

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

October 7, 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.	14-23005-D-7	ROBERT/LONA CASTLEBERRY	MOTION FOR RELIEF FROM
	BHT-1		AUTOMATIC STAY
	HSBC BANK USA, N.A. VS.		8-27-15 [23]

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. The debtors received their discharge on June 30, 2014 and, as a result, the stay is no longer in effect as to the debtors (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtors as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

2. 15-23511-D-7 SCOTT COURTNEY
15-2150 SS-1
BAKER V. COURTNEY

MOTION TO DISMISS ADVERSARY
PROCEEDING
8-31-15 [9]

Tentative ruling:

This is the defendant's motion to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), made applicable in this proceeding by Fed. R. Bankr. P. 7012(b), for failure to state a claim upon which relief can be granted. The plaintiff has filed opposition. For the following reasons, the motion will be conditionally granted. In addition, the court will grant relief from stay to allow the parties to proceed with pending state court litigation.

In ruling on a Rule 12(b)(6) motion, a court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" al-Kidd, 580 F.3d at 949, citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, (2009), in turn quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

The plaintiff and defendant are spouses and parties to a marital dissolution proceeding pending in the Sacramento County Superior Court. In addition, prior to the filing of the defendant's bankruptcy case, the plaintiff sued the defendant in state court for damages for breach of fiduciary duty, conversion, and financial dependent adult abuse, and for an accounting. That action is pending but was stayed by the defendant's filing of his bankruptcy case.

By her complaint in this adversary proceeding, the plaintiff seeks a judgment against the defendant for damages for intentional and negligent breach of fiduciary duty (first and second causes of action) and conversion (third cause of action) based on the defendant's alleged management of funds that were the net proceeds of the plaintiff's settlement of a personal injury lawsuit (the "Funds" or the "Settlement Funds"). The net amount of the Settlement Funds initially was \$5,325,972. The plaintiff alleges she and the defendant initially deposited the Funds into an account designated as community property, and that the Funds were assigned to the plaintiff by agreement of the parties or will be assigned to her in the dissolution proceeding. In summary, the plaintiff claims:

Defendant breached his fiduciary duty to Plaintiff by failing to consider her interests and needs, using substantial portions of the Settlement Funds to further his own separate financial interests, exposing her to loss and risk for his own separate financial gain, self-dealing with substantial portions of the Settlement Funds, and failure to disclose, and in some instances misrepresentation of or active concealment of important facts concerning the financial transactions he entered into and/or arranged.

Plaintiff's Complaint, filed July 23, 2015 ("Compl."), at 3:25-4:2. As a result of the defendant's conduct, the plaintiff alleges, the amount of the Settlement Funds was reduced to \$702,187. In addition to a monetary judgment, the plaintiff seeks a determination that the judgment is nondischargeable pursuant to § 523(a)(4) on account of a breach of fiduciary duty and/or § 523(a)(15) as a debt incurred in

connection with a separation agreement or divorce decree. The complaint also purports to state causes of action for an accounting (fourth cause of action) and financial dependent adult abuse (fifth cause of action).

In this motion, the defendant contends the complaint is not sufficiently specific to state a claim for intentional breach of fiduciary duty. The defendant refers to this claim as a "fraud-based" cause of action, and on that basis, attacks the complaint for failure to state the "how, when, where, to whom, and by what means the representations were tendered." Defendant's Motion, filed Aug. 31, 2015 ("Mot."), at 10:13-14. Citing Fed. R. Civ. P. 9(b) and case law in fraud cases, the defendant concludes that the complaint fails to allege the requisite intention to harm the plaintiff and that, instead, "everything sounds in negligence." Id. at 10:14.

The defendant's argument assumes § 523(a)(4) creates a "fraud-based" cause of action. Instead, the statute excepts from discharge a debt arising from fraud or defalcation.¹ Thus, the defendant goes too far when he insists the plaintiff must allege the "who, what, when, where," and so on, of alleged misrepresentations, as well as the intent to harm that would be required for a fraud cause of action. The complaint alleges that the plaintiff, as a result of her injuries, was in a weakened and vulnerable condition; that the defendant, while making what appeared to be regular and complete reports to the plaintiff, "entered into and carried out a series of transactions with the Settlement Funds" (Compl. at 4:7), including transferring \$350,000 to a retirement home that was his separate property; that he did so knowing the retirement home was "in a desperate condition and not likely to remain solvent" (id. at 4:14-15); and that he made transfers totaling another \$67,000 to the retirement home, another \$147,249 to himself, and another \$300,000 to his mother. "Defalcation is the 'misappropriation of trust funds or money held in any fiduciary capacity; [the] failure to properly account for such funds.'" Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1186 (9th Cir. 1996). In light of that definition, and except as noted below, the court finds that the complaint contains sufficient detail to apprise the defendant of the particular misconduct alleged to constitute defalcation to enable the defendant to "defend against the charge and not just deny that [he has] done anything wrong." See Johnson v. JP Morgan Chase Bank, 395 B.R. 442, 446-47 (Bankr. E. D. Cal. 2008), quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001).

The exception is in the allegations regarding the defendant's state of mind. Prior to May of 2013, it was the law in the Ninth Circuit that, "[u]nder section 523(a)(4), defalcation includes the innocent default of a fiduciary who fails to account fully for money received." Id. In May of 2013, however, the Supreme Court held that, as used in § 523(a)(4), defalcation "includes a culpable state of mind requirement akin to that which accompanies application of the other terms in the same statutory phrase. We describe that state of mind as one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1757 (2013). Further, "[w]here actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary consciously disregards (or is willfully blind to) a substantial and unjustifiable risk that his conduct will turn out to violate a fiduciary duty." Id. at 1759. The Bullock decision "effectively abrogated that part of In re Lewis holding that a debtor who failed to account to another need not possess any particular state of mind" to be held to have committed a defalcation. Utnehrmer v. Crull (In re Utnehrmer), 499 B.R. 705, 713 (9th Cir. BAP 2013).

Here, the complaint contains virtually no allegations that would satisfy the

"culpable state of mind requirement" defined in Bullock. It does allege the defendant's breach was "willful, intentional, fraudulent, oppressive and in violation of public policy" (Compl. at 5:21-22)); in this regard, the court recognizes that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Nevertheless, the specific allegations of the complaint contravene those conclusory words and thereby render the complaint insufficient to satisfy the Bullock standard. The complaint alleges the defendant breached his fiduciary duty by

failing to consider [the plaintiff's] interests and needs, using substantial portions of the Settlement Funds to further his own separate financial interests, exposing [the plaintiff] to loss and risk for his own separate financial gain, self-dealing with substantial portions of the Settlement Funds, and failure to disclose, and in some instances, misrepresentation of or active concealment of important facts concerning the financial transactions he entered into and/or arranged.

Compl. at 3:25-4:2. The complaint also refers to "ill advised" and "deceptive transactions" (id. at 4:27) and claims the defendant "wrongfully diverted and used" the Funds "for his own benefit or otherwise misused them" (at 5:13-14) and took "unfair and illegal advantage" of the plaintiff (at 5:16).

These allegations do not rise to the level of "knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior" or, where actual knowledge is lacking, to the level of "conscious disregard or willful blindness to a substantial and unjustifiable risk that the conduct will turn out to violate a fiduciary duty," as required by Bullock. Despite Rule 9(b), the plaintiff must set forth some facts from which an inference of scienter could be drawn. Klein v. Bd. of Trs. of the Cal. State Univ. (In re Moriarty), 2014 Bankr. LEXIS 4802, *24 (Bankr. C.D. Cal. 2014); Mangindin v. Wash. Mut. Bank, 637 F. Supp. 2d 700, 706-07 (N.D. Cal. 2009). Here, the plaintiff has alleged with some specificity the types of conduct the defendant engaged in and has set forth various ways in which that conduct is alleged to constitute a breach of fiduciary duty. However, the allegations of that behavior - failing to consider the plaintiff's interests and needs, using the funds to further his own separate interests, exposing the plaintiff to loss and risk, and so on - fall short of alleging that the defendant acted with the "culpable state of mind" required by Bullock.²

The court will allow the plaintiff to amend her complaint. Amendments to pleadings are to be liberally allowed in view of the policy favoring determination of disputes on their merits. See FRBP 7015, incorporating FRCP 15(a)(2); Magno v. Rigsby (In re Magno), 216 B.R. 34, 38 (9th Cir. BAP 1997), citing Forsyth v. Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997) [rule is applied with "extreme liberality"]. In light of this policy, the court declines the defendant's invitation to assess the competence of the plaintiff's attorney or the time the plaintiff had to conduct discovery in the marital dissolution proceeding before filing this adversary proceeding in determining whether leave to amend should be granted. The court finds neither undue prejudice to the defendant, bad faith on the part of the plaintiff, futility of any possible amendment, nor undue delay, such as might warrant dismissal without leave to amend. See Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999).

