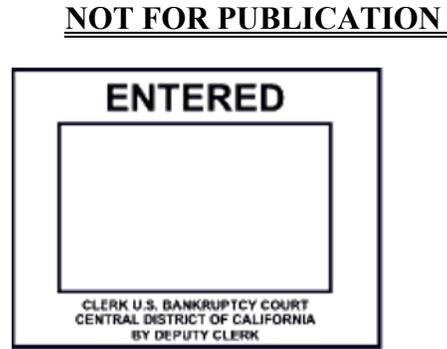


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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA**

In re )  
LAU CAPITAL FUNDING, INC., )  
Debtor. )  
\_\_\_\_\_)  
NANCY KNUPFER, )  
CHAPTER 7 TRUSTEE )  
Plaintiff, )  
vs. )  
HSA RESIDENTIAL MORTGAGE )  
SERVICES OF TEXAS, INC., a Delaware )  
Corporation, AIG INTERNATIONAL )  
GROUP, INC., and DOES 1 through 20, )  
inclusive )  
Defendants. )  
\_\_\_\_\_)

Case No. LA 99-37171 ES RN  
Adversary No.: AD 02-01413 ES RN  
Chapter 7

**MEMORANDUM DECISION ON  
DEFENDANTS' SECOND MOTION  
FOR SUMMARY JUDGMENT  
[FRAUD CLAIM]**

The debtor, Lau Capital Funding ("LCF" or "debtor") filed a voluntary Chapter 11 petition on July 20, 1999 and voluntarily converted to Chapter 7 on November 2, 1999. The Chapter 7 Trustee, Nancy Knupfer ("Trustee" or plaintiff"), commenced an adversary action on March 12, 2002 against HSA Residential Mortgage Services of Texas, Inc. ("HSA" or "defendants") on the following claims: breach of contract, avoidance, turnover, fraud,

1 conversion, goods sold and delivered, declaratory relief, waste, and special relief. On February  
2 15, 2006, the Court issued a memorandum decision granting in part and denying in part  
3 defendants' motion for summary judgment ("Memorandum Decision"). As a result, only the  
4 fraud cause of action remained. In the Memorandum Decision, the Court specified that the  
5 defendants' motion for summary judgment on the fraud claim was being "denied without  
6 prejudice, to renew at a later date." See Memorandum Decision, p. 21, line 10.5. Defendants  
7 now bring this Second Motion for Summary Judgment with the goal of dispensing with the  
8 Trustee's fraud claim.  
9

10 The Court issues this memorandum in support of its decision.  
11

### 12 **Summary Judgment Standard**

13  
14 In considering a motion for summary judgment, the court must view the evidence, and all  
15 justifiable inferences drawn from that evidence, in the light most favorable to the non-moving  
16 party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). "A party seeking summary  
17 judgment always bears the initial responsibility of informing the [court] of the basis for its  
18 motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories,  
19 and admissions on file, together with the affidavits, if any,' which it believes demonstrates the  
20 absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).  
21

22 However, even though the moving party bears the initial burden of demonstrating the  
23 absence of a "genuine issue of material fact for trial," the party opposing a motion for summary  
24 judgment may not rely on mere allegations or denials of the pleadings. Anderson v. Liberty  
25 Lobby, Inc., 477 U.S. at 256, 248. Once the moving party has met its initial burden, the party  
26 opposing summary judgment must present specific facts showing that there is a genuine issue for  
27 trial. Id. at 248. If the non-moving party fails to make a showing sufficient to establish the  
28

1 existence of an element essential to the party's case, on which the party would bear the burden of  
2 proof at trial, the court may grant summary judgment against that party. Celotex, 477 U.S. at  
3 322.  
4

