United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

9:30 AM

8:18-13001 Mohsen Masoudfar **Chapter 7**

Adv#: 8:18-01206 Sakhai v. Masoudfar

#1.00 CONT STATUS CONFERENCE RE: Complaint to determine dischargeability of debt and for denial of discharge (11 U.S.C. section 523(a)(15); 727(a)(2)(A) & (B);(a)(3) & (a)(4)(A))

[fr: 2/12/19, 7/23/19, 10/22/19, 1/21/20, 3/24/20, 6/30/20]; 9/29/20, Rm 5D

Docket 1

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

In light of pending settlement negotiations, continue this Status Conference to January 21, 2021 at 9:30 a.m.; an updated Status Report must be filed by January 7, 2021. (XX)

Note: Appearances at this hearing are not required; Plaintiff to serve notice of the continued hearing date/time.

Party Information

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

9:30 AM

CONT... Mohsen Masoudfar **Chapter 7**

Debtor(s):

Mohsen Masoudfar — Represented By D Edward Hays

Defendant(s):

Mohsen Masoudfar — Pro Se

Plaintiff(s):

Parastou Sakhai — Represented By Jeffrey S Shinbrot

Trustee(s):

Weneta M Kosmala (TR) — Represented By Reem J Bello

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

9:30 AM
8:19-11551 Richard Allen Rietveld **Chapter 7**
Adv#: 8:19-01162 Becharoff Capital Corporation v. Rietveld

#2.00 CONTD PRE-TRIAL CONFERENCE RE: Complaint Objecting To Debtor's Discharge Under 11 U.S.C. Section 727(a)(2), 727(a)(3), 727 (a)(4) and 727(a)(5)

FR: 11-7-19; 5-21-20; 8-20-20

Docket 1

Courtroom Deputy:

SPECIAL NOTE: Motion to Continue Pretrial Conference Pursuant to Local Rule 9013-1(m) filed 9/29/2020; No Order Lodged - td (9/30/2020)

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

November 7, 2019

Discovery Cut-off Date:	April 1, 2020
Pretrial Conference Date:	May 21, 2020 at 9:30 a.m.
(XX)	
Deadline to File Joint Pretrial Stipulation:	May 7, 2020

Note: If all parties agree with the foregoing schedule, appearances at today's hearing are waived and Plaintiff shall serve/lodge a scheduling

9:30 AM
CONT... Richard Allen Rietveld **Chapter 7**

order consistent with the same.

August 20, 2020

If more time is needed for settlement discussions, continue the pretrial conference to October 1, 2020 at 9:30 a.m. Plaintiff must file either a joint pretrial stipulation (if no settlement) or a status report (settlement reached or pending) by no later than September 22, 2020 or monetary sanctions may be imposed. (XX)

Note: If all parties accept the foregoing tentative ruling, appearances at today's hearing are not required and Plaintiff shall serve notice of the continued hearing date/time.

October 1, 2020

Continue this Pretrial Conference to December 17, 2020 at 9:30 a.m. as a Status Conference; an updated Status Report must be filed by December 3, 2020. (XX)

Special Note: A Status Report was not timely filed by September 17, 2020 as previously ordered by the Court [docket #14]. If this adversary proceeding remains pending as of December 3, 2020 and no Status Report is filed by such date, sanctions in an amount of not less than $200 will be imposed on Plaintiff's counsel for failure to do so.

Note: If the parties accept the foregoing tentative ruling, appearances at this hearing are not required; Plaintiff to serve notice of the continued hearing date/time on Defendant.

Party Information

Debtor(s):

Richard Allen Rietveld — Represented By
Alon Darvish

9:30 AM
CONT... Richard Allen Rietveld **Chapter 7**

Defendant(s):

Richard Allen Rietveld	Pro Se

Plaintiff(s):

Becharoff Capital Corporation	Represented By Fritz J Firman

Trustee(s):

Richard A Marshack (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

9:30 AM

8:19-13441 Alpha Floors, Inc. **Chapter 7**

Adv#: 8:20-01065 Kosmala v. U.S. Customs and Border Protection

#3.00 CON'TD STATUS CONFERENCE RE: Complaint: (1) To Avoid preferential transfer pursuant 11 U.S.C. section 547; (2) For recovery of avoided transfer under 11 U.S.C. section 550; (3) To preserve transfer for the benefit of the Estate pursuant to 11 U.S.C. section 551; (4) Turnover of the property of the Estate pursuant to 11 U.S.C. section 542
[Set per another summons issued on 7/7/2020]

FR: 9-29-20, Rm 5D

Docket 1

***** VACATED *** REASON: CONTINUED TO 12/10/2020 AT 9:30 A.M., Per Order Entered 9/10/2020 (XX)**

Courtroom Deputy:

CONTINUED: Status Conference Continued to 12/10/2020 at 9:30 a.m., Per Order Entered 9/10/2020 (XX) - td (9/10/2020)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Alpha Floors, Inc.	Represented By Eric J Fromme

Defendant(s):

U.S. Customs and Border Protection	Pro Se

Plaintiff(s):

Weneta M.A. Kosmala	Represented By Jeffrey I Golden Reem J Bello Ryan W Beall

9:30 AM
CONT... Alpha Floors, Inc. **Chapter 7**

Trustee(s):

Weneta M Kosmala (TR) Represented By
Reem J Bello

10:00 AM
8:18-10727 Mark Douglas Holland **Chapter 13**

#4.00 CONT'D Hearing RE: Motion for relief from the automatic stay [REAL PROPERTY]

MEB LOAN TRUST IV

VS.

DEBTOR

FR: 9-3-20

Docket 70
***** VACATED *** REASON: OFF CALENDAR: Order Granting Motion for Relief from the Automatic Stay (Settled by Stipulation) Entered 9/30/2020**

Courtroom Deputy:

OFF CALENDAR: Order Granting Motion for Relief from the Automatic Stay (Settled by Stipulation) Entered 9/30/2020 - td (9/30/2020)

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

Grant the Motion without waiver of Rule 4001(a)(3) unless the parties are engaged in negotiations for a resolution and require additional time to

10:00 AM

CONT... Mark Douglas Holland **Chapter 13**

complete such negotiations, in which case the parties may request a further continuance during the clerk's calendar roll call just prior to the hearing.

Available hearing dates are 10/22/20, 11/5/20, 11/12/20 and 11/19/20 at 10:00 a.m.

Party Information

Debtor(s):

Mark Douglas Holland	Represented By William P White

Movant(s):

MEB Loan Trust IV	Represented By Nancy L Lee

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:00 AM

8:18-11594 George Carl Natzic and Cheri Lynn Natzic **Chapter 7**

#5.00 Hearing RE: Motion for relief from the automatic stay [PERSONAL PROPERTY]

U.S. BANK NATIONAL ASSOCIATION

VS.

DEBTORS

Docket 127

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

Grant with 4001(a)(3) waiver.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:00 AM

CONT... George Carl Natzic and Cheri Lynn Natzic **Chapter 7**

Debtor(s):

George Carl Natzic — Represented By Moises S Bardavid

Joint Debtor(s):

Cheri Lynn Natzic — Represented By Moises S Bardavid

Movant(s):

U.S. Bank National Association — Represented By Dane W Exnowski

Trustee(s):

Thomas H Casey (TR) — Pro Se

10:00 AM
8:20-10533 American Renewable Power LLC **Chapter 7**

#6.00 Hearing RE: Motion for relief from the automatic stay [PERSONAL PROPERTY]

JPMORGAN CHASE BANK, N.A.

VS.

DEBTOR

Docket 156

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

Continue hearing to October 22, 2020 at 10:00 a.m. to allow Movant to correct defective service of the Motion on Debtor (proper service to Debtor must be made by October 1, 2020). (XX)

As a motion for relief from the automatic stay is a contested matter within the meaning of Fed.R.Bankr.P. 9014, service of the Motion must be made to Debtor, a corporate entity, in the manner set forth in Fed.R.Bankr.P. 7004(b)(3).

10:00 AM
CONT... American Renewable Power LLC **Chapter 7**

Tentative ruling for 10/22/20 hearing (if unopposed): Grant with 4001(a)(3) waiver.

Note: If Movant accepts the foregoing tentative ruling, appearance at this hearing is not required.

Party Information

Debtor(s):

American Renewable Power LLC	Represented By David B Golubchik Todd M Arnold

Movant(s):

JPMorgan Chase Bank, N.A.	Represented By Jenelle C Arnold

Trustee(s):

Thomas H Casey (TR)	Represented By Beth Gaschen Steven T Gubner Jeffrey I Golden

10:00 AM
8:20-11827 William Mark Heiden and Bonnie Jean Heiden **Chapter 7**

#7.00 Hearing RE: Motion for relief from the automatic stay [PERSONAL PROPERTY]

FORD MOTOR CREDIT COMPANY, LLC

VS.

DEBTORS

Docket 17

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

Grant with 4001(a)(3) waiver.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:00 AM

CONT... William Mark Heiden and Bonnie Jean Heiden **Chapter 7**

Debtor(s):

William Mark Heiden	Represented By Bert Briones

Joint Debtor(s):

Bonnie Jean Heiden	Represented By Bert Briones

Movant(s):

Ford Motor Credit Company LLC	Represented By Sheryl K Ith

Trustee(s):

Thomas H Casey (TR)	Pro Se

10:00 AM
8:20-12210 Heedo Scott Moon and Kristine Mijin Moon **Chapter 7**

#8.00 Hearing RE: Motion for relief from the automatic stay [PERSONAL PROPERTY]

TOYOTA MOTOR CREDIT CORPORATION

VS.

DEBTORS

Docket 10

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

Grant with 4001(a)(3) waiver.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine

10:00 AM

CONT... Heedo Scott Moon and Kristine Mijin Moon **Chapter 7**

whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

Heedo Scott Moon	Represented By Raymond J Seo

Joint Debtor(s):

Kristine Mijin Moon	Represented By Raymond J Seo

Movant(s):

Toyota Motor Credit Corporation	Represented By Kirsten Martinez

Trustee(s):

Weneta M Kosmala (TR)	Pro Se

10:30 AM
8:09-20845 Commercial Services Building Inc **Chapter 7**

#9.00 Hearing RE: Motion of Chapter 7 Trustee for an Order Authorizing Sale of Certain Assets of the Debtor's Estate Free and Clear of Liens, Claims, Interests, and Encumbrances

Docket 419

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

Continue hearing to November 12, 2020 at 10:30 a.m. to allow the Trustee to file supplemental pleading in support of Motion by October 22, 2020; response/opposition must be filed by October 29, 2020; and any reply by November 5, 2020.

Basis for Tentative Ruling:

The standards for approval of a sale pursuant to § 363(b)(1) require that the proponent of the sale establish that: "(1) a sound business purpose exists for the sale; (2) the sale is in the best interest of the estate, *i.e.*, the sale price is fair and reasonable; (3) notice to creditors was proper; and (4) the sale is made in good faith." *In re Slates*, 2012 WL 5359489 (B.A.P. 9th Cir. Oct. 31,

10:30 AM

CONT... Commercial Services Building Inc **Chapter 7**

2012) (unpublished) (citation omitted). A bankruptcy court's power to authorize a sale under § 363(b) is reviewed for abuse of discretion. *In re Walter*, 83 B.R. 14, 19 (BAP 9th Cir. 1988). The paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See e.g.*, *In re Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 2010). As long as the sale appears to enhance a debtor's estate, court approval of a trustee's decision to sell should only be withheld if the trustee's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Code. *In re Lajijani*, 325 B.R. 282, 289 (BAP 9th Cir. 2005).

Though the court does not agree with all of the objections presented by Douglas Patrick ("Patrick"), some of his points are well taken and need to be addressed by the Trustee in a supplemental pleading.

