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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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11 In re
12 KAVEH LAHIJANI,

Case No. SV 98-15561 GM
Chapter No. 7

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15
16 Debtor.

Adv. No. SV 02-01797 GM

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18 KAMIAR SIMANTOB, KAMRAN SIMANTOB,
19 and NASSER LAHIJANI,

20 Plaintiffs,

**MEMORANDUM OF OPINION RE
PLAINTIFFS' MOTION FOR
SUBSTANTIVE CONSOLIDATION**

21 v.

22 KAVEH LAHIJANI,

23 Defendant.

Date: July 14, 2005
Time: 10:00 a.m.
Place: Courtroom 303

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26 **I. INTRODUCTION**

27 This decision arises out of an adversary proceeding in which
28 Kamiar Simantob, Kamran Simantob and Nasser Lahijani ("Plaintiffs")

1 moved to substantively consolidate two non-debtor corporations, Elan
2 Enterprises, Inc. ("Elan"), an entity created pre-petition, and Vista
3 Lane, LLC ("Vista"),¹ an entity created after the bankruptcy filing,
4 with the bankruptcy estate of Kaveh Lahijani ("Debtor"). This opinion
5 addresses the following issues: 1) whether creditors have standing to
6 bring a motion for substantive consolidation, 2) whether the two non-
7 debtor corporations may be substantively consolidated with the
8 bankruptcy estate, and (3) whether *nunc pro tunc* consolidation as of
9 the petition date is appropriate.

11 II. PROCEDURAL HISTORY

12 On April 22, 1998, Debtor filed a voluntary petition under
13 chapter 7 of the Bankruptcy Code.² The Debtor was granted a discharge
14 on August 7, 1998, and the case was closed as a no-asset case on
15 August 3, 1999.

16 The Debtor had a preexisting business relationship with the
17 Plaintiffs in connection with two real estate developments financed by
18 Plaintiffs in 1987 and 1988 for which Debtor served as developer and
19 manager. Plaintiffs allege that Debtor engaged in fraud and
20 embezzlement and that his conduct resulted in approximately \$7 million
21 worth of losses to Plaintiffs.

23 ¹The amended second amended complaint filed by Plaintiffs on July
24 23, 2003, identifies Vista as "630 Vista Lane LLC." However, the motion
25 for substantive consolidation filed on November 5, 2003, identifies
26 Vista as "Vista Lane LLC." It appears that this is one and the same
27 entity because it is described as being the owner of 630 Vista Lane,
Laguna Beach, California. However, Plaintiffs are ordered to clarify
this fact in their supplemental evidence regarding the date of Vista's
formation (as discussed below and as required in the order accompanying
this memorandum).

28 ²This case was initially assigned to Judge Greenwald. Upon Judge
Greenwald's retirement, the case was reassigned to me on June 1, 2005.

1 When Debtor filed bankruptcy in April 1998, he did not list
2 Plaintiffs on his schedules and they did not make an appearance in the
3 case. In May 2000, Plaintiffs sued Debtor and others in the Los
4 Angeles County Superior Court, alleging intentional misrepresentation,
5 fraudulent concealment, rescission, conspiracy to defraud, breach of
6 fiduciary duty, imposition of constructive trust, and conversion.³
7 Debtor filed a cross-complaint and, on March 20, 2002, brought a
8 motion to reopen the bankruptcy case to include the cross-complaint as
9 an asset of the bankruptcy estate.⁴ Peter C. Anderson was appointed
10 chapter 7 trustee ("Trustee").

11 On September 3, 2002, Plaintiffs filed (1) an unsecured
12 proof of claim in the sum of \$9,786,000⁵ and (2) an adversary
13 complaint to determine dischargeability of debt pursuant to §§
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16 ³Plaintiffs first discovered the alleged fraud in late 1999 (see
17 Amended Second Amended Complaint, ¶ 30), and admit to knowing about the
18 bankruptcy when they filed their state court complaint (see Joint Status
Report filed on June 17, 2005, p.6, l.19), at which point the Debtor had
already received his discharge and the bankruptcy case had been closed.

19 ⁴After the bankruptcy case was reopened, Plaintiffs tried to have
20 the state court action removed to the bankruptcy court. However,
21 pursuant to an order entered on December 23, 2002, Judge Greenwald
22 remanded the matter, allowing the Debtor to defend the state court
23 action and proceed with his cross-complaint. Despite this order, on
24 February 13, 2003, the Debtor filed a motion for relief from stay to be
25 allowed to proceed with his cross-complaint in state court, stating that
26 Plaintiffs still maintained the position that Debtor was not authorized
to do so. In response, Plaintiffs asserted that the Debtor was not
authorized to prosecute the cross-complaint until it had been abandoned
by the Trustee. Relief from stay was granted on June 11, 2003,
retroactive to June 6, 2002, the date the bankruptcy case was reopened.
In addition, the order provided that relief from stay was not necessary
for the Debtor or the Trustee to proceed with prosecution of the cross-
complaint.

27 ⁵After the Debtor filed an objection to Plaintiffs' claim, Judge
28 Greenwald consolidated the objection with the instant adversary
proceeding pursuant to order entered on September 25, 2003. Six (6)
other proofs of claim were filed in this case and approximately 20-25
creditors are listed on the creditor matrix.

1 523(a)(2)(A) and (a)(4)⁶ and to revoke debtor's discharge pursuant to
2 § 727(a)(4). Following the entry of an order granting Debtor's motion
3 to dismiss for failure to state a claim, the original adversary
4 complaint was amended on January 31, 2003 to include an additional
5 cause of action under § 523(a)(6). Debtor moved to dismiss
6 Plaintiffs' first amended complaint and, at a hearing held on March 6,
7 2003, Judge Greenwald dismissed Plaintiffs' § 727 cause of action on
8 the ground that it was time-barred pursuant to § 727(e).⁷ The court
9 further granted Plaintiffs leave to amend their allegations in
10 accordance with § 523(a)(3)(B) regarding Plaintiffs' lack of notice or
11 actual knowledge of Debtor's bankruptcy filing in time to file a proof
12 of claim and dischargeability complaint.

13 On March 24, 2003 Plaintiffs filed a second amended
14 complaint which included an additional five causes of action and new
15 non-debtor defendants.⁸ Debtor moved to dismiss and at a hearing on
16 May 29, 2003, Judge Greenwald granted the dismissal of several of
17 Plaintiffs' claims. The claims for conspiracy to defraud, conspiracy
18 to convert and breach of fiduciary duty were dismissed with prejudice,
19 while the §§ 542 and 548 claims were dismissed without prejudice.
20 Judge Greenwald also dismissed all non-debtor defendants

21 Further, at a continued hearing on July 18, 2003, Judge

22 ⁶All "section" references are to 11 U.S.C. 101 et seq. and all
23 "rule" references are to the Federal Rules of Bankruptcy Procedure.

