), the court's Revised Guidelines for the Preparation of Documents, EDC 2-901 (Rev. 1/17/14), and LBR 9014-1(e)(3).¹ Because the EDD has filed opposition, the court will waive these defects in this one instance and proceed to consider the merits of the objection. However, the debtor's counsel is cautioned that such defects will generally not be waived in the future.

As a preliminary matter, the EDD points out that the objection is directed to the EDD's Claim No. 4, filed May 16, 2014, whereas the EDD filed an amended claim on December 22, 2014. Thus, the EDD posits that the objection is moot. There are only minor differences between the original claim and the amended one.² In the interest of judicial economy and avoidance of delay and expense to the parties, the court sees no reason not to construe the objection as an objection to the amended claim. Thus, the court will proceed to consider the merits.³

The debtor testifies he has filed amended returns covering the time he was in charge of the Mariner's Inn with employees, between January 1 and January 25, 2011. He states as follows: "I now owe \$789.17 to the EDD according to my returns and computations supplied to me by EDD. I am to be given an opportunity to pay this amount, but have not yet received the exact billing. If I receive the exact billing, I will have paid the obligation before the date of this hearing." G. Grego Decl., filed Aug. 17, 2015 ("Grego Decl."), at 2:4-9.⁴ The debtor has not submitted copies of the amended returns or the computations allegedly supplied by the EDD.

In response, the EDD has filed a declaration of a Senior Tax Compliance Representative, who testifies the EDD has no record of receiving an amended Form DE9 or DE9C for the 2011 tax year, and that "[t]here are no account notes stating that EDD advised Mr. Grego or his attorney that he owes EDD an amount of \$789.17." S. Breen Decl., filed Sept. 9, 2015, at 2:16-17.

Thus, there is conflicting testimony as to whether or not the debtor has filed amended returns with the EDD, but that is not the key issue. Even if the debtor has filed the returns, as he claims, the issue is whether those returns accurately reflect the debtor's liability. The only evidence on that point is the debtor's conclusory testimony that he "now owe[s] \$789.17 to the EDD." He states the conclusion is "according to [his] returns and computations supplied to [him] by EDD." Thus, the debtor's conclusion is based on hearsay and is inadmissible for that reason as well because it is too conclusory to be afforded any weight.

Further, the debtor's conclusion appears to be based in addition on his statement that he "was briefly in charge of the Mariner's Inn with employees between January 1, 2011 and January 25, 2011; at which point, a Receiver was installed" (Grego Decl. at 2:1-2), whereas the proof of claim includes taxes and interest due for tax periods both before January 1, 2011 and after January 25, 2011. Although there is some indication in the records of the Bankruptcy Court in the debtor's earlier case, Case No. 11-10391 in the bankruptcy court for the Central District of California, to the effect that a receiver was appointed for the Mariner's Inn on January 21, 2011,⁵ there is no evidence to support the conclusion that anyone other than the debtor was in charge of the Inn prior to January 1, 2011. And although the records in the prior case indicate the receiver was removed as such by the bankruptcy court on March 16, 2011 and a trustee was appointed on April 11, 2011, there is no evidence as to who was in charge between those dates.

To conclude, the debtor has failed to satisfy his burden of producing sufficient evidence to overcome the prima facie validity of the claim, so as to shift the burden of proof to the EDD to prove the validity of the claim. See Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000) (citations omitted). Accordingly, the objection will be overruled.

The court will hear the matter.

1 The debtor attempted to remedy the latter problem by filing two additional proofs of service - on August 21 and August 25, 2015, respectively. Those proofs of service have a caption and docket control number. However, they evidence service of the objection only, not the notice of hearing or declaration, and they are not signed under oath. Further, the docket control numbers on the two additional proofs of service are those used on documents pertaining to other creditors, not the documents associated with the objection to the EDD's claim.

2 The amended claim is for \$8,127.71, which is \$91.57 less than the amount of the original claim. The components of the two claims are virtually the same - the only changes are that the portion of the original claim that was for the tax period 10/1/2011 to 12/31/2011 has been deleted and apparently corresponding adjustments to the interest and penalty portions of the claim have been made.

3 As an additional preliminary matter, where the debt underlying a claim will not or may not be discharged, the debtor has standing to object to the claim. Wellman v. Ziino (In re Wellman), 2007 Bankr. LEXIS 4291, *5 n.5 (9th Cir. BAP 2007); Vandevort v. Creditor's Adjustment Bureau, Inc. (In re Vandevort), 2007 Bankr. LEXIS 4919, *12 n.9 (9th Cir. BAP 2007). In this case, the debtor will not receive a discharge because he received a chapter 7 discharge in a case commenced within eight years prior to his filing of this case. As a result, the debtor has standing to object to claims.