1. The Filbeck Judgment:

In 2015, the Trustee obtained a $3.55 million judgment against David Filbeck. As of 2019, the Trustee has collected $615,000, leaving a balance owing of approximately $2.9 million. Neither the Motion or the notice served on creditors discusses this significant asset of the estate or explains why further collection efforts are not feasible. By the Reply, the Trustee has confirmed that the $2.9 million balance is included in the $6,000 Remnant Asset purchase price but, again, offers no explanation for why its inclusion in the Remnant Asset sale is in the best interests of the estate or why its collectibility value is negligible. Further detailed explanation by the Trustee is required.

2. Similarly, the proof of claim filed by the Trustee in the amount of $153,082 in the pending chapter 7 case *In re Phillip Barry Greer*, case no. 18-10203MW ("Greer POC"), an asset case, was not specifically discussed or disclosed in the Motion or notice sent to creditors. No explanation has been provided as to why its inclusion in the Remnant Asset sale is in the best interests of the estate or why its collectibility value is negligible. Further detailed explanation by the Trustee is required, (e.g., has the Trustee had discussions with the trustee of the *Greer* estate regarding the value of the estate's assets and projected date of distributions?).

10:30 AM

CONT... Commercial Services Building Inc **Chapter 7**

3. The Motion is silent as to specific efforts made by the Trustee to monetize known assets (such as the Filbeck Judgment and Greer POC) or to conduct investigations regarding other possible assets. Are there other known assets other than the Filbeck Judgment and Greer POC? If so, what are they?

4. No basis for the Remnant Asset valuation of $6,000 has been disclosed. Further, it is unclear why an initial overbid equal to 25% of the initial bid is reasonable. The court is concerned about the potential chilling effect on overbids due to the lack of information.

5. In light of the circumstances discussed in paragraphs 1-4 above, the court cannot presently find that the Trustee has met his burden of establishing that the proposed sale represents a sound business purposes, that the sale is in the best interest of the estate (i.e., that the sale price is fair and reasonable) or even that the notice to creditors was proper (in terms of adequately disclosing the included Remnant Assets). In sum, the court has no problem with the concept of a remnant asset sale but, in this case, the existing record contains inadequate information/evidence in support of the Motion.

6. Regarding the request that the sale be free and clear of all liens, claims, encumbrances and interests under 365(f), the Trustee must affirmatively identified which one of the five subsections has been satisfied.

7. Regarding objections of Patrick not discussed hereinabove:

a. As this is a contested matter within the meaning of FRBP 9014, nothing has prevented Patrick from taking depositions or propounding discovery. The continued hearing will allow additional time for that.

b. The argument concerning an alleged conflict of interest between attorney Thomas Polis and The Bascom Group is beyond the scope of the Motion. The focus is on the sound business judgment of the Trustee and other 363 factors noted above.

c. The argument that "The Bascom Group should . . . be required to declare under pnealty of perjury there is nothing owed by it to Filbeck . . . .", required by whom? This court? If so, there is no proper motion before the

10:30 AM
CONT... Commercial Services Building Inc **Chapter 7**

court.

d. The court is satisfied with the Trustee's response regarding unclaimed funds -- such funds are not by law accessible to any remnant asset purchaser. If the Motion is eventually approved, the sale order should so provide.

e. Except as noted above regarding the identification of assets or potential assets, the court is not persuaded that further information regarding the tax consequences of the sale is required.

Note: If both parties accept the foregoing tentative ruling, appearances at this hearing are not required.

Party Information

Debtor(s):

Commercial Services Building Inc	Represented By Phillip B Greer

Trustee(s):

Karl T Anderson (TR)	Represented By Misty A Perry Isaacson Misty A Perry Isaacson Thomas J Polis Robert M Dato Jason E Goldstein

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM
8:13-11037 Lawrence Keith Dodge **Chapter 7**

#10.00 Hearing RE: Chapter 11 Trustee's Motion Pursuant to 11 U.S.C. Section 363 for Order Authorizing the Trustee to Use the Estate's Shareholder Interest in American Sterling Corporation to Authorize Filing of Chapter 11 Bankruptcy Case

Docket 669

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

Grant the Motion.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

Lawrence Keith Dodge Represented By
Mike D Neue

10:30 AM
CONT... Lawrence Keith Dodge **Chapter 7**

Derrick Talerico
Alan J Friedman
William N Lobel

Trustee(s):

Thomas H Casey (TR) Represented By
Cathrine M Castaldi
Thomas H Casey
Bruce A Hughes

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM

8:17-11370 David Tudor Chamberlain **Chapter 11**

#11.00 CONT Scheduling and case management conference

[fr: 5/3/17, 5/24/17, 8/2/17, 9/6/17, 9/20/17, 11/29/17, 12/14/17, 3/7/18, 9/26/18, 1/9/19, 6/12/19, 12/11/19, 3/4/20], 9-30-20, Rm 5D

Docket 1

***** VACATED *** REASON: OFF CALENDAR: Order Granting Motion in Chapter 11 Case for the Entry of an Order Closing Case on Interim Basis Entered 8/7/2020**

Courtroom Deputy:

OFF CALENDAR: Order Granting Motion in Chapter 11 Case for the Entry of an Order Closing Case on Interim Basis Entered 8/7/2020 - td (9/22/2020)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

David Tudor Chamberlain — Represented By Jeffrey I Golden

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM
8:17-11370 David Tudor Chamberlain **Chapter 11**
Adv#: 8:17-01101 Martin D. Fern, individually and as Trustee of the v. Chamberlain et al

#12.00 CONT Hearing RE: Plaintiffs Martin D. Fern and Linda Taylor-Fern's Motion to Strike Defendants' Answer to Complaint

[fr: 9/26/17, 3/7/18, 9/26/18, 1/9/19, 6/12/19, 12/11/19, 3/4/20]; 9/30/20, Rm 5D

Docket 20

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

In light of pending state court litigation, continue this matter to January 21, 2021 at 10:30 a.m. (XX)

Note: If the parties accept the foregoing tentative ruling, appearances at this hearing are not required.

Party Information

Debtor(s):

David Tudor Chamberlain Represented By
Jeffrey I Golden

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM
CONT... David Tudor Chamberlain **Chapter 11**

Alan J Friedman
Beth Gaschen

Defendant(s):

David Tudor Chamberlain	Represented By Gregory S Page
Linda Chamberlain, an individual	Represented By Gregory S Page

Plaintiff(s):

Martin D. Fern, individually and as	Represented By Eric P Israel Sonia Singh
Linda Taylor-Fern, individually and	Represented By Eric P Israel Sonia Singh

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM

8:17-11370 David Tudor Chamberlain **Chapter 11**

Adv#: 8:17-01101 Martin D. Fern, individually and as Trustee of the v. Chamberlain et al

#13.00 CONT STATUS CONFERENCE RE: Complaint to determine nondischargeability of debts pursuant to 11 U.S.C. Sections 523(a) and 524(a)(3)

[fr: 8/22/17, 9/26/17, 3/7/18, 9/26/18, 1/9/19, 6/12/19, 12/11/19, 3/4/20]; 9-30-20, Rm 5D

Docket 1

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

In light of pending state court litigation, continue this matter to January 21, 2021 at 10:30 a.m. Plaintiff shall file a status report regarding the status of the state court trial by or before January 7, 2021.(XX)

Note: If the parties accept the foregoing tentative ruling, appearances at this hearing are not required and Plaintiffs shall serve Defendants with notice of the continued hearing date/time.

Party Information

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM

CONT... David Tudor Chamberlain **Chapter 11**

Debtor(s):

David Tudor Chamberlain	Represented By Jeffrey I Golden Alan J Friedman Beth Gaschen

Defendant(s):

David Tudor Chamberlain	Pro Se
Linda Chamberlain, an individual	Pro Se

Plaintiff(s):

Martin D. Fern, individually and as	Represented By Eric P Israel
Linda Taylor-Fern, individually and	Represented By Eric P Israel

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM

8:19-13587 Trent Tyrell Berglin and Adrienne Lynn Berglin **Chapter 11**

#14.00 Hearing RE: U.S. Trustee's Motion to Dismiss or Convert Reorganized Debtors' Case Under 11 U.S.C. Section 1112(b) for Failure to Pay Post-Confirmation Quarterly Fees

Docket 105

***** VACATED *** REASON: OFF CALENDAR: Voluntary Dismissal of U.S. Trustee's Motion, filed 9/14/2020**

Courtroom Deputy:

OFF CALENDAR: Voluntary Dismissal of U.S. Trustee's Motion, filed 9/14/2020 - td (9/14/2020)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Trent Tyrell Berglin — Represented By Michael Jones, Sara Tidd

Joint Debtor(s):

Adrienne Lynn Berglin — Represented By Michael Jones, Sara Tidd

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM
8:19-13858 Bruce Elieff **Chapter 7**

#15.00 Hearing RE: Chapter 11 Trustee's Motion for Order Enforcing Settlement Agreement and Authorizing Compromise of Controversy Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure

Docket 915
***** VACATED *** REASON: CONTINUED TO 10/22/2020 AT 10:30 A.M., Per Order Entered 10/17/2020 (XX)**

Courtroom Deputy:

CONTINUED: Hearing Continued to 10/22/2020 at 10:30 a.m., Per Order Entered 10/17/2020 (XX) - td (9/17/2020)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Bruce Elieff	Represented By Paul J Couchot Lisa Nelson

Movant(s):

Howard M Ehrenberg (TR)	Represented By Alan G Tippie Daniel A Lev Sean A OKeefe

Trustee(s):

Howard M Ehrenberg (TR)	Represented By Alan G Tippie Daniel A Lev Sean A OKeefe

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM
8:19-13858 Bruce Elieff **Chapter 7**

#16.00 CON'TD STATUS CONFERENCE Hearing RE: Status of Chapter 11 Case; and (2) Requiring Report on Status of Chapter 11 Case

FR: 12-5-19; 4-9-20; 7-23-20

Docket 1

***** VACATED *** REASON: OFF CALENDAR: Order, After Hearing, Granting Chapter 11 Trustee's Motion for Order Authorizing Conversion of Case to Chapter 7 Entered 9/10/2020**

Courtroom Deputy:

SPECIAL NOTE: Order Granting Motion to Approve Joint Administration of Cases in Part and Setting Hearing on Certain Issues Entered 10/10/2019. LEAD CASE: BRUCE ELIEFF, Case No. (8:19-bk-13858-ES) Jointly Administered with Member Cases: Morse Properties, LLC, Case No. (8:19-bk-13874-ES); and 4627 Camden, LLC, Case No. (8:19-bk-13875-ES).

OFF CALENDAR: Order, After Hearing, Granting Chapter 11 Trustee's Motion for Order Authorizing Conversion of Case to Chapter 7 Entered 9/10/2020 - td (9/21/2020)

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

December 5, 2019

10:30 AM
CONT... Bruce Elieff **Chapter 7**

Claims bar date:	Feb. 14, 2020
Deadline to serve notice of claims bar date:	Dec. 13, 2019
Deadline to file plan/disclosure statement:	Feb. 21, 2020
Continued status conference:	Apr. 9, 2020 at 10:30 a.m.
(XX)	
Deadline to file updated status report:	Mar.26, 2020*

**Special note: a hearing on the motion for summary judgment re the subordination action cannot be heard prior to April 9, 2020 at 2:00 p.m.*

*Requirement of an updated status report is waived if the plan and disclosure statement are timely filed.

Note: If Debtors accept the foregoing tentative ruling and are in substantial compliance with the requirements of the U.S. Trustee, appearance at this hearing is not required. It is the responsibility of Debtors to confirm compliance with the U.S. Trustee prior to the hearing.

April 9, 2020

Continue this status conference to July 23, 2020 at 10:30 a.m., the date currently set for hearing on the adequacy of Debtor's disclosure statement; an updated status report is not required. (XX)

July 23, 2020

Continue Status Conference to October 1, 2020 at 10:30 a.m.; updated Status Report must be filed by September 17, 2020 (XX)

Note: Appearances at this hearing are not required.

Special note: Unless, Debtors' counsel has an urgent update to report, the court would prefer not to engage in a general discussion about upcoming hearings scheduled for this and related cases.