### 5 6 **Procedural Issue**

7 As a preliminary matter, the Trustee argues that the defendants' Second Motion for  
8 Summary Judgment is improper because defendants were required to seek leave of Court to file  
9 the motion. Although the Court denied defendants' motion for summary judgment on the fraud  
10 claim, the Court denied it without prejudice, to renew at a later date. As explained in my earlier  
11 ruling, the Spoliation Motion had not yet been decided, and at that procedural junction, the  
12 possibility that reasonable inferences in favor of the Trustee could be made was still open.  
13 Therefore, defendants did not need to request leave of court to file the Second Motion for  
14 Summary Judgment.  
15

### 16 17 **The Trustee's Fraud Claim**

18 The Trustee's fraud claim seemingly rests upon two theories. The first theory is that  
19 defendants made representations in the Agreement that they would acquire and fund LCF's  
20 customer accounts, but never actually had the intention of doing so. The second theory is that  
21 defendants entered the deal with LCF with the intention eliminating LCF as a competitor and  
22 frustrating LCF's reorganization plans by obtaining LCF's customer list and not entering  
23 relationships with all 18 customers on the list.  
24

25 On the Trustee's fraud claim, she must prove the following elements: (1) defendants  
26 made representations, (2) defendants knew the representations were false at the time they were  
27 made, (3) defendants made the representations with the intent and purpose of deceiving plaintiff,  
28

1 (4) plaintiff justifiably relied on defendants' representations, and (5) plaintiff sustained a loss  
2 and damage as a proximate cause of the defendants' representations. See Molko v. Holy Spirit  
3 Assn., 46 Cal.3d 1092, 1108 (1988). The Trustee has the burden of proof at trial on these  
4 elements.  
5

6 For the reasons discussed in the breach of contract and fraud claim sections of the  
7 Court's Memorandum Decision, filed February 15, 2005, the Trustee's fraud claim based on the  
8 first theory is not supported by the evidence. The language of the contract is clear. HSA had  
9 sole discretion and was under no obligation to fund all or any of the 18 LCF customers on the  
10 list. HSA purchased LCF's customer list to use at its own discretion. Because the contract terms  
11 are unambiguous and because the Trustee has not presented any evidence to contradict the terms  
12 of the Agreement, the Trustee has no grounds to claim defendants made any false representations  
13 in the Agreement. Moreover, "there cannot be reasonable reliance upon misrepresentations or a  
14 failure to disclose that are contradicted by the express language of the . . . contract." Baymiller  
15 v. Guarantee Mutual Life Co., 2000 WL 33774562 (C.D. Cal. 2000). Even if the Court accepts  
16 the Trustee's argument that defendants never intended to enter relationships with all 18  
17 customers despite signing the Agreement, LCF cannot claim reasonable reliance on alleged  
18 misrepresentations that contravene the plain language of the Agreement.  
19  
20

21 Similarly, the Trustee's second theory of fraud is unsustainable. The Trustee argues that  
22 HSA obtained LCF's customer list in a plan to thwart LCF's reorganization efforts and to put  
23 LCF out of business. However, the Trustee has not produced any facts that support or that  
24 would give rise to reasonable inferences to support this theory of fraud. The first element is  
25 wholly absent. The Trustee has not identified any fraudulent representations, either in the  
26 Agreement or outside of the Agreement. Furthermore, the Court cannot discern any. As the  
27 Court has already discussed with respect to the Trustee's first theory of fraud, the Agreement  
28

1 does not reflect any false representations. HSA did not have a duty to fund all, or any, of the 18  
2 LCF customers on the list under the Agreement. Moreover, the Trustee has not produced any  
3 evidence to show that defendants made any promises or representations to debtor beyond those  
4 contained in the Agreement. A secret motive is not a representation upon which a plaintiff's  
5 fraud claim can rest.  
6

7         The second, third, and fourth elements are also unsupported by the evidence. Without a  
8 representation being offered, the remaining elements cannot be proven because each of the  
9 elements hinge on a representation being made. Regarding the second element, there can be no  
10 false representation if there was never a representation being made in the first place. The  
11 Trustee is also unable to prove the fourth element, justifiable reliance, given the fact that the  
12 Agreement specifically gave defendants the discretion to choose with which, if any, of the 18  
13 customers it wished to do business.  
14