4 The declaration of the debtor's attorney recites essentially the same allegations as the debtor's declaration, but fails to evidence the attorney's personal knowledge of the facts alleged; thus, the EDD's objection to that declaration will be sustained and the declaration will not be considered.

5 The court takes judicial notice of the declaration of Myraline Morris Whitaker in support of her motion for compensation for services as custodian, in which Ms. Whitaker testified she was appointed as receiver on January 21, 2011, and "promptly took control of The Mariner's Inn." Whitaker Decl., filed Aug. 31, 2011 in Case No.

11-10391, at 2:7. In addition, attached to her declaration is a copy of an order of the San Luis Obispo County Superior Court, filed January 21, 2011, appointing Ms. Whitaker as receiver of the Inn.

48. 14-20064-D-7 GLENN GREGO
WR-48

OBJECTION TO CLAIM OF FRANCHISE
TAX BOARD, CLAIM NUMBER 6
8-17-15 [414]

Final ruling:

This is the debtor's objection to the claim of the Franchise Tax Board, Claim No. 6. On August 26, 2015, the Board filed an amended proof of claim which states that the amount owed is \$0.00. As a result of the filing of the amended claim, the objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

49. 14-20064-D-7 GLENN GREGO
WR-51

OBJECTION TO CLAIM OF SAN LUIS
OBISPO COUNTY TAX COLLECTOR,
CLAIM NUMBER 7
8-17-15 [420]

Tentative ruling:

This is the debtor's objection to the claim of the San Luis Obispo County Tax Collector (the "Tax Collector"), Claim No. 7, in the amount of \$16,635.28. The Tax Collector has filed a response. For the following reasons, the objection will be overruled.

First, the court notes certain procedural problems with the objection and the notice of hearing. Specifically, the debtor gave insufficient notice of the hearing (see LBR 3007-1); the objection and documents supporting it all contain different docket control numbers, which is contrary to LBR 9014-1(c)(1) and (4); and the proofs of service do not include a caption or a docket control number, as required by LBR 9004-1(a), the court's Revised Guidelines for the Preparation of Documents, EDC 2-901 (Rev. 1/17/14), and LBR 9014-1(e)(3).¹ Because the Tax Collector has filed opposition, the court will waive these defects in this one instance and proceed to consider the merits of the objection. However, the debtor's counsel is cautioned that such defects will generally not be waived in the future.

As a preliminary matter, the Tax Collector points out that the objection is directed to his Claim No. 7, filed December 22, 2014, whereas the Tax Collector filed an amended claim on July 17, 2015. The Tax Collector states the amended claim was filed to reflect subsequent payments made on the claim. (The amount of the amended claim is \$4,524.01.) Arguably, the filing of the amended claim moots this objection. However, the debtor states in his declaration that he is aware of the amended claim and expects it to be withdrawn, apparently on the same basis as he objects to the original claim. In the interest of judicial economy and avoidance of delay and expense to the parties, the court sees no reason not to construe the objection as an objection to the amended claim. Thus, the court will proceed to consider the merits.

The debtor testifies he has applied for an amended property tax appraisal. He adds: "The process that I have initiated is cause to delete any claim from the . .

. Tax Collector until such time as it is determined that there is a claim to be paid." G. Grego Decl., filed Aug. 17, 2015 ("Grego Decl."), at 2:3-6. In response, the Tax Collector confirms that an assessment appeal has been filed, but adds, "there is no indication at this time whether or not Mr. Grego will be successful in obtaining a reassessment." Tax Collector's Resp., filed Sept. 8, 2015, at 2:7-8. Thus, the Tax Collector believes the debtor's objection is premature.

The debtor is indeed trying to put the cart before the horse. A creditor with a claim against a bankruptcy debtor has the right to file a proof of claim even where the debtor has raised a challenge to the claim in state court or, as here, through an administrative process. In many cases, a claims bar date is set and if the creditor does not file a proof of claim by the deadline, his or her claim may well be disallowed, and even if allowed, may be subordinated to timely claims. In this case, creditors were notified that the deadline to file a proof of claim was February 23, 2015. The Tax Collector filed a timely proof of claim, which he has since amended, as he had the right to do. The only evidence in support of the objection is evidence that the debtor has applied to have the property reappraised and reassessed, a point the Tax Collector concedes. That is not evidence that the Tax Collector's assessment was not appropriate or that the taxes are not owed.