The defendant makes additional arguments. First, he claims that under California law, the fiduciary duty between spouses extends only to "transparency, not affirmative acts to protect assets." Mot. at 11:6-7. He concludes that "[t]o

date, no California court has established an affirmative duty to act." Id. at 11:11. Phrased differently, he contends "there is no duty to act. The duty is to refrain from acting." Id. at 12:1-2. First, this argument does not help the defendant because the conduct complained of in the complaint is that he failed to refrain from acting improperly.

Second, the first case the defendant cites, In re Marriage of Prentis-Margulis & Margulis, 198 Cal. App. 4th 277 (2011), supports the opposite conclusion; that is, it supports the conclusion that there is an affirmative duty on the part of the spouse managing community assets to protect them from improper dissipation. The original decision was contrary to the defendant's conclusion; further, it has been modified since it was originally published so that it now even more strongly supports a non-managerial spouse's right to hold the managerial spouse accountable for missing or improperly transferred assets. In that case, the husband had complete control of the parties' community investment assets. Just before the trial in the marital dissolution proceeding, he "disclosed for the first time that the once-brimming investment accounts were virtually empty." 198 Cal. App. 4th at 282. The husband attributed the losses to the payment of community expenses and stock market losses but provided no corroborating evidence.

The appellate court held:

Based on relevant Family Code provisions, equitable principles, and case law, we conclude the trial court erred in failing to shift to the managing spouse the burden of proof concerning the missing community assets. Once a nonmanaging spouse makes a prima facie showing of the existence and value of community assets in the other spouse's control postseparation, the burden of proof shifts to the managing spouse to prove the proper disposition or lesser value of those assets. Failing such proof, the court should charge the managing spouse with the assets according to the prima facie showing.

Id.³ The decision was based in large part on provisions of the California Family Code that negate the defendant's conclusion that the Code "does not impose any affirmative obligation to protect assets." Mot. at 11:18. First, as cited in Prentis-Margulis, Cal. Fam. Code § 2550 requires, absent a contrary agreement of the parties, the equal division of the community estate. Second, § 721(b) provides:

spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in Sections 16403, 16404, and 16503 of the Corporations Code

Thus, contrary to the defendant's position, one spouse has a fiduciary duty to the other "of the highest good faith and fair dealing" and a duty not to "take any unfair advantage of the other"; in other words, "accountability for the management of community assets is a fundamental aspect of the fiduciary duties owed between spouses." Prentis-Margulis, 198 Cal. App. 4th at 294. Coming back to the defendant's citation of the spouse's duty as a duty to "refrain from acting," the Code prohibits a spouse from making a gift of community personal property, or disposing of community personal property for less than fair and reasonable value,

without the other spouse's written consent. Cal. Fam. Code § 1100(b).

The Code provides strong remedies for breach of those duties.

A spouse has a claim against the other spouse for any breach of the fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate, including, but not limited to, a single transaction or a pattern or series of transactions, which transaction or transactions have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate.

Cal. Fam. Code § 1101(a). "Remedies for breach of the fiduciary duty by one spouse, including those set out in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs." § 1101(g). When the defendant spouse has been guilty of oppression, fraud, or malice, the mandatory remedy is increased to 100% or an amount equal to 100% of the asset. § 1101(h). These statutes and the Prentis-Margulis decision negate the defendant's conclusions that the only duty is one of transparency and that there is no duty to take affirmative acts to protect assets.

The defendant also cites Cal. Corp. Code § 16404(c), incorporated by Cal. Fam. Code § 721(b) as part of the statement of one spouse's fiduciary duties to the other, which provides: "A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." The defendant interprets this to mean that here, "Debtor was under an obligation to not affirmatively, and with specific intent to harm Complainant, do something that harms the community interest. However, there is no duty to act. The duty is to refrain from acting." Mot. at 11:28-12:2. Again, the court does not see the advantage to the defendant in this argument: the complaint in fact alleges the defendant improperly transferred portions of the Funds for his separate interests, exposed the plaintiff to loss and risk for his own gain, and engaged in self-dealing with portions of the Funds; that is, the complaint implicitly alleges the defendant failed to refrain from engaging in those acts. The "duty to act/duty to refrain from acting" dichotomy is merely irrelevant semantics.

The defendant cites several other cases incorrectly. First, he cites Vai v. Bank of America Nat'l Trust & Sav. Asso., 56 Cal. 2d 329 (1961), for the proposition that "even when a partner in control of an asset somehow mismanages that asset, that partner will not be liable to the other." Mot. at 12:7-8. The case has nothing to do with mismanagement - the word does not even appear in the decision. The holding of the case was that one spouse's fiduciary duty to the other continues even into the period of negotiating a property settlement agreement and even when the other spouse is represented by counsel, so long as the first spouse continues to have management and control of community assets. 56 Cal. 2d at 339-40. The defendant cites White v. White, 26 Cal. App. 2d 524 (1938), for the proposition that "at least one court has concluded that the fiduciary duty does not even impose a limited duty to keep books." Directly to the contrary, the appellate court affirmed the trial court's finding that "it had jurisdiction to render a personal judgment in favor of one party against the other for such amount as was disbursed by the other party from the community funds and not satisfactorily accounted for." 26 Cal. App. 2d at 528. "Where the handling of the community funds is entrusted by law to the husband, a

certain amount of precaution devolves upon him to keep an approximately accurate account of their disbursements and to keep segregated the community and the separate funds of the parties or to take the legal consequences of being unable satisfactorily to account therefor." Id. at 529.

Finally, the defendant cites In re Marriage of Duffy, 91 Cal. App. 4th 923 (2001), as holding that "spouses are not bound by the 'Prudent Investor Rule.'" Mot. at 12:17-18. The court did reach that holding. However, in light of subsequent amendments to Cal. Fam. Code § 721(a), it is unclear whether the holding is still good. See In re Marriage of Walker, 138 Cal. App. 4th 1408, 1425 (2006), quoting Stats. 2002, ch. 310, § 2, and 1426, quoting Sen. Com. on Judiciary, 3d reading analysis of Sen. Bill No. 1936 (2001-2002 Reg. Sess.) as amended July 2, 2002, p. 3.4 In any event, the argument is a red herring. For the purposes of this motion, it is irrelevant whether the defendant can be held to the standards of a reasonably prudent investor. The question is whether the plaintiff has sufficiently stated a claim that the defendant had a fiduciary duty to the plaintiff and that he breached that duty in one or more ways. The court has already concluded that the complaint is sufficient in this regard, except with regard to allegations of the defendant's state of mind.

The defendant's argument about the prudent investor rule appears in the portion of the motion dealing with the plaintiff's first cause of action - for intentional breach of fiduciary duty. It might arguably have been appropriately raised concerning the second cause of action - for negligent breach of fiduciary duty and constructive fraud. The crux of that cause of action is the allegation that "Defendant failed to act as a reasonably careful and prudent person would have acted under the same or similar circumstances." Compl. at 5:23-24. The court is prepared to conditionally grant the motion as to that cause of action for failure to allege the "culpable state of mind" required under Bullock. However, because the Bullock standard includes "gross recklessness in respect to, the improper nature of the relevant fiduciary behavior," the court will grant leave to amend.