10:30 AM
CONT... Bruce Elieff **Chapter 7**

Note: If Debtors accept the foregoing tentative ruling and are in substantial compliance with the requirements of the U.S. Trustee, appearance at this hearing is not required. It is the responsibility of Debtors to confirm compliance with the U.S. Trustee prior to the hearing. Nonappearance by Debtors and the U.S. Trustee will be deemed acceptance of the tentative ruling. Nonappearance by Debtors and the U.S. Trustee shall be deemed acceptance of the tentative ruling.

Party Information

Debtor(s):

Bruce Elieff	Represented By Paul J Couchot Lisa Nelson

Trustee(s):

Howard M Ehrenberg (TR)	Represented By Alan G Tippie Daniel A Lev Sean A OKeefe

10:30 AM
8:19-14169 Gary Clesceri **Chapter 7**
Adv#: 8:20-01091 Payday Loan, LLC v. Clesceri

#17.00 Hearing RE: Defendant's Motion to Dismiss for Failure to Effectuate Service

Docket 9

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

Deny Motion. The time to serve the summons and complaint on Defendant's counsel is extended to September 30, 2020 under FRCP 4(m).

Basis for Tentative Ruling:

Short Answer: The court believes that the totality of the circumstances warrants the exercise of its discretion to extend the time for service of the summons and complaint upon Defendant's counsel under Rule 4(m).

Long Answer:

Gary Clesceri ("Defendant") and Charlene Clesceri (collectively,

10:30 AM
CONT... Gary Clesceri **Chapter 7**

"Debtors") filed a voluntary chapter 7 petition on October 24, 2019. Karen Naylor was appointed chapter 7 trustee, who filed a no-asset report on December 5, 2019. Debtors received their discharge on July 23, 2020 and the case was closed on July 29, 2020. On May 22, 2020, plaintiff Payday Loan, LLC ("Plaintiff") filed a nondischargeability complaint (the "Complaint") against Defendant alleging causes of action under §§ 523 (a)(2). Defendant filed his answer on June 22, 2020 (the "Answer").

Defendant now moves to dismiss the AP pursuant to FRCP 12(b)(2) and (5) because the Summons and Complaint were not served on Defendant's attorney in accordance with Rule 7004(g) within the 90-day limit of Rule 7004(m), so the Court does not have personal jurisdiction over the Defendant (the "Motion")[AP dkt. 9]. Plaintiff opposes the Motion.

A. Background facts

The deadline to file a nondischargeability complaint was December 4, 2019, but Plaintiff did not receive notice of the deadline because Defendant did not list Plaintiff as a creditor. On May 22, 2020, Plaintiff filed the instant AP. On May 29, 2020, Plaintiff served Defendant's counsel by electronic notice only via CM/ECF.

Defendant timely filed his Answer, *pro se*, on June 22, 2020 and asserted, as his Third Affirmative Defense, that the court lacked jurisdiction over Defendant because "Plaintiff has failed to serve the Summons and Complaint in accordance with Federal Rule of Civil Procedure 7004." Defendant also appeared unrepresented at the first Status Conference in the matter held on August 13, 2020.

B. Legal standards

1. Legal Standard for FRCP 12(b)(1)

Under FRCP 12(b)(2), as incorporated by FRBP 7012, an adversary proceeding may be dismissed for lack of personal jurisdiction. A federal court is without personal jurisdiction over a defendant unless the defendant

10:30 AM
CONT... Gary Clesceri **Chapter 7**

has been served in accordance with Federal Rule 4. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982). "Neither actual notice, nor simply naming the person in the caption of the complaint, will subject defendants to personal jurisdiction if service was not made in *substantial compliance* with Rule 4." Id. (emphasis added).

"When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction." *Medimpact Healthcare Sys, Inc. v. IQVIA Holdings, Inc.* 2020 WL 1433327, at *4 (S.D. Cal. Mar. 24, 2020).

"Under the substantial compliance doctrine, a federal court need not dismiss a complaint for insufficient service of process based on technical defects in service of process when: (a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed." *In re 701 Mariposa Project, LLC ,* 514 B.R. 10, 17 (B.A.P. 9th Cir. 2014)(quoting *Whale v. U.S.*, 792 F.2d 951, 953 (9th Cir. 1986)).

Here, Defendant received actual notice of the Complaint because Defendant was himself was properly served and Defendant timely filed an Answer to the Complaint. See, Opp'n, Timothy Silverman Decl., p. 3, ¶9. Defendant would also suffer no prejudice in the defect in service on Defendant's counsel because service on Defendant himself was proper and, again, Defendant timely filed his Answer. Moreover, Defendant will suffer no prejudice because there is no discovery pending and Defendant has not suffered any adverse rulings. See id., p. 4, ¶(2). And while Defendant argues that Plaintiff he has been prejudiced because his right a "fresh start" has been delayed, Defendant's discharge has actually already been entered as to all other dischargeable debts. See, Mot, p. 10. Defendant has not provided any supporting declaration detailing how he has had to live with the "stress of this litigation and put his life on complete hold." See Id. Plaintiff, on the other hand, will be severely prejudiced if the Complaint is dismissed because Defendant's discharge order has been entered and Defendant will be

timebarred from prosecuting its claims for nondischargeability. See Id., p. 4, ¶3.

Nonetheless, Plaintiff has failed to satisfy the "justifiable excuse" requirement for application of the substantial compliance doctrine. In short, Plaintiff states that because Plaintiff's counsel's staff has had to work remotely since mid-March 2020 due to the Covid-19 pandemic, Plaintiff's counsel's management of staff members has been challenged and Plaintiff's counsel was unable to review the service completed by an "inexperience bankruptcy paralegal." See id., p. 3, ¶¶9-11. While the Covid-19 pandemic has been unprecedented, by Plaintiff's counsel's own admission, his office had been working remotely for more than two months before Plaintiff's counsel failed to review the May 29, 2020 proof of service. See id., p. 3. ¶12. Thus, the failure to properly serve Defendant's counsel was not justified because failing to implement procedures for ensuring proper service (even after working remotely for two months so Plaintiff's counsel was aware of the challenges caused by remote working) is not reasonable. Moreover, the pandemic has affected all industries, including the practice of law, so the challenges caused by working remotely are not unique to Plaintiff's counsel's office alone.

Failure to serve the debtor's attorney renders service ineffective. *U.S. Escrow v. Bloomingdale (In re Bloomingdale)*, 137 B.R. 351,354 (Bankr. C.D. Cal. 1991). Accordingly, because Defendant's counsel was not served within 90 days of the Complaint filing date, service of process did not substantially comply with FRCP 4. See, Reply, p. 2; But see, Opp'n, p. 3-5.

2. Plaintiff has failed to establish good cause for extending the service period under Rule 4(m)

"The time for service in an adversary proceeding may be extended under two different rules: Rule 4(m) of the Federal Rules of Civil Procedure, and Bankruptcy Rule 9006(b)." Rule 7004(a) incorporates by reference FRCP 4(m). *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001).

FRCP 4(m) provides:

> If a defendant is not served within 90 days after the complaint is filed, the court -- on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

Thus, "Rule 4(m) requires a two-step analysis in deciding whether or not to extend the prescribed time period for the service of a complaint…. First, upon a showing of good cause for the defective service, the court must extend the time period. Second, if there is no good cause, the court has the discretion to dismiss without prejudice or to extend the time period." *Id.*

"When considering a motion to dismiss a complaint for untimely service, courts must determine whether good cause for the delay has been shown on a case by case basis." Id. A plaintiff may be required to show the following factors to establish good cause: "(a) the party to be served received actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed." Id. (citing *Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir. 1991). "The party responsible for service has the burden of demonstrating good cause." *Guzman*, supra, *5.

"The unintentional failure to comply alone is not a good enough excuse for this court to ignore plaintiffs' lack of compliance with FRBP 7004." *In re Bloomingdale*, 137 B.R. 351, 355 (Bankr. C.D. Cal. 1991). The fact that an action that is dismissed for lack of proper service may be precluded from being refiled because the action has become time barred, alone, is not good cause under FRCP 4(m). See, *In re Guzman*, 2010 WL 6259994, *5 (BAP 9th Cir. Sep. 20, 2010).

In this case, Plaintiff has failed to demonstrate "good cause" under FRCP 4(m) for extending the time for service. As discussed above regarding

substantial compliance, Defendant received actual notice of the Complaint, Defendant will not suffer any prejudice by extending the service deadline since Defendant is already enjoying his "fresh start" with regards to all other dischargeable debts, and Plaintiff will be significantly prejudiced if the Complaint is dismissed because the Complaint is now time barred.

However, "good cause" is akin to excusable neglect. *Sheehan*, supra, at 512. And as discussed above, Plaintiff's counsel's failure to ensure proper service was not excusable, or justified, because, notwithstanding the pandemic, Plaintiff's counsel had over two months to implement procedures to ensure his office was properly serving parties after Plaintiff's counsel's office had begun working remotely since mid-March 2020. Put differently, had Plaintiff attempted to serve the Complaint and Summons at the outset of the pandemic and around the time that his office had just starting to work remotely, Plaintiff's counsel's argument would have been more understandable and persuasive.

3. Even if there is no good cause, the Court exercises its discretion to extend the service period under FRCP (4)(m)

If good cause is not demonstrated under FRCP 4(m), courts nonetheless have the discretion to extend the service period. "Courts have discretion under Rule 4(m), absent a showing of good cause, to extend the time for service or to dismiss the action without prejudice. In addition, the court may extend the time limit upon a showing of excusable neglect under 9006(b)." *Sheehan,* supra, at 513. There is no specific test for the court's exercise of discretion under FRCP 4(m), but "the court's discretion is broad." *Id*. at 511, 513 n.2.

The passage of the statute of limitation can be "a factor for the court to consider in exercising its discretion to extend the service time under FRCP 4(m) absent good cause[.]" *Guzman*, supra, at *6.

Here, the Court exercises its broad discretion to extend the service period under FRCP 4(m) based upon the following circumstances:

10:30 AM
CONT... Gary Clesceri **Chapter 7**

a. Defendant was properly served with the summons and complaint;

b. Defendant's bankruptcy counsel of record received actual notice of the filing of the Complaint via the court's electronic filing system;

c. Defendant timely filed an Answer to the Complaint and, significantly, filed the Answer *pro se*.

d. Defendant appeared (*pro se)* at the initial Status Conference.

e. Defendant has already received a discharge of his other debts (no 727 objections to discharge were included in the Complaint).

f. Defendant will not be prejudiced by the extension of the time for service of the summons and complaint upon his counsel. As noted above, the lack of proper service on Defendant's bankruptcy counsel did not prevent Defendant from filing a timely answer to the Complaint.

g. Plaintiff would be significantly harmed by the dismissal of the adversary as its claim would be timebarred.

h. Plaintiff has already corrected the service issue by serving Defendant's bankruptcy counsel of record prior to this hearing, i.e., on or about September 17, 2020.

i. The exercise of its discretion to extend the service time under FRCP 4(m) is consistent with this Circuit's longstanding policy in favor of deciding matters on the merits.

j. Though not germane to the court's exercise of discretion, the court notes that it remains unclear whether Defendant's bankruptcy counsel of record, Mr. Spector, is even representing Defendant in this adversary proceeding in light of the fact that, until the Motion was filed, Defendant appeared in the case *pro se*, and the Motion indicates that Mr. Spector is "specially" appearing regarding the prosecution of the Motion.

Finally, in light of the court's exercise of its discretion to extend the time for serving he summons and complaint upon Defendant's counsel to

10:30 AM
CONT... Gary Clesceri **Chapter 7**

September 30, 2020, the court need not address the application of Rule 9006(b) (excusable neglect) and declines to do so.