24 ⁷This order was affirmed by the District Court but is now on appeal
25 at the Ninth Circuit Court of Appeals.

26 ⁸Plaintiffs' second amended complaint included causes of action
27 pursuant to §§ 523(a)(2)(A), (a)(4), and (a)(6), as well as conspiracy
28 to defraud, conspiracy to convert, breach of fiduciary duty and requests
to avoid fraudulent transfers under § 548 and for turnover under § 542.
The new named defendants were: Bahman "Brian" Mashian, Micha Mottale,
Safie Mirsafavi, Elan Enterprises, Inc., 630 Vista Lane LLC, and First
& Fairview, Inc.

1 Greenwald ruled as follows: (1) the claims under §§ 523(a)(2), (a)(4)
2 and (a)(6) contained in the second amended complaint had been validly
3 pleaded and (2) Plaintiffs were ordered to file an amended second
4 amended complaint wherein they were to delete the remaining causes of
5 action and the word "defendant" when referring to parties other than
6 the Debtor.⁹ On July 23, 2003, Plaintiffs filed an amended second
7 amended complaint that included the remaining causes of action and
8 named Debtor as the sole defendant.

9 Plaintiffs also filed a motion for substantive consolidation
10 to add Elan and Vista as parties and estates to the adversary
11 proceeding.¹⁰ However, Judge Greenwald abstained from hearing the
12 motion and all matters relating to this adversary proceeding pending
13 the outcome of the state court action.¹¹ The state court entered its
14 judgment on January 20, 2004, disposing of all causes of action in
15 favor of the Debtor, Mottale and Mashian, and ordering that the
16 Plaintiffs take nothing and that the Debtor, Mottale and Mashian be
17 deemed the prevailing parties entitled to recover costs and attorney's
18 fees stemming from the action.¹²

19 In addition, Plaintiffs sought to purchase the estate's
20 avoidance claims which the Trustee had decided not to pursue. The

22 ⁹See Notice of Ruling and Order on Defendant Kaveh Lahijani's
23 Motion to Strike Under Rule 12(f), on the Defendant's Motion to Compel,
24 on the Multiple Motions to Quash by Third Parties and on the Status
Conference, entered on November 17, 2003, para.1 and 2.

25 ¹⁰The motion to substantively consolidate Elan and Vista as parties
and estates in the adversary proceeding was filed on November 5, 2003.

26 ¹¹See Order, etc., entered on January 8, 2004 (referencing December
27 15, 2003 hearing date).

28 ¹²See Exhibit 5 to the Supplement to Joint Status Report filed by
the Debtor on June 27, 2005. Plaintiffs have appealed the state court
judgment and the appeal is still pending.

1 Trustee had initially filed a motion for permission to assign his
2 avoiding powers to Plaintiffs, subject to overbid, but later
3 determined that a competing bid¹³ would be more beneficial to the
4 estate.¹⁴ At an auction held on June 2, 2004, the Trustee accepted an
5 offer by Claims Prosecutor of \$175,000 in cash and rejected
6 Plaintiffs' bid which did not offer as much cash but included
7 additional percentage recoveries for the estate. An order granting
8 the Trustee's motion to sell the avoiding powers and all other assets
9 of the estate to Claims Prosecutor was entered on July 1, 2004 but was
10 subsequently appealed.¹⁵

11 Due to Judge Greenwald's abstention order, the adversary
12 proceeding was in abeyance until the case was reassigned to me. I
13 treated the order of abstention as a stay order and, with agreement of
14 the parties, heard oral arguments on the motion for substantive
15 consolidation and submitted the matter for written decision.

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20 ¹³Debtor's brother-in-law, Bahman Mashian aka Bashan Mashian aka
21 Bryan Mashian aka Brian Mashian ("Mashian"), an attorney, formed Claims
22 Prosecutor, LLC ("Claims Prosecutor") to acquire these causes of action.
Mashian is the sole holder of Claims Prosecutor.

23 ¹⁴On May 6, 2004, Mashian and Micha Mottale aka Micha Mottalle
24 ("Mottale"), a friend of the Debtor, joined the Trustee's motion to
assign the avoiding powers to Claims Prosecutor subject to overbid.

25 ¹⁵On July 14, 2004, the sale order was appealed to the Bankruptcy
26 Appellate Panel ("BAP"). In a decision dated April 21, 2005, the BAP
27 concluded that the bankruptcy court abused its discretion when it
28 decided to approve the sale of the estate's avoidance claims to Claims
Prosecutor without appropriately evaluating Plaintiffs' bid and
considering the fair and equitable settlement standard. In re Kaveh
Lahijani, 325 B.R. 282, 292 (9th Cir. BAP 2005). Although the BAP
reversed and remanded, the BAP's ruling is now on appeal at the Ninth
Circuit Court of Appeals.

1 **III. STATEMENT OF FACTS¹⁶**

2 The basis and outcome of this motion rests on the nature of
3 Debtor's involvement in two non-debtor corporations, Elan and Vista.
4 Plaintiffs allege that Debtor controlled and acted as alter ego of
5 these entities, while Debtor, Elan, and Vista contend that these
6 entities exist independently of Debtor.

7 1. Debtor's Participation in Elan

8 In 1991, Debtor incorporated Elan, a corporation involved in
9 the management of real estate.¹⁷ The articles of incorporation signed
10 by the Debtor and filed with the Secretary of State on September 12,
11 1991 show that Debtor was the initial agent for service of process and
12 do not contain the names of any other individuals.¹⁸ On December 4,
13 2002, the Debtor testified that he played a limited role in Elan from
14 1995 forward and remained employed only as a project supervisor who
15 was paid \$3,000 per month and given use of a car, but was not an
16 officer.¹⁹ On April 4, 2003, the Debtor declared under penalty of
17 perjury that in 1995, he sold all of his ownership interest in Elan to
18 his friend Mottale but was still intermittently authorized to act as
19 Elan's president. For example, he signed off on the September 1999

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21 ¹⁶After having reviewed the evidence submitted by Plaintiffs in this
22 matter and the objections raised thereto, I made evidentiary rulings
23 which were distributed to the parties at the July 14, 2005 hearing and
24 entered on the case docket on September 20, 2005. Debtor presented no
25 facts to rebut Plaintiffs' evidence. The following statement is thus
26 based on Plaintiffs' facts which have been admitted into evidence.