The defendant contends the plaintiff's third cause of action - for conversion - fails to state a claim because "it is well established" that conversion does not involve "willful and malicious injury," as required by § 523(a)(6) for a determination of nondischargeability. Again, the defendant's conclusion is wrong - conversion may involve willful and malicious injury, depending on the facts alleged. The case cited by the defendant, Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001), held only that "[u]nder California law, a conversion is not per se always a willful and malicious injury to the property of another." Stripped of its inaccurate conclusion, however, the defendant's premise - that the complaint fails to state a claim under § 523(a)(6) - is accurate. The complaint fails to allege facts sufficient to state a claim for willful and malicious injury to property. As with the first two causes of action, the plaintiff will be allowed to amend. The court will refrain from ruling at this time on the motion as it pertains to the plaintiff's fourth and fifth causes of action (for an accounting and damages for financial dependent adult abuse) as the issues raised would be more appropriately determined by the state court.

Finally, the court finds that all of the plaintiff's causes of action, except to the extent they seek a determination of nondischargeability, would be more appropriately determined by the state court. There is already a pending state court action in which the plaintiff sets forth the same causes of action as she has here. The factual allegations of the complaint in this adversary proceeding raise issues of state law not bankruptcy law. Thus, the court will grant the parties relief from

stay to proceed to judgment in the state court and will stay this adversary proceeding, with the parties to return to this court for a determination of the dischargeability issues, over which this court has exclusive jurisdiction,⁵ in the event the plaintiff obtains a monetary award in the state court or some other award that would fall within the scope of a chapter 7 discharge. Enforcement of any state court judgment, except a judgment for injunctive relief (which the plaintiff also seeks, both here and in the state court), will be left to this court.

However, as presently stated, the plaintiff's complaint in the adversary proceeding fails to state a claim upon which relief can be granted, in light of Bullock. Thus, the court will conditionally grant the motion and grant leave to the plaintiff to amend. In the event she does so, the defendant will have the opportunity to answer or otherwise respond. The court will then stay this adversary proceeding pending further developments in the state court and will grant relief from stay.

For the reasons stated, the court will conditionally grant the motion. The plaintiff may file an amended complaint within 20 days from the date of the order on the motion; if she does not, the complaint will be dismissed without further notice or hearing. If the plaintiff files an amended complaint within 20 days from the date of the order, the defendant shall file an answer or other response in accordance with applicable rules.

The court will hear the matter.

1 "[D]efalcation,' unlike 'fraud,' may be used to refer to nonfraudulent breaches of fiduciary duty." Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1760 (2013).

2 The court does not mean to suggest that much, or even any, detail as to the culpable state of mind is required. To require more than the bare allegation would be to ignore Rule 9(b)'s statement that intent, malice, knowledge, and other conditions of the mind may be pled generally.

3 Nothing in the decision indicates that the fact that the dissipation of assets occurred post-separation was relevant. The decision was based on statutes and case law pertaining to the fiduciary duties of one spouse to the other, whether before or after separation.

4 The defendant also cites Cal. Prob. Code § 16040(c) as "specifically" providing that "the so-called 'Prudent Investor Rule' does not apply to spouses." Mot. at 12:5-6. Neither that Probate Code section nor the statutes comprising the Uniform Prudent Investor Act, Cal. Prob. Code §§ 16045-16054, 16002(a), and 16003, say anything about spouses.

5 Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 869 (9th Cir. 2005).

3. 15-25124-D-7 ROBERT/JUDITH ROSE MOTION FOR RELIEF FROM
BHT-1 AUTOMATIC STAY
U.S. BANK, N.A. VS. 8-31-15 [20]

Final ruling:

This matter is resolved without oral argument. This is U.S. Bank, N.A.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

4. 10-49826-D-7 MARLON/MARIA VEGA MOTION TO EMPLOY HUISMAN
ICE-1 AUCTIONS, INC. AS AUCTIONEER(S)
9-8-15 [91]

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 the motion to employ Huisman Auctions, Inc. As auctioneer to sell a 1999 Porche and pay commissions. Moving party is to submit an appropriate order. No appearance is necessary.

5. 10-49826-D-7 MARLON/MARIA VEGA MOTION TO SELL AND/OR MOTION
ICE-2 FOR COMPENSATION FOR HUISMAN
AUCTIONS, INC., AUCTIONEER(S)
9-8-15 [95]

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 the motion to sell a 1999 Porche pursuant to § 363(b). Moving party is to submit an appropriate order. No appearance is necessary.

6. 15-25526-D-7 AR BUSINESS GROUP, INC. MOTION FOR RELIEF FROM
DMB-1 AUTOMATIC STAY
SHAUN AND MARSHAUN TATE VS. 8-27-15 [16]

Final ruling:

The moving party failed to serve the debtor and the Chapter 7 trustee as required by FRBP §§ 9014 and 7004. As a result of this service defect, the court will deny the motion by minute order. No appearance is necessary.

7. 15-25526-D-7 AR BUSINESS GROUP, INC. MOTION FOR RELIEF FROM
DMB-2 AUTOMATIC STAY
ELISEO QUINTERO VS. 8-27-15 [10]

Final ruling:

The moving party failed to serve the debtor and the Chapter 7 trustee as required by FRBP §§ 9014 and 7004. As a result of this service defect, the court will deny the motion by minute order. No appearance is necessary.

8. 15-26439-D-7 DIANA TYLER MOTION TO COMPEL ABANDONMENT
JMC-1 8-27-15 [9]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the debtor's motion to compel the trustee to abandon property, the trustee has filed a statement of non-opposition, and the debtor has demonstrated the property to be abandoned is of inconsequential value to the estate. Accordingly, the motion will be granted and the property that is the subject of the motion will be deemed abandoned by minute order. No appearance is necessary.

9. 10-42050-D-7 VINCENT/MALANIE SINGH CONTINUED MOTION FOR SUMMARY
12-2312 HLC-1 JUDGMENT
BURKART V. BISESSAR 7-1-15 [183]

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

10. 10-42050-D-7 VINCENT/MALANIE SINGH CONTINUED MOTION FOR SUMMARY
12-2383 HLC-1 JUDGMENT
BURKART V. NIRANJAN 7-6-15 [102]

Final ruling:

This adversary proceeding was dismissed on August 26, 2015. As a result the motion will be denied by minute order as moot. No appearance is necessary.

11.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2401	HLC-1	JUDGMENT
	BURKART V. BISESSAR		7-1-15 [171]

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

12.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2402	HLC-1	JUDGMENT
	BURKART V. CHAND		7-6-15 [99]

This matter will not be called before 10:30 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, Vinesh Chand (the "defendant"), in the amount of \$61,135.11. The defendant has not filed opposition. For the following reason, the court intends to deny the motion.

The court's tentative ruling posted in advance of the initial hearing on this motion raised an issue concerning service. The hearing was continued but the trustee has failed to address the service issue in any way. Thus, the court intends to deny the motion on the ground that the trustee served the motion, as well as the summons and complaint in this adversary proceeding, on the defendant at an address the trustee knew or should have known was outdated.

The trustee served this motion on the defendant at an address on Waterman Road in Sacramento. That is the same address at which the trustee served the defendant with the complaint and amended complaint in this proceeding, in August of 2012 and March of 2013, respectively. In September of 2013, the court denied the trustee's motion for entry of a default judgment against the defendant, which had also been served on the defendant at the Waterman Road address, on the ground it did not appear service had been correctly accomplished. The court noted that according to the docket in this adversary proceeding, on two separate occasions, an envelope addressed to the defendant at the Waterman Road address had been returned to the court as undeliverable.

The court added that it had discovered that an individual named Vinesh Chand had filed, in another adversary proceeding in this case, Adv. No. 10-2573, a Change of Address listing the Waterman Road address as his old address, as of November 18, 2011, with his new address being on Silverdale Court in Sacramento. The trustee did not file his complaint commencing this adversary proceeding until August 6, 2012. By that time, the defendant had, according to the Change of Address, moved from the Waterman Road address.