Party Information

Debtor(s):

Gary Clesceri	Represented By Michael G Spector

Defendant(s):

Gary Clesceri	Represented By Michael G Spector

Joint Debtor(s):

Charlene Clesceri	Represented By Michael G Spector

Movant(s):

Gary Clesceri	Represented By Michael G Spector

Plaintiff(s):

Payday Loan, LLC	Represented By Timothy J Silverman

Trustee(s):

Karen S Naylor (TR)	Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM
8:20-10132 Tera Thamawatanakul and Grissel Thamawatanakul **Chapter 7**

#18.00 Hearing RE: Trustee's Final Report and Application for Final Fees and Expenses

[RICHARD A. MARSHACK, CHAPTER 7 TRUSTEE]

Docket 25

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

10:30 AM
CONT... Tera Thamawatanakul and Grissel Thamawatanakul **Chapter 7**

October 1, 2020

Approve fees and expenses as requested.

Note: This matter appears to be uncontested. Accordingly, no court appearance by Applicant is required. Should an opposition party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Applicant will be so notified.

Party Information

Debtor(s):

Tera Thamawatanakul	Represented By Amanda G Billyard

Joint Debtor(s):

Grissel Thamawatanakul	Represented By Amanda G Billyard

Trustee(s):

Richard A Marshack (TR)	Pro Se

10:30 AM
8:20-11507 Hytera Communications America (West) Inc **Chapter 11**

#19.00 Hearing RE: Debtors and Debtors in Possessions' Motion for Order Extending Time Within Which the Debtors May Assume, Assume and Assign, or Reject Unexpired Leases of Nonresidential Real Property to the Maximum Number of Days Authorized by 11 U.S.C. Section 365(d)(4)(B)(i)

Docket 242

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

10:30 AM
CONT... Hytera Communications America (West) Inc **Chapter 11**

October 1, 2020

Grant the Motion.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

Hytera Communications America	Represented By John W Lucas Jason H Rosell Victoria Newmark

Movant(s):

Hytera Communications America	Represented By John W Lucas Jason H Rosell Victoria Newmark

10:30 AM
8:20-11507 Hytera Communications America (West) Inc **Chapter 11**

#20.00 Hearing RE: Debtors and Debtors in Possessions' Motion for Order Extending the Time Periods During Which the Debtors Have the Exclusive Right to File a Plan and to Solicit Acceptances Thereof Pursuant to Section 1121(D) of the Bankruptcy Code

Docket 243

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

10:30 AM
CONT... Hytera Communications America (West) Inc **Chapter 11**

October 1, 2020

Grant the Motion.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

Hytera Communications America	Represented By John W Lucas Jason H Rosell Victoria Newmark

Movant(s):

Hytera Communications America	Represented By John W Lucas Jason H Rosell Victoria Newmark

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM

8:20-11853 The Three Gals 2014 Nevada Trust **Chapter 11**

#21.00 CONT Scheduling and Case Management Conference

[fr: 7/7/20]; 9-22-20, Rm 5D

Docket 7

***** VACATED *** REASON: OFF CALENDAR: Order Dismissing Case Pursuant to 11 U.S.C. Section 1112(b) Entered 9/29/2020**

Courtroom Deputy:

OFF CALENDAR: Order Dismissing Case Pursuant to 11 U.S.C. Section 1112(b) Entered 9/29/2020 - td (9/29/2020)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

The Three Gals 2014 Nevada Trust Represented By
Thomas B Ure

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

10:30 AM
8:20-12328 Chase Merritt Global Fund LLC **Chapter 11**

#22.00 Hearing RE: Motion by United States Trustee to Dismiss Case or Convert Case to One Under Chapter 7 Pursuant to 11 U.S.C. Section 1112(b)

Docket 15
***** VACATED *** REASON: OFF CALENDAR: Voluntary Dismissal of U.S. Trustee's Motion to Dismiss or Convert Debtor's Case Under 11 U.S.C. Section 1112(b) filed 9/29/2020**

Courtroom Deputy:

OFF CALENDAR: Voluntary Dismissal of U.S. Trustee's Motion to Dismiss or Convert Debtor's Case Under 11 U.S.C. Section 1112(b) filed 9/29/2020 - td (9/30/2020)

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until October 1, 2020 The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. STARTING OCTOBER 8, 2020, AND CONTINUING THEREAFTER UNTIL FURTHER NOTICE, ALL HEARINGS BEFORE

10:30 AM

CONT... Chase Merritt Global Fund LLC **Chapter 11**

JUDGE SMITH WILL BE BY ZOOM VIDEO CONFERENCE. See the Court's website at www.cacb.uscourts.gov for details.

October 1, 2020

Grant the Motion.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

Party Information

Debtor(s):

Chase Merritt Global Fund LLC — Represented By
Thomas C Nguyen

2:00 PM
8:17-14535 Prime Metals U.S.A., Inc. **Chapter 7**
Adv#: 8:19-01216 Marshack v. Hyundai Steel Company

#23.00 Hearing RE: Defendant Hyundai's Motion to Dismiss First Amended Complaint

Docket 38

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

October 1, 2020

Grant in part; deny in part. Grant without leave to amend as to claims 7, 8, 9, 10, and 11. Deny as to claims 1-6. Defendant must file answer by or before October 29, 2020. Continu Status Conference to December 10, 2020 at 9:30 a.m.; Joint Status Report must be filed by November 25, 2020.

Basis for Tentative Ruling:

Special note: the court apologizes in advancee for formatting issues in the analysis below (e.g., many case citations are not italicized or underscored).

On November 17, 2017, Prime Metals U.S.A., Inc. ("Debtor") filed a voluntary chapter 7 petition. Richard A. Marshack was appointed chapter 7 trustee ("Trustee") of Debtor's estate.

On November 15, 2019, Trustee filed a 10-count complaint (the "Complaint")[AP dkt. 1] against defendant Hyundai Steel Company, a Korean corporation ("Hyundai").

The Complaint alleges the following ten claims for relief:

1. Breach of contract;
2. Breach of implied covenant of good faith and fair dealing;

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

3. Avoidance and recovery of intentional fraudulent transfers;
4. Avoidance and recovery of constructive fraudulent transfers;
5. Avoidance and recovery of estate property;
6. Temporary restraining order and preliminary injunction;
7. Avoidance of preferential transfers;
8. Recovery of avoided transfers;
9. Substantive consolidation;
10. Declaratory judgment: alter ego.

On April 17, 2020, the order granting Hyundai's first motion to dismiss under FRCP 12(b)(6) was entered with leave to amend except for the following two causes of action which were dismissed with prejudice: the sixth claim for relief for TRO and preliminary injunction and the ninth claim for relief for substantive consolidation (the "First Dismissal Order").

The Court noted in the First Dismissal Order that it did "not find persuasive the argument that there is a relaxed pleading standard for fraud for trustees," but instead, "trustees are required to plead fraud with particularity."

On May 20, 2020 the order granting Hyundai's motion to dismiss for forum non conveniens and dismissing the following two causes of action with prejudice: the first claim for relief for breach of contract, and the second claim for relief for breach of the covenant of good faith and fair dealing.

On June 1, 2020, Trustee filed his first amended complaint against Hyundai (the "FAC")[dkt. 37].

The FAC alleges the following eleven claims for relief:

1. Avoidance and recovery of intentional fraudulent transfers;
2. Avoidance and recovery of constructive fraudulent transfers;
3. Avoidance and recovery of estate property;
4. Avoidance of preferential transfers;
5. Recovery of avoided transfers;
6. Declaratory judgment: alter ego;
7. Price fixing and collusion between competitors;

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

8. Attempted monopolization and conspiracy to monopolize;
9. Unfair competition;
10. Collusion to restraint trade; and
11. Fraud.

Hyundai now moves to dismiss the FAC in its entirety under FRCP 12(b)(6), made applicable herein my Rule 7012 (the "Motion")[AP dkt. 11]. Trustee opposes the Motion (the "Opposition")[AP dkt. 42].

Legal Standard

FRCP 12(b)(6) is made applicable to this AP under Rule 7012. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and probability of entitlement to relief. In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. Id. at 1950. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Id. The court must construe the complaint in the light most favorable to the plaintiff, and accept all well-pleaded factual allegations as true. Johnson v. Riverside Healthcare Sys., LP., 534 F.3d 1116, 1122 (9th Cir. 1990).

In Atlantic Corp. v. Twombly, 550 U.S. 544, 561 (2007), the Supreme Court established more stringent notice-pleading standard for motions to dismiss for failure to state a claim upon which relief may be granted. A plaintiff is required to provide more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action ...." Id. The plaintiff

must provide "enough facts to state a claim to relief that is plausible on its face." Twombly overruled the more liberal Conley v. Gibson standard, which held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. With the new standard in Twombly, the Supreme Court has said that the facts asserted in support of the claim need to cross the line "from conceivable to plausible."

Turning to Trustee's claims for relief in the order they were alleged in the FAC:

1. The first claim for relief- avoidance and recovery of intentional transfers (the "1st Claim")

The "strong-arm" powers under § 544(b) allows trustees to utilize remedies available to creditors under state law. California's Uniform Voidable Transactions Act under California Civil Code ("Civil Code") § 3439 et seq. provides such a remedy. Thus, under Civil Code § 3439.04(a)(1), and § 548(a)(1)(A), Trustee may avoid transfers made with "actual intent to hinder, delay, or defraud" creditors.

With respect to allegations of actual fraudulent transfers, "a claim to avoid a fraudulent transfer is sufficient if it satisfies the heightened pleading standard for actual fraud provided in [FRCP 9(b)] made applicable by [FRBP 7009] requires a party alleging fraud to 'state with particularity the circumstances constituting fraud[.]" In re Automated Fin. Corp., 2011 WL 10502417, at *4 (Bankr. C.D. Cal. Jan. 25, 2011)(finding that trustee had not met FRCP (9)(b) standards when pleading § 548(a)(1)(A) and Civil Code § 3439.04(a)(1) claims because trustee had failed to plead facts that tied together intent to defraud with the specific transfers). To satisfy this requirement, a plaintiff is required to allege with particularity the facts giving rise to the alleged fraud: "'the who, what, when, where and how'" of the fraud. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)(citation omitted).

Per FRCP 9, "In alleging fraud or mistake, a party must state with

particularity the circumstances constituting fraud or mistake." However, "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Id. "While mere conclusory allegations of fraud are insufficient, statements of the time, place and nature of the alleged fraudulent activities are sufficient" to comply with FRCP 9. Wool v. Tandem Computers Inc., 818 F.2d 1433, 1439 (9th Cir. 1987), overruled on other grounds as stated in Flood v. Miller, 35 Fed.Appx. 701, 703 n.3 (9th Cir. 2002). "Allegations of fraud based on information and belief may suffice as to matters peculiarly within the opposing party's knowledge, so long as the allegations are accompanied by a statement of the facts upon which the belief is founded." Puri v. Khalsa, 674 F. App'x 679, 687 (9th Cir. 2017)(relying on Wool, supra, at 439).

A. The applicable pleading standard for chapter 7 trustees

Hyundai, relying on Desaigoudar v. Meyercord, 223 F.3d 1020, 1023 (9th Cir. 2000) argues that Trustee is subject to the heightened pleadings standard requiring "a high degree of meticulousness" which balances "quantity and quality." See, Mot., p. 5-7. This argument is unpersuasive because Desaigoudar is a securities fraud case in which a modified and heightened version of FRCP 9(b) was applied due to the application of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Desaigoudar, supra, at 1021; Opp'n, p.8-9. The law of the case, per the Court's First Dismissal Order [AP dkt. 26], is that Trustee is required to plead fraud with particularity under FRCP 9(b), and not the modified and heightened version of FRCP 9(b) standard used in securities fraud cases. Accordingly, while Trustee is required to satisfy FRCP 9(b) regarding his fraud claims for relief, the modified and heightened version of FRCP 9(b) applied in Desaigoudar is not applicable in this case because no securities fraud claims for relief are being alleged.