15         Even if the Court were to assume that defendants made a representation to LCF that they  
16 knew to be false at the time of making it, plaintiff has no facts or circumstantial evidence to  
17 support the third element of fraudulent intent. The Trustee's sole piece of evidence regarding  
18 intent, whereby Trevino's discovery that LCF was going to "park" customers with defendants  
19 allegedly caused HSA to seek the elimination of LCF as a competitor, lacks relevance. Trevino  
20 did not learn about LCF's purported plan until after the Agreement was signed. To prove fraud,  
21 plaintiff must show that defendants had the intent to deceive at the time of representation, or in  
22 this case, at the time the Agreement was entered. There has been no evidence to show that  
23 defendants did not intend to pursue relationships with each of the 18 customers on the list at the  
24 time they signed the Agreement. The fact that defendants only entered relationships with 4 of  
25 the 18 customers is of no consequence. There are many reasons, unrelated to fraud, why  
26 defendants might not have entered relationships with the remaining customers. Perhaps those  
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28

1 customers did not wish to do business with defendants. LCF's former customers were free to do  
2 business with whomever they wanted, including LCF if it had reorganized and returned as a  
3 mortgage warehouse lending business. The Court need not speculate as to the many plausible  
4 reasons that HSA did not enter relationships with all 18 customers. Moreover, the  
5 uncontradicted testimony of Trevino refutes the Trustee's other theory of fraudulent intent, that  
6 Trevino may have intended to pursue all relationships but that the parent company, AGF, never  
7 had the same intention. Trevino testified that the desire to enter relationships with the LCF  
8 customers was never "thwarted by AGF" and that AGF "would agree to enter into any  
9 relationship [Trevino] suggested." Trevino's testimony has not been contradicted by any  
10 evidence submitted by plaintiff.  
11

12  
13 Lastly, as to the issue of damages, the Trustee has provided no evidence to prove  
14 damages resulted from defendants' representations. LCF's reorganization efforts were ended  
15 when LCF filed for voluntary conversion to chapter 7 one month after the Agreement was  
16 signed, not because of any scheming by defendants. LCF ended its own business; it wasn't  
17 caused by the actions of defendants. The loss of LCF's customers to HSA was the result of the  
18 sale of LCF's customer list to HSA and the inability of LCF to recapture those customers was the  
19 result of LCF's filing for conversion to chapter 7. Because of the voluntary conversion only one  
20 month after the Agreement was signed, plaintiff is not able to demonstrate the necessary nexus  
21 between defendants' alleged fraudulent conduct and damage to LCF.  
22

23 The Trustee argues that defendants' Second Motion for Summary Judgment is premature  
24 due to Judge Smith's ruling on the Trustee's Spoliation Motion, which was heard on May 17,  
25 2005. At the hearing, Judge Smith explained that she was denying the Spoliation Motion,  
26 subject to being renewed at the time of trial, because any inferences to be drawn could only be  
27 drawn in the context of trial or a motion for summary judgment. The inferences to be drawn  
28

1 from any discovery failures cannot be drawn in a vacuum, but must be considered in the context  
2 of the evidence and the applicable legal burden of proof. This Court now has the proper context  
3 since it is reviewing the facts and evidence submitted in connection with the defendants' Second  
4 Motion for Summary Judgment. While all reasonable inferences must be made in favor of the  
5 Trustee, summary judgment may not be defeated by evidence that amounts to mere speculation.  
6 The Court is only allowed to make reasonable inferences from specific facts produced.  
7 Considering the evidence proffered in the Spoliation Motion along with evidence provided in the  
8 summary judgment motion, the Court concludes that the facts provided, and all reasonable  
9 inferences to be drawn from these facts, in relation to the Trustee's allegations of defendants'  
10 improprieties, are not sufficiently strong enough to raise a genuine issue for trial.  
11