In a status conference statement filed May 8, 2014, the trustee stated:

"Plaintiff served a motion for default on Defendant. However, the Court raised concerns about service. Plaintiff has been unable to find a more recent address for defendant to serve him with the documents but is continuing efforts." Plaintiff's Status Conference Statement, DN 62, p. 15. As indicated above, the court's ruling on the trustee's motion for entry of a default judgment referred to the defendant's Change of Address filed in Adv. No. 10-2573, listing the Silverdale Court address as his new address. However, the trustee did not serve the defendant at that address, instead continuing to use the Waterman Road address listed in the Change of Address as the defendant's old address.

In support of the present motion, the trustee's attorney testifies: "The address at which Defendant was served was 8155 Waterman Rd. 1523, Sacramento, CA 95829, which is the address used by Defendant in his proof of claim and in an adversary proceeding filed by him against Debtor Vincent Singh. This is the address Plaintiff has used for all notices and mailed communications to Defendant." Declaration of Christopher Hughes, DN 102, at 2:24-28. It is accurate that the Waterman Road address was used by the defendant in his adversary proceeding against Vincent Singh, Adv. No. 10-2573 - that was the address he used on his complaint, filed September 16, 2010. However, he filed a Change of Address in November of 2011 indicating he had moved from the Waterman Road address to the Silverdale Court address.

As indicated above, the court's docket in this adversary proceeding indicates an envelope addressed to the defendant at the Waterman Road address (the court's entry of default) was returned as undeliverable in December of 2012. Now, two and one-half years later, the trustee continues to use that address. As it appears the defendant has never been properly served in this adversary proceeding, it appears the adversary proceeding should be dismissed pursuant to Fed. R. Civ. P. 4(m), incorporated herein by Fed. R. Bankr. P. 7004(a)(1) (requiring service within 120 days).

The court will hear the matter.

13.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2442	HLC-1	JUDGMENT
	BURKART V. REDDY		7-6-15 [62]

Final ruling:

This adversary proceeding was dismissed on September 25, 2015. As a result the motion will be denied by minute order as moot. No appearance is necessary.

14. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2455 HLC-1
BURKART V. KUMAR

CONTINUED MOTION FOR SUMMARY
JUDGMENT
7-6-15 [67]

This matter will not be called before 10:30 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, Jyoti Kumar, aka Joyti Kumar (the "defendant"), in the amount of \$22,000. The defendant has not filed opposition. For the following reasons, the motion will be granted.

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 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 a payment 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 in the amount of \$22,000 is avoided as an actual fraudulent transfer pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, the trustee seeks a judgment against the defendant in the amount of \$22,000. In support of the motion, the trustee 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; and (b) a bank record evidencing a wire transfer from Vincent Singh to the defendant in the amount of \$22,000 on March 1, 2010. In addition, the trustee has submitted his own declaration and a supplemental declaration of Mr. Hughes in which they authenticate the bank record

just described.

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 The defendant has submitted nothing in opposition to this evidence. As to the question whether the payment to the defendant was made by Singh in furtherance of the Ponzi scheme, the defendant has raised no opposition, and nothing in the record suggests the payment was not made in furtherance of that scheme. Thus, the court concludes that the payment to the defendant was made in furtherance of the Ponzi scheme.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payment made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell v. Kowell, 533 F.3d 762, 771 (9th Cir. 2008) (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court concludes that the trustee is entitled to judgment as a matter of law for the full amount of the payment made to the defendant, \$22,000.

For the reasons stated, the motion will be granted. The trustee is to submit an appropriate order and judgment.

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, 770 (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).

15. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2470 HLC-1
BURKART V. BEZAWADA

CONTINUED MOTION FOR SUMMARY
JUDGMENT
7-6-15 [73]

This matter will not be called before 10:30 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, Arun Bezawada (the "defendant"), in the amount of \$20,000. The defendant has not filed opposition. For the following reasons, the motion will be granted.

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 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 a payment 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 in the amount of \$20,000 is avoided as an actual fraudulent transfer pursuant to § 548(a)(1)(A) of the Bankruptcy Code and Cal. Civ. Code § 3439.04(a)(1). Thus, the trustee seeks a judgment against the defendant in the amount of \$20,000. In support of the motion, the trustee 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 evidencing a payment by Vincent Singh on the account of one of his companies - an entity that has been consolidated with the debtor's estate - to the defendant in the amount of

\$20,000 on May 13, 2009; and (c) evidence of the defendant's address in the form of a bank statement and private investigator's report. In addition, the trustee has submitted his own declaration and a supplemental declaration of Mr. Hughes in which they authenticate the check just described. 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 The defendant has submitted nothing in opposition to this evidence. As to the question whether the payment to the defendant was made by Singh in furtherance of the Ponzi scheme, the defendant has raised no opposition, and nothing in the record suggests the payment was not made in furtherance of that scheme. Thus, the court concludes that the payment to the defendant was made in furtherance of the Ponzi scheme.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payment made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell v. Kowell, 533 F.3d 762, 771 (9th Cir. 2008) (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court concludes that the trustee is entitled to judgment as a matter of law for the full amount of the payment made to the defendant, \$20,000.

For the reasons stated, the motion will be granted. The trustee is to submit an appropriate order and judgment.

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, 770 (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).

16. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2472 HLC-1
BURKART V. CHAUDHARY

CONTINUED MOTION FOR SUMMARY
JUDGMENT
7-6-15 [64]

This matter will not be called before 10:30 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, Vimlesh Chaudhary (the "defendant"), in the amount of \$24,000. The defendant has not filed opposition. For the following reasons, the motion will be granted.

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 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 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 in the total amount of \$24,000 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, the trustee seeks a judgment against the defendant in the amount of \$24,000. In support of the motion, the trustee 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 four checks evidencing payments by Vincent Singh on the account of one of his companies - an entity that has been consolidated with the debtor's estate - to

the defendant in the total amount of \$24,000. In addition, the trustee has submitted his own declaration and a supplemental declaration of Mr. Hughes in which they authenticate the checks just described. 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 The defendant has submitted nothing in opposition to this evidence. As to the question whether the payments to the defendant were made by Singh in furtherance of the Ponzi scheme, the defendant has raised no opposition, and nothing in the record suggests the payments were not made in furtherance of that scheme. Thus, the court concludes that the payments to the defendant were made in furtherance of the Ponzi scheme.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payment made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell v. Kowell, 533 F.3d 762, 771 (9th Cir. 2008) (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court concludes that the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant, \$24,000.

For the reasons stated, the motion will be granted. The trustee is to submit an appropriate order and judgment.

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, 770 (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).

17. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2474 HLC-1
BURKART V. GOSAI

CONTINUED MOTION FOR SUMMARY
JUDGMENT
7-6-15 [64]

This matter will not be called before 10:30 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, Mohit Gosai (the "defendant"), in the amount of \$15,800. The defendant has not filed opposition. For the following reasons, the motion will be granted.

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 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 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 in the total amount of \$15,800 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, the trustee seeks a judgment against the defendant in the amount of \$15,800. In support of the motion, the trustee 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; and (b) copies of checks evidencing payments by Vincent Singh and Om Lata Singh to the defendant in the total amount of \$15,800. In addition, the trustee has submitted his own declaration, a supplemental declaration of Mr. Hughes, and a declaration of the debtor's brother,

John Singh, in which they authenticate the checks just described. 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 The defendant has submitted nothing in opposition to this evidence. As to the question whether the payments to the defendant were made by Singh in furtherance of the Ponzi scheme, the defendant has raised no opposition, and nothing in the record suggests the payments were not made in furtherance of that scheme. Thus, the court concludes that the payments to the defendant were made in furtherance of the Ponzi scheme.