27 ¹⁷See Exhibit 8 to Declaration of John R. Fuchs in Support of
28 Plaintiffs' Motion for Substantive Consolidation, filed on November 5,
2003 ("Fuchs Declaration"). Exhibit 31 to the Fuchs Declaration shows
that Elan was suspended in June 2001 for nonpayment of taxes and that
the suspension was still in effect on January 14, 2003.

¹⁸Id.

¹⁹See Fuchs Declaration, ¶ 3.

1 purchase of real property on Moorea in Laguna Beach, California
2 ("Moorea"),²⁰ obtained various building permits in connection with the
3 construction of a residence on Moorea,²¹ and acted as a signatory on
4 some of Elan's bank accounts.²²

5 The Debtor's testimony as to his limited involvement with
6 Elan after 1995 is contradicted by the Statement By Domestic Stock
7 Corporation signed by the Debtor and filed with the California
8 Secretary of State on April 18, 1997 which indicates that two years
9 after the purported transfer, Debtor was the president, sole officer
10 and director, and agent for service of process for Elan.²³ In
11 addition, the Debtor's involvement in Elan after 1995 was not
12 disclosed in his schedules filed in 1998, despite the fact that Debtor
13 was required to list all businesses in which he was a director or
14 officer within two years prior to filing bankruptcy.²⁴

15 2. Transfer of Residence and Formation of Vista

16 Also in 1995, the Debtor sold real property located at 630
17 Vista Lane in Laguna Beach, California ("Vista Lane") to his brother-

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20 ²⁰See Exhibit 6 to Fuchs Declaration.

21 ²¹See Exhibit 7 to Fuchs Declaration (containing Declaration of
22 Kaveh Lahijani).

23 ²²See Exhibit 9 to Fuchs Declaration.

24 ²³See Exhibit 8 to Fuchs Declaration. The Debtor does not contest
the authenticity of his signature on this document.

25 ²⁴See Exhibit 2 to the Fuchs Declaration. The Debtor's involvement
26 in "Lahijani Laundromat" was also not disclosed in his schedules,
27 despite Plaintiffs' introduction into evidence of a check in the amount
28 of \$4,990.57 dated August 27, 1997 (within eight months of filing
bankruptcy) payable to the Debtor dba Lahijani Laundromat and deposited
in Elan's account. See Exhibit 28 to Supplemental Declaration of John
R. Fuchs in Support of Plaintiffs' Motion for Substantive Consolidation
filed on December 9, 2003 ("Supplemental Fuchs Declaration").

1 in-law Mashian.²⁵ However, despite the purported sale, the Debtor
2 continued to fund construction on Vista Lane through Elan's checks
3 which were signed by the Debtor.²⁶

4 Debtor's schedules filed on April 22, 1998 and signed under
5 penalty of perjury reflect that he lived in an apartment in Sherman
6 Oaks, California, owned no real property, had personal property worth
7 \$1,600, had been self-employed since 1995, and had earned \$9,000 per
8 year in 1996 and 1997.²⁷ Plaintiffs allege that the Sherman Oaks
9 apartment listed in Debtor's schedules is a false and fraudulent
10 address at which the Debtor has never resided, but have not presented
11 admissible evidence to support this contention.

12 In 2000, after Debtor received his discharge and the case
13 was closed, Mashian transferred Vista Lane into the newly-created
14 Vista. Debtor testified that by 2001, he had resumed residence at
15 Vista Lane rent-free because he could not afford to pay rent.²⁸

16 3. Debtor's Financial Transactions

17 Debtor's participation in Elan and Vista is elucidated
18 through various bank transactions, the vast majority of which took
19 place before or after, but not during, the pendency of the bankruptcy
20 case. For example, between March 1997 and December 1997, Elan's
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22 ²⁵See Fuchs Declaration, ¶ 3; Exhibit 7 to Fuchs Declaration.

23 ²⁶See Exhibits 11-14 and 18-27 to Fuchs Declaration; see also
24 Exhibits 2, 4-5, 8-10, 19, 26, 28-29, and 31 to Supplemental Fuchs
Declaration.

25 ²⁷See Exhibit 2 of Fuchs Declaration; see also Schedules and
26 Statement of Financial Affairs, filed on April 22, 1998.

27 ²⁸See Fuchs Declaration p.3, 1.3-7; p.21, 1.21-22. Debtor confirmed
28 this information in response to questions by Fuchs at the § 341(a)
meeting held after the bankruptcy case was reopened. Based on Fuchs'
personal knowledge of Debtor's statements at the § 341(a) meeting, these
facts have been admitted into evidence.

1 account at Sanwa Bank (on which the Debtor was an authorized
2 signatory) shows deposits of \$1,268,000 and checks of \$1,238,000.
3 Yet, between April 1998 and June 1998 (immediately before and during
4 the first two months the bankruptcy case was pending), the same
5 account shows a maximum balance of \$89 with no activity. From
6 September 1998 through December 1998, the account shows deposits of
7 \$245,000 and withdrawals of \$182,000, with a balance of \$118,000.

8 Out of 191 Elan checks produced by the Bank of the West
9 (successor to Sanwa Bank) for the period from May 1998 to December 31,
10 1999 (while the bankruptcy case was pending and for several months
11 after it was closed), 189 were signed by the Debtor.²⁹ A stream of
12 checks made payable to Debtor, Debtor c/o Elan, Debtor/Elan, Debtor
13 dba Lahijani Laundromat, and Debtor c/o Kamiar Simantob was deposited
14 into Elan's accounts from December 1996 through July 1999, including
15 checks from L.A. Cellular (coded "BRO"),³⁰ tenant rent checks from a
16 property owned by Elan,³¹ checks from the Los Angeles Department of
17 Water and Power,³² and a check from Symbolic Motor Car Company.³³

18 Further, from mid-1998 through December 1999 withdrawals
19 were made from Elan's accounts for Debtor's personal use,³⁴ including
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21 ²⁹See Fuchs Declaration p.9-10; Exhibits 11-14, 18-27 of Fuchs
22 Declaration.

23 ³⁰See Exhibit 31 to Supplemental Fuchs Declaration.

24 ³¹See Exhibit 26 to Supplemental Fuchs Declaration.

25 ³²See Exhibits 28-29 to Supplemental Fuchs Declaration.

26 ³³See Exhibit 19 to Supplemental Fuchs Declaration, check #18873.
27 In May 1997, Symbolic paid Elan \$99,000 and in September 1997, Symbolic
paid Elan \$82,000 (referencing "Daytona Cpe").