B. The fraudulent transfers

The Code defines "transfers" as "each mode, direct and indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property." 11 U.S.C. § 101(54)(D). The Civil Code mirrors the Code and defines a "transfer" as "every mode, direct or

indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, license, and creation of a lien or other encumbrance." Civ. Code § 3439.01(l).

The necessary intent to "hinder, delay or defraud" creditors" for causes of action under § 548(a)1) and Civil Code § 3439.04 may be inferred based on the traditional "badges of fraud". See, In re Acequia, Inc., 34 F.3d 800, 805-06 (9th Cir. 1994)("[C]ourts applying...§ 548(a)(1) frequently infer fraudulent intent from the circumstances surrounding the transfer, taking particular note of certain recognized indicia or badges of fraud."); Attebury Grain Ltd. Liab. Co. v. Grayn Co., 721 F. App'x 669, 671 (9th Cir. 2018) ("Under California law, a transaction may be voided if a debtor makes a transfer with the intent to "hinder, delay, or defraud" its creditors... This intent can be inferred based on consideration of the statute's non-exhaustive list of eleven badges of fraud."); Civ. Code § 3439.04(b).

The FAC alleges three different transfers were intentionally fraudulent- the CMI Notes Transfer, the Hyundai Transfers, and the R-Tech Transfers. See, FAC, p. 13-20, ¶¶54-86.

i. The CMI Notes Transfer

Trustee alleges that Central Metal Inc. ("CMI") borrowed $17 million (the "CMI Notes") and the CMI Notes were secured by three real properties valued at $35.3 million. The CMI Notes were subsequently purchased by MKLUS LLC, an alter ego company of Hyundai created specifically to purchase the CMI Notes for $17.7 million. On December 29, 2014, Debtor purchased the CMI Notes for $17.7 million. Realizing the significant equity in the collateral securing the CMI Notes, Hyundai forced Debtor to transfer, on January 2017, the CMI Notes for no consideration other than Hyundai paying off its guaranty of the loan used by Debtor to purchase the CMI Notes (the "CMI Notes Transfer"). See, FAC, p. 5, ¶¶1-27 (the FAC restarts numbering the paragraphs at p. 5 with ¶1) and ¶¶54-68 and Ex. 8 (the Mortgage Loan Purchase and Sale Agreement), Ex. 8 (Assignment of Loan Documents).

Here, taking the FAC's well-pled factual allegations as true and

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

construing those facts in the light most favorable to the non-moving party, Trustee has alleged sufficient facts regarding the transfer itself. The FAC describes the "who, what, where, when" of the CMI Transfer. The transfer occurred in January 2017 [which was within 2 and 4 years of November 17, 2017, the petition date (the "Petition Date")], Debtor was the transferor, Hyundai was the transferee, and the transfer was of identified assets- the CMI Notes which were purportedly oversecured by real property valued at $35.3 million.

And taking the FAC's well-pled factual allegations as true and construing those facts in the light most favorable to Trustee, Trustee has also alleged sufficient facts regarding the "badges of fraud" from which fraudulent intent can be inferred. See, Mot., p. 8-11; Opp'n, p. 13-19.

First, with regards to transfers to an insider, the FAC alleges sufficient facts to find that Hyundai is a statutory or non-statutory insider. There are "two types of insiders: statutory insiders and non-statutory insiders." In re The Vill. at Lakeridge, LLC, 814 F.3d 993, 999 (9th Cir. 2016), aff'd sub nom. U.S. Bank Nat. Ass'n ex rel. CW Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC, 138 S. Ct. 960 (2018).

"To be a 'statutory insider,' a creditor must fall within one of the categories listed in 11 U.S.C. § 101(31)." Vill. at Lakeridge, supra, at 996 (emphasis in original). "Whether a creditor is an insider is a factual inquiry that must be conducted on a case-by-case basis." Id. at 1000. Control is the ability of the creditor to "unqualifiably dictate corporate policy and the disposition of corporate assets," or the "legal right or ability to exercise control over a corporate entity. In re U.S. Medical, Inc., 531 F.3d 1272, 1274 (10th Cir. 2008)(finding that control was not present where the creditor was the debtor medical equipment distributor's sole laser manufacturer and the creditor acquired a 10.6% equity interest in the debtor).

"In conducting a factual inquiry for insider status, courts should begin with the statute. If the [alleged insider] fits within the statutory insider classification on his own, the court's review ends; it need not examine the nature of the statutory insider's relationship to the debtor." Vill. at Lakeridge, supra, at 1001

Trustee alleges that Hyundai was a statutory insider under 11 U.S.C. § 101(31)(B)(iii), "The term "insider" includes…if the debtor is a corporation… person in control of the debtor[.]"

Trustee makes several allegations that collectively plead a plausible claim that Hyundai was in control of Debtor. See, FAC, p. 17-18, ¶¶72, and p. 25-28, ¶¶115-131 (allegations regarding alter ego); Opp'n, p. 13-15. First, Hyundai, represented up to 90% of Debtor's business providing Hyundai significant leverage in its dealings with Debtor. See, FAC, p. 14, ¶¶58 and 60. The FAC alleges that Hyundai owned the majority shares of R-Tech, who in turn owned 100% of Debtor's shares. See, FAC, p. p. 10, ¶34 and p. 17:24-25. Next, Trustee alleges that Hyundai "controlled" two key individuals at Debtor, a former Hyundai employee who became an executive and board member at Debtor and Debtor's CFO (who was also an executive at R-Techo). See, FAC, p. 17:26-28. As further alleged evidence of this control, the executive/board member emailed weekly reports regarding Debtor's finances to Hyundai beginning in September 2015, and Debtor's records were stored at Hyundai's office building in Orange County. See, FAC, p. 18:1-2 and 18:12-13. Hyundai and Debtor were represented by the same attorneys during the negotiations for the CMI Notes Transfer and Hyundai paid for Debtor's attorneys' fees indicating that the negotiations were less than arm's length, i.e., further evidence of Hyundai's control. See, FAC, p. 15, ¶64, p. 27, ¶¶125.

"A non-statutory insider is a person who is not explicitly listed in § 101(31), but who has a sufficiently close relationship with the debtor to fall within the definition." Vill. at Lakeridge, 814 F.3d at 999. To qualify as such, a plaintiff must allege two conditions: "(1) the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arm's length." Id. at 1001. "A court cannot assign non-statutory insider status to a creditor simply because it finds the creditor and debtor share a close relationship." Id.

Alternatively, in this case, the Trustee's allegations detailed above regarding Hyundai's control of Debtor plausibly claim that Hyundai was a non-

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

statutory insider of Debtor because the closeness of Hyundai and Debtor's relationship was "comparable" to that of a "person in control" of Debtor under § 101(31)(B)(iii), and the negotiations regarding the CMI Notes Transfer were at less than arms' length. Indeed, the CMI Notes Transfer assignment documents were signed by Minho An, the very individual the FAC alleges that Hyundai placed in Debtor who would send weekly reports back to Hyundai regarding Debtor's financial position. See, FAC, ¶¶46-47, 63, and Ex. 8A and 8B.

The FAC also sufficiently alleges that Debtor was insolvent when the CMI Notes Transfer was made in January 2017. See, FAC, p. 16, ¶67, p. 17:3-5, and p. 15, ¶75; Opp'n, p. 18-19. The FAC alleges that per an independent auditor's report, Debtor incurred a net loss of $3.5 million, its current liabilities exceeded its assets by $12.7 million, and its total liabilities exceeded its assets by $9.2 million for the year ended December 31, 2016. See, FAC, p. 15, ¶75. Thus, during the month Debtor signed the sale agreement in December 2016 and one month prior to the CMI Notes Transfer, the FAC alleges sufficient facts to plausibly allege that Debtor was insolvent at the time of the CMI Notes Transfer.

With regards to lack of reasonably equivalent value received by Debtor for the CMI Transfer, Trustee does not explain why Hyundai's guaranty of Debtor's loan used to purchase the CMI Notes is a sham, see, FAC, p. 9, ¶ 25, or why Debtor would have been able to recover all of the equity from the real property valued at $35.3 million securing the CMI Notes (which were in default) when foreclosing on just the Santa Fe Property worth $25 million would have satisfied the CMI Notes in full. See, FAC, p. 16, ¶67; Opp'n, p. 21:15-22:6. Trustee does not explain whether Debtor had the right to foreclose on all three properties irrespective of whether the value of one property was sufficient to pay the notes in full. See id. This information relates the amount of equity, or value, that was allegedly transferred to Hyundai because, on the other side, while Debtor may not have received any funds directly for the CMI Notes Transfer, Debtor received value in the form of Debtor's liability to the bank for the CMI Notes purchase loan being eliminated by Hyundai's payoff. In any event, the FAC has sufficiently alleged facts to support the claim that reasonably equivalent value was not received because the value of at least the Santa Fe Property would have provided an equity

recovery greater than the value of Debtor's liability that was eliminated by Hyundai's payoff. Hyundai's argument regarding value of the real estate collateral being between $1.4 million and $5.8 million is a question a fact that is not appropriate for consideration within the context of this Motion since Debtor's valuation of $25.3 must be construed as true. See, Mot., p. 6:14-20 and n. 5.

Unlike insider status, insolvency, and lack of reasonably equivalent value, the FAC does not sufficiently allege that CMI Notes Transfer was the transfer of substantially all of Debtor's assets. See, FAC, p. 16:17-18. The FAC does not include details regarding Debtor's assets on the date of the transfer. See id., p. 16:8-9 ("Prime Metals… and had no assets to satisfy its creditors…"). The independent auditor's report only states that Debtor's liabilities exceeded assets, but the amount of assets is not provided. See, FAC, ¶75.

Trustee has sufficiently alleged facts to find that the four creditors identified in the FAC were hindered, delayed or defrauded by the CMI Notes Transfer by imputing Hyundai's intent to Debtor. See, FAC, ¶83; See, Opp'n, p. 11:11-14 and n. 4; But see, Reply, p. 3-5.

In sum, the FAC pleads sufficient particular factual allegations, which construed as true and in the light most favorable to Trustee, to find that Trustee has plausible pled his claim to avoid the CMI Notes Transfer as an intentional fraudulent transfer under the 1st Claim.

ii. The Hyundai Transfers

Trustee alleges that, between November 2014 to March 2017, transferred $67.8 million to Hyundai in the form of scrap steel (the "Hyundai Transfers") at reduced, under-market value. See, FAC, p. 17-19, ¶¶69-78, and Ex. 9 (spreadsheet of transfers), ¶141; Opp'n, p. 30:16-17.

Here, Trustee has alleged sufficient facts regarding the transfer itself. The FAC describes the "who, what, where, when" of the Hyundai Transfer. The transfers occurred between November 2014 to March 2017 [which was within 2 and/or 4 years of the Petition Date), Debtor was the transferor,

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

Hyundai was the transferee, each transfer is identified in the spreadsheet derived from Debtor's accounting journal/software that is attached to the FAC, and the transfer was of scrap steel sold to Hyundai. See, FAC, p. 17-19, ¶¶ 69-78, and Ex. 9 (spreadsheet of transfers).

As for fraudulent intent, Hyundai has plausibly pled at least two badge of fraud- transfer to an insider and insolvency. As discussed above, Trustee has sufficiently pled facts regarding Hyundai's status as a statutory insider under § 101(31)(B)(iii), or alternatively, as non-statutory insider.

With regards to insolvency, the FAC fails to allege sufficient facts to find that Debtor was insolvent during the entire period that the Hyundai Transfers were made- between November 2014 to March 2017. For the time period of January 2016 to January 2017, the independent auditors report discussed above could plausibly support the finding that Debtor was insolvent during that time since the report covered the year of 2016. See, FAC, p. 15, ¶ 75. And with regards to the time period from November 2014 to December 2015, the FAC alleges that Debtor was experiencing "financial problems" around September 2014 which is supported by the further factual allegation that a collection lawsuit was filed against Debtor in January 2016 (i.e., payments were not made during an earlier time period, such as in 2014 or 2015) and Debtor was in default of a forbearance agreement (further evidence of earlier financial problems) and a revolving credit agreement. See, FAC, p. 7, ¶15, p. 24, ¶ 107; Opp'n, p. 18:18-19:2. Accordingly, insolvency is plausibly alleged in the FAC.