Under Bankruptcy Code §§ 548(a)(1)(A) and 550 and Civil Code § 3439.04(a)(1), the trustee is entitled to avoid and recover the full amount of the payment made to the defendant. "Under the actual fraud theory, the receiver may recover the entire amount paid to the winning investor, including amounts which could be considered 'return of principal.'" Donell v. Kowell, 533 F.3d 762, 771 (9th Cir. 2008) (citations omitted). Although there may be a defense to an actual fraudulent transfer claim (see Bankruptcy Code § 548(c) and Civil Code § 3439.08(a)), it was incumbent on the defendant to come forward with affirmative evidence to show the existence of genuine issues of fact for trial (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986)) based on affirmative defenses or otherwise. The defendant has not done so. Accordingly, the court concludes that the trustee is entitled to judgment as a matter of law for the full amount of the payments made to the defendant, \$15,800.

For the reasons stated, the motion will be granted. The trustee is to submit an appropriate order and judgment.

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, 770 (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).

18. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2481 HLC-1
BURKART V. MARDAL

CONTINUED MOTION FOR SUMMARY
JUDGMENT
7-6-15 [74]

This matter will not be called before 10:30 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, Jai Mardal, aka Jai Hind Ramayan Mandall, aka Jai Hind Ramayan Mandali, aka Jai Hind Ramayan Bhajan Mandali (the "defendant"), in the amount of \$22,000. The defendant has not filed opposition. For the following reasons, the motion will be denied.

First, there is a service issue the court overlooked when preparing its tentative ruling on this motion prior to the initial hearing. The defendant was named in the plaintiff's amended complaint as Jai Mardal; the summons and complaint were served addressed as follows: "Jai Mardal, 29090 Colony Ct., Hayward, CA 94544." In May of 2013, the trustee requested entry of default and the defendant's default was entered. On December 1, 2014, the trustee filed an ex parte motion to vacate entry of the default and the default was vacated. In that motion, the trustee indicated it was possible the defendant is not a real person or entity but "a fictitious person created by certain individuals in conjunction with their financial relationship with the Debtors." Trustee's Ex Parte Motion, filed Dec. 1, 2014, at 2:13-14. He added that he had linked another defendant, then represented by counsel, to the payment listed in the complaint and intended to depose that individual to obtain more information. He concluded that once he was able to conclude that the defendant is "a true person or entity" (*id.* at 2:24), he would renew his request for entry of default if the complaint went unanswered.

In a declaration filed in support of this motion, the trustee's attorney, Christopher Hughes, testifies that according to a proof of claim in the case, Claim No. 79, the defendant is a temple with an address of 29090 Colony Ct., Hayward, CA 94544, which is a residence where another creditor, Yogesh Kumar, also resides. Mr. Hughes notes that it appears Mr. Kumar signed the proof of claim as the treasurer of the defendant.² Mr. Hughes states he received a telephone call in May of 2013 from someone with the last name of Prasad, who was calling about the complaint on behalf of the defendant. Mr. Hughes called back and left a message, but no further communication took place. Based on a promissory note attached to the defendant's proof of claim, Mr. Hughes believes one Parvin Prasad was the individual who called. Mr. Prasad is a defendant in another adversary proceeding and is represented by counsel. Mr. Hughes concludes: "It is my belie[f] that Defendant is aware of the complaint and that the principal parties involved with the temple of Jai Hind Ramayan Bhajan Mandali, namely Yogesh Kumar, the temple's treasurer, and Parvin Prasad, are also aware of the complaint." Hughes Decl., filed July 6, 2015, at 3:18-20. There is no indication of any facts other than those just stated on which Mr. Hughes bases his belief and no indication whether he took the deposition of the individual he earlier indicated he intended to question about the defendant's identity or otherwise attempted to learn whether the defendant is an individual or an entity.

If the defendant is an entity rather than an individual, it has not been properly served. The summons and amended complaint were served on "Jai Mardal" with

no attention line, whereas service on a corporation, partnership, or other unincorporated association must be to the attention of an officer, managing or general agent, or agent for service of process. Fed. R. Bankr. P. 7004(b)(3). The present motion, but not the summons and complaint, was served on "Jai Hind Ramayan Bhajan Mandali" at the Colony Ct. address with no attention line and on Yogesh Kumar at the Colony Ct. address, with no indication he was being served as an officer of the defendant. Even if service on Yogesh Kumar can be said to be sufficient to effect service of the motion on the defendant, the problem remains that the summons and amended complaint were not properly served. Mr. Hughes' testimony that he believes the defendant and its principals are aware of the complaint is too conclusory to be conclusive on the issue.

Second, there is an evidentiary problem with the motion. By this motion, the trustee seeks to avoid and recover as an actual fraudulent transfer a payment allegedly made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant in the amount of \$22,000. In support of the motion, the trustee 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) copies of two checks evidencing payments by Vincent Singh on the account of one of his companies to Jai Hind Ramayan Mandali and Jai Hind Mandali in the total amount of \$24,000;¹ and (c) copies of proofs of claim filed by Jai Hind Ramayan Mandali and Yogesh Kumar.

In his declaration, Mr. Hughes who summarily concluded that the second group of exhibits (the copies of checks) are "[a] true and correct copy of the documents evidencing the Payment" (Hughes Decl. at 2:5); that is, the payments made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks and other documents accurately reflect the payments made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The court stated in its tentative ruling issued in advance of the initial hearing on this motion that the trustee needed to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

The hearing was continued to permit the trustee to lay such a foundation; however, as of this date, he has filed nothing further. As a result, the court concludes that the trustee has failed to demonstrate by admissible evidence that the defendant received a payment of \$22,000 from the debtor.

As a result of these service and evidentiary defects, the motion will be denied. The court will hear the matter.

1 Although the trustee has submitted copies of checks in the amounts of \$22,000 and \$2,000, he seeks a judgment in the amount of \$22,000 only.

2 The proof of claim, Trustee's Exhibits, p. 63 of 85, states the claimant's name

as "Jai Hind Ramayan Mandali." Attached to the claim is a letter signed "Yogesh Kumar, Treasurer, 29090 Colony Ct., Hayward, CA 94544." The signature on the letter appears to be the same as the signature on the proof of claim. The letter suggests but does not state that the claimant is a temple.

19.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2490	HLC-1	JUDGMENT
	BURKART V. DEO		7-6-15 [60]

This matter will not be called before 10:30 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, Jai Mardal, aka Jai Hind Ramayan Mandall, aka Jai Hind Ramayan Mandali, aka Jai Hind Ramayan Bhajan Mandali (the "defendant"), in the amount of \$22,000. The defendant has not filed opposition. For the following reasons, the motion will be denied.

First, there is a service issue the court overlooked when preparing its tentative ruling on this motion prior to the initial hearing. The defendant was named in the plaintiff's amended complaint as Jai Mardal; the summons and complaint were served addressed as follows: "Jai Mardal, 29090 Colony Ct., Hayward, CA 94544." In May of 2013, the trustee requested entry of default and the defendant's default was entered. On December 1, 2014, the trustee filed an ex parte motion to vacate entry of the default and the default was vacated. In that motion, the trustee indicated it was possible the defendant is not a real person or entity but "a fictitious person created by certain individuals in conjunction with their financial relationship with the Debtors." Trustee's Ex Parte Motion, filed Dec. 1, 2014, at 2:13-14. He added that he had linked another defendant, then represented by counsel, to the payment listed in the complaint and intended to depose that individual to obtain more information. He concluded that once he was able to conclude that the defendant is "a true person or entity" (id. at 2:24), he would renew his request for entry of default if the complaint went unanswered.

In a declaration filed in support of this motion, the trustee's attorney, Christopher Hughes, testifies that according to a proof of claim in the case, Claim No. 79, the defendant is a temple with an address of 29090 Colony Ct., Hayward, CA 94544, which is a residence where another creditor, Yogesh Kumar, also resides. Mr. Hughes notes that it appears Mr. Kumar signed the proof of claim as the treasurer of the defendant.² Mr. Hughes states he received a telephone call in May of 2013 from someone with the last name of Prasad, who was calling about the complaint on behalf of the defendant. Mr. Hughes called back and left a message, but no further communication took place. Based on a promissory note attached to the defendant's proof of claim, Mr. Hughes believes one Parvin Prasad was the individual who called. Mr. Prasad is a defendant in another adversary proceeding and is represented by counsel. Mr. Hughes concludes: "It is my belie[f] that Defendant is aware of the complaint and that the principal parties involved with the temple of Jai Hind Ramayan Bhajan Mandali, namely Yogesh Kumar, the temple's treasurer, and Parvin Prasad, are also aware of the complaint." Hughes Decl., filed July 6, 2015, at 3:18-20. There is no indication of any facts other than those just stated on which Mr. Hughes bases his belief and no indication whether he took the deposition of the individual he earlier indicated he intended to question about the defendant's

identity or otherwise attempted to learn whether the defendant is an individual or an entity.