28 ³⁴See Exhibits 11-14 and 18-27 to Fuchs Declaration; see also
Exhibits 2, 4-5, 8-10, 19, 26, 28-29, and 31 to Supplemental Fuchs
Declaration.

1 checks in the sum of \$87,700 made payable to cash and cashed by the
2 Debtor, checks in the sum of \$35,880 made payable to Debtor's mother,
3 checks in the sum of \$42,000 made payable to Debtor's wife, checks to
4 purchase a car for the Debtor in the amount of \$47,828, checks to pay
5 repairs on two Ferraris, checks to pay Debtor's lawyer and Mashian's
6 law firm, and a check showing the payoff of a car loan owed by the
7 Debtor's brother.³⁵

8 In addition, from January 1997 through October 1997, Elan
9 paid \$2,295.21 per month to World Savings Bank with checks referencing
10 a number that matched a loan Mashian had obtained for Vista Lane³⁶
11 and, in April 1997, Elan paid the Orange County Tax Collector
12 \$3,273.70 in funds referencing the Vista Lane assessor's parcel
13 number.³⁷ The Debtor also signed Elan checks for construction work on
14 Vista Lane, including \$79,000 worth of checks between January 1997 and
15 October 1997, and \$21,176 worth of checks between mid-1998 and
16 December 1999.³⁸ Further, from May 1997 to November 1997, Debtor was
17 paid a draw or cash from Elan in the total amount of approximately
18 \$110,000.³⁹ Also during 1997, Debtor signed checks which transferred
19 approximately \$310,000 to Sanwa Bank for an unspecified purpose.⁴⁰

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³⁵See Fuchs Declaration p.9-10 and Exhibits 11-14, 18-27.

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³⁶See Exhibit 8 to Supplemental Fuchs Declaration.

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³⁷See Exhibit 9 to Supplemental Fuchs Declaration.

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³⁸See Fuchs Declaration p.9; Exhibit 10 to Supplemental Fuchs Declaration.

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³⁹See Exhibit 5 to Supplemental Fuchs Declaration. Five of these seven checks were signed by the Debtor.

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⁴⁰See Exhibit 4 to Supplemental Fuchs Declaration.

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13 **IV. DISCUSSION**

14 It appears that Plaintiffs filed the instant motion for
15 substantive consolidation as an alternate means of recovering Debtor's
16 alleged fraudulent transfers. Plaintiffs contend that Debtor
17 fraudulently transferred funds and assets into and out of Elan and
18 Vista, thereby skirting his personal liability to Plaintiffs, an
19 allegation denied by the Debtor. Elan and Vista argue that Plaintiffs
20 are not entitled to substantive consolidation because (1) Plaintiffs
21 lack standing and (2) unusual circumstances, such as the existence of
22 alter egos, are not present to warrant substantive consolidation. The
23 Court will deal with each of these arguments below.

24 **A. Standing to Bring Motion for Substantive Consolidation**

25 While no Ninth Circuit Court of Appeals case holds that a
26 creditor has standing to move for substantive consolidation, numerous
27 district and bankruptcy courts have held it is proper for creditors to
28 bring this type of motion.⁴¹ Thus, based on a number of persuasive
authorities in this area, I hold that Plaintiffs do have standing to
bring a motion for substantive consolidation.

However, to provide a more complete analysis reflecting the
parties' positions, I will also discuss the cases cited by Elan and

⁴¹See cases listed and discussed in In re Bonham, 226 B.R. 56, 83-89 (Bankr. D. Alaska 1998), *aff'd*, 229 F.3d 750 (9th Cir. 2000); In re Stone & Webster, Inc., 286 B.R. 532 (Bankr. D. Del. 2002) (granting consolidation motion filed by Official Committee of Equity Security Holders); In re New Center Hospital, 187 B.R. 560 (E.D. Mich. 1995) (granting *nunc pro tunc* consolidation on creditors' motion); In re Baker & Getty Fin. Serv., Inc., 78 B.R. 139 (Bankr. N.D. Ohio 1987) (allowing substantive consolidation on creditors' motion); In re Crabtree, 39 B.R. 718 (Bankr. E.D. Tenn. 1984) (granting creditors' motion for substantive consolidation); In re 1438 Meridian Place, N.W., Inc., 15 B.R. 89 (Bankr. D.C. 1981) (finding substantive consolidation appropriate following creditors' motion).

1 Vista in support of their position that Plaintiffs lack standing,⁴² in
2 response to which Plaintiffs contend that these cases are not
3 applicable because the standing issue was neither raised nor
4 adjudicated. Further, Plaintiffs assert that commingling of funds
5 and/or alter ego doctrine was not established in at least three of
6 these cases, and thus a denial based on the merits implies that the
7 creditors had standing.⁴³

8 **1. In re Doctors Hospital of Hyde Park**

9 Hyde Park does not support the contention that creditors
10 lack standing to pursue substantive consolidation. In that case, the
11 court stated that generally substantive consolidation has been ordered
12 at the request of a trustee or debtor-in-possession, not a creditor.⁴⁴
13 However, the court did not deal with whether a creditor could ever
14 have standing because the court found that the creditor's allegations
15 were insufficient to establish standing.

16 **2. In re United Stairs Corp.**

17 United Stairs also does not support the argument that
18 creditors lack standing to bring a motion for substantive
19 consolidation. In that case, the court referenced other courts that
20 applied a qualification test before allowing a creditor to file a
21 motion for substantive consolidation. However, the court stated that

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23 ⁴²These cases include the following: In re United Stairs Corp., 176
24 B.R. 359 (Bankr. D.N.J. 1995); In re Doctors Hospital of Hyde Park,
25 Inc., 308 B.R. 311 (Bankr. N.D. Ill. 2004); In re Lease-A-Fleet, Inc.,
26 141 B.R. 869 (Bankr. E.D. Pa. 1992); In re Andonis Morfesis, 270 B.R.
27 28 (Bankr. N.J. 2001); and In re Fas Mart Convenience Stores, Inc. 320
28 B.R. 587 (Bankr. E.E.D. Va. 2004).

⁴³See Plaintiffs' Supplemental Memorandum of Points and Authorities
in Support of Motion for Substantive Consolidation, filed on July 21,
2005.

⁴⁴See 308 B.R. at 323.