With regards to lack of reasonably equivalent value, the FAC fails to allege sufficient facts to support the allegation that the Hyundai Transfers were made for lack of reasonably equivalent value. See, FAC, p. 21, ¶91; Opp'n, p. 18:15. The FAC alleges that Debtor received $67.8 million of scrap steel it transferred to Hyundai, but the FAC does not allege any particular facts demonstrating that $67.8 million was below-market value for the scrap steel. See FAC, ¶¶70-71 and 91. At best, the FAC only includes a blanket statement that the scrap steel was sold to Hyundai for below-market value. See, FAC, ¶141.

Like the allegations regarding a transfer of substantially all of Debtor's

assets for the CMI Notes Transfer, the FAC does not plausibly allege that the Hyundai Transfers were the transfer of all of Debtor's assets because the FAC makes no allegations regarding Debtor's assets on the dates of the Hyundai Transfers. See, FAC, ¶¶69-78. The independent auditor's report only states that Debtor's liabilities exceeded assets, but the amount of assets is not provided. See, FAC, ¶75.

As discussed above, Debtor's intent to hinder, delay or defraud creditors could be imputed from Hyundai's intent.

Construing the facts in the light most favorable to Trustee, however, the Court cannot find that Trustee has plausible pled his claim to avoid the Hyundai Transfers as intentional fraudulent transfers under the 1st Claim. In short, while the FAC has sufficiently alleged some badges of fraud, the FAC fails to allege with particularity how the Hyundai Transfers were fraudulent. At best, the FAC currently alleges that Debtor, while insolvent, sold scrap metal to its insider, Hyundai who wanted to extract Debtor's value for its own benefit, for $67.8 million. See, Reply, p. 3:15-21. But there is no particular factual allegation in the FAC demonstrating that $67.8 million was below below-market value. The FAC also does not plausibly allege how Hyundai, through R-Tech, forced Debtor to sell scrap metal to Hyundai for below-market value when some of the Hyundai Transfers were made during the time period between November 2014 to July 2015, but R-Techo did not purchase Debtor's shares until August 2015. See, FAC, ¶¶49-50, 141.

iii. R-Techo Transfers

Trustee alleges that between August 2015 to December 2016, Debtor transferred $4.8 million to R-Techo under the pretext of legitimate payments an transactions, and R-Techo transferred $1.8 million of those funds to Hyundai. See, FAC, ¶¶79-86. Trustee seeks to avoid and recover the $1.8 million transferred to Hyundai by R-Techo (the "R-Tech Transfers").

Here, Trustee has failed to allege sufficient facts regarding the transfers of the $1.8 million. While the FAC does allege that Debtor was the transferor, R-Techo was the initial transferee, and Hyundai was the subsequent transferee, unlike the Hyundai Transfers, the FAC provides no

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

details regarding the date, amounts, and reasons why R-Techo made the transfers.

The transfers occurred between November 2014 to March 2017 [which was
within 2 and/or 4 years of the Petition Date.

As for fraudulent intent, Hyundai has plausibly pled at least two badge of fraud- transfer to an insider and insolvency. As discussed above, Trustee has sufficiently pled facts regarding Hyundai's status as a statutory insider under § 101(31)(B)(iii), or alternatively, as non-statutory insider.

With regards to insolvency, as discussed above in the Hyundai Transfers section, the FAC alleges sufficient facts to demonstrate insolvency during the period that the R-Techo Transfers were made, from August 2015 to December 2015 (collection lawsuits filed against Debtor in January 2016 and Debtor in breach of forbearance agreement and revolving credit agreement) and the calendar year of 2016 (the independent auditor's report). See, FAC, p. 15, ¶75, p. 24, ¶ 107; Opp'n, p. 18:18-19:2. Accordingly, insolvency is plausibly alleged in the FAC.

With regards to lack of reasonably equivalent value, the FAC sufficiently alleges that R-Techo Transfers were made for lack of reasonably equivalent value because the FAC alleges that the transfers were made for no consideration. See, FAC, p. 21, ¶¶91 and 94; Opp'n, p. 18:16-17.

The FAC does not plausibly allege that the R-Techo Transfers were the transfer of all of Debtor's assets because the FAC makes no allegations regarding Debtor's assets on the dates of the Hyundai Transfers. See, FAC, ¶¶69-78. The independent auditor's report only states that Debtor's liabilities exceeded assets, but the amount of assets is not provided. See, FAC, ¶75.

As discussed above, Debtor's intent to hinder, delay or defraud creditors could be imputed from Hyundai's intent.

Construing the facts in the light most favorable to Trustee, the Court finds that Trustee has plausible pled his claim to avoid the R-Techo Transfers

as intentional fraudulent transfers under the 1st Claim. In short, Trustee has pled that $1.8 million was transferred from Debtor to Hyundai, via R-Techo, for no consideration as part of Hyundai's overall scheme to extract Debtor's value.

2. The second claim for relief- avoidance and recovery of constructive transfers (the "2nd Claim")

Under Civil Code § 3439.04(a)(2) and § 548(a)(1)(B), Plaintiff may avoid "constructive" fraudulent transfers if transfer was made for less than reasonably equivalent value and the debtor was, or by way of the transfer, became insolvent. "A cause of action asserting a constructively fraudulent transfer is not subject to the heightened pleading standards... These causes of action are adequately pled as to most elements with a short plain statement as required by [FRCP] 8, as modified by Twombly." Automated Fin. Corp., supra, at 5. "Reasonably equivalent value is the value of the property on the date of the transfer from the perspective of the creditors." Id. (citing In re Prejean, 994 F.2d 706, 708 (9th Cir. 1993).

"At the motion to dismiss stage, to plead adequately a constructive fraud claim all that is needed... is an allegation that there was a transfer for less than reasonably equivalent value at a time when the Debtors were insolvent." Beskrone v. OpenGate Capital Grp. (In re Pennysaver USA Publ'g, LLC), 587 B.R. 445, 456 (Bankr. D. Del. 2018) (quotations and citation omitted). "Reasonably equivalent value and insolvency are generally factual determinations that should be reserved for discovery." Id. (citation omitted). And, "[a] constructive fraudulent conveyance claim is sufficient under Rule 8(a)(2) even if it alleges an aggregate monetary amount for multiple transfers during a multi-year period without a breakdown of individual transfers." Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.), 429 B.R. 73 (Bankr. S.D.N.Y. 2010).

Here, construing the facts in the light most favorable to Trustee, the Court finds that Trustee has plead a plausible claim for constructive fraudulent transfer under the 2nd Claim. See, FAC, p. 20-21, ¶¶87-96; Opp'n, p. 19-23. As discussed above, Trustee has sufficiently pled facts regarding the CMI Notes Transfer and the R-Techo Transfers and Debtor's

insolvency when the transfers were made, and lack of reasonably equivalent value being received for the transfers.

3. The third claim for relief- avoidance and recovery of estate property by turnover (the "3rd Claim")

The 3rd Claim seeks avoidance and recovery pursuant to 11 U.S.C. § 542 and 550. See, FAC, p. 21-22, 97-99. The "trustee may recover, for the benefit of the estate, the property transferred, or if the court so orders, the value of such property" from the initial transferee or any immediate or mediate transferee. 11 U.S.C. § 550(a). Under 11 U.S.C. § 541(a)(3), any interest in property that a trustee recovers under § 550 is property of the estate. Under 11 U.S.C. § 542, an entity in possession, custody, or control of estate property that the trustee may use, sell, or lease must turnover the estate property to the trustee.

Because the 1st and 2nd Claim are plausible, the 3rd Claim, which is derivative of those claims, is also plausible because the value of any avoided transfers is property of the estate currently in the possession of Hyundai during the pendency of this case. See, Opp'n, p. 23:13-19.

4. The fourth claim for relief- avoidance of preferential transfers (the "4th Claim")

Under 11 U.S.C. § 547(b), in relevant part, the "trustee may avoid any transfer of an interest of the debtor in property- (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made: (3) made while the debtor was insolvent; (4) made– (A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if– (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provision of this title." 11 U.S.C. § 101(54)(D) defines the term "transfer" to include "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with – (i)

property; or (ii) an interest in property." 11 U.S.C. § 101(54)(D).

Thus, to state such a claim, Trustee must adequately allege (1) there was a transfer of Debtor's interest in property; (2) that was "to or for the benefit of" Hyundai; (3) "for or on account of an antecedent debt owed by the debtor before such transfer;" (4) "made while the debtor was insolvent;" (5) made within a year before the date of the filing of the petition; and (6) that enables Hyundai to receive more than it would have received in a hypothetical Chapter 7 case had the prepetition transfer not been made. 11 U.S.C. § 547(b); Screen Capital, 510 B.R. at 259-60.

Here, Trustee seeks to avoid three transfers as preferences: the First Contract Transfer, the Second Contract Transfer, and the Hyundai 1 Year Transfers. See, FAC, p. 22-24, ¶¶100-111.

The FAC alleges that on January 10, 2017, as part of the CMI Notes Transfer, Debtor paid $144,378.54 to Hyundai by way of the cancellation of an unsecured loan agreement between Debtor and Hyundai entered into on October 11, 2016 (the "First Contract Transfer"). See, FAC, p. 22, ¶102.

The FAC alleges that on January 10, 2017, also as part of the CMI Notes Transfer, Debtor paid $108,838.95 to Hyundai by way of the cancellation of an unsecured loan agreement between Debtor and Hyundai entered into on December 21, 2016 (the "Second Contract Transfer"). See, FAC, p. 22, ¶103.

The FAC further alleges that the transfers were within 1 year of the petition date to an insider of Debtor (discussed above), while Debtor was insolvent (discussed above), for the benefit of Hyundai because Hyundai would no longer be liable under the cancelled loan agreements, and Debtor had an interest in the repayment of the loan agreements as the lender. See, FAC, p. 33, ¶102-103. The FAC, however, fails to make any allegation regarding the antecedent debt that was owed by Debtor to Hyundai or that the First and Second Contract Transfer enabled Hyundai to receive more than it would in chapter 7. See, FAC, p. 24, ¶¶109-110. The allegations made in

the FAC regarding antecedent debt and received more than chapter 7 pertain only to the Hyundai 1-Year Transfers. See id. Accordingly, Trustee has failed to plead a plausible preference claim regarding the First and Second Contract Transfers.

The FAC also alleges that Debtor made transfers of scrap metal in the amount of $6.4 million to Hyundai within one year of the petition date (the "Hyundai 1 Year Transfers"). FAC, p. 22-23, ¶¶105-106. The Hyundai 1 Year Transfers are a subset of the Hyundai Transfers made within one year of the petition date. The FAC further sufficiently alleges that the transfers were within 1 year of the petition date to an insider of Debtor (discussed above), while Debtor was insolvent (discussed above), on account of the antecedent debt owed by Debtor to Hyundai in the form of letters of credit under which Debtor was liable in the event it did not ship the scrap steel to Debtor. See FAC, ¶¶107-109. The transfers sufficiently alleges that the transfers were for the benefit of Hyundai, the recipient of the scrap steel shipments, and that Hyundai received more that it would in chapter 7 because the estate has not made any distributions to unsecured creditors. See, FAC, p. 24 ¶110.

Accordingly, construing the facts in the light most favorable to Trustee, the Court finds that Trustee has plead a plausible claim for avoidance of preferential transfer under the 4th Claim with regards to the Hyundai 1 Year Transfers. See, Opp'n, p. 19-23; but see, Mot., p. 13.