If the defendant is an entity rather than an individual, it has not been properly served. The summons and amended complaint were served on "Jai Mardal" with no attention line, whereas service on a corporation, partnership, or other unincorporated association must be to the attention of an officer, managing or general agent, or agent for service of process. Fed. R. Bankr. P. 7004(b)(3). The present motion, but not the summons and complaint, was served on "Jai Hind Ramayan Bhajan Mandali" at the Colony Ct. address with no attention line and on Yogesh Kumar at the Colony Ct. address, with no indication he was being served as an officer of the defendant. Even if service on Yogesh Kumar can be said to be sufficient to effect service of the motion on the defendant, the problem remains that the summons and amended complaint were not properly served. Mr. Hughes' testimony that he believes the defendant and its principals are aware of the complaint is too conclusory to be conclusive on the issue.

Second, there is an evidentiary problem with the motion. By this motion, the trustee seeks to avoid and recover as an actual fraudulent transfer a payment allegedly made by the debtor in the underlying chapter 7 case, Vincent Singh (the "debtor" or "Singh"), to the defendant in the amount of \$22,000. In support of the motion, the trustee 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) copies of two checks evidencing payments by Vincent Singh on the account of one of his companies to Jai Hind Ramayan Mandali and Jai Hind Mandali in the total amount of \$24,000; and (c) copies of proofs of claim filed by Jai Hind Ramayan Mandali and Yogesh Kumar.

In his declaration, Mr. Hughes who summarily concluded that the second group of exhibits (the copies of checks) are "[a] true and correct copy of the documents evidencing the Payment" (Hughes Decl. at 2:5); that is, the payments made to the defendant that the trustee seeks to recover. This testimony is insufficient to demonstrate that those checks and other documents accurately reflect the payments made to the defendant.

It is a threshold requirement to the admissibility of an item of evidence that it be properly authenticated. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Thus, the Ninth Circuit has "repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment." Id. To satisfy this requirement, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a), incorporated herein by Fed. R. Bankr. P. 9017. Mr. Hughes' testimony that the documents filed as exhibits are "true and correct copies of documents evidencing the Payments" is insufficient for this purpose. The court stated in its tentative ruling issued in advance of the initial hearing on this motion that the trustee needed to lay a sufficient foundation as to how he came into possession of the documents and as to the chain of custody or control since he obtained them.

The hearing was continued to permit the trustee to lay such a foundation; however, as of this date, he has filed nothing further. As a result, the court concludes that the trustee has failed to demonstrate by admissible evidence that the defendant received a payment of \$22,000 from the debtor.

As a result of these service and evidentiary defects, the motion will be denied. The court will hear the matter.

1 Although the trustee has submitted copies of checks in the amounts of \$22,000 and \$2,000, he seeks a judgment in the amount of \$22,000 only.

2 The proof of claim, Trustee's Exhibits, p. 63 of 85, states the claimant's name as "Jai Hind Ramayan Mandali." Attached to the claim is a letter signed "Yogesh Kumar, Treasurer, 29090 Colony Ct., Hayward, CA 94544." The signature on the letter appears to be the same as the signature on the proof of claim. The letter suggests but does not state that the claimant is a temple.

20.	10-42050-D-7	VINCENT/MALANIE SINGH	CONTINUED MOTION FOR SUMMARY
	12-2492	HLC-1	JUDGMENT
	BURKART V. PRASAD		7-6-15 [114]

This matter will not be called before 10:30 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, Vinod Prasad (the "defendant"), in the amount of \$110,190. 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 \$110,190, 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 \$110,190. 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 \$110,190 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. 149, 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 \$110,190 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 checks payable to the defendant on accounts of the debtor, one or another of his companies - entities that have been consolidated with the debtor's estate, or on an account of an individual named Om Lata Singh to the defendant in the total amount of \$110,190. In addition, the trustee has submitted his own declaration, a supplemental declaration of Mr. Hughes, and a declaration of the debtor's brother, John Singh, in which they authenticate the checks just described. 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 the opposition that the defendant disputes the contention that Singh was running a Ponzi scheme during the period in which the payments to the defendant were made.

The defendant does list as disputed questions of fact whether those payments were made by Singh as part of a Ponzi scheme and whether they were made with the actual intent to hinder, delay, or defraud creditors. However, the defendant has offered no argument or evidence on either of these issues. Thus, the court concludes that the payments made to the defendant 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 the amount of the payments that were made to the defendant, the trustee requests a determination that the payments totaled \$110,190. In his opposition, the defendant lists as a disputed question of fact whether he actually received every check the debtor wrote out for him. However, the defendant has not otherwise denied that he received payments totaling \$110,190 and has made no other argument on the issue. 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 \$110,190 were made in furtherance of the Ponzi scheme.

The defendant adds that he invested over \$607,186 with Singh, such that he was a "net loser." The defendant has filed no evidence in support of this contention. In reply to this contention, the trustee states: "As made explicit by this Court's Order, entered on May 26, 2015, 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." Trustee's Reply, filed Sept. 23, 2015, at 2:18-20. 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 3:28-4:3.

The defendant's contention pertains to the affirmative defense that he took his payments for value; as to that component of the "good faith and for value" defense, as well as the good faith component, the defendant will have an opportunity to present admissible evidence at trial.⁴ However, as to the "for value" component, the trustee's conclusion that a trial will be necessary may be premature. The court made clear at the hearing and reiterates in this ruling 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. Thus, the court strongly encourages the parties to work together to determine whether the issue of the amount the defendant invested can be resolved in whole or in part prior to the trial.

The court recognizes that if the defendant cannot establish the "good faith" component of his defense at trial, the trustee would be able to recover all payments to the defendant regardless of whether the defendant was a net winner or a net loser. It appears the trustee contends the defendants in all, or at least, most of these adversary proceedings will not be able to establish their good faith, in which case the "for value" component of the defense would become moot. However, as a matter of judicial economy, in the event one or more defendants prevail on the good faith component of the defense, the court would expect the parties to have made a sincere effort to iron out disputes about the "for value" component prior to trial.

For the reasons stated above, the motion will be granted in part. The trustee is to submit an appropriate order as outlined at the hearing.

¹ In the trustee's words, "[the defendant] has done enough to earn a trial on

[his] defenses." Trustee's Reply, filed Sept. 23, 2015, at 4:10.

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, 770 (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 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.

21. 15-26650-D-7 HELEN GATHERCOLE
ABG-1
VANDERBILT MORTGAGE AND
FINANCE, INC. VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
9-10-15 [9]

Final ruling:

This matter is resolved without oral argument. This is Vanderbilt Mortgage and Finance, Inc.'s motion for relief from automatic stay. The court records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

22. 15-21861-D-12 LAURA BRANDON
LLB-1

MOTION TO CONFIRM CHAPTER 12
PLAN
8-26-15 [44]

Final ruling:

This case was dismissed on August 27, 2015. As a result the motion will be denied by minute order as moot. No appearance is necessary.

23. 09-29162-D-11 SK FOODS, L.P.
JCK-1

MOTION FOR COMPENSATION FOR
DUFF AND PHELPS SECURITIES, LLC
AND CHANIN CAPITAL PARTNERS,
OTHER PROFESSIONAL(S)
9-4-15 [5723]

24. 09-29162-D-11 SK FOODS, L.P.
JER-3

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF WINSTON AND
STRAWN, LLP SPECIAL COUNSEL
9-4-15 [5715]

25. 12-29374-D-7 KEITH GRIFFIN AND KELLY
AP-1 WEAVER-GRIFFIN
BANK OF AMERICA, N.A. VS.