1 the qualification test was inapplicable to that particular case and,
2 thus, found that the individual creditor did not have standing.⁴⁵

3 **3. In re Lease-A-Fleet, Inc.**

4 The standing issue was not raised in Lease-A-Fleet where a
5 creditor commenced an adversary proceeding against defendant, a
6 business entity, to substantively consolidate the business with the
7 debtor. Instead, the court granted defendants' motion for summary
8 judgment and dismissed the creditor's adversary proceeding on the
9 grounds that the entities to be consolidated continually stood alone
10 as totally distinct entities (i.e., no alter ego finding) and no basis
11 for relief was stated.⁴⁶

12 **4. In re Morfesis**

13 The standing issue was not raised in Morfesis, where a
14 creditor filed an adversary proceeding and, later, a cross-motion
15 seeking to substantively consolidate debtor's ex-wife's estate with
16 the bankruptcy estate. The court denied creditor's motion for
17 substantive consolidation because no showing was made that the ex-wife
18 operated as an alter ego of the debtor or the debtor's business
19 entities.⁴⁷ In particular, there was no evidence of commingled
20 assets. Furthermore, the creditor did not establish that if
21 consolidation were granted the estate would greatly benefit. The ex-
22 wife's only asset was her home and there was no evidence of equity
23 above the ex-wife's exemption; thus, the creditor would not receive a
24 greater recovery on its claim through consolidation because the
25 inclusion of the ex-wife's house would not greatly increase the

26 ⁴⁵See 176 B.R. at 368.

27 ⁴⁶See 141 B.R. at 877-878.

28 ⁴⁷See 270 B.R. at 31-32.

1 consolidated estate. Finally, the court noted that substantive
2 consolidation should be considered with extreme caution when dealing
3 with nondebtors, and movant did not show that any benefits of
4 consolidation would outweigh the ex-wife's due process rights.⁴⁸

5 **5. In re Fas Mart**

6 Standing was not raised in Fas Mart where the creditor, who
7 had filed eight identical proofs of claim, argued that the court
8 should substantively consolidate the bankruptcy estate with a
9 nondebtor affiliate. The court found that substantive consolidation
10 was inappropriate because the case did not involve unusual or
11 compelling circumstances to justify consolidation of a nondebtor
12 entity.⁴⁹ Furthermore, the court held that substantive consolidation
13 was not warranted because the affairs of the debtor and the nondebtor
14 affiliate were not so entangled that consolidation would benefit all
15 creditors.⁵⁰

16
17 **B. Standard for Granting Substantive Consolidation**

18 The bankruptcy court's authority to substantively
19 consolidate has evolved under § 105(a) of the Bankruptcy Code.⁵¹
20 Historically, "substantive consolidation was fashioned as a device to
21 combat the commission of fraud upon creditors which might go
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24 ⁴⁸Id.

25 ⁴⁹320 B.R. at 594.

26 ⁵⁰Id. at 595.

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28 ⁵¹See Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219
(1941); In re Bonham, 226 B.R. at 75; In re Augie/Restivo, 860 F.2d 515,
518 (2d. Cir. 1988).

1 uncorrected in its absence.”⁵² However, substantive consolidation was
2 also used for practical reasons in cases involving intermingling of
3 assets, disregard of corporate formalities, and where inadequate or
4 incomplete financial or corporate records had been kept.⁵³

5 In the seminal case of Sampsell, the Supreme Court
6 sanctioned the bankruptcy court’s power to substantively consolidate
7 the estate of an individual debtor with the assets and claims of a
8 nondebtor corporation wholly owned by the debtor and his family.⁵⁴
9 Subsequently, numerous courts, including the Ninth Circuit, have
10 applied § 105 to allow the consolidation of a non-debtor estate into
11 that of a debtor estate;⁵⁵ however, this form of consolidation is
12 cautiously used only under unusual circumstances.⁵⁶ Generally, the
13 determination to substantively consolidate is fact-driven and
14 sparingly applied with the aim of avoiding inequity among creditors.⁵⁷

15 When substantive consolidation is granted, the assets and
16 liabilities of two or more related entities are pooled to create a
17 single fund from which the creditors of the combined estate may be
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20 ⁵²226 B.R. at 77, citing Sampsell.

21 ⁵³Id.

22 ⁵⁴See 313 U.S. at 219.

23 ⁵⁵See cases listed in Bonham, 226 B.R. at 83-84, citing cases
24 allowing substantive consolidation of non-debtors, including In re
25 Creditors Serv. Corp., 195 B.R. 680 (Bankr. S.D. Ohio 1996); Matter of
26 New Center Hospital, 187 B.R. 560 (E.D. Mich. 1995); In re Munford,
Inc., 115 B.R. 390 (Bankr. N.D. Ga 1990); In re Tureaud, 45 B.R. 658
(Bankr. N.D. Okla. 1985), *aff’d*, 59 B.R. 973 (1986); In re Crabtree, 39
B.R. 718 (Bankr. E.D. Tenn. 1984).

27 ⁵⁶See Bonham, 226 B.R. at 59, 74-75 (citing cases denying substantive
28 consolidation of non-debtors).

⁵⁷See 226 B.R. at 59-60; 83-93.

1 paid.⁵⁸ Various circumstances regarding the related entities form a
2 basis on which substantive consolidation has been allowed, including
3 entanglement of financial affairs, commingling of funds, and/or the
4 finding that the debtor is an alter ego of the entities.⁵⁹

5 The Ninth Circuit in Bonham decided to follow the test
6 applied by the Second Circuit, namely whether (1) the creditors dealt
7 with the consolidated entities as if they were the same and did not
8 rely on their separate identity in extending credit, or (2) the
9 affairs of the debtor are so entangled that consolidation will benefit
10 all creditors.⁶⁰ In either circumstance, "the bankruptcy court must
11 in essence determine that the assets of all the consolidated parties
12 are substantially the same."⁶¹ And although the presence of only one
13 factor is sufficient, "[c]onsolidation under the second factor,
14 entanglement of the debtors affairs, is justified only where 'the time
15 and expense necessary even to attempt to unscramble them [is] so
16 substantial as to threaten the realization of any net assets for all
17 the creditors' or where no accurate identification and allocation of
18 assets is possible."⁶²

19 The Bonham bankruptcy court allowed substantive
20 consolidation of the debtor with the estates of two closely held
21 corporations (formed pre-bankruptcy) in order to enable the trustee to
22 pursue avoidance claims in bankruptcy. As requested by the chapter 7
23 trustee who filed the motion, the consolidation order was effective

24 ⁵⁸See 229 F.3d at 764 (cit. omitted).

25 ⁵⁹See 226 B.R. at 96-97 (cit. omitted).

26 ⁶⁰229 F.3d at 766, citing Augie/Restivo, 860 F.2d at 518.

27 ⁶¹Id. at 771.

28 ⁶²Id. at 767, citing 860 F.2d at 519.