Finally, the debtor objects to the claim on the ground that "[i]n any event, the claim is a secured claim and is not relevant to a Chapter 7 liquidating Trustee." Grego Decl. at 2:8-9. The debtor is wrong. Secured creditors have as much right as unsecured creditors to file a proof of claim in a bankruptcy case. That a claim is secured is not a ground for disallowing it.

For the reasons stated, the debtor has failed to satisfy his burden of producing sufficient evidence to overcome the prima facie validity of the claim, so as to shift the burden of proof to the Tax Collector to prove the validity of the claim. See Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000) (citations omitted). Accordingly, the objection will be overruled.

The court will hear the matter.

1 The debtor attempted to remedy the latter problem by filing another proof of service on August 21, 2015. That proof of service has a caption and docket control number. However, it evidences service of the objection only, not the notice of hearing or declaration, and it is not signed under oath.

50. 14-20064-D-7 GLENN GREGO
WR-54

MOTION TO COMPEL ABANDONMENT
8-26-15 [442]

Tentative ruling:

This is the debtor's motion for an order abandoning a lawsuit pending in the San Luis Obispo County Superior Court, Case No. CV128369, in which three lawsuits are consolidated as one (the "Lawsuit"). The trustee has filed opposition. For the following reasons, the motion will be denied.

First, the moving party served some but not all of the creditors in this case. Fed. R. Bankr. P. 6007(a) requires the trustee or debtor-in-possession to "give notice of a proposed abandonment or disposition of property to the United States trustee [and] all creditors" On the other hand, Fed. R. Bankr. P. 6007(b) provides that "[a] party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate." Ostensibly, the latter subparagraph does not require that notice be given to all creditors, even though the former does. A motion under subparagraph (b), however, should generally be served on the same parties who would receive notice under subparagraph (a). See In re Jandous Elec. Constr. Corp., 96 B.R. 462, 465 (Bankr. S.D.N.Y. 1989) (citing Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 709-10 (9th Cir. 1986)).

Here, the moving party failed to serve several of the creditors who have filed claims in this case at the addresses on their proofs of claim (see Fed. R. Bankr. P. 2002(g));¹ he failed to serve the IRS at its address on the Roster of Governmental Agencies, as required by LBR 2002-1; and he failed to serve any of the secured creditors listed on his most recently-filed Schedule D.

The motion will be denied for the additional independent reason that the debtor has failed to demonstrate that the Lawsuit is either burdensome to the estate or of inconsequential value and benefit to the estate. The debtor has aptly summarized his argument as follows:

The lawsuit is of substantial value and to compromise the lawsuit[] for a fracture [sic] of its value would have the effect of depriving the Plaintiff [the debtor] of his civil rights with no resulting benefit of any substantial value to this estimate [sic], in which Debtor has currently pending objections to all the remaining claims. Therefore, since the total sum of claims that could conceivably be paid in this entire estate is zero[,] it would be a violation of Debtor's due process rights to grant this Motion.

Notice of Motion, filed Aug. 26, 2015, at 2:3-8.

The court will begin with the contention that there are no claims that would be paid in this case if the Lawsuit were liquidated rather than abandoned. The debtor, in fact, makes the blanket statement in his supporting declaration that "I have objections pending to all claims that were filed in this case" Grego Decl. at 5:13-14. That statement is untrue. There have been 12 claims filed in the case. Claim Nos. 1, 2, and 8 have been withdrawn. Claim No. 6 has been amended by the claimant to the amount of \$0.00. The debtor has filed objections to Claim Nos. 3, 4, and 7, which are on this calendar. The court has issued a final ruling overruling one of those objections and tentative rulings overruling the other two. Claim No. 5 is the subject of an adversary proceeding in which the debtor has a pending motion for summary judgment, which has not been resolved. The debtor has filed an objection to Claim No. 12, which is set for hearing on October 21, 2015. He has not objected to Claim Nos. 9 through 11. Thus, as of this date, Claim Nos. 3, 4, 5, 7, and 9 through 12 remain subject to the presumption of validity afforded them by Fed. R. Bankr. P. 3001(f) and, although it is possible that some or all of them might be disallowed in the future, as of this date, the status of these claims rebuts the debtor's contention that "there will in fact be no claimants to pay in this entire estate" Id. at 5:15-16. In addition, the court rightly takes into consideration the administrative claims of the trustee and his counsel.²

Second, the debtor has not identified any civil rights or due process rights he will be deprived of if the Lawsuit is not abandoned back to him. It is part of the quid pro quo for any bankruptcy filing that all legal and equitable interests of the debtor in property become property of the bankruptcy estate at the time the petition is filed. See § 541(a)(1) of the Bankruptcy Code. The debtor is permitted to claim certain assets as exempt and, if no successful objection is interposed, the assets so claimed revert to the debtor. In this case, the court has disallowed the debtor's claim of exemption of the Lawsuit; the court's order is on appeal. Pending the outcome of the appeal or of a subsequent appeal if there is one, the debtor has no civil right or due process right to have the Lawsuit abandoned back to him.