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
7-20-15 [64]

Tentative ruling:

This motion was continued to this calendar to allow the moving party to properly serve the Chapter 7 trustee. It appears that the trustee was served with the initial notice of hearing indicating August 26, 2015 as the hearing date. Thus, the Chapter 7 trustee did not receive notice of the continued hearing date. As a result of this service defect, the court intends to deny the motion by minute order.

26. 15-25578-D-7 DAVID ENKE
ABG-1
KINECTA FEDERAL CREDIT UNION
VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
9-1-15 [12]

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 he 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.

27. 15-26189-D-7 DAVID HAMNER
APN-1
WELLS FARGO BANK, N.A. VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
8-27-15 [17]

Final ruling:

This matter is resolved without oral argument. This is Wells Fargo Bank's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

28. 15-26592-D-7 DONELLA BANDA

MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER
FEE
8-20-15 [5]

29. 14-28694-D-11 RICHARD/JENNIFER GARCIA
CAH-6

CONTINUED MOTION FOR FINAL
DECREE AND ORDER CLOSING CASE
8-3-15 [96]

Tentative ruling:

This is the debtors' motion for a final decree and order closing this chapter 11 case. In response to a tentative ruling issued prior to the initial hearing, the debtors and their counsel have supplemented the record. The supplemental declarations do not resolve the court's concerns raised in the earlier tentative ruling. The court will continue the hearing one last time to allow the debtors and/or counsel to further supplement the record.

As explained in the earlier tentative ruling, the debtors' counsel, Hughes Financial Law ("Counsel"), never obtained court approval of its employment in this case and has never sought approval of its compensation for services rendered in and in connection with the case. There is a conflict between that failure and the debtors' and Counsel's understanding as newly disclosed in the supplemental declarations, on the one hand, and the statements made by the debtors and Counsel in several different documents filed earlier in the case, some under oath, on the other hand. Counsel's original and amended Rule 2016(b) statements and the debtors' original and amended statements of financial affairs all stated that the debtors had a \$13,000 credit balance with Counsel as of the commencement of the case, of which \$7,000 was being applied to pre-petition services, leaving a \$6,000 credit balance for post-petition services. In addition, one of Counsel's attorneys, Anthony Hughes, stated in his declaration in support of Counsel's employment application (denied without prejudice) that although the debtors in fact had \$0 on retainer for the filing of this case, Counsel had credited \$13,000 back to them "for the filing of this case for customer service purposes." Hughes Decl., filed Oct. 16, 2014, at 3:16-20.1

Mr. Hughes also stated in his declaration:

The Debtors further understand that Mr. Hughes will seek court authorization for his employment and payment of all his fees pursuant to Bankruptcy Code §§ 327, 328, 330 and 331. The Debtors have agreed that Mr. Hughes will be paid his normal actual time charges and disbursements, with all fees and costs, subject to approval from the Court. Mr. Hughes' current hourly rate for these services is \$425.00; however, the Debtors and Counsel understand that it is up to the Court to establish the compensation including the hourly rate pursuant to a motion for

compensation.

Id. at 4:7-8.

It now appears the \$13,000 credit was not a credit at all, as the debtors and Counsel viewed it as having been exhausted by Counsel's services in a pre-petition state court action. In their supplemental declaration, the debtors testify that the corrected billings for Counsel's services in the state court action had left a \$0 retainer for this bankruptcy case and that Counsel agreed to file this case for free as a result of the error. The declarations of both the debtors and Mr. Hughes reiterate that Counsel applied the \$13,000 as a credit for services in this case, \$7,000 for pre-petition fees and \$6,000 to be billed against for post-petition fees. Mr. Hughes references the parties' fee agreement, which also stated that the debtors have a \$13,000 credit to be applied \$7,000 as earned pre-petition and \$6,000 as a post-petition retainer.² However, Mr. Hughes now adds:

The term "credit" was defined and agreed by the Firm and Debtor to mean simply that if the case cost less than \$6,000 of time and expense for post-petition work that Debtors would not be billed anything for post-petition work. [¶] Debtors understood that they were never entitled to a refund because it was earned in the state court litigation. [¶] This \$13,000 concession was made simply for the benefit of the debtors to give them the benefit of doubt from all the work that was done in the state court litigation. The Firm was under no legal obligation to give such a substantial concession to the debtors.

Hughes Sept. 23, 2015 Decl. at 3:3-10. The debtors confirm the first two of these statements in their declaration.

These statements are disjointed and unclear and conflict with the documents filed earlier in the case, discussed above. The statement that the debtors were never entitled to a refund because the \$13,000 was earned in the state court litigation conflicts with the earlier statements that a \$13,000 credit was given to the debtors. Further, these "understandings" were never made known to the court or creditors. Finally, the declarations do not explain how Counsel's and the debtors' "understanding" takes Counsel outside the scope of §§ 327(a) and 330(a) of the Code and outside the scope of the parties' understanding, as expressed in Mr. Hughes' October 16, 2014 declaration, that Counsel would seek court authorization for its employment and payment of all fees pursuant to Bankruptcy Code §§ 327, 328, 330 and 331. Counsel will need to address all of these issues.

In addition, Counsel will need to demonstrate how the payments totaling \$22,000 made by the debtors were handled and applied. Counsel must disclose whether the payments were deposited into a client trust account or a general account. If into a client trust account, Counsel must show the dates and amounts of each payment out of the trust account to pay Counsel for its services. Counsel must also disclose whether there were funds of the debtors remaining in the trust account as of the date this case was filed and whether any withdrawals of funds of the debtors were made from the trust account after the filing. Finally, Counsel must provide authority for the proposition that despite the previously undisclosed understanding between Counsel and the debtors that the \$13,000 had been earned in the state court litigation and would not be refunded to the debtors to the extent it was not earned in or in preparing for this case, Counsel should not be required to seek court approval of its fees and costs, which Counsel indicated at the initial hearing on this motion amounted to less than \$13,000.

The court will hear the matter.

1 The \$6,000 portion of the credit designated for post-petition services was listed as an asset on the debtors' original Schedule B. For reasons that have never been explained, it was removed in an amended Schedule B filed three months later.

2 Mr. Hughes states that a copy of the fee agreement is attached to his declaration as an exhibit; there is no such copy attached. The court has located a copy filed in support of the employment application that was denied, DN 31 on the court's docket.

30.	14-28694-D-11	RICHARD/JENNIFER GARCIA	CONTINUED MOTION FOR ENTRY OF
	CAH-7		DISCHARGE
			8-3-15 [92]

31.	14-25816-D-11	DEEPAL WANNAKUWATTE	MOTION TO SELL
	DNL-57		9-16-15 [859]

32.	15-27016-D-7	JENNIFER/CURTIS MARTIN	ORDER TO SHOW CAUSE - FAILURE
			TO PAY FEES
			9-18-15 [11]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

33. 14-25820-D-11 INTERNATIONAL MOTION TO COMPROMISE
DMC-18 MANUFACTURING GROUP, INC. CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH FRED A. LEMKE
AND/OR MOTION FOR COMPENSATION
FOR CHRISTOPHER D. SULLIVAN,
SPECIAL COUNSEL(S)
9-16-15 [756]

34. 15-26623-D-7 HOLLY BURGESS ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
9-18-15 [21]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

35. 15-25527-D-7 BRANDY MESSMER MOTION FOR RELIEF FROM
AP-1 AUTOMATIC STAY
ELIZON MASTER PARTICIPATION
TRUST I, U.S. BANK TRUST
N.A. VS. 9-16-15 [15]

36. 15-24747-D-7 RAYMOND POQUETTE MOTION TO EXTEND DEADLINE TO
BHS-2 FILE A COMPLAINT OBJECTING TO
DISCHARGE OF THE DEBTOR
9-21-15 [39]

37. 15-24747-D-7 RAYMOND POQUETTE
BHS-3

MOTION TO COMPEL
9-21-15 [44]

38. 10-42050-D-7 VINCENT/MALANIE SINGH
12-2319 HLC-1
BURKART V. SHARMA

CONTINUED MOTION FOR SUMMARY
JUDGMENT
8-24-15 [88]

This matter will not be called before 10:30 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.