1 *nunc pro tunc* to the date of the filing of the involuntary petition,
2 so that the trustee could take advantage of the time frame for filing
3 avoidance actions, since virtually no assets were available for
4 distribution to Bonham's creditors. And because the avoidance claims
5 arose from the investment operations of the debtor and her two related
6 companies, the court found it was equitable to pool the assets of all
7 three entities and fairly allocate them among the creditors.⁶³ Due to
8 the importance of the Bonham decision in my ruling, it is useful to
9 conduct a detailed analysis of the circumstances giving rise to
10 substantive consolidation, as initially described in the opinion of
11 the bankruptcy court,⁶⁴ and later as examined in the more narrowly
12 tailored opinion of the Ninth Circuit Court of Appeals.

13 Bonham, an individual debtor in a bankruptcy arising from an
14 involuntary chapter 7 bankruptcy, operated a Ponzi scheme through
15 investment contracts issued in the name of two corporations, WPI and
16 APFC, in the four to five years prior to the involuntary filing.
17 Absent consolidation, debtor's creditors who held approximately \$50
18 million in claims, would recover nothing.

19 Debtor incorporated WPI and was its registered agent and
20 sole director. The only other officer of WPI was debtor's husband who
21 denied any significant involvement in the corporation's affairs.
22 Although debtor was the sole shareholder of WPI, the corporation never
23 issued stock certificates or otherwise recorded ownership of its
24 stock. Further, there was no evidence that WPI ever held shareholder
25 meetings and there were no minutes of director meetings. WPI never
26 filed any income tax returns and the trustee had not been able to

27 ⁶³226 B.R. at 60-61.

28 ⁶⁴Discussed in more detail at 226 B.R. 61-75.

1 discover any financial statements. WPI was involuntarily dissolved a
2 few months before the bankruptcy filing.

3 The other closely held corporation, APFC, was also
4 incorporated by debtor pre-petition. Although initially APFC did not
5 have any shareholders, officers or agents, debtor eventually
6 identified herself as the president of APFC. Debtor also opened a
7 bank account in her name "dba APFC," making the initial deposit with a
8 check drawn on a WPI account (which also contained debtor's name). At
9 one point, debtor "sold" APFC to a third party for \$1,000, and the
10 third party became APFC's director. However, within a few months, the
11 third party was removed and debtor was named the sole director of the
12 corporation. A few months thereafter, debtor identified herself as
13 the president, secretary and treasurer of the corporation. Debtor's
14 husband denied any significant role in APFC's operations and claimed
15 that debtor ran the business by herself. In fact, APFC had no
16 employees, stock certificates, documentation regarding capitalization,
17 financial statements, was not registered in the state where it was
18 doing business, and never filed income tax returns.

19 The trustee in Bonham determined that WPI routinely
20 transferred investment funds to APFC. However, he found no records
21 setting forth the relationship between the two corporations,
22 reflecting the transfers of funds between them, or showing any basis
23 for the transfers. In addition, the trustee found that debtor would
24 also deposit investment funds from the corporations into her personal
25 account which she held jointly with her husband. The court concluded
26 that debtor used the corporate funds to finance her personal expenses,
27 including credit cards, housing, food, travel, and entertainment.

28 In addition, the court took judicial notice of evidence

1 offered by the trustee in other proceedings showing that WPI or its
2 predecessor made a \$200,000 transfer to a proprietorship owned by
3 debtor's husband. The court also found that debtor was the sole
4 person responsible for WPI's and APFC's business operations. As a
5 result of the "indiscriminate and arbitrary" intermingling, the
6 trustee was unable to arrive at a clear financial picture of the
7 structure and operations with respect to the debtor and the two
8 corporations.⁶⁵ Further, it was impossible to separate the assets and
9 liabilities of the debtor and the two entities given "debtor's
10 indiscriminate use of the corporations."⁶⁶ Coupled with "debtor's
11 lack of cooperation and apparent untrustworthy testimony in various
12 proceedings before the court,"⁶⁷ the court found that substantive
13 consolidation was proper.

14
15 **C. Whether Substantive Consolidation Is Appropriate In This Case**

16 Plaintiffs base their argument on the second prong of the
17 Bonham test, i.e., commingling. Relying on the equitable principle
18 that substantive consolidation should be applied sparingly,
19 particularly when non-debtor entities are at issue, Elan and Vista
20 contend that insufficient unusual circumstances exist to grant
21 Plaintiffs' motion for substantive consolidation. In effect, Elan and
22 Vista argue that the Debtor is not the alter ego of Elan or Vista and,
23 thus, the time and expense necessary to unscramble any commingling of
24 funds is insubstantial and does not warrant substantive consolidation.
25 Plaintiffs, however, argue that Debtor is the alter ego of both Elan

26 ⁶⁵226 B.R. at 69.

27 ⁶⁶Id. at 74.

28 ⁶⁷Id. at 69.

1 and Vista; therefore, substantive consolidation is appropriate.

2 First, substantive consolidation must be distinguished from
3 state law alter ego remedies.⁶⁸ Although elements of the alter ego
4 doctrine may provide grounds for substantive consolidation,⁶⁹ the law
5 of substantive consolidation is federal bankruptcy law and is not
6 dependent upon state law concepts.⁷⁰ Thus, the term "alter ego" does
7 not have to meet the definition under any state law but instead is
8 used loosely to indicate that a corporation is the instrumentality of
9 the debtor used to conduct the debtor's financial affairs.⁷¹ To more
10 thoroughly explain this concept, it is worthwhile to restate a quote
11 found in the Bonham bankruptcy court opinion:

12 2. Misplaced Analogy to Corporate Law

13 The factors evaluated on a motion for substantive
14 consolidation appear similar to an analysis of piercing the
15 corporate veil. Like piercing the corporate veil,
16 substantive consolidation ignores artificial structures
17 legally defining the consolidated entities. Ultimately,
18 however, such an analogy is misplaced because the corporate
19 law doctrine of limited liability is not involved.
20 Rather, substantive consolidation is more like the corporate
21 law notion of enterprise liability because substantive
22 consolidation does not seek to hold shareholders liable for
23 the acts of their incorporated entity. [footnote omitted]
24 Substantive consolidation more closely resembles the
25 bankruptcy rule of subordination because competition for the
26 consolidated assets is between creditors alone. Thus,
27 substantive consolidation ignores artificial legal
28 structures but looks only to the combined assets of the
consolidated entities for satisfaction of all claims against
the collective group. [footnotes in original omitted]⁷²

23 ⁶⁸See Bonham, 226 B.R. at 76.