The debtor also claims the trustee's motion to compromise and sell the Lawsuit, also on this calendar, if granted, "[would] be to excuse and make a gift of hundreds of thousands of dollars of personal property to Defendant Whitaker, United Staffing Associates, and their employees." Grego Decl. at 5:17-19. This argument is based on the debtor's allegations in the Lawsuit that these defendants essentially stole "a lifetime worth of memorabilia and heirlooms" having a value, according to the debtor, of \$1,255,680. This court is not called upon to assess the validity of the debtor's claims in the Lawsuit. It is sufficient for purposes of deciding this motion to abandon that the trustee has obtained a significant offer to purchase the Lawsuit which, although it may not approximate the value the debtor asserts for the items as alleged, represents a fair and equitable compromise. Again, the debtor lost control of the Lawsuit, and hence, of his right to recover damages for the alleged loss of his memorabilia and heirlooms, when he filed this bankruptcy case. Although he sought to regain the Lawsuit by way of his claim of exemptions, he was unsuccessful and he has failed to obtain a stay pending appeal.

For the reasons stated, the debtor has failed to demonstrate that the Lawsuit is either burdensome to the estate or of inconsequential value and benefit to the estate. Accordingly, the motion will be denied. The court will hear the matter.

1 The court recognizes that the holders of Claim Nos. 1, 2, and 8 have withdrawn their claims; however, several other claimants who have not withdrawn their claims were not served.

2 The court rejects the debtor's contention that "[t]his [the proposed sale of the Lawsuit] is an effort to abuse the Debtor . . . by a Trustee who is intent on paying his own attorney and augmenting his own assets and not for the benefit of any claimants, since there are not any claimants." P. & A. at 6:15-18.

51. 14-20064-D-7 GLENN GREGO
15-2042 WR-35
GREGO V. PACIFIC WESTERN BANK

MOTION FOR SUMMARY JUDGMENT
8-7-15 [82]

Final ruling:

The hearing on this motion is continued to October 7, 2015 at 10:00 a.m. No appearance is necessary on September 23, 2015.

52. 12-27473-D-7 MICHAEL P. ALLEN GENERAL MOTION TO WITHDRAW CLAIM NUMBER
HLC-1 CONTRACTORS, INC. 11
8-19-15 [42]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion of Michael P. Allen to withdraw claim no. 11 is supported by the record. As such the court will grant the motion of Michael P. Allen to withdraw claim no. 11. Moving party is to submit an appropriate order. No appearance is necessary.

53. 13-34980-D-7 MICHELO/MYLA SANTIAGO MOTION FOR COMPENSATION BY THE
MHK-4 LAW OFFICE OF MEEGAN, HANSCHU &
KASSENBRICK FOR ANTHONY
ASEBEDO, TRUSTEE'S ATTORNEY(S)
8-21-15 [51]

Final ruling:

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

54. 15-25084-D-7 WILLIAM/CAROL HARRIS MOTION FOR RELIEF FROM
APN-1 AUTOMATIC STAY
WELLS FARGO BANK, N.A. VS. 8-18-15 [20]

Final ruling:

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

55. 15-24832-D-7 MICHAEL ROGERS ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
9-4-15 [28]

56. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION TO COMPROMISE
CDH-16 CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH CLASS G
CONTROVERSIES
9-2-15 [577]

This matter will not be called before 10:45 a.m.

57. 10-42050-D-7 VINCENT/MALANIE SINGH MOTION FOR ADMINISTRATIVE
CDH-17 EXPENSES
9-2-15 [581]

This matter will not be called before 10:45 a.m.

58. 15-27055-D-7 GABRIELLE MASSEY MOTION FOR RELIEF FROM
CPG-1 AUTOMATIC STAY
BLUE GOAT VENTURES, LLC VS. 9-9-15 [11]

59. 15-23174-D-7 ROEUN PANN AND SENG MOTION FOR AN EXTENSION OF TIME
SAETEUN TO PAY THE UNPAID FILING FEE
AND ADMINISTRATIVE FEE
8-31-15 [19]

60. 15-26395-D-7 R & R RV SALES LLC

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
9-1-15 [20]

Final ruling:

This case was dismissed on September 10, 2015. As a result the order to show cause will be removed from calendar as moot. No appearance is necessary.