5. The fifth claim for relief- recovery of avoided transfers (the "5th Claim")

The 5th Claim seeks recovery of avoided transfers under 11 U.S.C. § 550. See, FAC, p. 24-25, ¶¶112-114. The "trustee may recover, for the benefit of the estate, the property transferred, or if the court so orders, the value of such property" from the initial transferee or any immediate or mediate transferee. 11 U.S.C. § 550(a). Under 11 U.S.C. § 541(a)(3), any interest in property that a trustee recovers under § 550 is property of the estate. Accordingly, because the 1st, 2nd, and 4th Claims are plausible, the 5th Claim, which is derivative of those claims, is also plausible. See, Opp'n, p. 25:15-23.

6. **The sixth claim for relief- declaratory judgment for alter ego (the "6th Claim")**

As a preliminary matter, "State law controls whether the bankruptcy court finds alter ego" and "[t]his finding is a question of fact." *In re Pajaro Dunes Rental Agency, Inc*., 174 B.R. 557, 582 (Bankr. N.D. Cal. 1994)(citing *Matter of Christian & Porter Aluminum Co*., 584 F.2d 326, 337 (9th Cir. 1978); In re Schwarzkopf, 626 F.3d 1032 1037 (9th Cir. 2010). "It is well-settled that a bankruptcy judge's alter ego findings can only be set aside if "clearly erroneous." Christian, supra at 337. "California law provides that the party seeking to have the corporate entity disregarded has the burden of proving that the alter ego theory should be applied." Id. at 338; 21 Century Fin. Serv., LLC v. Manchester, 255 F.Supp.3d 1012, 1022 (S.D. Cal. June 8, 2017) (stating that party requesting alter ego determination bears the burden of proof by a preponderance of the evidence)(citations omitted).

Alter ego is an equitable doctrine that allows courts to ignore the corporate form when that corporate form is used to perpetuate a fraud or injustice. *Sonora Diamond Corp. v. Sup. Ct*., 83 Cal. App. 4th 523, 538 (2000). The alter ego doctrine "is an extreme remedy, sparingly used." Id. at 539.

In general, California law has a "presumption of the separate existence of the corporate entity." *Mid- Century Ins. Co. v. Gardner*, 9 Cal. App. 4th 12015, 1212-13 (1992). "Since society recognizes the benefits of allowing persons and organizations to limit their business risks through incorporation, sound public policy dictates that disregard of those separate corporate entities be approached with caution." *Pac. Landmark Hotel, Ltd. v. Marriott Hotels, Inc*., 19 Cal. App. 4th 615, 628 (1993). It "is well recognized that the law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities." Id. (citation omitted). Thus, "[t]he alter ego doctrine does not guard every unsatisfied creditor of a corporation." *Sonora Diamond,* supra, at 539.

ownership. See, *In re Schwarzkopf*, 626 F.3d 1032, 1038–39 (9th Cir. 2010) ("Hickey therefore did not foreclose the possibility that equitable ownership

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

might be sufficient in some contexts... We conclude that under California law, equitable ownership in a trust is sufficient to meet the ownership requirement for purposes of alter ego liability."); *Cambridge Elec. Corp. v. MGA Elec., Inc.,* 227 F.R.D. 313, 326 (C.D. Cal., Jun. 22, 2004)("The terminology 'alter ego' and 'piercing the corporate veil' refers to situations where there has been an abuse of corporate privilege, because of which the equitable owner of a corporation will be held liable for the actions of the corporation.")(emphasis added); *21 Century*, supra, at 1029 ("Common legal or equitable ownership is an important component of the unity of interest required to support alter ego liability under California law.")(citing Hickey); See also, *Sonora Diamond Corp. v. Superior Ct*., 83 Cal.App4th 523, 538 (2000)("Under the alter ego doctrine...the courts will... deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners.")

To determine whether there a unity of interest and ownership exists under equitable ownership, courts consider the following factors:

> Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses... the treatment by an individual of the assets of the corporation as his own... the failure to obtain authority to issue stock or to subscribe to or issue the same... the holding out by an individual that he is personally liable for the debts of the corporation... the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities... the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family... the use of the same office or business location; the employment of the same employees and/or attorney... the failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization... the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation... the concealment and

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

> misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities... the disregard of legal formalities and the failure to maintain arm's length relationships among related entities... the use of the corporate entity to procure labor, services or merchandise for another person or entity... the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another... the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions... and the formation and use of a corporation to transfer to it the existing liability of another person or entity...

Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d 825, 838-40 (1962) (citations omitted)(finding that lessee corporation under breached lease was not the alter ego of a sister corporation because, in part, the corporations were incorporated at different times, the employment of separate counsel for each corporation, keeping separate corporate records, separate, bank accounts, employees, and payroll).

No one factor is conclusive, but the application of the alter ego will entail the presences of several factors. See id. "Some of these factors are less important than others. In particular, 'courts have cautioned against relying too heavily in isolation on the factors of inadequate capitalization or concentration of ownership and control.' " *Cambridge Elecs*., supra at 326 (citing *Mid-Century*, supra, at 1213); Cf. *Slottow v. Am. Cas. Co. of Reading, Penn*., 10 F.3d 1355, 1360 (9th Cir. 1993)("Under California law, inadequate capitalization of a subsidiary may alone be a basis for holding the parent corporation liable for the acts of the subsidiary.").

In this case, the FAC alleges sufficient facts to plausibly find that there was such unity of interest and ownership between Hyundai and Debtor. While there are no allegations that Hyundai and Debtor had the same ownership with domination and control over both Hyundai and Debtor, that Hyundai held

itself out to be liable for all of Debtor's debts, or that Hyundai's assets and funds were commingled with Debtor's assets and funds,), the Court recognizes that no one factor is conclusive.

Moreover, as discussed under the 1st Claim, the facts alleged that demonstrate that Hyundai may be plausibly found to be either a statutory insider or non-statutory insider, are factual allegations that could support an alter ego claim since the factual allegations touch on several factors identified as alter ego factors that touch on the issue of Hyundai's control over Debtor: such as former Hyundai executives becoming Debtor's board members, lack of arms-length negotiations, Debtor may be a downstream subsidiary of Hyundai, etc. The test is stated as "requiring a showing that the parent controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former" such that the "parent dictates every facet of the subsidiary's business, from broad policy decisions to matters of day-to-day operations." *Gerritsen*, 116 F.Supp.3d at 1138-40 (citation omitted).

Thus, whether the factual allegations ultimately rise to the degree required to find unity of interest and ownership remains to be seen, but there are at least some factual allegations in the FAC that could plausibly support an alter ego finding. See, Opp'n, p. 26-27.

The second requirement for a finding of alter ego liability is that, if the acts are treated as those of the corporation alone, an inequitable result will follow. Associated Vendors, 210 Cal. App. 2d at 837.

"[T]he prerequisite of 'inequitable result' must coexist with the other requirement of unity of interest and ownership.... Certainly, it is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an 'inequitable result.' In almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor. The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable ... for the equitable owner of a corporation to hide behind its corporate veil." Associated Vendors, supra, at 842; see *Sonora Diamond*, supra, at 539 ("The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard").

"The kind of "inequitable result" that makes alter ego liability appropriate is an abuse of the corporate form, such as under-capitalization or misrepresentation of the corporate structure to creditors... No specific finding of bad faith is required if such an abuse is found." *Orloff v. Allman*, 819 F.2d 904, 909 (9th Cir. 1987), abrogated on other grounds *by Hollinger v. Titan Capital Corp*., 914 F.2d 1564 (9th Cir. 1990). "California courts generally require some evidence of bad faith conduct on the part of defendants before concluding that in inequitable result justifies an alter ego finding." Cambridge, supra, at 331 (citing Mid-Century, supra, at 1213.). Although actual fraud is not required, "bad faith in one form or another is an underlying consideration." *Associated Vendors*, 210 Cal.App.2d at 838. "The fact that an incorporator wishes limited liability is not, by itself, sufficient reason to pierce a corporate veil." Orloff, supra, at 909.

The FAC sufficiently pleads factual allegations that an inequitable result will follow if corporate formalities are observed. See, Opp'n, p. 28. The FAC alleges that Hyundai extracted millions of dollars from Debtor in fraudulent transfers while Debtor's creditors remain unpaid. See, FAC, p. 27-28, ¶¶128-130. And contrary to Hyundai's assertion that there have been no material changes to this claim, see, Mot., p. 15-16, the FAC includes several additional material facts providing context to Hyundai's alleged scheme to recoup its $10 million dollar More loss from Debtor that adds substance to the inequitable result allegation. See, FAC, ¶¶28-, and 50.

Construing the facts in the light most favorable to Trustee, the Court finds that Trustee has plausible pled his claim for declaratory judgment finding Hyundai to be the alter ego of Debtor under the 6th Claim. In short, alter ego is factually intensive inquiry and Trustee has pled at least some factual allegations touching on alter ego factors that could plausibly support an alter ego finding.

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

7. The seventh claim for relief- violation of the Sherman Act, 15 U.S.C. § 1, Unlawful Restraint on Trade (the "7th Claim")

"Antitrust cases are not to be judged by a higher or different pleading standard than other cases… An antitrust plaintiff 'need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws.'" *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000). "Because § 1 of the Sherman Act does not prohibit [all] unreasonable restraints of trade ... but only restraints effected by a contract, combination, or conspiracy,…the crucial question is whether the challenged anticompetitive conduct "stems from independent decision or from an agreement, tacit or express[.]" *Twombly*, 550 U.S. at 553.

To state a claim under the Sherman Act, §1, "claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Id. "[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice." Id.

"[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy…The Sherman Act proscribes agreements to restrain trade, whether express or implicit or whether by formal agreement or otherwise… While conclusory allegations of parallel conduct will not suffice, the pleadings need only allege enough facts "to suggest that an agreement was made." *Solyndra Residual Tr. by & through Neilson v. Suntech Power Holdings Co*., 62 F. Supp. 3d 1027, 1040 (N.D. Cal. 2014)

The following elements must be satisfied for a cause of action under the Sherman Act, § 1: "(1) a contract, combination, or conspiracy (2) intended to harm or restrain trade (3) that actually injures competition and (4) harms plaintiff. Solyndra Residual Tr., supra, at 1039). "When horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs. This is seen most often in claims by overcharged buyers; as to

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

underpaid sellers it is less common in the reported cases, but is equally true." *Knevelbaard*, supra, at 988; see Opp'n, p. 29:4-10. "In the antitrust context, there is a presumption that legitimate business justifications exist for companies' conduct. *In re Musical Instruments*, 798 F.3d at 1189; see Twombly, 550 U.S. at 566-68. The threshold pleading requirement is not met if the allegations are merely "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 554." Mot., p. 17:14-18. A plaintiff "is required to plead that he was harmed by the alleged antitrust violation" and that the harm "suffered was caused by the anti-competitive aspect of the defendants' conduct." *In re Nat'l Football League's Sunday Ticket Antitrust Litig*., 933 F.3d 1136, 1150 (9th Cir. 2019); See, Mot., p. 18:13-15.

In this case, the FAC fails to allege a plausible claim for relief because the FAC fails to allege an agreement or conspiracy to manipulate the price of steel that injured plaintiff because , at best, Debtor alleges that . See, FAC, ¶¶135; Mot., p. 16-17.

The FAC alleges , at best, that if any agreement, or conspiracy, was reached, Debtor was a party to the agreement or conspiracy because Debtor, under Hyundai's control, sold scrap metal at below-market value to Hyundai- thereby harming the West Coast scrap metal industry by artificially depressing the price of scrap metal. See, FAC, ¶¶1-3, 50, 139, 148. In other words, Debtor lists several entities that were allegedly engaged in this price-fixing activity (Hyundai, R-Techo, MKLUS, LACWK, and CMI) but the alleged facts demonstrate that Debtor was a part of that group also- again, all under Hyundai's alleged control. In short, the FAC alleges facts that Debtor itself engaged in illegal price fixing activity with Hyundai by selling below-market value scrap steel for years, and it is now seeking relief against Hyundai for its own alleged bad acts.