24 ⁶⁹See id. at 77; 96-97.

25 ⁷⁰Id. at 77.

26 ⁷¹See id. at 85, 96 (cit. omitted).

27 ⁷²226 B.R. at 77, quoting J. Stephen Gilbert, Note: Substantive
28 Consolidation in Bankruptcy: A Primer, 43 Vand L Rev 207, 218 and fn 77-
81 (cit. omitted).

1 Further, "[w]hile the remedy of substantive consolidation is
2 similar to the state law remedy of piercing the corporate veil based
3 on a finding that the entities are alter egos," it is not the same.⁷³
4 "The bankruptcy remedy of substantive consolidation ensures the
5 equitable distribution of property to all creditors, while on the
6 other hand, piercing the corporate veil is a limited merger for the
7 benefit of a particular creditor."⁷⁴

8 With these principles in mind, I turn to an analysis of the
9 facts at hand.

10 1. As to Elan

11 In this case, approximately one year before the bankruptcy
12 filing, the Debtor signed an official document representing to the
13 California Secretary of State that he was the president, sole officer,
14 sole director, and agent for service of process for Elan, although he
15 failed to disclose this in his schedules. Debtor freely used Elan's
16 funds for personal expenses, including paying a draw or cash to
17 himself from Elan totaling approximately \$110,000 between May and
18 November 1997. Debtor's use of Elan's funds for various cash
19 transactions benefitting himself, his wife and his mother illustrates
20 the free flow of funds without a legitimate business purpose,
21 commingling and failure to segregate. Such extensive use of Elan's
22 funds for a vast array of personal reasons leads to the conclusion
23 that Debtor used Elan's assets as if they were his own with the
24 purpose of shielding them from creditors.

25 2. As to Vista

26
27 ⁷³226 B.R. at 89.

28 ⁷⁴Id., quoting Creditors Service Corp., 195 B.R. at 689 (cit.
omitted).

1 Regarding Vista, Plaintiffs have not submitted evidence
2 showing that Debtor was the principal officer, director, or
3 stockholder of Vista. However, Plaintiffs have established that
4 Debtor used Vista Lane, the title to which was held by Mashian and
5 then by Vista, for personal benefit. Further, Plaintiffs have
6 established that money from Elan was freely flowing into Vista Lane:
7 the Debtor signed Elan checks for construction work on Vista Lane,
8 including \$79,000 worth of checks between January 1997 and October
9 1997, and \$21,176 worth of checks between mid-1998 and December 1999.

10 Although Debtor testified that he sold Vista Lane to Mashian
11 in 1995, he was allowed to reside there from 2001 forward without
12 paying rent, thereby deriving a substantial personal benefit from
13 Vista. Further, from January 1997 through October 1997, Elan paid
14 \$2,295.21 per month to World Savings Bank with checks referencing a
15 number that matched a loan Mashian had obtained for Vista Lane and, in
16 April 1997, Elan made a payment to the tax collector in connection
17 with Vista Lane.

18 As stated by the court in Bonham, "one can infer a corrupt
19 purpose"⁷⁵ when faced with facts such as the initial transfer of Vista
20 Lane to Mashian and the subsequent transfer from Mashian to Vista, an
21 entity created for the specific purpose of holding Vista Lane, at a
22 time when the Debtor faced litigation with Plaintiffs. This type of
23 conduct, coupled with Debtor's personal use of Vista Lane as his
24 residence without paying rent, leads to the conclusion that Debtor
25 treated Vista's asset as his own and that Vista was used as a vehicle
26 to shield Debtor's assets from creditors.

27 3. Asset Transfers

28

⁷⁵226 B.R. at 96.

1 Debtor also engaged in asset transfers which appear to have
2 been orchestrated to prevent any possible recovery by creditors and
3 are potentially fraudulent. First, Debtor transferred Vista Lane to
4 Mashian in 1995, although he continued to fund construction
5 improvements, a loan and property taxes on Vista Lane through Elan
6 before and after filing bankruptcy. Then, Debtor resumed residence at
7 Vista Lane in 2001, rent-free, after Mashian had transferred the
8 property to Vista in 2000.

9 Second, also in 1995, Debtor transferred Elan to Mottale but
10 continued to act as Elan's president, sole director and officer, agent
11 for process of service, and was an authorized signatory on Elan's bank
12 accounts. Yet, in his bankruptcy, the Debtor failed to disclose his
13 interest in the corporation. Debtor also commingled personal funds
14 with Elan, thereby confusing his personal assets with that of Elan,
15 and contributed to Vista's net worth by funding Vista Lane's
16 improvement through Elan.

17 4. Summary of Debtor's Activities

18 Based on the commingling of funds and transfers between the
19 Debtor, Elan and Vista, I conclude that the assets of the Debtor and
20 the two entities are substantially the same. As stated by the Ninth
21 Circuit in Bonham, substantive consolidation is appropriate where no
22 accurate identification and allocation of assets is possible.⁷⁶
23 Specifically, the various factors this case shares in common with
24 other cases where substantive consolidation was allowed, including
25 Bonham, are⁷⁷ (1) commingling, including the use of corporate funds to
26 pay personal expenses and without an identifiable business purpose;

27 ⁷⁶229 F.3d at 767, citing 860 F.2d at 519.

28 ⁷⁷See 226 B.R. at 84-88, 96-97 (cit. omitted).

1 (2) disregard of corporate form in that, despite the fact that the
2 Debtor transferred Elan to a third party, records signed by the Debtor
3 and filed with the California Secretary of State two years after the
4 transfer took place show Debtor as the sole director, officer, agent
5 for process of service, and a signatory on Elan's bank account; (3)
6 Debtor acting as a principal who dominated Elan and used Vista's sole
7 asset for his personal benefit; (4) purported transfers of assets to
8 the corporations to place them out of reach of Debtor's creditors; (5)
9 the use of the corporations for a corrupt purpose; (6) failure to
10 disclose the existence of Elan and the various transfers made to and
11 from Elan by the Debtor in his bankruptcy, despite the fact that the
12 transfers took place before and during the time the bankruptcy was
13 pending; (7) the entanglement of financial affairs between the
14 entities without any justifiable reason, resulting in the inability to
15 trace the funds and to find a specific purpose for the various
16 transfers; and (8) the untrustworthy testimony by Debtor regarding his
17 involvement in Elan after 1995.