12  
13 The Trustee has the burden of proof at trial on all the elements of her fraud claim. An  
14 adverse inference deriving from her Spoliation Motion would only aid in establishing the  
15 element of intent. The Trustee has not shown that there are any disputes as to material facts  
16 concerning the other elements of fraud, and therefore, a ruling in favor of the Trustee on the  
17 Spoliation Motion would not affect this Court's ruling on the defendants' Second Motion for  
18 Summary Judgment.  
19

20 Essentially, the Trustee seeks to continue the defendants' Second Motion for Summary  
21 Judgment and to delay any ruling on the Trustee's fraud claim until trial based on claims of  
22 undiscovered facts. However, the Trustee has not followed the applicable rule and procedure as  
23 established in Bankruptcy Rule 7056, which incorporates Federal Rule of Civil Procedure 56(f):  
24

25 References in memoranda and declarations to a need for discovery do not qualify  
26 as motions under Rule 56(f). Rule 56(f) requires affidavits setting forth the  
27 particular facts expected from the movant's discovery. Failure to comply with the  
28 requirements of Rule 56(f) is a proper ground for denying discovery and  
proceeding to summary judgment.

1 Barona Group of the Capitan Grande Band of Mission Indians v. American Management  
2 & Amusement, 840 F.2d 1394, 1400 (9th Cir. 1988); Brae Transp., Inc. v. Coopers &  
3 Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986); Foster v. Arcata Assoc., Inc., 772 F.2d  
4 1453, 1467 (9th Cir. 1985); see also Fed. Bankr. P. 7056; Fed. R. Civ. P. 56(f).

4 A party opposing a motion for summary judgment based on a need to conduct more  
5 discovery must “make clear what information is sought and how it would preclude  
6 summary judgment.” Barona Group of the Capitan Grande Band of Mission Indians, 840  
7 F.2d at 1400; Garrett v. City and County of San Francisco, 818 F.2d 1515, 1518 (9th Cir.  
8 1987); Continental Maritime of San Francisco v. Pacific Coast Metal Trades, 817 F.2d  
9 1391, 1395 (9th Cir. 1987) (“The mere hope that further evidence may develop prior to  
10 trial is an insufficient basis for a continuance under Fed.R.Civ.P. 56(f).”). In this case,  
11 the Trustee did not file an affidavit to support the request to continue summary judgment,  
12 as is required under Rule 56(f). Moreover, although the Trustee states in her  
13 memorandum in opposition to the motion for summary judgment that she seeks the  
14 production of all credit committee meeting minutes, the Trustee fails to allege what  
15 specific facts are anticipated from those documents and how those facts would impact the  
16 disposition of the defendants’ Second Motion for Summary Judgment. The import of  
17 further discovery to the outcome of summary judgment has not been properly  
18 demonstrated by the Trustee; therefore, the Court need not defer ruling on defendants’  
19 Second Motion for Summary Judgment.  
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23 The Court further notes that the Trustee’s complaint regarding unproduced credit  
24 committee meeting minutes and the related Spoliation Motion were not brought in a  
25 timely fashion. The alleged missing documents should have been pursued earlier as a  
26 discovery dispute under Bankruptcy Rule 7037, which incorporates Federal Rule of Civil  
27 Procedure 37. Upon failing to bring the appropriate Rule 37 motion by the close of  
28

1 discovery, the Trustee should have filed the Spoliation Motion in time for the Court's  
2 concurrent consideration with defendants' First Motion for Summary Judgment.

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4  
5 **CONCLUSION**

6 For the foregoing reasons, as there are no genuine issues of material fact remaining for  
7 trial, defendants' Second Motion for Summary Judgment on the remaining claim of fraud is  
8 granted.

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13 DATED: February 22 , 2006

\_\_\_\_\_  
/s/  
MAUREEN A. TIGHE  
United States Bankruptcy Judge

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**CERTIFICATE OF SERVICE BY MAIL**

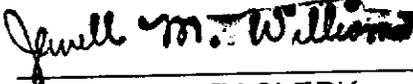
I certify that a true copy of this **MEMORANDUM DECISION ON DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT [FRAUD CLAIM]**, was mailed on **FEB 22 2006** to the parties listed below:

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