Hyundai's argument that 7th Claim is "impossible" based on Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769–70 (1984), which held that coordinated activity between a parent and its wholly owned subsidiary must be viewed as a single enterprise for purposes of the Sherman Act, § 1, is unpersuasive because Trustee is allowed to plead alternate

theories of claim and inconsistent claims because FRCP 8(d)(3) expressly states that, "A Party may state as many separate claims or defenses as it has, regardless of consistency" See, Opp'n, p. 32; Mot., p. 19.

8. The eighth claim for relief- violation of the Sherman Act, 15 U.S.C. § 2, attempted monopolization and conspiracy to monopolize (the "8th Claim")

"Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action 'monopolize[s],' 15 U.S.C. § 2, or 'threatens actual monopolization,' ... a category that is narrower than restraint of trade." Solyndra Residual Tr. by & through Neilson v. Suntech Power Holdings Co., 62 F. Supp. 3d 1027, 1041 (N.D. Cal. 2014). "Monopolization, the first breed of Section 2 claim, targets "the conduct of a single firm…and is unlawful only when it threatens actual monopolization." Copperweld, 467 U.S. at 767. The U.S. Supreme Court describes the high pleading threshold as follows: "[i]t is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression." Id." Mot., p. 20:7-11. "Monopolization under § 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Aspen Skiing Co. v. Aspen Highlands Skiing Co., 472 U.S. 585, 596 n.19 (1985)." Opp'n, p. 33:16-20.

In this case, the FAC fails to allege a plausible claim for relief because the FAC fails sufficient facts that demonstrate that Hyundai has "the possession of monopoly power" over the West Coast scrap metal industry. See, FAC, ¶¶146-155; Mot., p. 19-21. The FAC merely makes the blanket statement that "Hyundai has a long history of wielding monopoly and monopsony power, including in the West Coast scrap metal market as a buyer." FAC, ¶148. Indeed, even the alleged factual statement that Hyundai is the "largest buyer of scrap steel in the West Coast scrap steel market" does not plausibly establish that Hyundai holds monopoly power in the scrap metal industry without further allegations regarding the overall size of the buyer market and Hyundai's place in the market. For example, there could be

99 buyers, including Hyundai, in the scrap steel market with each buyer representing 1% of the market except for Hyundai who represents 2%. In this scenario, Hyundai would be the largest buyer but it strains plausibility that Hyundai would be wielding monopolistic power in the market.

The FAC's further allegations that Hyundai conspired to acquire, or attempted to acquire, a monopoly in the West Cost scrap metal market also lack sufficient factual allegations to find that the claim is plausible. See, FAC, ¶¶150-153. "Conspiracy to monopolize requires: "(1) the existence of a combination or conspiracy to monopolize, (2) an overt act in furtherance of the conspiracy, (3) the specific intent to monopolize, and (4) causal antitrust injury." *Paladin Associates, Inc. v. Montana Power Co*., 328 F.3d 1145 (9th Cir. 2003)." Opp'n, p. 34:28-35:3. " Attempted monopoly requires: "1) a specific intent to monopolize a relevant market; 2) predatory or anticompetitive conduct; and 3) a dangerous probability of success." *Alaska Airlines, Inc. v. United Airlines*, Inc., 948 F.2d 536, 541–42 (9th Cir. 1991)." Opp'n, p. 34:11-13. Again, without further factual allegations regarding the size of the market, construing the factual allegations as true and in the light most favorable to Trustee, the FAC alleges that Hyundai attempted to, or conspired to, monopolize the scrap steel market by controlling just 4 scrap metal companies (CMI, Debtor, R-Techo, MKLUS) in an market with a currently unknown total number of scrap metal companies. See also, Mot., p. 19-21; but see, Opp'n, p. 33-35.

9. The ninth claim for relief- unfair competition in violation of Cal. Bus. & Prof. Code § 17200 (the "9th Claim")

"Under the California Unfair Competition Law ("UCL"), "unfair competition shall mean and include any unlawful, unfair, or fraudulent business act or practice . . ." Cal. Bus. & Prof. § 17200." Mot., p. 22:9-11. The UCL "proscribes conduct forbidden by other state and federal laws. "Claims under this statute are thus entirely derivative*." Maxim Integrated Prod., Inc. v. Analog Devices, Inc.,* No. 1994 WL 514024, at *4 (N.D. Cal. Sept. 7, 1994), aff'd in relevant part, rev'd in part on other grounds, 79 F.3d 1153 (9th Cir. 1996). If the underlying antitrust claim survives a Rule 12(b)(6) challenge, the corresponding unfair competition claim will persist as well. See N. California Minimally *Invasive Cardiovascular Surgery, Inc. v. Northbay*

Healthcare Corp., No. 2016 WL 1570015, at *6 (N.D. Cal. April 19, 2016)." Opp'n, p. 35:18-27. Here, as discussed above, because the FAC fails to allege plausible claims for relief under the Sherman Act under the 7th and 8th Claims, the FAC fails to allege a plausible claim for relief under the Cal. Bu. & Prof. Code § 17200 under either the unlawful, unfair, or fraudulent prongs of the UCL. See, Mot., p. 22-23; but see, Opp'n, p. 35.

10. The tenth claim for relief- collusion to restrain trade in violation of Cal. Bus. & Prof. Code § 16700 (the "10th Claim")

"The Cartwright Act prohibits, among other things, any combination "[t] o prevent competition in [the] sale or purchase of ... any commodity" or to "[a] gree in any manner to keep the price of ... [any] commodity ... at a fixed or graduated figure." *Knevelbaard Dairies v. Kraft Foods, Inc*., 232 F.3d 979, 986 (9th Cir. 2000)(citing Cal. Bus. & Prof.Code § 16720(c) and (e)(2)). "The requirements to plead a claim under California's Cartwright Act are patterned after Section 1 of the Sherman Act." Kelsey K., 757 F. App'x at 527 (borrowing its Sherman Act Section 1 reasoning to dismiss a Cartwright Act claim outright); Cascades Computer Innovation, LLC v. RPX Corp., 719 F. App'x 553, 555 (9th Cir. 2017) (affirming district court's dismissal of state law Cartwright Act claims "with prejudice because they are inadequate for the same reasons as the federal antitrust claims.")." Mot., p. 31:17-22.

Like the 9th Claim, because the FAC fails to allege plausible claims for relief under the Sherman Act under the 7th and 8th Claims, the FAC fails to allege a plausible claim for relief under the Cartwright Act under the 10th Claim. See, Mot., p. 21-22; but see, Opp'n, p. 36.

11. The eleventh claim for relief- fraud (the "11th Claim")

"'A complaint for fraud must allege the following elements: (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages.' *Service by Medallion, Inc. v. Clorox Co*. (1996), 44 Cal.App.4th 1807, 1816. '[F]raudulent intent is an issue for the trier of fact to decide." *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061.'" Opp'n, p. 36:21-25.

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

As a preliminary matter, the 11th Claim is not based on the Supply Contract. Rather, the FAC alleges that the representation is akin to a separate "promise" made by Hyundai to Debtor to induce Debtor to make the CMI Notes Transfer. Thus, the Court's prior order granting Hyundai's motion to dismiss the breach of contract and breach of covenants of good faith and fair dealing claims for relief do not preclude Trustee from bring this clams. See, Mot., p. 23; Opp'n, p. 36-37.

Construing the allegations as true and in the light most favorable to Trustee, the FAC fails to allege a plausible claim for fraud due the heightened pleading standard of FRCP 9(b). The FAC fails to allege any facts with particularity regarding the actual representations made by Hyundai or its agents. See, FAC, ¶172. The FAC alleges that representations were made that Hyundai would continue to purchase Debtor's scrap metal if the CMI Notes Transfer was competed, but no details regarding when or how these alleged representation were made is alleged. The FAC does, however, allege sufficient facts from which falsity of the representation and intent to deceive can be inferred because Hyundai stopped purchasing Debtor's scrap metal immediately after the CMI Notes Transfer was completed even though Debtor's counsel, who also represented Hyundai and was paid by Hyundai during the CMI Notes Transfer negotiations, sent a letter to the bank who was withholding consent to the CMI Notes transfer and effectively threatened the bank with non-payment of Debtor's debt if the bank did not consent to the transfer because Hyundai would cease doing business with Debtor: "The broken trust and relationship with the largest buyer will likely result in the unrecoverable business damages on [Debtor's] business. See, FAC, FAC, ¶¶ 66, 125, 73-176 and Ex. 6. The FAC allegations regarding Debtor's justifiable reliance is similarly plausible based on the letter provided to the bank by Debtor and Hyundai's counsel. See id. Finally, Trustee has alleged sufficient facts regarding damages because, as discussed under the 1st Claim, there was likely some amount of equity that Debtor would have likely recovered upon foreclosing on the collateral securing the defaulted CMI Notes. See, FAC, ¶¶178-179.

Leave to Amend

Leave to amend a complaint or claim is generally within the discretion

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

of the bankruptcy court and is reviewed under the abuse of discretion standard. *Mende v. Dun & Bradstreet, Inc.*, 670 F.2d 129 (9th Cir. 1982). Federal Rule of Civil Procedure 15 (made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7015) provides that a party may amend the party's pleading by leave of court and leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a). The Ninth Circuit applies this rule with "extreme liberality." Forsyth v. Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997). In exercising its discretion, a bankruptcy court "must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities." *In re Magno*, 216 B.R. 34 (9th Cir. BAP 1997). A bankruptcy court considers the following factors in determining whether a motion to amend should be granted: (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party. *Hurn v. Retirement Fund Trust of Plumbing, Etc.*, 648 F.2d 1252, 1254 (9th Cir. 1981).

In this matter, the court does not believe that further leave to amend should be granted as Trustee has been permitted multiple opportunities to properly plead his claims. At some point, Defendant is entitled to finality of the pleading stage.

Party Information

Debtor(s):

Prime Metals U.S.A., Inc. — Represented By Steven Werth

Defendant(s):

Hyundai Steel Company — Represented By Philip S Warden

Plaintiff(s):

Richard A Marshack — Represented By Ronald S Hodges

2:00 PM
CONT... Prime Metals U.S.A., Inc. **Chapter 7**

Robert P Goe
Ryan S Riddles

Trustee(s):

Richard A Marshack (TR) Represented By
D Edward Hays
Laila Masud
David M Goodrich
Robert P Goe

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

2:00 PM

8:17-14535 Prime Metals U.S.A., Inc. **Chapter 7**

Adv#: 8:19-01216 Marshack v. Hyundai Steel Company

#24.00 CON'TD STATUS CONFERENCE RE: Complaint For: 1. Breach of Contract; 2. Breach of Implied Covenant of Good Faith and Fair Dealing; 3. Avoidance and Recovery of Intentional Fraudulent Transfers; 4. Avoidance and Recovery of Constructive Fraudulent Transfers; 5. Avoidance and Recovery of Property of the Bankruptcy Estate; 6. Temporary Restraining Order and Preliminary Injunction; 7. Avoidance of Preferential Transfers; 8. Recovery of Avoided Transfers; 9. Substantive Consolidation; 10. Declaratory Judgment: Alter Ego

FR: 2-6-20; 4-2-20; 8-20-20

Docket 1

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

August 20, 2020

Continue Status Conference to October 1, 2020 at 2:00 p.m., same date/time as hearing on pending motion to dismiss. An updated Joint Status Report is not required. (XX)

Note: Appearances at today's hearing are not required.

Party Information

Debtor(s):

Prime Metals U.S.A., Inc. Represented By
Steven Werth

Defendant(s):

Hyundai Steel Company Represented By
Philip S Warden

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, October 1, 2020 **Hearing Room 5A**

2:00 PM

CONT... Prime Metals U.S.A., Inc. **Chapter 7**

Plaintiff(s):

Richard A Marshack	Represented By Ronald S Hodges Robert P Goe Ryan S Riddles

Trustee(s):

Richard A Marshack (TR)	Represented By D Edward Hays Laila Masud David M Goodrich Robert P Goe