18 "The case law uniformly holds that substantive consolidation
19 should be sparingly used, with an eye to possible negative effects on
20 creditors."⁷⁸ In this case, no evidence was presented as to any
21 negative effect on creditors of the debtor, Vista or Elan, and no
22 negative impact is apparent to the Court. As in Bonham,⁷⁹ there is no
23 evidence that the creditors of Vista and Elan could recover any
24 significant assets outside of bankruptcy, and no evidence that
25 consolidation would diminish the recovery for Debtor's creditors.
26 Plaintiffs have represented to this Court that they are fully

27 ⁷⁸Id. at 59.

28 ⁷⁹226 B.R. at 73.

1 committed to recovering additional assets for the benefit of all
2 creditors.⁸⁰

3 Extraordinary circumstances required for substantive
4 consolidation are present where the debtor and non-debtor entities are
5 alter egos of each other⁸¹ and where the debtor uses corporate assets
6 as if they were his own. This Court is convinced that injustice would
7 occur absent consolidation in that the Debtor would be allowed to
8 retain his discharge and keep enjoying his assets, while his creditors
9 would walk away with nothing.⁸²

10
11 **D. Whether A *Nunc Pro Tunc* Order Should Be Entered**

12 Plaintiffs request that the consolidation order be effective
13 as of April 22, 1998, the date of the original bankruptcy filing.

14 Although the Ninth Circuit in Bonham ratified *nunc pro tunc*
15 consolidation, it did so pursuant to a different test than the one
16 employed by the Bonham bankruptcy court.⁸³ Following the reasoning of
17 the Sixth Circuit which "concluded that '[t]he order of consolidation
18 rests on the foundation that the assets of all of the consolidated
19 parties are substantially the same,' and that the earliest filing date
20 is the controlling date,"⁸⁴ the Ninth Circuit decided to leave it up
21 to the discretion of the bankruptcy court to determine whether *nunc*
22 *pro tunc* consolidation is appropriate in each case without having to

23 ⁸⁰See Plaintiffs' Supplemental Memorandum, page 4, footnote 1.

24 ⁸¹United Stairs Corp., 176 B.R. at 369 (cit. omitted).

25 ⁸²See Bonham, 226 B.R. at 76.

26 ⁸³See 229 F.3d at 770, citing Matter of Evans Temple Church of God
27 in Christ & Community Ctr., Inc., 55 B.R. 976, 981-82 (Bankr. N.D. Ohio
28 1986).

⁸⁴In re Baker, 974 F.2d 712, 720-21 (6th Cir. 1992).

1 apply a specific test.⁸⁵ As with granting substantive consolidation,
2 this power must be exercised sparingly and with caution.⁸⁶

3 In Bonham, the Ninth Circuit found that the bankruptcy
4 court's order allowing *nunc pro tunc* consolidation was appropriate
5 because Bonham commingled her personal assets with those of the two
6 closely held corporations and failed to maintain any corporate
7 distinction between the entities.⁸⁷ Therefore, since the Bonham
8 trustee wanted to exercise his avoidance powers, the date of the
9 involuntary petition was found to be the controlling date from which
10 to measure the limitations period.

11 In this case, the issue of avoidance powers which Plaintiffs
12 sought to purchase from the estate is currently on appeal at the Ninth
13 Circuit Court of Appeals.⁸⁸ If the BAP's ruling is affirmed, I will
14 have to deal with the avoidance powers on remand. However, although
15 the issue of avoidance powers may have been the underlying reason for
16 bringing a motion for substantive consolidation in other cases, it is
17 not the sole consideration.⁸⁹ In fact, based on the facts of the

18
19 ⁸⁵229 F.3d at 771.

20 ⁸⁶Id.

21 ⁸⁷Id. at 769.

22 ⁸⁸Claims Prosecutor (the buyer of the avoidance powers) and its
23 holder Mashian were served with the motion for substantive consolidation
24 through their counsel Steven T. Gubner (who also represents the Debtor),
but have not raised any issues regarding the potential effect of this
memorandum and the accompanying order on the pending appeal.

25 ⁸⁹See 229 F.3d at 768-69 (stating that "[a]bsent express
26 preservation of the trustee's avoidance power, an order of substantive
27 consolidation would ordinarily eliminate that power" and citing In re
28 Giller, 962 F.2d 796, 798-99 (8th Cir. 1992) for the proposition that
"ordinarily substantive consolidation would eliminate justification for
exercise of trustee's avoidance power"); 226 B.R. at 95 (categorizing
creditors into "claimants" and "targets" depending on whether they will
recover through substantive consolidation or whether they will have to

1 cases cited by the Ninth Circuit in Bonham, the issue of avoidance
2 powers usually does not come up in granting substantive consolidation
3 but instead arises when a party requests a *nunc pro tunc* order.⁹⁰

4 As to Elan, admissible evidence has been presented that
5 substantial commingling did take place from 1996 through 1999,
6 including during the time when Debtor filed his bankruptcy petition.
7 Thus, due to the fact that Elan was being treated as one with the
8 Debtor at the time of the original filing, it is appropriate to order
9 *nunc pro tunc* consolidation with Elan as of the date of the petition
10 (April 22, 1998).

11 As to Vista, this entity did not come into being until after
12 the bankruptcy case was filed and I have been unable to find any cases
13 which specifically address this type of scenario. However, it is
14 clear that the corporation was formed in order to transfer the Vista
15 Lane property out of the reach of creditors in the same year as
16 Plaintiffs initiated litigation against the Debtor in state court.
17 The fact that the Debtor lived at the property several years before
18 bankruptcy was filed and then transferred the property to his brother-
19 in-law but funded renovations with money from Elan supports this
20 conclusion, as does evidence showing that Debtor continued to live at
21 Vista Lane after it was transferred to Vista, and still lives there.⁹¹
22 Thus, it is clear that Debtor has treated Vista's only asset as his
23 own at all applicable times. Therefore, it is appropriate to order

24 _____
25 give up assets previously transferred to them, and stating that the
26 "targets" are not always subject to avoidance actions but may see their
recovery diluted by having to share it with additional creditors).

27 ⁹⁰See id.

28 ⁹¹The Debtor was served at the Vista Lane address with papers served
by his counsel in June 2005.

CERTIFICATE OF MAILING

I, SMU / SI, a regularly appointed and qualified clerk of the United States Bankruptcy Court for the Central District of California, do hereby certify that in the performance of my duties as such clerk, I personally mailed to each of the parties listed below, at the addresses set opposite their respective names, a copy of the MEMORANDUM OF OPINION RE PLAINTIFFS' MOTION FOR SUBSTANTIVE CONSOLIDATION in the within matter. That said envelope containing said copy was deposited by me in a regular United States mailbox in the City of Los Angeles, in said District, on [REDACTED] OCT 3 2005.

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