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. 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. 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 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 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 \$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, 770 (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	CONTINUED MOTION FOR SUMMARY
	12-2458	HLC-1	JUDGMENT
	BURKART V. GUO		8-22-15 [69]

This matter will not be called before 10:30 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 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, 770 (9th Cir. 2008); AFI Holding, Inc. v. Mackenzie, 525 F.3d 700, 704 (9th Cir. 2008); La Bella v. Bains,

40. 15-27284-D-11 CONSOLIDATED RELIANCE, ORDER TO SHOW CAUSE
INC. 9-21-15 [13]

41. 14-20064-D-7 GLENN GREGO CONTINUED MOTION FOR SUMMARY
15-2042 WR-35 JUDGMENT
GREGO V. PACIFIC WESTERN BANK 8-7-15 [82]

Tentative ruling:

This is the plaintiff's motion for summary judgment. The defendant has filed opposition and the plaintiff has filed a reply. In the opposition, the defendant essentially asks the court to reconsider its ruling on the defendant's earlier motion to dismiss this adversary proceeding. Among other things, the defendant asks the court to reconsider its ruling on an issue involving § 523(a)(7) of the Bankruptcy Code, or in the alternative, to defer a ruling on the motion pending the outcome of a case pending before the Ninth Circuit Court of Appeals on the same issue. The defendant states that if the Ninth Circuit rules against the position taken by the defendant in this case, the defendant will withdraw its claim in this case, which would moot this adversary proceeding. The court is inclined to defer a ruling on the motion pending the outcome of the appeal in the other case. The issue as presented in this case is squarely before the court of appeals in the other case, such that the outcome of the appeal would be decisive on the issue in this case. Further, the appeal has been fully briefed.

The court will hear the matter.

42. 10-42050-D-7 VINCENT/MALANIE SINGH CONTINUED MOTION FOR SUMMARY
12-2368 HLC-1 JUDGMENT
BURKART V. PRASAD 7-1-15 [160]

This matter will not be called before 10:30 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, Shiu Prasad (the "defendant"), in

the amount of \$160,811.35. 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 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 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 \$160,811.35, 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 \$160,811.35. 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 \$160,811.35 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. 142, 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. See discussion below. 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 \$160,811.35 in furtherance of the Ponzi scheme.

The court has previously ordered in this and several related adversary proceedings as follows:

With respect to the plaintiff's claims for avoidance and recovery of actual fraudulent transfers under § 548(a)(1)(A) of the

Bankruptcy Code and Cal. Civ. Code § 3439.04 (a) (1), partial summary adjudication is appropriate and it is hereby determined, pursuant to Fed. R. Civ. P. 7056(g), incorporated herein by Fed. R. Bankr. P. 7056, that debtor Vincent Singh's operation of a Ponzi scheme with the requisite fraudulent intent is not genuinely in dispute and will be treated as established in these adversary proceedings.

Order, filed April 22, 2015 (the "Order"), at 2:8-16. It does not appear any further summary adjudication is necessary concerning the fact that Vincent Singh was running a Ponzi scheme. The sole remaining relief requested is a determination that the debtor made the payments to the defendant totaling \$160,811.35 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 checks payable to the defendant on accounts of the debtor, one or another of his companies - entities that have been consolidated with the debtor's estate, or on an account of individuals named John A. and Om L. Singh to the defendant; and (d) copies of cashier's checks payable to the defendant and deposit slips bearing the name of the defendant, in the total amount of \$160,811.35. In addition, the trustee has submitted his own declaration, a supplemental declaration of Mr. Hughes, and a declaration of the debtor's brother, John Singh, in which they authenticate some of the documents just described. (As to particular documents, see discussion below.)

Mr. McHale testifies that in his opinion, "[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. The defendant states there are disputed questions of fact "[w]hether Debtors made the transfer[s] to Defendant with actual intent to hinder, delay, or defraud the creditors" (Defendant's Opposition, filed August 3, 2015 ("Opp."), at 5:16-17) and "[w]hether Debtors made the payments to Defendant as part of a Ponzi scheme." Id. at 5:26-27. However, the defendant also states he invested in the debtor's business, Perfect Financial Group, believing it to be a legitimate business. He refers to the payments he received as being received in connection with his investments, and he characterizes himself as "one of the victims of Debtors' scheme." Opp. at 6:24. In short, the defendant's opposition leaves the court in no doubt that the payments made to him were made as part of the debtor's operation of the Ponzi scheme and in furtherance of that scheme. The defendant raises no serious argument, and has presented no evidence, that the payments he received were not made in furtherance of Singh's 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 that the payments made to the defendant were made in furtherance of the Ponzi scheme.

As to the amount of the payments that were made to the defendant, the trustee requests a determination that the payments totaled \$160,811.35. Of that amount, the defendant admits he received payments totaling \$91,987.35, leaving \$68,824 in dispute. The defendant has not submitted a detailed list of the particular items comprising the \$68,824 in dispute. In its initial tentative ruling on this motion, the court raised a concern as to the trustee's evidence of the authenticity of his exhibits; however, the court also raised a number of concerns about particular

exhibits. For example, the trustee submitted copies of what appear to be the front and reverse sides of two checks, Check Nos. 1264 and 1927, and impliedly claimed they had cleared the debtor's bank account,¹ whereas he now admits at least one of those checks bounced and the other may have bounced.

As another example, the trustee's copy of Check No. 1264 has this heading at the top: "THIS ITEM IS PART OF A LEGAL STATEMENT RECONSTRUCTION." (Several other of the trustee's checks and deposit slips has the same heading.) The court stated in its initial tentative ruling that the trustee would need to explain what this means, who wrote it and why, and whether the original documents were altered in some way. Yet the supplemental declarations filed after the hearing was continued do not address this issue, serving instead only to authenticate the trustee's bank record exhibits generally. Finally, the court indicated the trustee would need to explain why he seeks to hold the defendant liable for payments made to Sunita Prasad, who is not a defendant in this proceeding. The trustee has not done so. In short, the court finds the trustee's evidence is insufficient to demonstrate, as to the amount disputed by the defendant, that they were payments actually made by Singh or one of his entities to the defendant and received by the defendant. Thus, for purposes of this motion, the court is prepared to conclude that the defendant received \$91,987.35 in payments from the debtor. The trustee will have an opportunity at trial to show that a greater amount was received.

The defendant adds that he invested \$310,500 with Singh, such that he was a "net loser." The defendant has filed no evidence in support of this contention. In reply to this contention, the trustee states: "It is unclear whether Defendant is attempting to raise any defenses that would justify a trial" Trustee's Reply, filed Aug. 5, 2015, at 7:2-3. The court finds it clear from the defendant's opposition that he intends to raise the affirmative defense that he took his payments in good faith and for value; as to both of these components of the defense, the defendant will have an opportunity to present admissible evidence at trial.² As to the "for value" component, it may be premature to conclude that a trial will be necessary. The court made clear at the hearing and reiterates in this ruling 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. Thus, the court strongly encourages the parties to work together to determine whether the issue of the amount the defendant invested can be resolved in whole or in part prior to the trial.

The court recognizes that if the defendant cannot establish the "good faith" component of his defense at trial, the trustee would be able to recover all payments to the defendant regardless of whether the defendant was a net winner or a net loser. It appears the trustee contends the defendants in all, or at least, most of these adversary proceedings will not be able to establish their good faith, in which case the "for value" component of the defense would become moot. However, as a matter of judicial economy, in the event one or more defendants prevail on the good faith component of the defense, the court would expect the parties to have made a sincere effort to iron out disputes about the "for value" component prior to trial.

For the reasons stated above, the motion will be granted in part. The trustee is to submit an appropriate order as outlined at the hearing.

¹ The trustee's attorney testified that his Exhibit 2, which included those two checks, was a true and correct summary of the transfers received by the defendant

and that the copies of the checks, which included those two checks, were true and correct copies of documents evidencing the payments.

2 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.